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ALL INDIA REPORTER

1929

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1929

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NAGPUR JUDICIAL COMMISSIONER'S COURT

1929

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Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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N.B.—Column No. 1 denotes pages of 25 NAGPUR LAW REPORTS.
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6	" " 133	55	" " 68	99	" " 219	144	" " 98	186	1930 " 56
9	" " 5	58	" " 130	104	" " 73	163	" *PC* 261	187	1929 " 254
12	" " 225	61	" " 93	107	1930 " 24	171	" *N* 135	192	" " 281
16	" " 108	68	" *PC* 92	110	1929 " 164	173	" " 274	194	1930 " 38
19	" " 246	74	" *N* 145	119	" " 120				
28	" " 60	81	" " 170	121	" *PC* 190	175	1928 " 333	198	" " 124
35	" " 50	85	" " 156	131	" *N* 194	180	1929 " 260	208	1929 " 289

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

12 Nagpur Law Journal=All India Reporter

NLJ	A. I. R.	NLJ	A. I. R.	NLJ	A. I. R.	NLJ	A. I. R.	NLJ	A. I. R.
1	1929 *N* 60	57	1929 *N* 120	86	1929 *N* 257	127	1930 *N* 33	170	1930 *N* 91
18	" " 79	59	" " 209	92	1930 " 28	131	1929 " 291	173	1929 " 360
17	" " 50	64	" " 148	101	1929 " 229	139	" " 254	175	1930 " 42
37	" *PC* 92	69	" " 268	108	" *Notes*15*a*	148	" " 251	177	" " 90
44	" *N* 93	72	" " 274	118	1930 *N* 20	156	1930 " 119	180	" " 61
51	" " 127	75	" " 211	117	1929 " 338	161	" " 49	185	" " 73
54	" " 109	82	" " 282	124	" " 275	164	" " 1	214	1929 *Notes*30*d*

Non-J. C. Court's cases are not included.

1929 Criminal Cases=All India Reporter

Cr.C)	A. I. R.	Cr.C)	A. I. R.	Cr.C)	A. I. R.	Cr.C)	A. I. R.	Cr.C)	A. I. R.
1	1929 *A* 374	78	1929 *M* 604	169	1929 *R* 177	264	1929 *N* 240	337*a*	1929 *M* 744
2	" *L* 443	80	" " 603	172	" *C* 490	265	" *P* 505	337*b*	" *S* 137
3	" " 436	81	" *L* 522	174*a*	" *A* 608	266	" " 506	341	" *P* 473
4	" " 423	82	" " 520	174*b*	" " 599	268	" " 508	344	" *C* 692
6	" *A* 396	83	" *N* 193	175	" " 585	270	" " 510	345	" *O* 369
8	" *L* 456	85	" *L* 542	176*a*	" " 588	271	" " 511	346	" *A* 650
9	" *M* 498	87*a*	" " 544	176*b*	" " 587	272	" " 512	351	" *L* 705
11	" " 510	87*b*	" " 540	177	" *R* 203	273	" " 513	353	" *P* 469
12	" " 511	90	" " 531	181	" *L* 623	274	" " 514	355	" *A* 750
13	" *O* 280	91	" *C* 457	182	" " 615	277	" " 517	356	" *R* 209
14	" " 172	91	" " 480	183	" " 614	278	" " 518	357	" *C* 699
18	" *N* 152	95*a*	" " 479	184	" *C* 521	280	" " 520	358	" *A* 893
19	" " 150	95*b*	" " 468	187	" " 514	282	" " 522	359	" *O* 723
21	" *P* 268	97	" *P* 316	188	" *L* 687	283	" " 523	360	" " 724
23	" " 263	99	" " 313	190	" " 631	287	" " 527	362	" " 726
25	" *M* 544	102	" *L* 558	193	" *A* 614	289	" *A* 705	364	" " 728
26	" *C* 390	104*a*	" *S* 119	194	" *C* 589	291*a*	" " 707	365	" " 729
28	" " 415	104*b*	" " 118	197	" " 592	291*b*	" " 707	366	" " 780
30	" " 406	106	" " 115	198	" *P* 415	293*a*	" " 709	368	" *L* 801
31	" " 401	107	" " 113	199	" " 406	293*b*	" " 709	369	" *P* 640
36	" *B* 287	108	" *N* 222	201	" " 404	294	" " 710	370	" *L* 803
37	" " 286	110	" " 215	202	" *C* 563	304	" " 720	371	" *P* 643
38	" " 283	114	" *B* 296	205	" *L* 641	305	" *L* 713	372	" " 644
41	" " 274	124	" " 313	210	" " 670	310	" " 718	378	" " 650
46	" " 278	130	" " 309	212	" " 667	311	" " 719	379	" " 651
47	" *N* 172	135	" " 306	214	" " 665	312	" " 720	382	" " 654
51	" " 161	138	" *M* 667	215	" " 658	313	" *S* 145	385	" *C* 751
53	" " 190	140	" " 659	216	" " 702	315	" " 147	386	" " 785
54	" *O* 428	142	" *L* 576	219	" " 692	317	" " 149	387	" " 739
56	" *M* 600	148	" *O* 321	220	" *O* 381	318	" " 150	389	" " 742
57	" *L* 496	149	" *L* 587	222	" *C* 598	319	" " 151	390	" " 747
58*a*	" " 494	150	" " 584	228	" " 617	321	" *B* 385	395	" " 737
58*b*	" *R* 150	152	" " 578	242	" *A* 655	322	" " 375	399	" " 685
60	" " 147	153	" *P* 351	243	" *P* 491	325	" *C* 644	401*a*	" " 683
61*a*	" *L* 508	155	" " 343	252	" " 500	326	" " 646	401*b*	" " 683
61*b*	" " 504	158	" " 367	254	" " 502	327	" " 657	403	" *A* 850
62	" *P* 275	160	" *S* 132	255	" " 503	329	" *L* 739	404	" " 855
71	" *O* 448	163	" *A* 575	257	" *N* 288	330	" *M* 748	408	" *O* 754
72	" " 440	164	" *L* 607	261	" " 287	333	" " 754	409	" *N* 295
74	" *P* 302	165	" " 601	262	" " 288	334	" " 756	410	" *P* 660
77	" *A* 585	167	" " 597	268	" " 289	335	" *S* 160	418	"

1929 Criminal Cases=All India Reporter—(*Concld.*)

CrC)	A. I. R.			CrC)	A. I. R.			CrC)	A. I. R.			CrC)	A. I. R.			CrC)	A. I. R.		
414	1929	*S*	179	465	1929	*L*	768	513	1929	*C*	769	573	1929	*L*	845	625*b*	1929	*O*	527
417*a*	"	*L*	785	466	"	"	766	515	"	"	771	574*a*	"	"	846	626	1929	"	850
417*b*	"	"	785	467	"	*C*	755	517	"	"	773	574*b*	"	*C*	805	636	"	"	860
419	"	"	787	468	"	"	756	518	"	"	774	577	"	*P*	705	637	"	"	861
420	"	"	788	474	"	"	762	519	"	"	775	582	"	"	710	639	"	"	863
423	"	"	791	477	"	"	765	520	"	"	776	584	"	"	712	641	"	*O*	526
426	"	"	794	479	"	"	767	521	"	"	777	586	"	"	714	642*a*	"	*A*	914
429	"	"	797	480	"	"	768	522	"	"	778	588	"	"	716	642*b*	"	"	914
433	"	*B*	404	481	"	*M*	833	523	"	"	779	589	"	*O*	515	644	"	"	916
436	"	"	408	482	"	"	834	525	"	"	781	590	"	*N*	934	645	"	"	917
439	"	*C*	785	485	"	"	837	529	"	*N*	325	593	"	*A*	950	647	"	"	919
441	"	*L*	803	487	"	"	839	532	"	"	328	595	"	*C*	807	656	"	"	928
442	"	"	817	489	"	*A*	897	536	"	*S*	242	597	"	"	809	658	"	"	930
444	"	*P*	658	490	"	"	898	537	"	"	243	600	"	"	813	659	"	"	931
446	"	*R*	278	491*a*	"	"	899	539	"	"	245	601	"	*L*	867	660	"	"	932
447	"	*S*	177	491*b*	"	"	899	542	"	"	249	602	"	*M*	862	663	"	"	935
449	"	*A*	813	493*a*	"	"	901	543	"	"	249	604	"	*O*	516	664	"	"	936
450	"	*R*	254	493*b*	"	"	901	544	"	*L*	872	607	"	*M*	864	665	"	"	937
451	"	"	256	495	"	"	903	545	"	*B*	433	608	"	*R*	352	668	"	"	940
452*a*	"	*S*	176	496	"	"	904	555	"	"	443	609	"	*M*	841	669	"	*O*	822
452*b*	"	"	179	497	"	*R*	321	559	"	"	447	610	"	"	842	673*a*	"	*N*	360
458	"	"	175	498	"	"	922	563	"	*L*	895	612	"	"	844	673*b*	"	"	950
454	"	*N*	278	507	"	"	331	564	"	"	836	613	"	"	845	677	"	*O*	543
456	"	"	279	509	"	*A*	905	565	"	"	837	614	"	"	846	678	"	*S*	250
458	"	"	281	510	"	*B*	451	566	"	"	838	615	"	"	847	682	"	"	253
459	"	"	285	511*a*	"	*M*	849	568*a*	"	"	840	617	"	*R*	345	683	"	"	255
462	"	*B*	410	511*b*	"	*N*	932	568*a*	"	"	840	624	"	*M*	880	684	"	*N*	860
464	"	*R*	279	512	"	*L*	849	571	"	"	843	625*a*	"	*O*	527	685	"	*M*	906

11 & 12 All India Criminal Reports=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

30 Criminal Law Journal, 113 to 120 Indian Cases and Indian Rulings, 1929 Nagpur=All India Reporter.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

Table No. III.

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Nagpur Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Nagpur. Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

A. I. R. 1929 Nagpur=Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	24	*N L R*	197	14	114	*I C*	449	41	11	*N L J*	123	63	117	*I C*	280
	11	*N L J*	232	17 (1)	112	*I C*	648		109	*I C*	647		26	*N L R*	44
	113	*I C*	34	17 (2)	24	*N L R*	158	42	11	*N L J*	260	64	114	*I C*	452
2	11	*N L J*	169	FB	114	*I C*	278		29	*Cr L J*	1092	65	113	*I C*	110
	24	*N L R*	172		30	*Cr L J*	258		112	*I C*	676	66	115	*I C*	167
	118	*I C*	893		12	*A I Cr R*	177		11	*A I Cr R*	369	67	117	*I C*	286
5	112	*I C*	657	23	110	*I C*	487	43	30	*Cr L J*	88	68	25	*N L R*	55
	25	*N L R*	9	27	11	*N L J*	162		112	*I C*	901		115	*I C*	168
6	118	*I C*	891		112	*I C*	248		11	*A I Cr R*	526	70	114	*I C*	288
8	11	*N L J*	186	30 (1)	24	*N L R*	153	50	12	*N L J*	17	71	25	*N L R*	52
	114	*I C*	612		118	*I C*	128	FB	25	*N L R*	35		118	*I C*	465
10	106	*I C*	568	30 (2)	24	*N L R*	189		117	*I C*	253	72	115	*I C*	172
11	113	*I C*	357	FB	114	*I C*	461	58	112	*I C*	653	73	12	*N L J*	13
18 (1)	114	*I C*	622	34	115	*I C*	161	59	11	*N L J*	240		116	*I C*	645
18 (2)	29	*Cr L J*	618	36	29	*Cr L J*	968		118	*I C*	176		25	*N L R*	104
	10	*A I Cr R*	888		112	*I C*	51	60	12	*N L J*	1				
	109	*I C*	810		11	*A I Cr R*	802		25	*N L R*	28	74	117	*I C*	282
14	80	*Cr L J*	307	41	24	*N L R*	85		116	*I C*	648	75		...	

A. I. R. 1929 Nagpur=Other Journals—(*Concld.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
79	17 *I C*	285	137	116 *I C*	646	224	115 *I C*	175	281	30 *Cr L J*	1098
81	115 *I C*	170	188	117 *I C*	288	225	25 *N L R*	12		1929*Cr C*	458
82	..		189	116 *I C*	666	227	115 *I C*	165	282	12 *N L J*	82
88	118 *I C*	55	141	117 *I C*	224	228	119 *I C*	673		119 *I C*	682
84	30 *Cr L J*	310	142FB	116 *I C*	657	229	25 *N L R*	183	283	119 *I C*	687
	114 *I C*	453	144	118 *I C*	880	FB	12 *N L J*	101	285	121 *I C*	47
85	110 *I C*	855	145	25 *N L R*	74	232	116 *I C*	661		1929*Cr C*	459
87	11 *N L J*	242		116 *I C*	421	233	114 *I C*	609	288	121 *I C*	33
	116 *I C*	169	148	25 *N L R*	94		30 *Cr L J*	333	289	118 *I C*	685
	30 *Cr L J*	405		116 *I C*	655		1929*Cr C*	257		25 *N L R*	208
	12 *A I Cr R*	297		12 *N L J*	64	237	115 *I C*	164	291	118 *I C*	869
88	113 *I C*	253	150	117 *I C*	279		30 *Cr L J*	404		12 *N L J*	191
89	11 *N L J*	298		30 *Cr L J*	791		1929*Cr C*	261	294	119 *I C*	700
	115 *I C*	179		1929*Cr C*	19		12 *A I Cr R*	368	295	1929*Cr C*	410
90	118 *I C*	52	152	116 *I C*	424	238	115 *I C*	161	298	116 *I C*	70
91	107 *I C*	658		30 *Cr L J*	693		30 *Cr L J*	403	305	116 *I C*	65
98	25 *N L R*	61		1929*Cr C*	18		1929*Cr C*	262	311	121 *I C*	43
	12 *N L J*	44		13 *A I Cr R*	63	239	116 *I C*	671	313	121 *I C*	35
	116 *I C*	663	158	117 *I C*	217		30 *Cr L J*	692	315	118 *I C*	876
96	113 *I C*	285	156	25 *N L R*	85		1929*Cr C*	263	317	120 *I C*	401
	30 *Cr L J*	125	161	117 *I C*	267		18 *A I Cr R*	120	318	119 *I C*	701
	12 *A I Cr R*	69		30 *Cr L J*	763	240	119 *I C*	675	319	119 *I C*	697
97	25 *N L R*	1		1929*Cr C*	51		30 *Cr L J*	1097	321	118 *I C*	477
FB	116 *I C*	77	162	...			1929*Cr C*	264	325	1929 *Cr C*	529
	30 *Cr L J*	550	164	116 *I C*	651	241	116 *I C*	497		30 *Cr L J*	944
	12 *A I Cr R*	345		25 *N L R*	110	243	...			118 *I C*	473
98	116 *I C*	499	169	116 *I C*	662	246	25 *N L R*	19	328	120 *I C*	215
FB	25 *N L R*	144	170	25 *N L R*	81	251	12 *N L J*	148		1929*Cr C*	532
108	25 *N L R*	16		116 *I C*	669	FB	121 *I C*	57		31 *Cr L J*	20
	116 *I C*	76	172	117 *I C*	213	254	25 *N L R*	187	332	1929*Cr C*	511
109	12 *N L J*	54		30 *Cr L J*	728	FB	12 *N L J*	139	333	120 *I C*	209
	118 *I C*	58		1929*Cr C*	47		119 *I C*	684	334	1929*Cr C*	590
110	117 *I C*	283	176	116 *I C*	669	257	118 *I C*	865	336	120 *I C*	409
111	118 *I C*	61	177	117 *I C*	268		12 *N L J*	86	338	12 *N L J*	117
112	116 *I C*	80		25 *N L R*	199	260	25 *N L R*	180		121 *I C*	54
113	117 *I C*	277	179	...			121 *I C*	44		26 *N L R*	46
	30 *Cr L J*	789	180	...		261	117 *I C*	257	339	119 *I C*	704
114	117 *I C*	284	185	116 *I C*	127	262	118 *I C*	680	340	118 *I C*	466
	30 *Cr L J*	793	190	1929*Cr C*	53	268	116 *I C*	511	343	119 *I C*	698
115	118 *I C*	57	191	117 *I C*	266	264	119 *I C*	694	345	120 *I C*	825
117 (1)	116 *I C*	432	193	116 *I C*	643	265	119 *I C*	689	347	120 *I C*	404
117 (2)	117 *I C*	223		30 *Cr L J*	655	267	118 *I C*	682	348	121 *I C*	60
119	116 *I C*	642		1929*Cr C*	83	268	12 *N L J*	69	349	120 *I C*	834
120	116 *I C*	426		13 *A I Cr R*	78		118 *I C*	687	350	31 *Cr L J*	15
	25 *N L R*	119	194	117 *I C*	271	269	118 *I C*	676		120 *I C*	210
	12 *N L J*	57		25 *N L R*	131	270	119 *I C*	674		13 *A I Cr R*	157
121	117 *I C*	220	201	118 *I C*	469	272	119 *I C*	680		1929*Cr C*	678
123	117 *I C*	287	206	...		273	118 *I C*	675	858	121 *I C*	655
124	118 *I C*	62	207	114 *I C*	615	274	12 *N L J*	72	355	121 *I C*	45
125	118 *I C*	50	209	116 *I C*	417		118 *I C*	673	356	120 *I C*	785
	30 *Cr L J*	870		12 *N L J*	59		25 *N L R*	178	357	120 *I C*	732
127	117 *I C*	209	211	12 *N L J*	75	275	12 *N L J*	124		26 *N L R*	60
	12 *N L J*	51		26 *N L R*	39		119 *I C*	673	358	121 *I C*	654
128	116 *I C*	79	213	116 *I C*	418	276	...		360 (1)	121 *I C*	64
129	117 *I C*	281	215	114 *I C*	457	277	119 *I C*	676		1929*Cr C*	684
130	25 *N L R*	58		30 *Cr L J*	311	278	118 *I C*	681	360 (2)	12 *N L J*	178
	118 *I C*	49		1929*Cr C*	110		30 *Cr L J*	960		121 *I C*	671
131	...		219	25 *N L R*	99		1929*Cr C*	454		1929*Cr C*	678
133	25 *N L R*	6		116 *I C*	509	279	117 *I C*	210	361	118 *I C*	867
	118 *I C*	68	221	115 *I C*	175		30 *Cr L J*	724	362	121 *I C*	662
	30 *Cr L J*	872	222	114 *I C*	623		1929*Cr C*	456	364	118 *I C*	677
35	118 *I C*	54		30 *Cr L J*	381	281	25 *N L R*	192	366	118 *I C*	868
	25 *N L R*	171		1929*Cr C*	108		119 *I C*	703	367	121 *I C*	50

Note—*Cases not bearing parallel references against them are not reported elsewhere.*

LIST OF CASES OVERRULED AND REVERSED

1929

Abdul Jalil Khan v. Obedullah Khan, (1921) 43 All. 416=19 A. L. J. 227= A.I.R. 1921 All. 165=62 I.C. 725.	Reversed in A. I. R. 1929 P. C. 228.
Abdulla v. Behari Lal, (1926) 97 I. C. 780=A I.R. 1926 Lah. 638=8 L.L.J. 361=27 P. L. R. 701.	Overruled in A.I.R. 1929 Lah. 481 (F.B.).
Bhiram Ali v. Gopikanth, (1897) 24 Cal. 355=1 C.W.N. 396.	" A.I.R. 1929 Cal. 374 (F.B.).
Chandramoni v. Halizennissa, (1909) 4 I.C. 168=9 C. L. J. 464.	" A.I.R. 1929 Cal. 374 (F.B.)
Chan Nyein v. Mg. Bwe, (1929) 6 Rang. 615=A. I. R. 1929 Rang. 31=114 I. C. 519.	Reversed in A.I.R. 1929 Rang. 300.
Collector of Nagpur v. Atmaram Bhagwant, A. I. R. 1925 Nag. 292.	" A.I.R. 1929 P. C. 92.
Darba Mal v. Asa Ram, (1927) 102 I. C. 418=A I. R. 1927 Lah. 461=28 P. L. R. 289.	" A.I.R. 1929 Lah. 513.
Durga Charan v. Karamat Khan, (1903) 7 C.W.N, 607.	Overruled in A.I.R. 1929 Cal. 374 (F.B.).
Emperor v. Bhairon, (1927) 49 All. 240= 25 A. L. J. 94=7 L. R. A. Cr. 183= A. I. R. 1927 All. 50=27 Cr. L. J. 1116=97 I. C. 428.	" A.I.R. 1929 All. 33 (F.B.).
Emperor v. Himayathullah, (1927) 49 All. 844=25 A. L. J. 679=8 A. I. Cr. R. 102=8 L. R. A. Cr. 106=A. I. R. 1927 All. 592=28 Cr. L. J. 567=102 I. C. 503,	" A.I.R. 1929 All. 33 (F.B.).
Fazl-un-nissa v. Didar Hussain, (1927) 109 I.C. 397=A.I.R. 1927 Lah. 451.	" A.I.R. 1929 Lah. 481 (F.B.).
Habibur Rahman v. Qasim Husain, (1926) 95 I. C. 367=1926 P.H.C.C. 178=A. I. R. 1926 Pat. 404=7 P. L. T. 664.	Reversed in A.I.R. 1929 P.C. 174.
Harnam Singh v. Emperor, (1928) 9 Lah. 626=29 P.L.R. 679=A.I.R. 1928 Lah. 308=29 Cr.L.J. 881=111 I.C. 561.	Overruled in A.I.R. 1929 Lah. 344 (F.B.).
Jai Prashad v. Chartered Bank of India, (1927) 102 I. C. 788=A. I. R. 1927 Lah. 562.	Reversed in A.I.R. 1929 Lah. 536.
Jhunalal Sahu v. Emperor, (1917) 2 Pat. L. J. 657=41 I. C. 1002=2 Pat. L. W. 152=18 Cr. L. J. 890.	Overruled in A.I.R. 1929 Pat. 473 (F.B.)
Joti Ram v. Harbakhsh Singh, (1928) 105 I. C. 653=A. I. R. 1928 Lah. 60 =9 L. L. J. 393=29 P. L. R. 224.	" A.I.R. 1929 Lah. 481 (F.B.).
Labha Singh v. Basant Singh, (1927) 104 I.C. 545=A. I. R. 1927 Lah. 449=9 L.L.J. 237=28 P.L.R. 407.	" A.I.R. 1929 Lah. 481 (F.B.).

Maung Mra Tun v. Ma Kra Zoe Pru, (1928) 6 Rang. 259=A. I. R. 1928 Rang. 240=111 I. C. 878.	Overruled in A.I.R. 1929 Rang. 97 (F.B.
Nanhe Mal Panna Mal v. Piare Lal Debi Sahai, (1928) 109 I. C. 399=A. I. R. 1928 Lah. 46=9 L. L. J. 502.	" A.I.R. 1929 Lah. 481 (F.B.)
National Bank of Upper India v. Bansidhar, (1926) 3 O. W. N. 83=A. I. R. 1926 Oudh 248=92 I. C. 94.	Reversed in A.I.R. 1929 P. C. 297.
Nilkamal v. Jahnabi, (1899) 26 Cal. 946.	Overruled in A.I.R 1929 Cal. 374 (F.B.).
Raghunath v. Ramchandra, (1922) 46 Bom. 384 = 23 Bom. L. R. 1098= A.I.R. 1922 Bom. 289=64 I.C. 928.	" A.I.R. 1929 Bom. 357 (F.B.)
Ramji Ram v. Banshi Raut, (1925) 4 Pat. 89=6 P.L.T. 240=A. I. R. 1925 Pat. 241=84 I. C. 305=1924 P. H. C. C. 337.	" A.I.R. 1929 Pat. 460 (F.B.)
Subrahmanya Somayajulu v. Seethayya, (1922) 46 Mad. 92=16 M. L. W. 462 =1922 M. W. N. 614=A. I. R. 1923 Mad. 1=70 I. C. 729 (F.B.).	Reversed in A.I.R. 1929 P.C. 115.
Suradhani v. Sittoo, (1922) 71 I. C. 378= 38 C. L. J. 17=A.I.R. 1922 Cal. 311= 27 C.W.N. 280.	Overruled in A.I.R. 1929 Cal. 374 (F.B.).
	" A.I.R. 1929 Rang. 354 (F.B.)
U Teza v. Ma E Gywe, (1928) 5 Rang. 626=A.I.R. 1928 Rang. 3=106 I. C. 201.	" A.I.R. 1929 Mad. 20.
Vishnu Embadri v. Tazakat Manayul, 1928 M.W.N. 390.	" A.I.R. 1929 Bom. 357 (F.B.)
Vithaldas v. Murtaja, (1922) 46 Bom. 764=A.I.R. 1922 Bom. 201=24 Bom. L. R. 267=67 I. C. 151.	

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NAGPUR J. C's. COURT

** A. I. R. 1929 Nagpur 1

PRIDEAUX AND KINKHEDE, A. J. Cs.

Wajdibegum—Plaintiff—Applicant.

v.

Abdul Gani and *others*—Defendants—Non-Applicants.

Civil Revn. Appln. No. 64 of 1928, Decided on 5th October 1928, from order of Dist. Judge., Wardha, D/- 4th January 1928, in Misc. Civil Appeal No. 26 of 1927.

**** (a) Court-fees Act, S. 7, Cl. (9)—Redemption suit—Surplus profits claimed—Value of suit for jurisdiction and Court-fee is principal sum secured—Suits valuation Act, S. 8.**

The value of a suit for redemption, even when surplus profits are also claimed, is for jurisdiction and Court-fee, the amount of principal expressed in the instrument of mortgage. 14 *C.P.L. R.* 154, *Rel. on*: 17 *C.P. L. R.* 139 and 8 *N. L. R.* 179, *Dist.*: 29 *All.* 471 ; *A. I. R.* 1922 *Nag.* 259 ; *A. I. R.* 1924 *Nag.* 346; and *A. I. R.* 1923 *All.* 261, *Foll.*: *Nag. C.R. No.* 275 *of* 1916, *dated* 23*rd Dec.* 1918, *Diss. from.*

[P 2 C 2]

**** (b) Civil P. C., O. 34, Rr. 7, 8 and 9—Power of Court to grant decree for surplus—Relief being outcome of the statutory provisions—No Court-fee is payable—Court-fees.**

The Civil P. C. gives a statutory jurisdiction to the Court to pass a decree for the surplus ; and ordinarily, for a relief which is an outcome of a statutory provision, no Court-fee is payable. For instance, where interest is decreed during the pendency of a suit, no Court-fee is charged, and as the surplus is the result of accounting directed by the Court under R. 7, O. 34, it cannot be separately charged for the purposes of Court-fees.

[P 2 C 2]

R. A. Mande—for Applicant.

S. A. Ghadgay—for Non-Applicants.

Order.—This order also governs Civil Revn. No. 63 of 1928. The question submitted for our decision is as follows :

"What is the value of a suit for redemption, when surplus profits are also claimed, for (1) jurisdiction and (2) Court-fees ?

That is, whether merely the mortgage amount expressed in the mortgage or that amount and the amount of surplus claimed ?"

We have been referred to the case-law on the subject. In *Deosthan of Sonegaon* v. *Mukunda* (1),Ismay, J. C. held that in a suit for redemption the subject-matter of the suit is the charge created by the mortgage and the value of such subject-matter for the purposes of jurisdiction is the principal money expressed to be secured by the instrument. In that case the plaintiff contended that the mortgage had been fully satisfied whereas the defendants claimed that a sum of nearly Rs. 8000 was still due to them. The learned Judge writes :

" The amount of fee payable under the Court-fees Act in a suit for redemption is computed according to the principal money expressed to be secured by the instrument of mortgage, and it seems to me that the same value may without any impropriety be adopted for the purposes of jurisdiction. "

In *Ghulaji Teli* v. *Fakir Shah* (2) Stanyon, A. J. C., observed inter alia :

" It seems to me that if the dictum contained in the case of *Deosthan of Sonegaon* v. *Mukunda* (1) is to be regarded as a hard and fast rule applicable to every redemption case, then difficulties are likely to arise. With great respect to the learned Judicial Commissioner who decided that case, I am unable to understand why a plaintiff in a redemption case who alleges that a larger sum than the principal sum remains due should not be obliged to seek a jurisdiction competent to try suits of the value of that sum. No doubt there is an anomaly in the jurisdiction valuation being placed below the Court-fee valuation

(1) [1901] 14 C. P. L. R. 154.
(2) [1904] 17 C. P. L. R. 139.

and I agree that the minimum valuation for purposes of jurisdiction in a redemption suit should be the Court-fee valuation, since that would be the valuation in a case where the plaintiff alleged that nothing remained payable on the mortgage "

But the case is not really applicable to the one before us, for the Judge further states :

" But I do not think I am called on to discuss in the present case questions as to the mode of arriving at the correct jurisdiction value either in foreclosure or in redemption cases. "

The case of *Kothiram* v *Ganpati* (3) has been quoted, but it is hardly applicable In the well-known case of *Huseni Khanam* v *Husain Khan* (4) a suit which was one for redemption, but the plaintiffs in the plaint alleged that a large surplus was due to them and asked that this surplus should be paid to them—their Lordships of the Allahabad High Court held that no additional fee was payable on the surplus profits claimed , and that ruling has been followed by Sir Henry Drake Brockman, J C in *Gopikisan* v *Sarabji* (5) Baker, J C in *Daulatram* v *Gulab Chand* (6) held that in a redemption suit where a definite amount is claimed as surplus profits, the Court-fee payable is on the amount of principal due under the deed only and not also on the amount of surplus profits claimed ; and the same view was held by the Allahabad High Court in *Chiddu Singh* v *Jhanjhan Rai* (7), where it was held that when a suit is brought for redemption and a certain amount is claimed as surplus mesne profits, the plaintiff is not bound to pay Court-fees upon the surplus amount claimed in addition to the Court-fee on the principal amount secured by the mortgage

The only dissenting case that we can find is *Civil Revn.No* 275 *of* 1916, *disposed of on* 23-12-18 by Batten, A J. C But the learned Judge's attention does not seem to have been directed to O 34, Rr. 7, 8 and 9, Civil P. C. The last rule, which is a new one, provides for cases where nothing is found due or where the mortgagee has been overpaid as may well happen where he is in possession. The rule authorizes the Court to pass a decree, in a case where the defendant has been overpaid, directing the defendant to retransfer the property and to pay to the plaintiff the amount which may be found due to him Thus, the Civil Procedure Code gives a statutory jurisdiction to the Court to pass a decree for the surplus , and ordinarily, for a relief which is an outcome of a statutory provision, no Court-fee is payable For instance, where interest is decreed during the pendency of a suit, no Court-fee is charged, and as the surplus is the result of accounting directed by the Court under R 7, O 34, we think it cannot be separately charged for the purposes of Court-fee As observed in *Husceni Khanam* v *Husain Khan* (4), where the mortgagee is in possession, the suit is substantially one for accounts, and it would not cease to be so merely because the accounting shows a balance in favour of the plaintiff instead of that of the mortgagee In a case where the account discloses that money is due on the mortgage to the mortgagee and this sum is decreed in his favour, the decree is not made conditional on payment of Court-fee calculated on that amount We can see no reason why, if the account results in a surplus, as contemplated by R 9, O 34, being payable to the mortgagor, he should pay Court-fee for the same S 17, Court-fees Act does not conflict with this view as it contemplates separate Court-fees being payable on distinct subjects or distinct kinds of reliefs embraced in the same suit ; while here the cause of action is one, namely, the mortgage, and the surplus claimed is merely ancillary to the main relief of redemption We have no hesitation in holding that the value of the suit for redemption, when surplus profits are also claimed is for jurisdiction and Court-fee the same, namely, the principal expressed in the instrument of mortgage

Let the record be returned,

A L /R K. *Reference answered.*

(3) [1912] 8 N. L. R. 179=17 I. C. 886.
(4) [1907] 29 All. 471=4 A. L. J. 375=(1907) A. W. N. 193.
(5) A I. R. 1922 Nag. 259.
(6) A. I. R. 1924 Nag. 346.
(7) A. I. R. 1923 All. 261=45 All. 154.

** A. I. R. 1929 Nagpur 2

HALLIFAX AND GHULAM MOHIUDDIN, A. J Cs

Laldas—Plaintiff—Appellant

v.

Gurudas and *another*—Defendants—Respondents.

First Appeal No. 122 of 1926, Decided on 14th July 1928, from decree of Additional Dist. J, Bilaspur, D/- 30-9-1926.

**** Hindu Law—Succession—Mitakshara —Preference of whole blood to half-blood is restricted to cases of brothers and their sons only.**

Under the Mitakshara the preference of the whole blood to half-blood in inheritance is restricted to the cases of brothers and their sons only . 24 *Bom.* 317, *Foll.* . *A.I R.* 1926 *Nag.* 218 *Diss. from, A.I.R.* 1915 *P.C.* 81, *Expl.* [P 4 C 2]

M B Niyogi—for Appellant.

H S. Gour and *G P. Dick*—for Respondents

Judgment —The relationship of the parties to the suit of which this appeal by the plaintiff Laldas and another by defendant 2, Bajrangdas (*F' A No.* 131 *of* 1926) arises is shown in the genealogical table (see p 5) attached to this judgment. In addition to the persons mentioned in that table two other members of the family survived Mahant Lakhmidas, a daughter Askuar Bai and a third widow Sonkuar Bai, both childless The dispute is over a part of an estate of 103 villages in the Bilaspur District known as Lormi Wasudeodas was the eldest son of Lakhmidas with Ramkrishnadas second and Bajrangdas third

Whether the sons of Lakhmidas ceased to form a joint Hindu family before the year 1901, as alleged by the plaintiff, or not is immaterial, as they certainly did cease to do so in that year, though the partition then made indicates that they had not separated before the death of Wasudeodas in 1899 as only two villages were allotted to his widow which she was to hold for her life only Early in 1901 Ramkrishnadas, the eldest surviving son of Lakmidas filed a suit against his three brothers and the widow of Wasudeodas claiming possession of all the 103 villages on the ground that they were an impartible estate passing to a single heir The case was compromised, and on 16th October 1901 a decree was passed in accordance with the agreement of the parties

The number of villages allotted to each person was as follows :

Ramkrishnadas 28, Bajrangdas 24, Garuddas 24, Laldas 23, Krishnapriya Bai 2, Sonkuar Bai 1 and Askuar Bai 1=103.

The numbers of the villages are of course not an exact measure of the relative values of the shares, but it appears that the portions of the three younger brothers were approximately equal while Ramkrishnadas as the eldest got a slightly larger share. The villages allotted to the ladies were to be held by them for life only.

The 28 villages allotted to Ramkrishnadas are the subject-matter of this suit. On his death on 1st September 1912 they passed to his son Bhagwatdas who died three months later They then passed to his widow Rajkuar Bai and on her death in 1914 to his grandmother Phulkuar Bai, after a suit against Dharmin Bai who claimed to be his second wife When Phulkuar Bai died on 23rd October 1922 Garuddas took possession of the whole 28 villages and on 16th September 1924 Laldas filed the present suit in which he claimed his one-third share in them from Garuddas. His claim rests on the ordinary rule of succession of Hindu law, though the plaint contains unnecessary reference to the agreement of 1901 and, by way of anticipating the defence, to a local custom. Bajrangdas was joined as defendant 2 because he denied the title of both the others, maintaining that he was entitled to the whole of the villages as the eldest surviving son of Lakhmidas or at least to the extra four villages given to Ramkrishnadas as the eldest

The defence of Garuddas, anticipated in the plaint, was that he was the full brother of the father of Bhagwatdas, the last male owner of the property, and would therefore inherit to the exclusion of the other two, who were the half-brothers of Ramkrishnadas. The contention of Laldas was that the rule of exclusion of the half-blood by the whole blood applied only in the case of brothers and their sons and even to that extent had been overridden by local custom Of any such local custom there is no evidence worthy of the name, and it certainly has not been proved.

It was also asserted for Laldas that at the time of the compromise in 1901 there was a contemporaneous oral agreement that in the case of the failure of heirs in any one line the property of that branch was to be divided equally among the other branches. That seems to mean little, but perhaps was intended to mean that there was an agreement to disregard the rule of the half-blood and the whole blood. Whatever it might be, it is, however, clear that no evidence could be given of this alleged oral addition to the terms of the document, which was very formal and solemn. Such evidence as the plaintiff could adduce was, however, rightly put on the record, and it goes no way at all to-

wards proving his allegation even if it is considered.

The only issue in which the plaintiff and defendant 1 are concerned is therefore whether the rule of Hindu law whereby heirs of the half-blood are excluded by those of the whole blood extends only to the brothers of the deceased and their sons, as the plaintiff asserts, or extends indefinitely as the defendant Garuddas maintains On this question the learned Judge followed the officially published judgment of a Single Judge of this Court in *Narain* v. *Homraji* (1), as he was bound to do, and held that the rule covers all sapinda relations and not only brothers and their sons The ruling in the case mentioned is based on that of the Privy Council in *Ganga Sahai* v. *Kesri* (2), in which their Lordships are regarded as having given an indication of their approval of this principle though it was outside the case before them It is impossible to find any such approval in the judgment mentioned, even by the most distant implication. What their Lordships decided was that even if the preference of the whole blood to the half-blood does extend beyond brothers and their sons, on which no opinion was expressed, it is confined to sapinda relations of the same degree of descent from the common ancestor.

The question is discussed at great length in the judgment of Ranade, J , in *Vithalrao* v *Ramrao* (3) and we respectfully concur in his conclusion that the exclusion of the half-blood by the whole blood is confined to the cases of brothers and their sons The distinction made in the Mitakshara is between sons of the same mother and those of another mother, and this is ordinarily expressed in English in the terms whole blood and half-blood. But neither expression applies correctly to any but the brothers, not even to brothers' sons Neither the son of a man's full brother nor his father's half-brother is of the same womb as he is, and the blood common to him and either his nephew or his father's stepbrother is only a quarter, not a half

The Mitakshara first lays down the fundamental rule that

" to the nearest sapinda the inheritance next belongs. "

Two exceptions are then stated to this rule The first is that

" if there are no uterine brothers, those by a different mother inherit the estate, "

that is to say, that if there are uterine brothers the half-brothers are excluded, though equal to the full brothers in sapinda relationship The second exception is an application of the same rule to the brothers' sons It says that

" on the failure of brothers also, their sons inherit in the order of their fathers, "

that is to say that if there are not even half-brothers, the sons of the full brothers inherit first and in their absence the sons of the half-brothers

These are two very precisely stated exceptions to the rule of equal inheritance by all those equal in sapinda relationship, and it would be difficult if not impossible to extend them further even if there were a principle apparently underlying them that would seem to point to the probability of such an extension having been intended. The principle underlying the exceptions is probably the matter of propinquity in blood, as Ranade, J , pointed out in the case already mentioned, and that would not extend them, but anyhow it seems impossible to imagine any principle or theory on which they are based that would extend them

Another apparently insuperable objection to any widening of the scope of the exceptions is the question of the limit of that widening If we are to go beyond the persons specifically mentioned where are we to stop? If we include what may be called step-uncles, there can be no reason for not including the last sapinda and no reason for stopping at him, we would have to go on to the end and include all the gentiles and the most distant kindred, which is manifestly absurd, if only because it would be impossible in practice. We hold that in the Hindu law under the Mitakshara the preference of the whole blood to the half-blood in inheritance is restricted to the cases of brothers and their sons only. The plaintiff Laldas is therefore equally entitled with his half-brother Garuddas and his full brother Bajrangdas to get one-third of the property left by their nephew Bhagwatdas.

We turn now to the case of defendant 2 Bajrangdas. It is apparent though it seems to have escaped observation, that the only possible result of the success of his main plea is the dismissal of the suit He has paid no Court-fees and cannot

(1) A.I.R. 1926 Nag. 218=21 N.L.R. 163.
(2) A.I.R. 1915 P.C. 81=37 All. 545=42 I.A. 177 (P.C.).
(3) [1900] 24 Bom. 317=2 Bom.L.R. 139.

therefore be given a decree even for the one-third share to which, so far, he appears entitled He claims the whole of the property left by Bhagwatdas on the ground that the agreement and the decree of 1901 laid down that it was to be impartible and was to pass to the eldest member of the eldest branch of the family. Such an agreement offends against the law in respect of perpetuities, though it might possibly be held that Garuddas and Laldas, being parties to it, would be bound to make it good so far as they could by giving up each his one-third share in the property to Bajrangdas

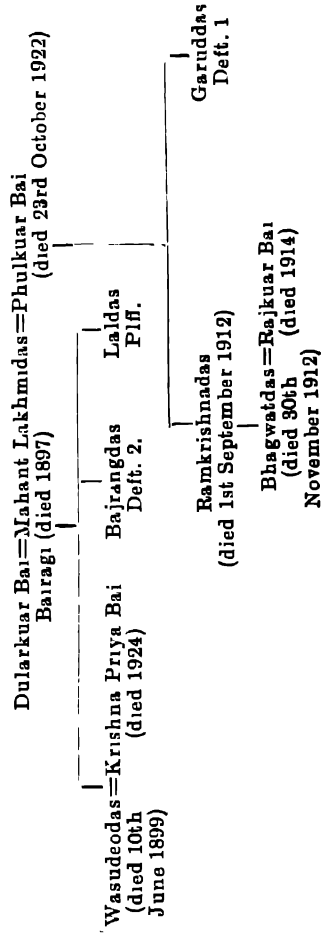
But there was no such agreement The relevant portion of the petition of compromise (Ex P-4), which was reproduced in the decree, is as follows :

" The villages held by Ramkrishnadas, the eldest brother, shall be impartible The villages held by the defendants shall be partible. The villages held by Ram Krishnadas shall not be divided from generation to generation. The eldest son of Ramakrishnadas shall alone be the owner of his villages. "

Not a word is said of what is to happen to the villages on the extinction of the line of Ramkrishnadas, and even if the agreement were enforceable it is impossible to import into it, as Bajrangdas suggests, a further stipulation that on the failure of heirs in the senior branch of the family the property should pass to the next senior branch

The alternative plea taken by Bajrangdas was that as the present head of the family he was entitled to get the four villages that were given to Ramkrishnadas in that capacity as Jethasi. It is mentioned in the agreement of 1901 that four extra villages were given to Ramkrishnadas as Jethasi, but they are not specified. Indeed the statement that the excess was four villages is not correct as he got five more than Laldas and, as has been said, the values of two groups of villages are not in the ratio of their numbers But there is no evidence whatever of any custom, or any agreement whereby the extra portion allotted to the eldest brother in a family should always pass to the eldest branch of the family for the time being, and such a rule would obviously be impossible to enforce after a very few generations

For all these reasons the decree of the lower Court dismissing the suit will be set aside and in its place a decree will issue ordering the defendant Garuddas to hand over to the plaintiff Laldas one-third of all the property that came to him from Bhagwatdas through Phulkuar Bai and to pay all the costs incurred by the plaintiff in both Courts Bajrangdas will pay his own costs in the suit and in this appeal, in which the pleader's fee will be Rs 500, and his own appeal will be dismissed.



J.V /R K. *Decree modified.*

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* * A. I. R. 1929 Nagpur 5

PRIDEAUX AND KINKHEDE, A. J. Cs.

Khunnanlal and *others*—Defendants—Appellants.

v.

Shrinandlal Singhai—Plaintiff—Respondents.

Second Appeal No. 110 of 1926, Decided on 24th September 1928, from decree of Dist. Judge, Saugor, D/- 12-11-1925.

**** C. P. Tenancy Act (1920), Sch. 2, Art. 1—Absolute occupancy.**

An absolute occupancy holding originally granted for agricultural purposes but which for long has been utilized for building upon is still a holding within the meaning of Art. 1. [P 6 C 1]

V. Bose and *P N. Rudra*—for Appellants

G. L. Subhedar and *K. V. Deoskar*—for Respondent

Order of Reference

Prideaux, A J C—A question of considerable public importance arises in this appeal It is

" Whether an absolute occupancy holding originally granted for aricultural purposes but which for long has been utilized for building upon is still a holding within the meaning of R. 1, Sch. 2, Tenancy Act of 1920."

I would ask for a Bench to decide this question.

Opinion.—We have no hesitation in finding the question sent to us for decision in the affirmative It seems to us that once a field is recorded as absolute occupancy, Sch. 2, Tenancy Act of 1920 would apply It is here argued that the entry cannot be treated as conclusive and that it is open to the plaintiff in the present case to show that the entry is erroneous We think that as there was no dispute at the time of making the entry it can only be presumed to be correct until the contrary is shown The plaintiff has himself admitted in the plaint that the land is absolute occupancy and that he is such tenant, and he nowhere challenges in the present suit the correctness of the entry Under these circumstances we must hold that the land in suit is agricultural land and governed as such by Art 1, Sch 2, Tenancy Act It has to be remembered that an absolute occupancy tenant could not be ejected for building on his holding unlike the occupancy tenant Thus there is no forfeiture of the tenancy right for the diversion of the land to non-agricultural purposes and the definition of a holding is land let for an agricultural purpose

Both sides agree that the field in suit is recorded as agricultural land, and it seems to us that until the character of the land is changed it is subject to the provisions of the Tenancy Act.

A.L./R K. *Reference answered.*

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* A. I. R. 1929 Nagpur 6

FINDLAY, J C.

Ram Gopal—Appellant—Defendant

v

Ambaprasad and *others*—Plaintiffs—Respondents

Second Appeal No. 127 of 1927, Decided on 23rd August 1928, against the decree of Dist. Judge, Nagpur, D/- 24th November 1926 in Civil Appeal No. 69 of 1926.

*** (a) C. P. Tenancy Act (1898), S. 46 (5)—Inclusion of an occupancy field in a mortgage-deed along with fields other than occupancy—Genuine and bona fide mistake in its inadvertent inclusion — Mortgage-deed not purporting to transfer rights in the occupancy land—Registration of the deed is not vitiated and the transaction is valid**

Inadvertent inclusion of an occupancy field amongst fields, other than occupancy, in a mortgage-deed, in a case of genuine and bona fide mistake on the part of the parties to a mortgage, where the mortgage deed does not purport to transfer any rights in occupancy land, does not vitiate the registration of the deed and does not strike at the root of the whole transaction. Its inclusion is to be treated merely as a surplusage *A I R* 1928 *Nag* 1 *Dist*, *Nag. F A. No.* 95 of 1924 and *Nag. Misc. Appeal No.* 5 *of* 1923, *Appr.*, *Nag S. A. No* 481 *of* 1918, *Ref* [P 7 C 1]

(b) C P. Tenancy Act (1898), S 46 (3)—Trees standing on *sir*—Ownership in cultivating and other *sir* rights separate from that in trees—Mortgage of the trees is not illegal.

Where property in trees is separate from that in *sir* land in which they stand and cultivating and other *sir* rights are separated from the ownership of such trees, there is nothing illegal in these trees being included in mortgage by the owner of the trees · *A. I R.* 1925 *Nag.* 277 *Dist.* [P 7 C 2]

(c) Civil P. C. S. 34—Interest pendente lite at Rs. 1-8 per cent (compound) is not excessive.

Interest allowed at Rs. 1-8-per cent (compound) pendente lite as stipulated for in mortgage-deed is not excessive. [P 8 C 1]

(d) Hindu Law—Legal necessity — Consideration of mortgage being antecedent debts —Mortgagee need not make enquiry as to existence of legal necessity.

Where practically the entire consideration of a mortgage is on account of antecedent debt, there is no reason for the mortgagee to make a further enquiry as to existence of legal necessity. [P 8 C 1]

S Y. Deshmukh—for Appellant.

W. R Puranik—for Respondents

Judgment.—It is unnecessary to repeat the facts of this case, which are sufficiently clear from the lower Court's judgments. The defendant has now come up on second appeal to this Court The first point raised is with regard to the

inclusion of field 9 in the mortgage. That field is admittedly occupancy and the finding of the District Judge is that it was by mistake, described as khudkasht in the mortgage-deed. I am not here, therefore, concerned with any question of fraud and the decision in *Vyankatesh* v *Annasa* (1) is not, therefore, to the point. The question for decision in this connexion is whether when a field like the one we are concerned with was, by mistake of the parties, shown as, and believed to be, khudkasht and was included in a mortgage in spite of its actually being an occupancy one, the registration of the mortgage was invalid under S. 46, sub-S. (5), Tenancy Act of 1898 The corresponding point was considered by Hallifax and Mitchell, A J. Cs , in First Appeal No 95 of 1924, decided on the 23rd September 1926, as well as as by Kotval, A J C., in his judgment in Misc Appeal No 5 of 1923 dated 4th February 1924, and I am so far in agreement with these decisions. Drake Brockman, J C , in Second Appeal No 481 of 1918, dated 7th April 1919, decided that the language of S 46, sub-S (5), indicates that the Registration Officer is not expected by the legislature to decide as to the soundness of the recitals in a deed presented for registration From this point of view, therefore, the present defendant would have no case in this connexion, for the mortgage-deed in suit does not purport to transfer any rights in occupancy land The case of genuine and bona fide mistake on the part of both parties to a mortgage like the present is, however, in my opinion, radically different from that of a case where fraud exists, or where an attempt is made deliberately to mortgage occupancy land Here, very obviously a mistake occurred and the inclusion, by inadvertence, of what was in reality an occupancy field seems to me a matter to be treated merely as a surplusage. The plaintiff-respondents do not claim any rights with reference to the field in question and, in those circumstances, I am wholly unable to accept the defendant-appellant's contention that the inadvertent inclusion of an occupancy number amongst the field mortgaged vitiates the registration of the deed and strikes at the root of the whole transaction

An analogous question has been raised with reference to the trees in suit It has been urged on behalf of the appellant, on the strength of the decision in *Fakira* v. *Ramkisan* (2), that the trees are an integral portion of the holding and that, therefore, as the *sir* land on which these stood could not be mortgaged, these trees fell under the same bar, and the whole deed was again invalid for this reason as a mortgage It seems to me, however, that, in the circumstances of the present case, there is clear evidence on record that the ownership and possession on the trees had been divorced from the *sir* land in question. I do not, for one moment, accept the dictum of the learned District Judge that any proprietor is as a matter of course, entitled to mortgage the trees standing on his occupancy holding, but, in the present instance, we have the following facts The mortgage-deed expressly states that *sir* rights are excluded, the *sir* land, on which the trees in question stood, admittedly does not belong to the mortgagor, and the entries in Exs like D-2 and D-3 go to suggest that, owing to special circumstances, the property in the trees was separate from that in the field in which they stood The case is one, in my opinion, in which undoubtedly existed the exceptional incident of the ownership of the trees having been separated from that land on which they stood Very clearly in the present case the cultivating and other rights in *sir* were expressly excluded from the security and, in those circumstances, I am wholly unable to see that there was anything illegal in these trees having been included in the mortgage-deed

An attempt has been made to urge on behalf of the appellant that the mortgagee in this case made no sufficient enquiry as to the legal necessity and as to the real existence of antecedent debt I confess I have been unable to understand how, in the circumstances, such a contention can be offered with the slightest hope of success It is true that by far the major part of the consideration was due on a previous bond of 1915, the balance being made up of money due for rent and a small amount of Rs. 17-1-6 paid in cash for registration expenses and the like. The bond (P-2) was, however, executed by the defendant's father and, in the circumstances of the present case, I see no reason for doubting that the mortgagee was not satisfied, on reasonable ground

(1) A. I. R. 1928 Nag. 1=23 N. L. R. 149.

(2) A. I. R. 1925 Nag. 277=21 N. L. R. 25.

that the mortgagor was entitled, in the interests of his family, to incur the debt in question The evidence of Baliram P. W. 1 and Atmaram (P. W. 6) sufficiently establishes this point Very clearly, practically the entire consideration of the present mortgage was on account of antecedent debt and, in those circumstances, I am unable to hold that there was any reason for the mortgagee having to make further enquiry as to existence of legal necessity. In any event, as I have already pointed out, the previous, bond (P-2) is on the record, and that debt had not been satisfied until it was wiped out by the mortgage-deed in suit

It has also been suggested that there has been no sufficient proof of attestation in the present case The plaintiffs examined not only the scribe of the bond, Sheikh Ibrahim (P W 4), but also one of the attesting witnesses, Kisan (P W 5). The evidence of these witnesses goes to show that the bond was duly attested by another man Ramkrishna and clearly, in the circumstances, there is prima facie evidence on record of a perfectly satisfactory nature as to the due execution and attestation of the mortgage-deed in suit The burden of proving the opposite clearly had shifted to the defendant and he made no attempt to discharge that burden

It has lastly been urged that interest at the rate of Rs 1-8-per cent, (compound) should not have been allowed, at any rate pendente lite The rate of interest is not, in any way, excessive and there are no grounds wnatever on which I could interfere in this connexion in the way of diminishing the interest stipulated for in the mortgage-deed in suit.

The appeal fails on all points and is dismissed. The appellant must bear the respondent's costs Costs in the lower Courts as already ordered.

A L /R.K *Appeal dismissed.*

A I. R. 1929 Nagpur 8

KINKHEDE, A. J. C

Shrikisan—Plaintiff—Appellant.

v

Secretary of State—Defendant — Respondent.

Second Appeal No. 73-B of 1927, Decided on 30th August 1928, from decree of 1st Addl Dist. Judge, Akola, D/- 31st January 1927, in Civil Appeal No 254 of 1926.

Limitation Act, S. 5 — Ordinarily High Court does not interfere with the exercise of discretion by the lower appellate Court—But if discretion is judicially unsound, High Court will interfere — Memo. of appeal accepted by appellate Court, though filed after limitation — Delay condoned without sufficient cause—Appeal accepted on merits and judgment of lower Court set aside — High Court set aside the appellate Court's judgment and restored that of the lower Court—Practice—Discretion.

In matters of discretion a Court of second appeal ought not and ordinarily does not interfere with the exercise of discretion on the part of the subordinate Courts, but that non-interference must necessarily be limited to cases where there is sufficient material on record to justify the exercise of discretion in any particular way. Where, however, it appears that the lower appellate Court has exercised its discretion in a judicially unsound manner without proper legal materials to support its decision, the High Court will surely interfere. [P 10 C 1, 2]

A memo. of appeal was accepted by the appellate Court after the period of limitation had expired, without enquiring into sufficient cause for condoning the delay in the presentation of the memo The appeal was accepted on merits setting aside the decree of the lower Court.

Held : that the appellate Court acted wrongly in entertaining appeal as it had no jurisdiction to touch the decree, and decide the case on merits on the basis of time-barred memo . *A. I. R.* 1917 *P. C.* 179 and *A. I. R.* 1924 *Bom.* 399, *Ref.* : 25 *Mad.* 166, *Foll.* [P 10 C 2]

M. R. Bobde—for Appellant.

G. P. Dick—for Respondent.

Judgment.—This is an appeal by the plaintiff, whose suit filed against the Secretary of State for India-in-Council, which was decreed by the first Court, has been dismissed by the lower appellate Court The first point for consideration is whether the defendant's appeal to the lower appellate Court was rightly admitted being within time though filed seven days beyond time

The judgment of the first Court was delivered on 24th August 1926 The copies of the judgment and decree to be appealed from were applied for on 28th August 1926, i e , when 27 days out of the period of 30 days prescribed for filing the appeal to the Court of the District Judge were still to the credit of the defendant. The copies were ready on 4th September 1926 and delivered the same day. Thus time spent.in obtaining the copies was eight days. The appeal had, therefore, to be filed before the expiry of the 38th day which fell on 1st October 1926, but as a matter of fact it was instituted on 8th October 1926.

Along with the memo of appeal, which purports to bear date 6th October 1926, a draft of the proposed grounds of appeal prepared on 7th September 1926, a covering letter addressed to the Deputy Commissioner, Akola, under the same date, and a true copy of a letter dated 21st September 1926 from the Assistant Secretary to Government, Legal Department, to the Commissioner, Berar, were produced apparently to explain away the delay which took place in the filing of the appeal. This true copy was transmitted by the Commissioner to the Deputy Commissioner by endorsement dated 29th September 1926, and presumably, it reached the latter in due course before 4th October 1926 The Deputy Commissioner's Office forwarded the papers to the Public Prosecutor, Akola, on 5th October 1926, and they reached him that very day at 5-30 p m , that is, after the usual Court hours The 6th and 7th October were holidays, and hence the appeal was filed on the 8th The Additional District Judge held the necessary enquiry and called upon the plaintiff to appear in that enquiry to oppose that application for extension of time under S. 5, Lim Act As a result of that enquiry the learned Judge was satisfied as to the diligence of the Government Pleader in the performance of his duty, and came to the conclusion that the delay was occasioned when the papers were in the course of transmission from the Legal Department to the Government Pleader through the usual media of the offices of the Commissioner and Deputy Commissioner. This delay remained unexplained. I think that if efforts had been made to find out the cause of this delay, some relevant information could have been secured on the point.

The Commissioner's office had despatched the papers before the expiry of the period of limitation, that is, when there were two days still to the credit of the party appealing, if we go by the date given in the forwarding endorsement. Under ordinary circumstances a letter despatched from Amraoti ought not to take two days to reach Akola, and if these papers did as a matter of fact reach Akola on or before 1st October 1926, I see no reason why the same could not have been handed over immediately to the Government Pleader to enable him to file the appeal at once within limitation. The ascertainment of the date of receipt of the papers in the Deputy Commissioner's office was absolutely necessary, before the Additional District Judge could exercise his discretion in the matter of condoning the delay. The Government Pleader had in the last line of his forwarding letter to the Deputy Commissioner, Akola, distinctly mentioned that the appeal will have to be filed the latest on 29th September 1926 I have not got before me anything to show whether any note of this warning was taken by the Deputy Commissioner when he forwarded the papers through the Commissioner to the Legal Remembrancer's Office, and whether he pointed out to the Commissioner the absolute necessity of securing from the Legal Department a prompt decision whether the appeal should, or should not, be filed and of returning the papers in sufficiently good time to enable him to instruct the Government Pleader, to institute the appeal (if sanctioned by the Legal Department) before the expiry of the period of limitation In the absence of any such material on record it is difficult to say that there was reasonable cause for the delay. I cannot understand what the Government Pleader means by urging that the agents of the Secretary of State in all departments had to do other important duties along with this duty, and so the time taken up in obtaining the sanction by the Deputy Commissioner, the Commissioner and the Legal Remembrancer as mentioned in the letters filed in the Court was unavoidable and that there was no negligence on the part of the appellant or his agents. Really speaking the sanction was given early enough.

The Additional District Judge instead of drawing an inference adverse to the appellant before him, from the absence of all explanation and proof of facts accounting for each day's delay, considered that there was a "presumption" which arose :

"in the course of office work of a Government,"

which

"may just be that there was reason why the matter should have not deserved the first attention."

In the absence of any detailed affidavit, or other evidence on record, it was no proper for the Additional District Judge to presume that there was no negligence,

and at the same time go the length of observing that :

"no serious attempt was made to gain time over the ordinary procedure,"

in spite of the fact that the appellant

"has to conduct business through a long series of hierarchy of servants."

On 26th November 1926, statements of the parties were recorded, but as the Government Pleader was not ready with facts necessary to explain the delay he took time to ascertain them from the different offices The hearing was, therefore, adjourned to 8th December 1926 His statement dated 8th December 1926 however throws no light on the question of the apportionment of the responsibility for the delay between the several offices, and why, with exercise of due diligence, the same could not have been avoided. An issue was struck on that date, and all that the Government Pleader perhaps desired to do in the case was to ask for a date for arguments, and for that purpose time was granted till 14th December 1926. The arguments were heard, and, straight off, without any evidence, or other sufficient date before him, the Additional District Judge condoned the delay and granting extension of time under S 5, Lim Act, admitted the appeal though barred by seven days The Additional District Judge thus deprived the successful party of a very valuable right, namely, the finality of the decision of the lower Court in his favour which had accrued to him by reason of the period of limitation filing the appeal having elapsed · cf *Krishnasami Panikondar* v. *Ramasami Chettiar* (1) and *Nagindas* v. *Nilaji Moroba* (2).

I am fully aware that in matters of discretion a Court of second appeal ought not and ordinarily does not interfere with the exercise of discretion on the part of the subordinate Courts, but that non-interference must necessarily be limited to cases where there is sufficient material on record to justify the exercise of discretion in any particular way. The test as laid down in *Kichilappa Naickar* v *Ramanujam Pillai* (3), is, has the discretion been exercised after appreciation and consideration of all the facts which were material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts ? If the discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion will be an exercise of discretion judicially sound Where, however, it appears that the lower appellate Court has exercised its discretion in a judicially unsound manner without proper legal materials to support its decision, the High Court will surely interfere

In the present case, there being no such proper material on record I am constrained to interfere with the lower appellate Court's exercise of discretion For these reasons I hold that the defendant had failed to show sufficient cause for condoning the delay in the presentation of the memo of appeal to the lower appellate Court and that the said Court acted wrongly in entertaining the appeal though instituted beyond time In my opinion the lower appellate Court had no jurisdiction to touch the decree passed by the Court of first instance and decide the case on the merits on the basis of a time-barred memo. of appeal. The decree dismissing the plaintiff's suit passed in appeal is, therefore, set aside, and that of the first Court decreeing the claim restored. The present appeal is allowed with costs The costs of the first appeal shall be paid by the defendant and those of the suit will be paid as already ordered by the first Court.

A L/R K. *Appeal allowed.*

(1) A.I.R. 1917 P.C. 179=41 Mad. 412=45 I. A. 25 (P.C.).
(2) A.I R. 1924 Bom. 399=48 Bom. 442.
(3) [1902] 25 Mad. 166.

A. I. R. 1929 Nagpur 10

FINDLAY, J. C

Sadasheo Kartatkar—Purchaser—Applicant

v

Narayan and *another*—Judgment-debtor and Decree-holder—Respondents

Civil Revn. No. 186 of 1927, Decided on 10th October 1927, from order of Dist. Judge, Nagpur, D/- 23rd March 1927, in Misc Appeal No. 32 of 1926

(a) Civil P. C., O. 21, R. 89—Provisions should be strictly complied with.

The provisions of R. 89, O. 21, are to be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor. [P 11 C 1]

(b) Civil P. C., S. 115, and O. 21, Rr. 89 and 92—Total amount liable not deposited within 30 days—No unequivocal acceptance

of it by decree-holder—Sale should be confirmed.

Where, when applying to set aside a Court sale, the total amount liable to be deposited was not deposited within 30 days of the sale, and there was no unequivocal acceptance by the decree-holder of the deposit so made, but, on the contrary, the judgment-debtor was only allowed to deposit the amount at his own risk, and the money, so to speak, was only provisionally received.

Held, that the decree cannot be said to have been satisfied and so the case was one in which the Court was bound to confirm the sale. The lower Court in supposing that it had no authority to do so and in accepting the deposit made by the judgment-debtor, exercised a jurisdiction which was not vested in it-and it is the duty of the High Court to interfere *A.I.R.* 1922 *Nag.* 248, *not Foll.* *A. I. R.* 1923 *All.* 392 *Dist.* *A. I. R.* 1928 *Nag.* 136, *Foll.* [P 11 C 1, 2]

M. R Bobde—for Applicant

D. R. Buxy—for Respondents.

Order—The facts of this case are sufficiently clear from the lower Courts' orders. I do not think the learned District Judge was correct in applying the decision in *Nilkanth* v *Yeshwant* (1) to the facts of the present case. In the first place, it is perfectly clear that the total amount liable to be deposited under R 89, O 21, Civil P. C., was not deposited within 30 days of the sale. I do not think there is any ground for supposing that in this connexion the judgment-debtor, non-applicant 1, was misled by the mistake in the proclamation of the sale The provisions of R. 89, O 21 are to be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor Here, there was no strict compliance with the rule in question Still further, there was no unequivocal acceptance by the decree-holder of the deposit so made On the contrary, the order-sheets of 26th April 1926 and 26th July 1926 show that the judgment-debtor was only allowed to deposit the amount at his own risk, and the money, so to speak, was only provisionally received I cannot, therefore, regard the decree as having been satisfied and even were one to adopt the somewhat wide principle laid down by Kotwal, A J C, in *Nilkanth* v. *Yeshwant* (1), above quoted, I do not think it can be predicated of the present case that the Court's power to execute the decree had ceased Mac Nair, A J C, in his judgment in *Kabiruddin* v. *Krishnarao* (2), has seen cause to differ from the decision of Kotwal, A. J. C, which is an officially reported case, but I do not think it necessary in the present case to go into the further questions involved for the simple reason that, in my opinion, R 89 must be strictly construed, and in this case there was no complete compliance with the provisions contained therein.

I do not further think that the case was one in which the Court could rightly have had recourse to the provisions contained in S 151, Civil P. C, nor did, in my opinion, the equities of the case call for any such resort to the provisions mentioned, even were this course permissible. In my opinion, therefore, the case was one in which the Court was bound to confirm the sale In supposing that it had authority not to do so and instead, to accept the deposit made by the judgment-debtor, it exercised a jurisdiction which was not vested in it and it is, in my opinion, the duty of this Court to interfere The facts of the decision in *Yad Ram* v. *Sundar Singh* (3), which has been quoted on behalf of the non-applicant 1, were highly peculiar and I am unable to accept the contention offered by the latter that the present application for revision does not lie.

In my opinion, therefore, the present revision application must succeed The order of the lower appellate Court is set aside and the order of the first Court, dated 30th October 1926, confirming the sale is restored The non-applicant 1 (judgment-debtor) must bear the applicant's costs both in this Court and in the lower appellate Court I fix Rs. 20 as pleader's fees

S.J /R K *Revision accepted.*

(1) A. I. R. 1922 Nag. 248=18 N. L. R. 194.
(2) A. I. R. 1928 Nag. 136.
(3) A. I. R. 1923 All. 392=45 All 425 (F.B.).

A. I. R. 1929 Nagpur 11

PRIDEAUX, A. J C.

Ganpat—Appellant.

v.

Harigir and *others*—Respondents

Second Appeal No 13-B of 1927, Decided on 26th July 1928, from decree of Dist Judge, Amraoti, D/- 25th November 1926, in Civil Appeal No 41 of 1926.

(a) Provincial Insolvency Act (5 of 1920), S. 27 (2)—Court has power to extend time for discharge even after expiry of the period.

The annulment of ajudication does not ipso facto come into operation without an express

Order.—This order will govern *Criminal Revisions Nos* 304 and 305 *of* 1927 also

These three applications have been filed by Chinai, Mohan Singh and Chittar Singh, who have been convicted under S 506, I P C, and have been directed to execute bonds for keeping the peace, under S 106, Criminal P C, by Rao Saheb Govind Rao Shrikhande, Honorary Magistrate, First Class, Saugor

Such applications under S. 435, Criminal P C., can be entertained by the District Magistrate or Sessions Judge, who have concurrent jurisdiction in this matter, and under S. 438, Criminal P C, the District Magistrate or Sessions Judge may, if he thinks fit, report for the orders of this Court the result of such examination, and action can then be taken by this Court under S 439, Criminal P C. Neither the District Magistrate nor the Sessions Judge has been moved in this matter In *Criminal Revision No* 237 *of* 1927, Kotval, A J C, ordered as follows:

"I decline to entertain this petition which has been made without first having recourse to the Sessions Judge."

The applications are, therefore, dismissed without notice to the Crown.

D B /R K *Applications dismissed*

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* A I. R. 1929 Nagpur 14

MOHIUDDIN, A J. C

Umed Hussain—Accused—Appellant.

v

Emperor—Opposite Party

Criminal Appeal No 117 of 1928, Decided on 3rd July 1928, from judgment of Sess, Judge, Raipur, D/- 16th April 1928

*** Penal Code, Ss. 149, 302 and 304—Unlawful assembly—Party *A* having common object to resist process-server and cause hurt to him and decree-holder's agents—Marpit beginning between them and decree-holder's party *B*—*S* member of *B* inflicting lathi-blow on *P*, a member of *A*—*P* in return giving blow to *S* and causing fatal wound—Members of *A* other than *P* are not guilty under S. 149—*P* is guilty not under S. 302 but Penal Code, S. 304.**

Certain persons who were members of party *A* had the common unlawful object to resist a process-server and agents of the decree-holder who formed another party *B* and to cause hurt to their persons. Marpit began between the two parties in which, party *A* was faring badly. Then suddenly *S*, a member of party *B*, came on the scene and inflicted a blow with his stick on *P*, a member of party *A*, and in return *P* gave a blow to *S* causing a wound on his head which proved fatal.

Held: that the members of party *A* other than *P* were not guilty for the offence of murder on account of their constructive liability under S. 149. 20 *W. R. Cr.* 5 (*F.B.*), *Foll.* [P 16 C 1]

Held further that under the circumstances *P* could not be said to have committed offence under S. 302, but only of culpable homicide punishable under S. 304. [P 16 C 2]

H S Gour—for Appellant

G P Dick—for the Crown

Judgment — This appeal has been filed on behalf of Umed Hussein who with his three sons Amir Ali, Jawahir Ali alias Bulaki and Wazir Ali, and six others, Santokh, Lalkhan, Bilam, Annoop, Ghasi, Latti, has been convicted under S 148 and S. 302 read with S 149, I P C, and has been sentenced to rigorous imprisonment for two years, and to transportation for life respectively, the sentences to run concurrently The other nine accused have been similarly convicted and their appeals in this Court are appeals Nos 118 to 126 of 1928. The judgment in this appeal will govern the other appeals also

The facts of this case have been mentioned in sufficient detail in the judgment of the learned Sessions Judge and therefore I do not consider it necessary to repeat them here It is an admitted fact that a marpit took place in the village Sarwani on 7th December 1927 when the possession of the share belonging to Umed Hussain was to be delivered to the decree-holder The prosecution case is that all the appellants armed with lathis came to the place, in front of the house of Thandaram, and assaulted Thandaram, Bandaram and Raghunandan Prasad. The accused Umed Hussain and Jawahir Ali allege that Thandaram and Bandaram accompanied with 10 or 15 persons came to their house, and after some altercation, Thandaram gave a blow to Umed Hussain and ordered his men to beat, that they took the sticks of Bandaram and Sheo Prasad and defended themselves, that many persons who had gone there hearing about the marpit intervened, and as there was a big crowed in the *angan*, in the Melee, Bandaram's head came into contact with the door-frame and got hurt.

Amir Ali and Wazir Ali pleaded alibi and alleged that they had gone to

Khamaria Santokh stated that he was ill on that day and did not take part in the riot Lalkhan alleged that he had not taken part in the marpit but was beaten by Thandaram and his son that day at 5 p m. Bilam stated that Kashiram and Parsoo beat him, when Thandaram, Bandaram and others were returning from the Gaontia's house Annoop, Fhasia and Latti stated that they were not present at the marpit

A careful perusal of the evidence of the prosecution witnesses Mahabir Prasad (P. W 11), Raghunandan Prasad (P W 12) and Thandaram (P W 13) makes it clear that besides the two mazkuris, at least 10 or 12 other persons had accompanied the process-server Raghunandan Prasad when he went to Sarwani on 7th December 1927, and about 20 or 25 men of Mohwadeh were being taken out of that village by Mahadeo (P W 18) to go to Sarwani to help the process server in handing over possession to the decree-holder. Mahadeo has stated that when Raghunandan Prasad asked him to arrange for men to go with him, he sent for his mukhtiar Thandaram and called the tenants of Lakhourri and Mohwadeh to be ready to go for taking possession of Sarwani and Parsapailli According to Mahabir Prasad (P W 11) some of the men who had accompanied him, had sticks It is thus clear that the mazkuris were accompanied by at least a dozen persons, some of whom had lathis, when they went to the village Sarwani, to deliver possession Regarding the place of marpit, both the parties have mentioned two different places, the lane in front of Thandaram's house and the *angan* of Umed Hussain, as the places where the marpit took place (The judgment here discussed evidence and concluded that the marpit took place near the house of Thandaram and not at the house of Umed Hussain It then proceeded) The nature of the injuries found on the persons of the members of the two parties will give some idea of the marpit as it took place The prosecution witnesses do not explain as to how the following persons had injuries on their persons.

1. Umed Hussain.
2. Bulaki alias Jawahir Ali.
3. Bilam.
4. Butru Sadhu (alias Lalkhan).
5. Latti.

The abovenamed appellants were examined by Assistant Surgeon B. R Kashyan, who on examination found that Umed Hussain had two injuries, Bulaki one injury, Bilam two injuries, Butru Sadhu one injury and Latti one wound. On the other side Bandaram received injuries, which resulted in his death. Thandaram had a contused wound and an inflammation, and the process-server one contused wound. It is thus fairly obvious that the party of the appellants had received more injuries in the marpit, before Bandaram arrived on the scene, who, according to the prosecution case, was the last one to arrive there, while the marpit was going on

In the report made by Balmukund, it was stated Sadhram Dhimar, Ratan Dhobi and Tehari Chamar had accompanied the mazkuri, but out of these only Sadhram Dhimar has been examined on behalf of the prosecution The other two have not been examined, and if they were eye-witnesses they ought to have been examined by the prosecution Having held that the marpit took place in the lane near Thandaram's house, between Umed Hussain and his party and Thandaram's party, the evidence adduced by the defence about the marpit has to be discarded, and reliance can only be placed on the prosecution evidence From a careful perusal of that evidence and taking into consideration the defence evidence about alibi, I find that all the ten accused were present at the scene of occurrence and took part in the riot (Judgment then discussed evidence and concluding that only an offence under S 147, and not one under S 146 was committed proceeded.) The next point which requires consideration is as to whether all the appellants are constructively liable for the death of Bandaram and their conviction under S 302 read with S 149 is correct The charge in this case is defective, and does not state clearly as to how the appellants are constructively liable for the murder of Bandaram It was stated in the charge that the common object of the unlawful assembly was to resist the process-server, by force from delivering possession of the property, and to cause hurt to the persons of the process-server and agents of the decree-holder. There is no reliable evidence on record to show as to what took place before Umed Hussain

and his companions arrived on the scene, and even according to the prosecution evidence, they did not all come together, but came from different sides. I have already held that the possession of deadly weapons has not been satisfactorily proved and it may safely be presumed that the appellants had lathis or sticks, similar to the ones which the companions of Thandaram were carrying. The appellants were not in greater numbers than the party of Thandaram, and when they came with the common object which has been stated in the charge, they could not be said to have known that the offence of murder was likely to be committed The nature and the number of the injuries inflicted on the injured persons except Bandaram is a clear indication that the appellants' party was faring badly and had received more injuries Bandaram's sudden appearance with a stick changed the whole thing, as he started giving blows to Lalkhan and Latti as soon as he came out, and according to Thandaram (P W. 13), aimed his stick at Amir, which did not hit him, after which Amir with great force, aimed his lathi on the head of Bandaram and hit him on the head This case seems to be similar to the one, *Queen* v *Sabed Ali* (1), in which the following was held :

" Where a certain number of persons, members of an unlawful assembly (party *A*) attacked another party *B* who were in occupation of land, with the view to drive them off the land by force, and one of the members in party *A* fired a gun at and killed one of the persons in party *B*, in consequence of a sudden and unexpected resistance which was offered by a party *B*, it was held (*Ainsli, J , dissenting*) on a consideration of the evidence that the persons composing party *A* other than the person who fired the gun could not be convicted of murder under S. 149, Penal Code. The conviction was altered under the circumstances to one of rioting armed with a deadly weapon under S. 148, Penal Code."

It has not been made out by the evidence satisfactorily that the appellants knew it to be likely that the offence of murder would be committed in the prosecution of the common object and, therefore, all the appellants cannot be made liable for the act of the individual who caused the fatal injury, the contused wound, above the left eye-brow of Bandaram. The appellants are not guilty for the offence of murder on account of their constructive liability under S. 149, I. P C. (The judgment then discussed evidence about Amir Ali and continued.) The evidence of these witnesses makes it clear that Bandaram had inflicted a lathi blow on the head of Amir Ali and immediately after that blow, Amir Ali hit Bandaram. Under these circumstances, the offence committed by Amir Ali is not one under S. 302, I. P C., but is culpable homicide not amounting to murder, punishable under S 304, I P C. As he inflicted a blow with a stick on the head and as the blow must have been inflicted with sufficient force, because it resulted in the death of Bandaram, he must have known that such act of his would be likely to cause death. Considering the age of the appellant Amir Ali and the other facts of the case, a sentence of rigorous imprisonment for five years will be sufficient to meet the ends of justice in this case.

Raghunandan Prasad was beaten by Santokh and Jawahir Ali, Thandaram was beaten by Wazir Ali, Anoop Bilan and Ghasia and Bandaram by Umed Hussain, Bulaki and Amir Ali, Santokh, Jawahir Ali, Wazir Ali, Anoop, Ghasia, Bilam and Umed Hussain, are, therefore, convicted under S 323, I P C , and sentenced to rigorous imprisonment for one year each, the sentence to run concurrently along with that passed under S 147, I. P C.

The result of this appeal is that the appellant's conviction under S. 148 and S 302, read with S. 149, I P C,, is set aside and he is convicted under S 147, and S 323, I P. C He is sentenced to rigorous imprisonment for one year for each of the offences, the sentences to run concurrently This order also applies to Bulaki alias Jawahir Ali, Wazir Ali, Santokh, Bilan, Anoop and Ghasia.

Amir Ali is convicted under Ss. 304 and 147, I P C , and is sentenced to rigorous imprisonment for five years and one year respectively, the sentences to run concurrently

Lalkhan and Latti are convicted under S. 147, I P. C., and sentenced to rigorous imprisonment for one year

S N./R K *Sentences reduced.*

(1) 20 W. R. Cr. 5=11 B. L. R. 347 (F.B.).

A. I. R. 1929 Nagpur 17 (1)

GHULAM MOHIUDDIN, A. J. C.

Nanhe and *another*—Appellant.

v.

Gandeo and *others*—Respondents

Second Appeal No 427 of 1926, Decided on 18th June 1928, from decree of Addl. Dist Judge, Raipur, D/- 12th April 1926, in Civil Appeal No 16 of 1926.

C. P. Land Revenue Act, S. 220—Suit for possession of abadi.

A suit for possession of an abadi site, by a cosharer to whose share it has fallen, against persons who own another patti in the same village can be entertained by civil Courts [P 17 C 2]

G. R Deo—for Appellants.

V. R Dhoke—for Respondents.

Judgment —The plaintiffs have filed this suit for possession of an abadi site used as bari against the defendants who own another patti in the same village. The defendant stated that they have been in possession of the plot for the last 40 years, and that the plaintiffs' claim was barred by time The trial Court found that 1st April 1925 was the date from which the partition order was to take effect and that the plot in suit was allotted to the plaintiffs, and, therefore decreed plaintiffs' claim The defendants filed an appeal in the Court of the Additional District Judge, which was dismissed

The first point which is urged on behalf of the appellants is that the lower appellate Court has not properly construed Ex. P-2, the order of the partitioning officer, in holding that the previous possession of the respective cosharers over abadi was disturbed. It is clear from the order that the abadi land was divided and it is admitted by the defendants that the land in suit fell into plaintiffs' patti. The interpretation which has been put by the lower appellate Court on the order as contained in Ex. P-2 that the possession of the abadi land will be given to the cosharer in whose patti it falls, seems to be correct.

The next point which was urged was about the jurisdiction of the civil Court to entertain this suit. It was argued that the revenue Court could have delivered possession under S. 31, Land Revenue Act, and the civil Court cannot do so. Matters excepted from the jurisdiction of the civil Court are mentioned in S. 220, Land Revenue Act, and the said Act contains no provision that the civil Court is precluded from trying a suit of the nature of this suit. The suit could be entertained in the civil Courts and they have jurisdiction to try such such suits.

The last ground is about the inquiry which was not made about the period of the appellants' possession. The cause of action in favour of the plaintiffs accrued after the passing of the order by the partitioning officer and, therefore, an inquiry about the period of appellants' possession was not necessary.

The appeal thus fails and is dismissed with costs

R.K *Appeal dismissed.*

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* * A. I. R. 1929 Nagpur 17 (2)

Full Bench

PRIDEAUX, KINKHEDE AND KOLHATKAR, A. J. Cs.

Gola—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 205 of 1927, Decided on 17th July 1928, from judgment of Sess Judge, Saugor, D/- 15th October 1927.

(a) Interpretation of Statutes — General later law does not abrogate special one by mere implication.

A general Act is to be so construed as not to repeal a particular one, that is one directed towards a special object. A general later law does not abrogate a special one by mere implication: *Mary Seward* v. *Vera Cruz*, (1884) 10 *A. C.* 59, *Rel. on.* [P 21 C 1]

*** * (b) Criminal P. C., S. 162—S. 162 as amended by Act 18 of 1923 does not repeal or affect Evidence Act, S. 27.**

The provisions of S. 27, Evidence Act are quite independent of those of S. 162, Criminal P. C., and the amended S. 162 does not repeal or in any way affect S. 27 : *A. I. R.* 1926 *Rang.* 116 (*F.B.*) ; *A. I. R.* 1926 *Lah.* 88 ; *A.I.R.* 1925 *Mad.* 574 and *A. I. R.* 1928 *Nag.* 108, *Appr.* : *A. I. R.* 1927 *Cal.* 17 ; *A. I. R.* 1926 *Pat.* 232 ; *A. I. R.* 1925 *Rang.* 101 and *A.I.R.* 1926 *Rang.* 116 (*F.B.*), *Ref.* : *A. I. R.* 1926 *Nag.* 368, *Diss. from.* [P 22 C 2]

(c) Interpretation of Statutes— Marginal notes.

Although a marginal note does not form part of a particular section it is of some assistance in properly construing a section. [P 20 C 2]

(d) Evidence Act, S. 27—S. 27 relates to statement of accused while in police custody and not prior to his arrest or detention.

Section 27 relates to a statement made by an accused person while in police custody, and

not to a statement made by him prior to his arrest and detention in such custody.
[P 21 C 1, 2]

(e) Criminal P. C., Ss. 160, 161 and 162—Meaning of "any person" explained.

The expression "any person" used in Ss. 160, 161 and 162 has one and the same meaning and denotes one and the same class of persons. That class is described with sufficient accurancy in S. 160, in which the expression is for the first time used. Every person belonging to that class must be a person who is within the limits of the station of the police officer making the investigation, or in an adjoining station, who from the information given or otherwise appears to be acquainted with the circumstances of the case, and who is bound to attend on an order in writing being issued to him by the said officer. An accused person who is in police custody cannot fall under this class of persons, for the simple reason that the question of a summons being issued to him and of the obligation to attend cannot possibly arise in his case, he being in police custody.
[P 19 C 2, P 20 C 1]

(f) Evidence Act, S. 27—S. 27 refers to statement by accused in police custody while S. 162, Criminal P. C., refers to statement during the course of investigation—Criminal P. C., S. 162.

Section 27 is confined in its operation to an incriminating statement by an accused person while in police custody, while S. 162 contains a general provision embracing all statements made by persons examined in the course of an investigation. [P 21 C 1]

G. L. Subhedar—for Appellant.

G P. Dick—for the Crown

Order of Reference

Kolhatkar, A. J. C—The appellant, Gola and one Ramdas—appellant in appeal No. 204 of 1927—were convicted of the offence of murder under S 302, I P.C by the Sessions Judge of Saugor, for having killed one Gouri Shankar and his wife Mt. Sukhrani, and both were sentenced to death on 15th October 1927. These two appeals were heard together by a Bench of this Court consisting of Hallifax and K B Mohiuddin, A. J. Cs. Both of them agreed about the correctness of Gola's conviction under S 302, I.P C, but differed in regard to the guilt of Ramdas, Hallifax, A. J. C., being of opinion that the guilt of Ramdas was clearly established, and that the case against him was stronger than that against Gola, and K. B. Mohiuddin, A. J. C, being of opinion that the evidence against Ramdas was not sufficient for his conviction. The appeal of Ramdas was thereupon referred, under S. 429, Criminal P C., to Prideaux, A. J. C., who held that the evidence against Ramdas was not sufficient. Ramdas was consequently acquitted. After his acquittal Hallifax, A. J. C., reconsidered his judgment in view of the opinion already expressed by him to the effect that the case against Ramdas was stronger than that against Gola and arrived at the conclusion that, if the statement made by the appellant Gola Khangar to the police officer was excluded from the evidence, as it must be, there was not sufficient evidence on record to justify Gola's conviction, and that therefore he should be acquitted. As regards the admissibility of the aforesaid statement of Gola, he was of opinion that it was inadmissible in evidence on the ground that S. 27, Evidence Act, had been repealed by S. 162, Criminal P. C., as amended by the amending Acts of 1923; while K. B. Mohiuddin, A. J. C., expressing his agreement with Hallifax, A J. C., in the view taken by the latter in regard to the effect of the amended S 162, Criminal P C., on the provisions of S. 27, Evidence Act, was of opinion that apart from the aforesaid estatement of the appellant Gola made to a police officer, there was sufficient evidence on record to establish his complicity in the murder of Gouri Shankar. The two Judges being thus divided in opinion in regard to Gola's guilt, the case has been referred to me under S 429, Criminal P. C, for recording my opinion on the said point.

In view of the conflicting decisions of the Judges of this Court in regard to the applicability of S. 27, Evidence Act, the learned Government Advocate requests that the matter should be referred to a Full Bench. His request is opposed by the appellant's learned counsel. I have been referred by the former to the decision of a Bench of this Court consisting of Findlay, J.C., and Macnair, A. J. C., in *Sheobalakprasad* v. *Emperor* (1), in which it was held that S. 27, Evidence Act was not repealed by the amended S 162, Criminal P. C., The same view was expressed by Mitchell, A J. C., in *Rama* v *Emperor* (2), decided by a Bench consisting of Hallifax, A J C., and Mitchell, A. J. C., while on the other hand the contrary view has been expressed by Hallifax, A. J. C., in the latter case, as well as in the present case, and it has been adopted by K. B. Mohiuddin, A.J.C. As at present inclined my personal view is that S. 162, Criminal P. C, has no

(1) A. I. R. 1928 Nag. 108.
(2) Criminal Appeal No. 65-B of 1926, Decided on the 14th October 1926.

reference to a statement made by an accused while in police custody, and that it does not repeal nor in any way affect the provisions of S. 27, Evidence Act,

Gola's statement made to the police at Gunjora, in consequence of which a blood stained axe was found concealed in bhusa, constitutes an important piece of incriminating evidence against him. Its admissibility or otherwise rests solely on the legal question whether S. 27, Evidence Act, has been repealed by the amended S. 162, Criminal P. C Although Hallifax, A. J C., has not expressed in clear terms that there would be sufficient evidence to sustain Gola's conviction under S 302, I. P. C , if his statement made to a police officer at Gunjora were admitted in evidence, the conclusion reached by him, referred to above, however, involves the necessary implication of the sufficiency of the evidence against Gola, if it be held to include the aforesaid statement made by him to a police officer Having regard to these facts and the divergence of judicial opinion expressed by the Judges of this Court, it seems to me to be necessary, in order to ensure uniformity in the administration of criminal justice, to refer the following question to a Full Bench :

" Does the amended S. 162, Criminal P C , repeal or in any way affect S. 27, Evidence Act ?"

As the present appeal out of which this question arises was heard by a Bench of two Judges, the question will have, in view of S. 9, Central Provinces Civil Courts Act, to be referred to a Full Bench I would therefore request that if the Judicial Commissioner thinks that the aforesaid question is a fit one for being referred to a Full Bench, it may be so referred, and the said Bench may be constituted.

Opinions

Kolhatkar, A J. C—The question referred to the Full Bench is :

" Does the amended S. 162, Criminal P. C., repeal or in any way affect S. 27, Evidence Act ?"

The question involves a construction of S 162, Criminal P C., and especially the expression "any person" used therein. Although words are to be interpreted according to their ordinary and natural meaning :

" general words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not ; or, be so restricted in meaning as not to reach all the cases which fall within the real intention" vide Maxwell on the Interpretation of Statutes, sixth edition, p. 38."

Further it is an elementary rule of construction vide p 36 of the same book :

" that a thing which is within the letter of a statute will generally be construed as not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention."

It follows therefore that :

" every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter " : vide p. 40 of the same book "

Thus the intention of the legislature is to be gathered from the ordinary meaning of the clause used in the statute, as well as from the context in which that clause appears in the statute. In other words, words used in a section of the Act are to be read and construed in the light of the context. Now Ss 160, 161 and 162, Criminal P.C , form a group by themselves dealing with investigation, the summoning and examination of the persons to be examined in the course of the investigation, and the extent to which the statements of such persons are to be used in an enquiry or trial held by a Magistrate or a Judge after the completion of the investigation. The next thing to be noted is that the expression "any person" is used in all the three sections On a perusal of the three sections it seems to me that the expression "any person" used therein has one and the same meaning and denotes one and the same class of persons. That class is described with sufficient accuracy in S. 160, in which the expression is for the first time used. Every person belonging to that class must be a person who is within the limits of the station of the police officer making the investigation, or in an adjoining station, who from the information given or otherwise appears to be acquainted with the circumstances of the case, and who is bound to attend on an order in writing being issued to him by the said officer Now an accused person who is in police custody cannot fall under this class of persons, for the simple reason that the question of a summons being issued to him and of the ob-

ligation to attend, cannot possibly arise in his case, he being in police custody. It has accordingly been held in *Queen-Empress* v. *Saminatha* (3) and in *Emperor* v. *Ratan* (4), that S. 160, Criminal P. C., does not empower the investigating officer to require the attendance of an accused person to answer the complaint made against him. It is observed in the former case that :

" The intention of the legislature seems to have been only to provide a facility for obtaining evidence, and not for procuring the attendance of the accused, who may be arrested at any time, if necessary, without a warrant."

The construction of S 160, Criminal P. C., adopted in these cases has my full concurrence This section aims at securing the attendance of persons who would supply the necessary information in regard to the commission of the offence, and who would be examined as witnesses in the enquiry or trial to be held in regard to the said offence It admits of no reasonable doubt therefore that S. 160 has reference to the persons to be examined as witnesses in the trial or enquiry to be held after the completion of the investigation. As an accused cannot be examined as a witness either for or against himself, he cannot be included in the class of persons referred to in the section. The next S 161 provides for the examination of persons who are to be summoned under S. 160, and whose attendance before the investigating officer is made obligatory thereunder. It thus refers to the same class of persons which is referred to in the preceding section. As regards the marginal notes, although they are not ordinarily referred to for the purposes of construing an Act, the rule regarding their rejection for the purposes of interpretation is now of imperfect obligation : vide Maxwell on the Interpretation of Statutes, p. 76. Collins, M. R observes in the case *Bushell* v. *Hammond* (5) :

" The side note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section."

The marginal note of S. 161, Criminal P. C. runs as follows:

" Examination of witnesses by police."

Similarly the marginal note of S. 160 refers to the police officer's power to require attendance of witnesses. Both the notes make mention of witnesses as the persons referred to in the two sections. Although a marginal note does not form part of the section, it is of some assistance in properly construing a section. It has been held in *Queen Empress* v. *Jadab Das* (6), that it is not permissible for the investigating officer to examine an accused person under S. 161. Criminal P. C. The next S. 162 deals with the very limited extent to which statements made by persons examined under S. 161 in the course of the investigation can be used in the course of enquiry or trial held by a Magistrate or a Judge. Although the expression " any person " used in S. 162 is a very general one and admits, according to its ordinary meaning, of including an accused person, the context leaves no doubt that it denotes the class of persons who are bound under S. 160 to attend on a summons being issued by the investigating officer, who are examined under S. 161, and who are intended to be examined as witnesses in the enquiry or trial following the investigation, and that it cannot consequently have any reference to an accused person.

There are several other considerations which warrant the construction adopted by me. There are no explicit words in S. 162, Criminal P C , indicating that the legislature intended to repeal the provisions of S. 27, Evidence Act As observed in Maxwell on the Interpretation of Statutes at p. 296:

" Repeal by implication is not favoured . . . . . It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the statute-book, or on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which affords an escape from it is more likely to be in consonance with the real intention."

Maxwell further observes at p. 149:

"It is in the least degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning when used either in their widest or usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being

(3) [1884] 7 Mad. 274 (F.B.).
(4) [1902] 4 Bom. L. R. 644.
(5) [1904] 2 K. B. 563=73 L. J. K. B. 1005=52 W. R. 453=91 L. T. 1=68 J. P. 370=20 T. L. R. 413.
(6) [1899] 27 Cal. 295=4 C. W. N. 129.

limited to the actual objects of the Act, and as not altering the law beyond."

All these observations hold good in the present case. I find it hard to believe that the legislature intended to repeal the substantive law embodied in S. 27, Evidence Act, by mere implication by enacting S. 162, Criminal P. C., which is an adjective law dealing with procedure. The desirability of avoiding, as far as possible, a conflict between the provisions of two different Acts has been emphasized in *Ranga Charya* v *Dasacharya* (7) and in *Jogendra Chandra Roy* v *Shyam Das* (8). Again the question under consideration admits of being looked at and considered from another standpoint. A general Act is to be so construed as not to repeal a particular one, that is one directed towards a special object. A general later law does not abrogate a special one by mere implication. It is remarked by Lord Selborne in the case of *Mary Seward* v. *The Vera Cruz* (9):

" Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of general words, without any indication of a particular intention to do so."

Now S. 27, Evidence Act, is confined in its operation to an incriminating statement by an accused person while in police custody; while S. 162, Criminal P C., contains a general provision embracing all statements made by persons examined in the course of an investigation. It is clear, therefore, in view of the rule of interpretation underlying the above remarks of Lord Selborne that as a general statute is to be so construed as not to repeal a particular one directed towards a special object, the provisions of S. 27, Evidence Act, must be held to be not overridden nor in any way affected by those of S. 162, Criminal P. C.

It is no doubt true that prior to his arrest and detention in police custody, an accused person will answer the description of the class of persons referred to in S. 160, Criminal P. C., and will consequently be liable to be examined by the investigation officer under S. 161, Criminal P. C. But S. 27, Evidence Act, relates to a statement made by an accused person while in police custody, and not to a statement made by him prior to his arrest and detention is such custody. The question whether a statement made by an accused person prior to his arrest in the course of the police investigation is governed by S. 162 does not therefore properly arise in the present case, being beyond the scope of this reference.

Having dealt so far with the question of the construction of S. 162, Criminal P. C. in the light of the context, I shall now proceed to consider the views expressed by the several High Courts on the point under consideration The view taken by me in regard to the construction of S. 162 is affirmed by the High Courts of Rangoon, Calcutta, Patna, Lahore and Madras, as well as by the Court of the Judicial Commissioner of Sind It has been held in *Emperor* v. *Maung Tha Din* (10), by a Full Bench of the Rangoon High Court (Heald, J., dissenting) that S, 27, Evidence Act, is neither repealed nor affected by the amended S 162, Criminal P C., because a person accused of an offence is not "any person being within the limits of" the station of the police officer making the investigation under Ch. 44, or any adjoining station,

" who from the information given, or otherwise appears to be acquainted with the circumstances of the case,"

and that consequently

" information received from a person accused of any offence in the custody of a police officer "

is not a statement within the meaning of S. 162, Cl (1), Criminal P. C The dissenting Judge admitted that the interpretation of the majority of Judges was in accordance with what was in fact the intention of the legislature. He seems to have attached more weight to the ordinary meaning of the words used in S. 162 than to the context in which the section appears and the bearing it has on the interpretation of the section. A Bench of the Calcutta High Court has affirmed in *Azimuddy* v. *Emperor* (11), that S. 162, Criminal P. C. applies to witnesses and not to accused persons under trial, and that it does not repeal S. 27, Evidence Act, or render inadmissible statements relevant under the latter section; while it is observed by a Bench of the Patna High Court in *Jagwa*

(7) [1913] 37 Bom. 231=19 I.C. 387=15 Bom. L. R. 178.
(8) [1909] 36 Cal. 548.
(9) [1884] 10 A. C. 59.
(10) A. I. R. 1926 Rang. 116=4 Rang. 72 (F.B.).
(11) A. I. R. 1927 Cal. 17=54 Cal. 237.

Dhanuk v *Emperor* (12), that the main object of the amendment of S. 162, Criminal P C is to prevent the use of the statement of prosecution witnesses as corroboration under S. 157, Evidence Act, and that the section does not override the general provisions of the law with regard to the admissibility of the statements made by accused persons, as laid down in S. 27, Evidence Act Similarly a Bench of the Lahore High Court has ruled in *Rannun* v *Emperor* (13), that S 162, Criminal P C, applies to statements of persons examined as witnesses in the course of a police investigation, and not to the statement of an accused person, and that it does not override or modify the provisions of S. 27, Evidence Act. In the course of his judgment, Sir Shadilal, C. J, referred to the observations appearing at p 149 in Maxwell on the Interpretation of Statutes, which have been already quoted The same view has been taken by the Madras High Court in *In re, Semalai Goundan, A I R.* 1925 *Mad* 574, while it has been affirmed by the Court of the Judicial Commissioner of Sind in *Umer Duraz Munshi* v. *Emperor* (14), that the words "statement of any person" in S 162, Criminal P C, refer to the statement of any witness in the course of a police investigation, and not to the statement of an accused person in respect of whom such investigation is held

So far as I am aware there is only one case of the Rangoon High Court, *Bau a Kouther* v *Emperor* (15), decided by a single Judge in September 1924 affirming the opposite view The effect of that decision is however, nullified by the decision in the recent Full Bench case, *Emperor* v *Maung Tha Din* (10), in which the former case was referred to There are also some observations made by the Judges constituting the Bench, who decided the case *Venkata Subbiah* v *Emperor* (16), favouring the view that S 162, Criminal P. C, applies to statements of witnesses, as well as to those of accused persons It would, however, appear from the remarks of Madhavan Nair, J., at p 651, that he adhered to the view that S 27, Evidence Act, was not affected by the provisions of S. 162, Criminal P C, and that the legislature did not contemplate to repeal the former when it amended the latter section This view, however, is founded on the narrow basis resting on the assumption that S 162 is limited to the use of written statements only, whether of witnesses or of accused persons, and that consequently it would in no way affect S. 27, Evidence Act. In this Court opinion is divided. Both the Judges who decided the unreported case, *Sheobalakprasad* v. *Emperor* (1), are in favour of the view that S 27, Evidence Act, is unaffected by the amended S 162, Criminal P C,, while on the other hand the opposite view is maintained by the two Judges who decided the case *Dadi Lodhi* v *Emperor*, *A. I. R.* 1926 *Nag* 368, and heard the case giving rise to the present reference. As for the unreported case *Rama* v. *Emperor* (2), there was a difference of opinion between the two Judges who decided it.

For all the reasons set forth above I feel no hesitation in concluding that the provisions of S 27, Evidence Act are quite independent of those of S. 162, Criminal P C, and that when the latter section was amended in 1923, the legislature did not intend that it should repeal or in any way affect S. 27, Evidence Act I would, therefore, answer in the negative the question referred to the Full Bench.

Prideaux, A. J. C.—I concur

Kinkhede, A J C.—The whole of the reasoning adopted and all the deductions drawn by Kolhatkar, A J C, have my complete concurrence Since I was a party to the decision in *Dadi Lodhi* v *Emperor*, *A I. R* 1926 *Nag.* 368, in which the following observations occur, I think, a word of explanation is due from me:

"Some inadmissible evidence of what the appellant told the police about the "balua" concealed in his house has been let in. The terms of S. 162, Criminal P. C. are perfectly clear, and no statement made to the police by "any person," whether accused or witness, during an investigation can be even mentioned in evidence except to the extent and under the circumstances and conditions stated in that section. The fact that the balua was found concealed in Dadi's house can be taken into consideration, but the fact that he or anybody else said so to the police must be entirely excluded."

Without meaning any disrespect to the learned colleague with whom I then sat,

(12) A. I. R. 1926 Pat. 232=5 Pat. 63.
(13) A. I. R. 1926 Lah. 88=7 Lah. 84.
(14) A. I. R. 1925 Sind 287.
(15) A. I. R. 1925 Rang. 101.
(16) A. I. R. 1925 Mad. 579=48 Mad. 640.

I must frankly admit that on that occasion the matter was not so fully thrashed out; and in the absence of any satisfactory arguments to the contrary I fell in with the view of my senior colleague on the point as expressed above. But whereas, I have since had some fresh opportunities of considering the question, independently for myself, in the light of the reported decisions of the other High Courts as also the unreported decision of another Bench of this Court in *Sheobalakprasad* v *Emperor* (1), and had the opportunity of perusing the well reasoned opinion of my colleague Kolhatkar, A.J C. I have no hesitation in endorsing the view so ably expressed. My reply, therefore, to the reference is in the same terms in which it is given by Kolhatkar, A J.C

(At this stage Kolhatkar, A J. C. proceeded on leave, and the appeal was transferred to Prideaux, A. J. C., who recorded the following opinion.)

Prideaux, A. J C —The present appellant Gola and one Ramdas, appellant in Criminal Appeal No. 204 of 1927, were convicted by the Sessions Judge, Saugor, of offences under S. 302, I P.C., they being found guilty of having killed one Gourishankar and his wife Mt Sukhrani, and both were sentenced to death on 15th October 1927. The two appeals were heard together by a Bench consisting of Hallifax and Khan Bahadur G. Mohiuddin, A J. Cs Both Judges agreed in the conviction of Gola under S. 302, I P C, but as they differed as to the guilt of Ramdas the case came to this Court by a reference under S. 429, Criminal P C, and I held, agreeing with K. B.G Mohiuddin, A. J. C, that the evidence against Ramdas was insufficient to warrant his conviction, and on the return of the case to the Bench Ramdas was acquitted After this acquittal, Hallifax, A. J. C, reconsidered his judgment as regards Gola, and he has come to the conclusion that, if the statement made by the appellant Gola Khangar to the police officer, which led to the discovery of the blood-stained axe under some bhusa where the double murder was committed, was excluded from evidence, there was not sufficient evidence on record to justify Gola's conviction Khan Bahadur G. Mohiuddin, A. J. C, agreed with Hallifax, A J C, that Gola's statement to the police could not be taken into account, but was of opinion that excluding this statement the evidence was sufficient to convict Gola of murder. The case was therefore referred to Kolhatkar, A. J C He asked for a Full Bench to decide the question:

"Does the amended S. 162, Criminal P. C. repeal or in any way affect S. 27, Evidence Act."

A Full Bench consisting of myself, Kinkhede and Kolhatkar, A. J Cs, have unanimously held that the provisions of S 27, Evidence Act, are quite independent of those of S. 162, Criminal P. C., and the question referred to the Full Bench was answered in the negative This finding permits Gola's statement to the police, which led to the discovery of the blood-stained axe in Gourishankar's house being proved against him.

There is no doubt that the axe was used to commit the murders. Its handle was broken and the broken piece was found in the morning near the murdered bodies Besides this evidence against Gola there is the fact that he absconded from Patmohna directly after the murder and that clothes stained with human blood were found with him. It is argued here that the evidence regarding the finding of these clothes is not conclusive, but it seems to me that the evidence of P Ws 13, 14 and 15 conclusively proves that these articles were found with the appellant Gola There is the evidence of the Sub-Inspector to show that a dhoti (Art. Z) found in Gola's house forms part of the blood-stained dhoti (Art. H) found in his bundle. Further, there is no doubt that after absconding Gola attempted to conceal himself in his brother's house at Ganjora where he was actually found This evidence seems to me to conclusively prove the guilt of Gola I find accordingly that he is guilty of the offence of murder

I return the case to the Bench for the passing of the sentence.

A L /R.K *Order accordingly.*

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KINKHEDE, A J. C

Biju Bapu—Plaintiff—Appellant

v

Munnalal—Defendant—Respondent.

First Appeal No 75 of 1927, Decided on 28th February 1928, from decree of 1st Class Sub-Judge, Bhandara, D/- 19th February 1927, in Civil Suit No 13 of 1926.

(a) Lease — Construction — Lease "for hamesha" — No right of re-entry but no words indicating that heritable estate was created — Lease cannot be interpreted to mean lease "for the lifetime of lessee."

The operation of a perpetual lease cannot be limited to the lifetime of the lessees. Where there is absolutely no reservation of any right of re-entry in favour of the lessor, in a lease for ever (hamesha karita) even in the absence of words indicating that a heritable estate was intended to be created in favour of the lessees, the words "hamesha karita" (for ever) cannot be interpreted to mean "Tumche jeewman pavsto" (for your lifetime): (*Case Law discussed.*) [P 25 C 1]

(b) Transfer of Property Act, S. 108—Lease—Heritability—In absence of words to the contrary, lease does not terminate by death of lessor or lessee.

In the absence of words to the contrary, a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either lessor or lessee: 3 *Cal.* 210 (*P.C.*), *Foll.*; 5 *All.* 191, *Ref.* [P 26 C 1]

W. R. Puranik—for Appellant

B. K. Bose and *P. A. Pandit*—for Respondent.

Judgment.—This appeal by the plaintiff arises out of a suit for ejectment filed by him against the defendant under the following circumstances: In Taluka Purada of which plaintiff is the superior proprietor is included the village of Bijepar alias Bijai Kutumb which comprises 3 mahals. The present suit relates to mahal 2. At the 30th year Settlement the plaintiff's ancestor was recorded as the superior proprietor and the defendants' lessors' predecessor-in-interest as the inferior proprietor of the mouza. The inferior proprietary rights were conferred on Holu son of Balsakhu Gond, as admitted by plaintiff. On his death the right devolved on his son Pandu and after his death on his son Pusa. Pusa died on 17th October 1920. Thereupon mutation was effected in favour of plaintiff on the ground that he died without heirs and the malik adna (or inferior proprietary) right became merged in the malik ala (or superior proprietary) right of the plaintiff. It is, therefore, contended by the plaintiff that the inferior proprietary right having thus lapsed, the lease granted by Pandu to Balkisan Patel and Hira Patel as per terms of the lease-deed, dated 25th January 1886, could not operate, after the death of Pusa or at any rate enure beyond the lifetime of the lessees (both of them having died respectively in 1924 and 1897) and that the sub-lease granted by the said lessees to defendant must, therefore, determine with the determination of the lease on which it was granted. The present suit was, therefore, filed on 27th April 1926, and an alternative claim for arrears of thekajama has been joined with it.

The defence was that the decision in the former Suit No 30 of 1914 debarred the plaintiff from suing the defendant and that though plaintiff was offered the thekajama he improperly declined to accept it, in respect of the years 1332-1334 Faslis

It was also contended that the inferior proprietor Pusa left heirs to his inferior proprietary right. The defendant pleaded that the transaction of the so-called lease to Balkisan and Hira and that of the subleases by them to him on 1st April 1897, was really an out-and-out transfer in perpetuity. In the oral pleadings the plaintiff amitted that the lessees Balkisan and Hira have left heirs but contended that despite the existence of the heirs plaintiff is entitled to possession of the mahal 2 as on the death of the lessees the possession of the defendant became that of a trespasser.

The lower Court held that the lease of 1886 was a lease in perpetuity and under that lease all the interest of the inferior proprietor Pandu was conveyed by him to the lessees Balkisen and Hira. In short that the lease amounted to an out-and-out sale of the inferior proprietary right. In this view of the case the plaintiff's claim was dismissed. Hence he has come up in appeal.

I think the plaintiff's contention that the former suit affirmed his right of re-entry on the expiry of the term of the lease is bound to fail. The decision of this Court in second appeal in the former litigation is just the other way. It negatived the plaintiff's right to present possession of the village on the ground that when a person gets a property by escheat he takes it subject to the liability to which that property is subject. It was held in that case that the term of that lease (meaning the lease of 1886) had not expired. We all know that the said lease created no definite term of years but was a lease for hamesha, i. e., in perpetuity. The term if at all was, therefore, one which entitled the lessees to hold on in perpetuity and if the plaintiff took the estate by escheat he took it subject to

that right of the lessees. This practically meant that plaintiff got nothing by the escheat. But the plaintiff contends that on the proper construction of that judgment as also of the terms of the lease of 1886, it should be held that Batten, A. J. C., meant to decide that plaintiff shall have a right of re-entry after the lifetime of the lessees Balkisan and Hira and that the former suit was, therefore, premature. I am not prepared to put such a construction on either the judgment in second appeal, or the terms of the lease-deed of 1886

The learned advocate for the appellant contends that despite the use of the expression hamesha karita (for ever) the lease must in the absence of words of inheritance be construed as enuring for the lifetime of the lessees only. By no stretch of the rules of interpretation, could the operation of the perpetual term of lease be limited to the lifetime of the lessees There is absolutely no reservation of any right of re-entry in favour of the lessor, in the document creating the lease in perpetuity. I cannot read in place of "hamesha karita" (for ever) the words " *tumche jeewman paveto* " (for your life) in the deed, as contended for by the appellant's advocate. It is wholly unnecessary to further amplify the meaning of the word " hamesha " by inserting the words "from generation to generation" in a deed of perpetual lease which, as interpreted in *Secretary of State* v. *Natabar Mangraj* (1), was held to be virtually a sale though in the garb of a lease.

It is, however, urged that the cases of *Lekhraj Roy* v *Kunhya Singh* (2), *Tulshi Pershad Singh* v. *Ramnarain Singh* (3) and *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (4) are authorities for the proposition that the lease in perpetuity even, is determined by the death of the grantee in the absence of words showing that a heritable estate was intended to be created. A careful perusal of the decision of their Lordships of the Privy Council in *Lekhraj Roy* v. *Kunhya Singh* (2) shows that the points for decision in that case were whether the grant by way of lease by a patta by Chunnilal to Nirputsingh was to enure for the life of the grantee only or whether it was to enure so long as the interest of Chunnilal existed. Their Lordships observe at p. 211 (of 3 *Cal.*) that to ascertain what is the term granted by this patta, we must see in the first place what is the interest which the grantor Chunnilal had. He calls it a mukarrari interest, but whether it be a true mukarrari interest or not, it was evidently the intention of the parties that the grant should enure during term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply If a grant be made to a man for an indefinite period, it enures generally speaking for his lifetime and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained further on. It was held that the interest of Chunnilal although perhaps not properly a mukarrari must be regarded, as long as it goes on, as an hereditary lease, a mourusi patta, and that the grant by him to Niruputsingh must enure, therefore, during the continuince of that interest and as there was no reason why it should be held to be limited to the life of Niruputsingh, their Lordships upheld the dismissal of the plaintiff's suit on the view that the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Applying the test laid down in this case to the facts of the present case, the British Government in 1860, or thereabout made a settlement with Pandu's father in respect of the village in inferior proprietary rights and thus made him the proprietor. To this right as a proprietor were attached the incidents of alienablility and heritability as was held in *Nilkanth Rao Udhoji* v. *Sambhoo Mali* (5) by this Court. Consequently Pundu's grant to Balkisan and Hira Patel must enure during the continuance of his interest. Then again, the term having been fixed in perpetuity is capable of being definitely ascertained and consequently the lease created in 1886 could not be treated as liable to be

(1) A. I. R. 1927 Pat. 254=6 Pat. 358.
(2) [1877] 3 Cal. 210=4 I. A. 223=3 Suth. 453=3 Sar. 758 (P.C.).
(3) [1886] 12 Cal. 117=12 I. A. 205=4 Sar. 646 (P.C.).
(4) [1903] 30 Cal. 20=7 C. W. N. 314.
(5) [1906] 2 N. L. R. 1.

determined by the death of either the lessor or the lessee. Thus the Privy Council case is authority for the principle, that in the absence of the words to the contrary a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either the lessor or the lessee. Cf *Badrinath* v *Bhajan Lal* (6)

That such is the right scope and interpretation of their aforesaid decision was expressly recognized by their Lordships of the Privy Council in *Gobind Lal Roy* v *Hemendra Narain Roy* (7) In *Kishori Lal Roy* v *Krishna Kamini* (8) it was pointed out by Mookerjee and Teunon, JJ , that

"the true test to apply is, as stated by Wood, J., in *Alsup* v. *Banks* (9) to determine from the terms of the grant, or from the nature of the tenancy whether the parties intended that the execution of the contract was to be contingent upon the continued existence of both or either of them."

Applying this test also to the case before us, the use of the words that the lessee shall have the right to enjoy in perpetuity all the rights which the lessor has as regards the hakka milkiyat of the village in its entirety, clearly points to the intention of the parties that personal considerations were not the foundation of the contract as in cases of principal and agent, master and servant, the zamindar and the dependant junior members or the father-in-law and son-in-law or husband and his wife in an impartible zamindar or Raj The cases of *Tulshi Pershad Singh* v *Ramnarain Singh* (3) and *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (4) are easily distinguishable on this ground the first being the case of a grant to a son-in-law of a Raja family and the second of a grant to wife who according to the usages of the Raj Estate were entitled to a provision for maintenance I may, however, remark here that even in *Tulshi Pershad Singh* v *Ramnarain Singh* (3) their Lordships of the Privy Council do not lay down the proposition contended for in unqualified terms After a review of the previous decisions they say that

"it is established that the words "ostomrari mokarrari" in a patta do not per se convey an estate of inheritance, but they do not accept the decisions as esablishing that such an estate cannot be created without the addition of the other words that are mentioned (such as, ba farzandan or naslan or similar words which would signify perpetual tenure to be enjoyed by heirs), as the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual."

So construing the deed of lease in this suit in the light of these observations the only conclusion possible, even in the absence of express words of inheritance, is that the grant of 1886 was to enure for ever and was to clothe the lessees and their transferees with the whole of the interest of the lessor in perpetuity and that there was no intention to restrict it to any shorter term terminable with the death either of the grantor or the grantee

In the case of *Bai Sona* v. *Bai Hiragavri* (10) it was held that even in the case of a lease which stipulated that so long as the tenant goes on paying rent to the landlord, the landlord will not be entitled to get the demised premises vacated, a permanent lease is created and that such a lease is not put an end to by the death of the lessee If this is so in the case of a lease for no definite term, much more should it be so in the case of a permanent lease like the one before me

On the whole the plaintiff did not get any additional right or cause of action merely because the original surviving lessee Balkisan died in 1924 That death did not add any new link to his cause of action. In fact no cause of action had or could have arisen either when the inferior proprietary was said to have lapsed or when the co-lessee Hira Patel died on which facts the former suit was based much less did it arise on the death of Balkisan, because the perpetual term of the lease is not liable to any termination by reason of the death of either the lessor of the lessee The plaintiff's suit for ejectment of the defendant was bound, therefore, to fail and the same has been rightly dismissed as not maintainable.

Now as regards the alternative claim for thekajama and interest for 3 years, I think the plaintiff's claim ought to have been decreed by the Court below. The respondents' learned advocate does

(6) [1882] 5 All. 191=(1882) A. W. N. 216.
(7) [1890] 17 Cal 686=5 Sar. 497 (P.C.).
(8) [1910] 37 Cal. 377=5 I. C. 500=11 C. L. J. 401.
(9) [1891] 68 Miss. 664.
(10) A. I. R. 1926 Bom. 374.

not object to the same being decreed but contends that the costs of the suit in regard to that relief should not be saddled on him as the arrears were offered but improperly declined by the plaintiff. I think, this attitude of the plaintiff is very likely in view of his claim of the year 1914 and the present claim and the presistency with which he has chosen to fight his cases. I, therefore, decree the alternative claim for thekajama for 3 years This claim for Rs. 537-12-0, is. therefore, decreed.

I do not allow anything on account of interest prior to the suit. But as the defendant who should have deposited the amount of arrears into Court failed to do so, I direct that these arrears of Rs. 537-12-0 should carry interest at eight annas per cent. per mensem from date of suit until liquidation The plaintiff's claim for ejectment will thus stand dismissed with costs but the alternative claim for Rs 537-12-0 with its interest from date of suit, 27th April 1926, will be decreed against the defendant but without proportionate costs.

The appeal thus substantially fails, but is successful only as regards a minor relief I, therefore, direct that the plaintiff-appellant shall get his costs of this appeal only as regards the sum of Rs 537-12-0 from the defendant who will bear his own so far as this amount is concerned. The appellant shall bear all costs of both sides in this Court so far as they were occasioned by his claiming the relief of ejectment

M N /R K *Order accordingly*

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KOLHATKAR, A J. C

Mahadeo Kunbi—Plaintiff—Appellant.

v.

Babya and *another*—Defendants—Respondents.

Second Appeal No. 68-B of 1927, Decided on 19th April 1928, from a decree of Addl. Dist. Judge, Amraoti, D/- 9th December 1927, in Civil Appeal No. 168 of 1926.

(a) Hindu law—Will—Legatee to get property after death of testator and his wife—Legatee and his heirs have vested interest after testator's death and are entitled to redeem the mortgage by testator—Transfer of Property Act, S. 91.

A legatee who has to get the devised property after the deaths of the testator and his wife, and who survives the testator, has after the testator's death a vested interest in the property which is transmissible to his son. The legatee and his heirs are persons falling under S. 91 and are entitled to redeem the mortgage by testator under S. 91, Cl. (a) or (b). 33 *All.* 558 and 38 *Cal.* 468 (*P.C.*), *Appr.*, 30 *All.* 497, 36 *Mad.* 426, *A. I. R.* 1921 *Mad.* 272 and *A. I. R.* 1925 *Mad.* 1219, *Dist.* [P 28 C 1, 2]

(b) Hindu law—Widow's estate—Testator not limiting nature of estate—Widow has widow's estate only—Decree on mortgage by testator against widow in absence of fraud or collusion is binding on reversioners.

In the absence of any words or any expression limiting the nature or extent of the interest of the testator's wife it should be presumed that she has a Hindu widow's estate during her lifetime. In absence of fraud or collusion, therefore, a decree in respect to a mortgage executed by testator on a claim binding on the inheritance obtained against the widow in possession is binding on all the succeeding heirs, and other persons entitled to possession of the property after widow's death. 9 *M. I. A.* 539 (*P C.*), 15 *N. L R.* 24, 30 *Mad.* 3, 34 *All.* 385; *A. I. R* 1918 *P. C.* 87, 37 *All*, 496 and *A. I. R.* 1925 *P. C.* 249, *Foll.* [P 29 C 2]

(c) Transfer of Property Act, S. 91—Person need not have immediate right to possession — Reversioner can redeem during widow's lifetime mortgage by her husband.

Possessing an immediate right to possession and enjoyment is not essential for claiming a right of redemption. As such a reversionary heir is entitled during the lifetime of the widow to redeem a mortgage made by her husband: 30 *All.* 497, *Diss. from.* [P 29 C 1]

K K Gandhe—for Appellant

M. B. Niyogi—for Respondents.

Judgment.—The material facts of the case giving rise to this second appeal are not disputed One Bapuji Kunbi owned sub-division No 3 of the field S. No 666 situated in Mauza Mangruli, Tahsil Morsi in the Amraoti District On 10th May 1915, he executed a mortgage (vide Ex P. 4 its copy) by conditional sale for Rs. 200 in respect of the said land, in favour of Krishnaji deceased father of defendants 1 and 2 Balya and Rajaram On the same date he executed a will in favour of the plaintiff's father Piraji his nephew. By the said will he bequeathed the aforesaid land to the latter, who was to be its owner after the deaths of the testator and his wife. Bapuji died in September 1915 while Piraji died in 1919. In 1921, defendant 2 one of the two sons and heirs of the mortgagee Krishnaji (who died in the year 1916) brought a suit upon the aforesaid mortgage against Bapuji's widow Mt. Bhiwari, obtained a foreclosure decree against her and took possession of the mortgaged property about 20th January.

1922 The plaintiff Mahadeo son of the deceased legatee Piraji was not impleaded as a defendant in the mortgage suit He has now instituted the suit leading to this appeal for redemption of the aforesaid mortgage. The Sub-Judge who tried this suit dismissed it on the strength of the finding that neither Piraji, nor the plaintiff acquired any interest in the land in suit, by virtue of the will, as Piragi died before Mt. Bhiwari, and that Mt Bhiwari fully represented the estate in the previous mortgage suit. On an appeal being preferred by the plaintiff, the Additional District Judge who heard it, confirmed the decree of the Court of first instance, holding that Mt. Bhiwari fully represented the estate in the mortgage suit, and that the plaintiff had absolutely no right to redeem the mortgage, his interest in the property being similar to that of a reversionary heir under Hindu Law.

The plaintiff has now preferred this second appeal, and both the adverse findings recorded by the lower appellate Court are assailed by him in this Court. It is contended on the appellant's behalf, that the plaintiff, who claims in the present suit as the son of the legatee under Bapuji's will, and not as a reversionary heir under Hindu Law, has a vested interest in the property in suit, and that consequeutly he is entitled to redeem the mortgage in question, as a person falling under Cl. (a) or Cl. (b), S. 91, T. P. Act ; while, on the other hand, it is argued for the respondents that the position of the plaintiff's father, Piraji under the will is not better than that of a reversionary heir under Hindu Law, that, as a person having a mere chance of succession, he cannot claim to possess the interest contemplated by either of the two Cls. (a) and (b), S 91, of the aforesaid Act, and that the plaintiff has consequently no right to redeem the property in question On giving due consideration to the arguments addressed by the learned counsel of the contending parties, it seems to me that the interest claimed by the plaintiff on the strength of the will stands on a much higher footing than that of a reversionary heir, that his case falls under either Cl. (a) or Cl. (b), S. 91, T. P. Act, and that, therefore, he would be entitled to claim the right to redeem the property in suit, provided his claim is not otherwise barred. It is an undisputed fact that the legatee Piraji survived the testator Bapuji. It follows from this fact that on the latter's death the former got a vested interest in the property bequeathed to him and that such an interest was transmissible to his heirs and assignees. It did not lack in certainty and cannot consequently be called a contingent or uncertain interest which may or may not have any legal operation. Looked at from this standpoint, the legatee's interest which the plaintiff inherited from his father Piragi stands on a much higher footing than the uncertain and contingent interest of a reversionary heir having a mere chance of succession, and which is in view of Cl. (a), S. 6, T. P. Act not a fit subject of legal transfer. The very fact of the character of the former as a vested interest differentiates it from the latter. It has been affirmed in *Bilaso* v. *Munni Lal* (1) that a legatee who has to get the devised property after the deaths of the testator, and his wife, and who survives the testato. has after the testator's death a vested interest in the property which is transmissible to his son

The same principle has been given effect to in *Rhagabati Barmanya* v. *Kali Charan Singh* (2) in which on the death of the testator's mother and wife the property was to pass to his sister's sons. It was held that the sister's sons who were living at the testator's death had a vested interest, though their possession and enjoyment of the property was postponed till the deaths of the testator's mother and widow. The cases of *Ram Chandar* v *Kallu* (3), *Narayana Kutti Goundan* v. *Pechiammal* (4), *Narayanasami Naicker* v. *Periasamy Odayar* (5) and *Kandaswami Nayakkar* v. *Venkata Reddiar*, *A. I. R.* 1925 *Mad* 1219 *at p.* 1221. relied on by the respondent's learned counsel do not help him in any way, as they are all cases of reversioners. On the other hand, there are some observations

(1) [1911] 33 All. 558=11 I. C. 516=8 A.L.J. 577.
(2) [1911] 38 Cal. 468=10 I. C. 641=38 I. A. 54 (P. C.).
(3) [1908] 30 All. 497=5 A. L. J. 681=(1908) A. W. N. 225.
(4) [1912] 36 Mad. 426=22 M. L. J. 364=15 I. C. 206=(1912) M. W. N. 358.
(5) A. I. R. 1921 Mad. 272=44 Mad. 951.

in the judgments of Sundara Aiyar, J. in *Narayana Kutti Goundan* v. *Pechiammal* (4) and of Ramesam, J., in *Narayanasami Naicker* v. *Periasamy Odayar* (5) in support of the proposition that under certain circumstances even a reversioner may be entitled to redeem, during the lifetime of the widow. There is no condition in the will in question, that Piraji would get the property in suit if he survived the testator's widow. In the absence of such a condition he would have a vested interest in the property immediately on the testator's death and such interest being transmissible legally passed to his son and heir, namely, the plaintiff. For the foregoing reasons such an interest would entitle the plaintiff to claim the right of redemption as a person falling under either Cl. (a) or Cl (b), S 91, T. P. Act. It is not necessary for the assertion of such a right that he should have a present right to possession and enjoyment. Even though the present right to possession and enjoyment cannot be claimed by persons falling under Cls. (c), (f) and (g), S 91, all of them have the right to institute a suit for redemption under the said section It is quite plain, therefore, that possessing a present right to possession and enjoyment is not essential for claiming a right of redemption.

I am, therefore, unable to accept the reasoning adopted by the learned Judges who decided the case of *Ram Chandar* v. *Kallu* (3) for holding that a reversionary heir is not entitled during the lifetime of the widow to redeem a mortgage made by the husband. Irrespective of the question of owning a present right to possession the person falling under any of the seven clauses of S. 91 is entitled to institute a suit for redemption, and it has been already observed that the plaintiff is a person falling under either Cl. (a) or Cl. (b) of the said section, and is as such entitled to redeem a mortgage made by the testator. As an abstract proposition of law, this conclusion is quite correct, but it cannot for reasons to be stated hereafter, be availed of by the appellant under the peculiar circumstances of the present case.

This brings me to the second question involved in this appeal. It is whether the interest possessed by the testator's widow is a mere life-estate or a Hindu widow's estate. If the former, the testator's widow would not be able to represent the full estate left by her husband, in an action brought by the mortgagee upon a mortgage executed by the testator, while, if the latter, she would represent the full estate in such an action, and the decree passed against her would bind the whole estate including the vested interest of the plaintiff. On a careful scrutiny of the will (vide Ex. P-3) I find that there are no words restricting or circumscribing the scope or extent of the interest, which the testator's widow would ordinarily own during her lifetime under Hindu law. The testator has mentioned himself and his wife in one and the same sentence as persons entitled to full enjoyment of the property during their lifetime. In the absence of any words or any expression limiting the nature or extent of the interest of the testator's wife, it would be presumed that Mt. Bhiwari had a Hindu widow's estate during her lifetime in respect of the property left by her husband. Now it is an established proposition of law that in absence of fraud or collusion a decree on a claim binding on the inheritance, obtained against the widow in possession, is binding on all the succeeding heirs and other persons entitled to possession of the property after the widow's death: vide, *Katama Natchiar* v. *Rajah of Shivagunga* (6) and *Ganpatrao* v. *Laxmi Bai* (7) and that in such a suit the widow represents the full estate inclusive of the interests of the said persons vide *Subbammal* v. *Avudiyammal* (8), *Gur Nanak Prashad* v. *Jai Narain Lal* (9), *Risal Singh* v. *Balwant Singh* (10), *Risal Singh* v *Balwant Singh* (11) and *Vaithialinga Mudaliar* v. *Srirangath Anni* (12).

I hold, therefore, that the testator's widow has a Hindu widow's estate during her lifetime in respect of the property left by her husband, that in the previous mortgage suit she fully represented the whole estate including the plaintiff's vested interest in the field in suit, and that in absence of any sugges-

(6) [1862] 9 M. I. A. 539=2 W. R. 31=1 Suther 520=2 Sar. 25 (P.C.).
(7) [1918] 15 N. L. R. 24=43 I. C. 64.
(8) [1907] 30 Mad. 3.
(9) [1912] 34 All. 385=14 I. C. 814=9 A. L. J. 375.
(10) A. I. R. 1918 P. C. 87=40 All. 593=45 I. A. 168 (P.C.).
(11) [1915] 37 All. 496=30 I. C. 657=13 A. L. J. 594.
(12) A. I. R. 1925 P. C. 249=48 Mad. 883=52 I. A. 322 (P.C.).

tion of fraud or collusion in respect of the decree passed in that suit, the foreclosure decree obtained therein is binding on the plaintiff and this fact bars the plaintiff's suit for redemption.

The result is that the appeal of the plaintiff fails, and is in consequence dismissed with costs

Counsel's fee will be Rs. 30.

A L /R K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 30 (1)

KOTVAL, A J C.

Kaluram and *another*—Plaintiffs—Appellants.

v.

Mohan Singh—Defendant — Respondent.

Second Appeal No. 518 of 1925, Decided on 20th June 1927, from decree of Dist Judge, Hoshangabad, D/- 28th July 1925

C. P. Tenancy Act (1920), S. 6—S. 6 does not validate mortgage which is voidable under Tenancy Act (1898), S. 41 (7).

Section 6 applies only to mortgages effected after the date of its coming into force. It does not do away with the voidability under Cl. (7), S. 41 (Tenancy Act of 1898), attached to mortgages executed in contravention of that section. [P 30 C 2]

M. R Pathak and *S A. Ghadgay*—for Appellants

N. G. Bose—for Respondent.

Judgment—The plaintiffs, who are mortgagees of an absolute occupancy holding and other property, sued the tenant and the landlord for foreclosure of the mortgage The landlord was not a necessary party to the suit on the mortgage as he claimed to be in possession by a paramount title and pleaded that he was not bound by the mortgage in favour of the plaintiffs appellants. However, the plaintiffs chose to proceed against him and sought and obtained a decision in the trial Court as to their mutual rights. Under these circumstances it would be too late to urge that the landlord should have been discharged from the suit, and the plaintiffs and the landlord here express their willingness to accept adjudication of their mutual rights in this suit

The lower appellate Court has refused to pass a decree for foreclosure of the absolute occupancy holding and has dismissed the suit against the landlord. A decree has been passed against the tenant for foreclosure of property other than the holding included in the mortgage. The position as between the plaintiffs appellants who are the mortgagees and defendant respondent 1, the landlord, is this. The plaintiffs hold a mortgage of an absolute occupancy holding executed by the tenant in 1919 before the new Tenancy Act came into force. The landlord is in possession under a surrender deed executed in 1924 after that Act came into force. The plaintiffs contend that the landlord is bound by the mortgage and unless he redeems the mortgage that holding should be foreclosed. The plaintiffs have therefore to prove that their mortgage is enforceable against the landlord. The mortgage to which S. 41, Tenancy Act of 1898 applied, was effected without notice under Cl (4) of that section, and was admittedly, voidable at his instance. It is difficult to see how the plaintiffs can seek to enforce such a mortgage against the landlord in possession under a bona fide surrender

The contention that S. 6, Tenancy Act of 1920, renders the mortgage binding on the landlord is untenable The section obviously applies only to mortgages effected after the date of its coming into force It does not do away with the voidability under Cl (7), S 41, Tenancy Act of 1898, attached to mortgages executed in contravention of that section It is not shown that the landlord's right or option to avoid the mortgage had ceased to exist or to be exercisable at the date of the suit

The appeal fails and is dismissed with costs

A L /R K *Appeal dismissed*

** A. I. R. 1929 Nagpur 30 (2) Full Bench

FINDLAY, J C , AND KINKHEDE AND GHULAM MOHIUDDIN, A. J. Cs

Abas Ali—Applicant.

v.

Kodhusao—Non-Applicant.

Civil Revn No. 15 of 1928, Decided on 22nd September 1928, from order of Small Cause Court Judge, Nagpur, D/- 13th December 1927

**** Transfer of Property Act, S. 54—Contract of sale—Vendee paying earnest money or part payment as would be akin to earnest money—Contract falling through for vendee's default—Vendee can recover**

neither earnest money nor such part payment—Vendor and Purchaser—Contract Act S. 74.

If *A* agrees to sell a property to *B* and earnest money or an advance payment of part of the purchase money (if such part payment was of such proportion of the purchase money as would be deemed to be a security for the due fulfilment of the contract) is paid to *A*, and if *B* subsequently commits a breach of the contract, *B* is not entitled to recover from *A* either the advance payment or the earnest money in question . 12 *N. L. R.* 177 , *A. I. R.* 1925 *Nag.* 103, *not Approved* ; *A. I. R.* 1922 *Nag.* 104, *Appr. A. I. R.* 1926 *P. C.* 1, *Foll.* 41 *All.* 324 ; 38 *Mad.* 178 ; 24 *C.W.N.* 967 and *A. I. R.* 1927 *Cal.* 964, *Rel. on.* [P 32 C 1]

A. V. Wazalvar—for Applicant

R. N. Padhey—for Non-Applicant.

Order of Reference

Findlay, J. C —The plaintiffs' suit for damages in respect of non-performance of a contract of sale has been dismissed by the Judge of the lower Court There was admittedly an agreement by the defendant's mother and natural guardian, Mt. Tulsabai, to sell the house in suit for Rs, 4,500 to the present applicants. Admittedly also Rs 500 was paid as earnest money.

The first question for decision is who is responsible for the breach of the contract. This question depends on whether the plaintiffs' allegation that a condition precedent to the forfeiture of the contract was that the defendant's mother should apply to the Court to be formally appointed as guardian of the minor, is true or not. On this point, after considering the evidence, I find myself in full agreement with the finding of fact arrived at by the Judge of the Small Cause Court. It is true that the plaintiffs have produced several witnesses who alleged the contrary, but their evidence strikes me as interested and unreliable when they were taken into details, e. g , regarding the presence or not of Mt. Tulsabai's mukhtyar, or regarding there having been any talk about a receipt being wanted or not, the witnesses are discrepant. To my mind, it seems grossly unlikely that, in a contract of sale of this sort where an amount of Rs. 4,500 was in question and where Rs. 500 was paid, a receipt would not have been insisted on, particularly in view of the fact that the contract was not to be completed until two months later. There seems every reason to suppose that the defendant's allegation in this connexion is correct and that the plaintiffs have refrained from producing the receipt as it would be unfavourable to themselves Over and beyond this, if there had been a definite agreement between the parties that Tulsabai had to get herself appointed formally as guardian by the Court, I am strongly of opinion that the plaintiffs would have insisted on this condition having been reduced to writing.

There are other circumstances which go to show that the plaintiffs have not played a straight game in the present case. The agreement took place on 17th October 1925 and the documentary evidence on the plaintiffs' part showing that they insisted on Mt. Tulsabai being appointed by the Court as the guardian of the minor occurs in Ex. P-2, dated 20th December 1926, in reply to the defendant's notice (P-1), dated the 14th idem. It seems to me that the plaintiffs, for reasons best known to themselves, failed to complete the contract and seized the opportunity of the defendant having effected a sale to another party to claim back their earnest money on the pretext mentioned I am, therefore, so far in agreement with the lower Court's judgment

It has, however, been urged before me that, in any event, the plaintiffs were entitled to recover their earnest money, and the decision of Hallifax, A. J. C., in *Lachhmi Narayan* v. *Damodardas* (1), has been relied on in this connexion. That decision, although one by a Single Judge, dissented from the decision of Drake-Brockman, J. C , in *Mangal Lal* v. *Mt. Nanni* (2), and this breach of rule No. 3 of the Rules of Practice of this Court was apparently justified in the learned Additional Judicial Commissioner's opinion by the fact that Drake-Brockman, J. C., in *Manga Lal* v. *Mt Nanni* (2), overlooked the Bench decision in *Ballabhdas* v. *Paikaji* (3). I may point out, however, that, in the last quoted case, the assumption was that there was a stipulation in the contract that the part payment or earnest money should be forfeited if the purchaser made default. In the present case, there has been no proof that there was any express agreement as regards the forfeiture of the earnest money, and the question which remains for consideration

(1) A. I. R. 1925 Nag. 103=20 N. L. R. 192.
(2) A. I. R. 1922 Nag. 104=19 N. L. R. 131.
(3) [1916] 12 N. L. R. 177=38 I. C. 915.

may be stated as follows. If *A* agrees to sell a property to *B* and earnest money or an advance payment of part of the purchase-money is paid to *A* and if *B* subsequently commits a breach of the contract, is *B* entitled to recover from *A* the advance payment or earnest money in question? As I have pointed out, the decisions in *Mangal Lal* v. *Mt. Nanni* (2) and *Lachhmi Narayan* v. *Damodardas* (1), quoted above, are conflicting on the point. Moreover, in view of the decision of their Lordships of the Privy Council in a case, so far not, to my knowledge, officially reported, viz., *Privy Council Appeal No.* 80 *of* 1923, from Allahabad Appeal No. 44 of 1921, it would appear that their Lordships held that earnest money is liable to be forfeited when a transaction falls through by reason of the fault or failure of the vendee. This decision, in turn, gives rise to some doubt as to whether the old Bench decision of this Court in *Ballabhdas* v. *Paikaji* (3), quoted above, requires re-consideration.

I accordingly refer the above question to a Full Bench consisting of Judicial Commissioner, 2nd Additional Judicial Commissioner and 3rd Additional Judicial Commissioner.

Opinion

Findlay, J. C.—The question referred for the consideration of this Full Bench is as follows :

"If *A* agrees to sell a property to *B* and earnest money or an advance payment of part of the purchase-money is paid to *A*, and if *B* subsequently commits a breach of the contract is *B* entitled to recover from *A*, the advance payment or earnest money in question?"

It will be convenient to consider first the question of earnest money simpliciter, leaving out of account the item of an advance payment of part of the purchase-money, regarding which it is possible that different legal incidents might arise.

This particular matter was considered at great length by Batten and Stanyon, A. J. Cs., in *Ballabhdas* v. *Paikaji* (3). It is unnecessary to repeat at length the reasoning of the learned Additional Judicial Commissioners in that judgment. It will suffice to say that the Additional Judicial Commissioners were of opinion that such earnest money or a part payment in advance of the purchase-money made under a stipulation that it shall be forfeited if the purchaser makes default is governed by S. 74, Contract Act, and gives the Courts discretion to deal with the forfeiture on equitable principles. In coming to this decision they did, the learned Additional Judicial Commissioners accepted the opinion of Sankaran Nair, J., in *Natesa Iyer* v. *Appavu Padayachi* (4), as opposed to that of Wallis, J. The matter next came before a Judge of this Court in *Mangal Lal* v. *Mt Nanni* (2). In that case, Drake-Brockman, J.C., dealt with the matter somewhat cursorily and came to the conclusion that a deposit or earnest money of the kind under consideration can be retained by the vendor where a contract goes off owing to a default of the purchaser. Hallifax, A.J.C., in *Lachhmi Narayan* v. *Damodardas* (1), again considered the question and accepted the view of the Bench decision in *Ballabhdas* v. *Paikaji* (3) Meanwhile, however, their Lordships of the Privy Council have had the same question before them in *Chiranjit Singh* v. *Har Swarap* (5). from a decision of the Allahabad High Court Their Lordships, it is true, have not dealt with the matter at any great length, but this appears to be, in my opinion, because they considered the point at issue a perfectly clear one which required no detailed discussion. The appeal was decided practically on the following statement of the law applicable in the opinion of their Lordships :

"Earnest money is part of the purchase price when the transaction goes forward it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

The application of this principle to the question before us settles the case in my opinion. It need hardly be said incidentally that, in the question we have before us, we assume that it is immovable property which has been agreed to be sold It has been urged by the pleader for the applicants that their Lordships' decision on this question must be regarded as a mere obiter dictum. I am wholly unable to see any ground whatever for this suggestion. Very obviously, the matter in question formed the crux of the appeal and the mere brevity of their Lordship's judgment on the question at issue cannot, in any way, justify the assumption that their Lordships had not given full consideration to the question involved. It would be utterly unreasonable to assume that, when their Lordships issued the dictum in question, they had

(4) [1909] 33 Mad. 375=3 I.C. 941=20 M.L.J. 230.

(5) A. I. R. 1926 P. C. 1.

not in mind the fact of the existence of the Indian Contract Act and the fact that provisions like Ss. 63, 64, 73 and 74 thereof are on the Statute Book. I find it impossible to assume that their Lordships were not laying down a general proposition of law on the point involved It has even been suggested that their Lordships, in deciding the question. were, at the time, dealing with a decision of the Allahabad High Court, which has been in the habit of taking the view followed by Drake-Brockman, J. C., in *Mangal Lal* v. *Mt. Nanhi* (2), quoted above, and that their decision might have been different had they been dealing with a case from certain other High Courts which have taken, in the past, the contrary view. I find it utterly impossible to make any such assumption which would involve the absurdity that their Lordships assumed that the incidents of the law of contract would differ on a matter like this as between different High Courts. In the circumstances, it seems to me clear that this Court, in view of the decision of their Lordships, is bound to answer the question referred to the Full Bench in the negative ; in other words, my answer to the said question would be as follows :

"If *A* agrees to sell a property to *B* and earnest money is paid to *A*, and if *B* subsequently commits a breach of the contract, *B* is not entitled to recover from *A* the said earnest money."

I desire, however, to add that, with all respect, I am unable to accept the view enunciated by Batten and Stanyon, A. J. Cs.. and by Hallifax, A. J. C., in the *Nagpur Law Report* cases quoted above. I am unable to accept the position that the Contract Act is exhaustive as regards the law of contract. As the very preamble to the said Act shows, the said piece of legislation only proposes to codify a certain part of the law referring to contracts, and the second part of S. 1 of the Act expressly exempts usages of customs of trade from being affected by the provisions of the Act. That payment of earnest money is a custom or usage of trade in India as well as in England cannot be denied and it, normally, is paid under an implied agreement with the vendee that if the contract is broken, the vendor is entitled to retain the said amount, whereas, if the contract is fulfilled, the earnest money is credited as part payment of the price : cf. *Muhammad Habib-Ullah* v. *Muhammad Shafi* (5), *Natesa Aiyer* v. *Appavu Padayachi* (6), *Atul Chandra Kundu* v. *Sarat Chandra Lala* (7) and *Nadiar Chand* v. *Satis Chandra* (8).

For my own part, it seems to me that ex natura rei earnest money, which is not, in essentials, a penalty but is a mere security for the due fulfilment of an agreement, is excluded from the operation of provisions like Ss. 63 and 64, Contract Act. Similarly, it seems to me that, as regards S. 74, earnest money as such cannot be, by any stretch of reasoning, regarded as a sum named in the contract to be paid in case of breach, nor can it equally be properly described as a stipulation by way of penalty. The reasoning of White, C. J , and of Miller, J., in *Natesa Aiyar* v. *Appavu Padayachi* (6), quoted above, has my respectful concurrence in this connexion.

The present case is thus not, in my opinion, one as has been argued by the pleader for the applicants, in which the Contract Act lays down a rule specifically applicable to the case we have considered. Had that been so, I should have agreed that the law applicable would have been the specific provision of the Contract Act in question on the general principle that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, but, as I have already indicated, the Contract Act is confessedly not exhaustive on the incidents of the law of contract applicable in this country.

It has been suggested that one of the objects of the Contract Act was to exclude from Indian law the intricacies thereof with reference to penalties, liquidated damages and the like, but had the intention of the legislature been to include, in sections like 63 and 64 of the said Act, the item of earnest money, I should certainly have expected specific mention of the same to have been made. I would, therefore, answer the question as regards earnest money as stated above and that, as a matter of fact. suffices for the purposes of the decision of Civil Revision No. 15 of 1928.

When I turn to the question of whether the same reply should be given on the reference as regards an advance payment

(5) [1919] 41 All. 324=50 I. C. 948=17 A. L. J. 309.
(6) [1913] 38 Mad. 178=24 M. L. J. 488=19 I. C. 462=(1913) M. W. N. 341 (F.B.).
(7) [1920] 24 C. W. N. 967=59 I. C. 215.
(8) A. I. R. 1927 Cal. 964=55 Cal. 638.

of part of the purchase-money, I find it impossible to frame, in categorical terms, a specific answer in the affirmative or in the negative for the simple reason that, even under English Law, forfeiture of the entire advance payment is not invariable when such payment is considerable in amount. My answer to this part of the reference would also be in the negative, if such part payment was of such proportion of the purchase-money and of such a nature generally as would enable the Court to regard it as akin or analogous to earnest money, i. e, if the part payment had been made mainly as a security for the due fulfilment of the contract.

It has been suggested in the present case that the proportion of earnest money was unduly high. This is a matter which hardly arises on the reference, but as it has been argued before the Full Bench, I desire to record my opinion that the amount of Rs. 500, coming only to 1/9th of the total price agreed upon, is not so high as to justify any assumption that the payment in question was not both nominally and in reality one of earnest money pure and simple. I accordingly would answer the reference as stated above.

Kinkhede, A J C—I concur with the learned Judicial Commissioner in the opinion recorded by him I have nothing to add.

Mohiuddin, A. J. C.—I concur.

S.N /R.K. *Reference answered.*

A. I. R 1929 Nagpur 34

FINDLAY, J. C., AND PRIDEAUX, A. J C.

Mt. Dhannabai Johri—Decree-holder—Appellant.

v

Keshrichand Johri and *another*—Judgment-debtors—Respondents

First Appeal No. 97 of 1927, Decided on 14th July 1928, from decree of Addl. Dist. Judge, Nagpur, D/- 30th April 1927. in Execution Case No. 23 of 1919.

Civil P. C., S. 152—Suit for partnership accounts compromised deciding *S* entitled to three annas share, but agreeing to another member to manage business—Decree ordering in terms of compromise, *S* to be entitled to that share—*S* not appealing against decree, nor applying for its review—*S* seeking execution of decree and praying alternately to amend decree if it be not in terms of compromise—Decree was in terms of compromise, merely declaratory and incapable of execution—Even if it were not in terms of compromise, it could not be amended, so as to make it capable of execution, as time for same had passed by—Decree—Executability.

Under a compromise terminating a suit for partnership accounts, a person, *S*, was held to be entitled to a three annas share in the partnership and it was further agreed that another sharer should transact all the business of the firm, balance the accounts and render them when asked. In the decree that followed it was ordered and declared in terms of compromise that *S* was entitled to three annas share in the property belonging to the firm. *S* sought to execute the decree praying that he should be put in joint possession of his share and if the decree were considered as not embodying terms of contract it should be amended under S. 152. No appeal against the decree was filed, nor any application for review made within time.

Held: that the decree was only declaratory and was also in accordance with the terms of the compromise. It could not, therefore, be executed as sought for. [P 35 C 2]

Held further that even supposing that the decree was faulty as not being according to terms of the compromise, it could not now be amended, as time for such amendment as to make it capable of execution had passed by: 21 *C. W. N.* 835; *A. I. R.* 1928 *Nag.* 173. *A. I. R.* 1927 *P. C.* 204 and *A. I. R.* 1922 *Oudh* 150, *Dist.* [P 36 C 1, 2]

H. S. Gour, *R N. Padhye* and *G. S. Brahmarakshas*—for Appellant.

V. V. Bose—for Respondents.

Judgment.—In Civil Suit No. 23 of 1919 in the Court of the Additional District Judge, Nagpur, the appellant Mt Dhannabai sued the respondent Keshrichand and one Manmal, now represented by his widow Manabai, for partnership accounts and for the recovery of certain profits as well for division, by metes and bounds, and possession of the plaintiff's alleged share in the immovable property concerned, as well as for the recovery of ornaments specified in Sch G. After the case had reached the evidence stage, a compromise was arrived at; the terms of the compromise are on record. Under it, the present appellant was held to be entitled to a three annas share, defendant 1 to a seven anna share and defendant 2 to six anna share. It was further agreed, that defendant 1 should transact all the business of the firm, balance the accounts and render them when asked, other terms as to the amount of money, the plaintiff and defendant 2 might spend for the construction of a temple and of a bunga-

low, were also included, as well as various miscellaneous matters which it is unnecessary to specify here. The decree passed in the case by the Additional District Judge cannot be described as a peculiarly clear or lucid one. It is in these terms :

"It is ordered and declared in terms of compromise that the plaintiff is entitled to three annas share only in the moveable and immovable property belonging to the firm of Ramkaran Hiralal noted on reverse and her claim for ornaments is dismissed as fully satisfied out of Court."

Further, orders were passed in the decree as to costs in accordance with the terms of the compromise.

The present appellant attempted to execute this decree in the lower Court, and the Additional District Judge, who was not the same officer as the one who had passed the decree in the suit, held that the application for execution did not lie. The main prayer in the execution was that the decree-holder should be put in joint possession of her share, that the profits should be ascertained and her share thereof credited to her in respect of the period ending in Dewali 1925, and that these profits and other items should be paid to her. The application for execution was opposed on the ground that merely a declaratory decree had been passed which was incapable of execution, and the Additional District Judge upheld this contention and dismissed the execution application.

The appellant has now come up to this Court on appeal, and in this connexion our attention has been drawn to the fact that the appellant prayed in the lower Court that, if the decree were considered as not embodying the terms of the compromise, it should be amended under S. 152, Civil P C. We may at once say that the terms of the compromise were not overlucid and that it remains a matter of some difficulty as to whether the intention of the parties was that the appellant should be put in formal joint possession of the share she was held to be entitled to. As we, however, read the compromise, particularly in connexion with the pleadings of the respective parties in the suit, it seems to us clear that the defendants did not dispute the plaintiff's right to a 3 anna share. Their main and reasonable objection was that it was desirable that defendant 1 should remain in sole charge of the business, and it seems to us that, rightly or wrongly, this was also the intention of the Additional District Judge in the form of the decree he drew up. It has been argued before us that the words "in terms of compromise," which occur in the decree, necessarily mean that the present appellant is entitled to claim in execution the various items of profits and the like, which were specifically referred to in the compromise, as well as the formal joint possession of the 3 anna share. We are, however, unable to accept this proposition. To our mind, it is clear that only a declaratory decree was passed affirming the fact that the appellant was entitled to a 3 anna share only in the estate and business and to the incidents that followed therefrom From this point of view, therefore, we agree with the Additional District Judge that the decree is not one capable of execution in the way in which the appellant now seems to enforce it.

We have been referred, in this connexion, to the decision in *Jayanuddin Khan* v. *Jamiruddin Sarkar* (1) and we are in full accord with the proposition laid down in that ruling. The proposition was to the effect that, in the case of a compromise decree, in order to properly understand and give effect to it, the Court is entitled to look behind the decree, so to speak, and consider the terms of the compromise. That case, however, was of a very different nature from the present one There the decree contained the amounts to be repaid by the respective defendants in instalments, but it omitted to include another condition relating to the whole amount becoming due in default of a single kist. The decision of Prideaux and Kinkhede, A J. Cs., in *Naraindas Bhagwanji & Co.* v *Kalyanji Mawaji & Co* (2) merely laid down that the terms of an award of a private arbitrator, or, of an adjustment, if susceptible, in every detail, to an effective order in the nature of specific performance, can be given effect to in the Court's decree, even if the original suit was merely declaratory in nature.

Our attention has also been drawn to the decision of their Lordships of the Privy Council in *Medhi Ali Khan* v. *Ghanshiam Singh* (3) and it has been

(1) [1917] 21 C. W. N. 845=37 I. C. 916.
(2) A. I. R. 1923 Nag. 173=24 N. L. R. 155.
(3) A. I. R. 1927 P. C. 204.

urged on behalf of the appellant that the case in question was closely analogous to the present one. The decision of their Lordships was that where a compromise completely disposes of a suit and the terms agreed upon are such as to be susceptible of specific performance being granted, no party to such compromise can refuse to be bound by its terms and to escape from his obligations thereunder.

Their Lordships further held that, under O. 23, R. 2, Civil P C the Court was competent to record the compromise and to pass a decree in accordance therewith If the terms of the compromise in the case quoted be, however, examined it will be seen that they were peculiarly specific and of a kind which could at once be effectively enforced under a decree. We have been referred to a very similar decision of Lyle, A J C of the Oudh Judicial Commissioner's Court in *Bisheshar Singh* v. *Mohammad Yasin* (4). We do not, however, think that the circumstances of the present case bring it within the purview of the ruling of their Lordships of the Privy Council quoted above As we read the compromise, it was intended to be merely one declaring the rights and shares of the different parties to the suit in the property, and there are various items in the compromise which, on the face of them, would be incapable of execution owing to the somewhat vague and general terms which are used in the deed in question Even however, if the position were otherwise and if we were to grant for the time being that the decree was a wrong or imperfect one and did not give effect to the intention of the parties, we are of opinion that the appellant has already lost her remedy If she were not satisfied with the terms of the decree as passed, she had a remedy by appeal under O 43, R 1 (m), Civil P C. and it is possible that the appellate Court might have been able to extract, from the compromise, certain of its specific terms capable of execution. No such appeal was filed and similarly an application for review under O. 47, R 2, Civil P C, no longer lies. Equally so, it seems to us impossible to hold that, assuming, for the time being, the decree to be a faulty one, it can now be corrected under S. 152, Civil P C. It is impossible, by any stretch of reasoning to hold that the Additional District Judge, in the terms of the decree merely made a clerical or arithmetical mistake, or an accidential slip or omission. It is perfectly obvious, on the contrary, that he deliberately drew up a declaratory decree stating what the plaintiff's rights were under the compromise, and, as we have already said, we do not see any reason to suppose that the Additional District Judge was wrong in so interpreting the compromise in question. Indeed we are prepared to go further and to affirm that the attempt of the present appellant to execute the decree in the way she desires to, would, in reality, amount to an effort to go behind the compromise and to give her a right to meddle directly in the management of the estate, a right which was expressly denied her by the terms of Cl. (b) of the compromise Even, however, had this not been so, the time for amendment of the decree in the manner in which the appellant desires it to be amended, so as to make it capable of execution, has clearly long since passed by and we are of opinion that the executing Court had no alternative but to dismiss the application for execution For these reasons, the appeal fails and is dismissed. The appellant must bear the respondents' costs. We fix Rs. 50 as pleader's fees Only one set of costs will be allowed to respondents.

S N./R.K. *Appeal dismissed.*

(4) A. I. R. 1922 Oudh 150=25 O.C. 53.

A. I. R. 1929 Nagpur 36

FINDLAY, J C.

Ramadhin Brahmin—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 129 of 1928, Decided on 16th July 1928, from order of Sess-Judge, Nagpur, D/- 20th March 1928, in Sessions Trial No 21 of 1927.

(a) Penal Code, S. 147 — Members of crowd charged with rioting — Prosecution need only establish that they were voluntarily members of the crowd.

Where persons are charged with rioting in a case of confused riot, all that the prosecution needs to establish is that the accused were voluntarily members of the crowd of rioters who committed the offence alleged. [P 37 C 2]

(b) Criminal P. C., S. 307 — High Court will not interfere with verdict of jury unless it is obviously perverse, manifestly wrong or unreasonable.

High Court will only interfere with a verdict of a jury when such verdict is obviously perverse or manifestly wrong or unreasonable : *A. I. R.* 1926 *Nag.* 308, *Foll.* [P 37 C 2]

(c) Criminal P. C., S. 162 — Police Officers deposing to identification of accused in identification parade — Evidence is admissible as it is an actual fact or circumstance witnessed.

Evidence of police officers who give evidence with regard to the identification parades which were held and who depose to certain of the accused having been identified by prosecution witnesses in an identification parade is not inadmissible in evidence under S. 162, as their evidence does not relate to any statement made to the police but is a simple exposition of a fact or circumstances witnessed by themselves. [P 38 C 1, 2]

(d) Evidence Act, S. 114 — Accused not disclosing their defence before the committing Magistrate nor in the Sessions Court and entering into a defence of alibi — Presumption arises against them—Criminal Trial.

If neither in their examination before the Committing Magistrate, nor in that in the Sessions Court, accused disclose what their exact defence is to be, and they only enter on their defence of alibi, a certain presumption arises against them as to their guilt of offence. [P 39 C 2]

(e) Criminal P. C., S. 307—Scope.

Perverse verdict does not make Court improperly constituted.

M. V. Abayankar—for Accused.

G P. Dick—for the Crown

Judgment. — The appellant, Ramadhin, together with his co-appellants Bachhoo Singh, Bhika, Ramprashad, Ramchandra, Dharma, Dewaji and Rama (Criminal Appeals Nos 130, 131, 132, 133, 134, 135 and 136 of 1928), whose appeals are also disposed of in this judgment, has been convicted by the Sessions Judge, Nagpur, of an offence under S. 302 read with S. 149, I P C, and sentenced to transportation for life At the same trial, eight appellants were also tried with the aid of a jury, under provisions of S 269 (3), Criminal P C., for an offences under S 436, read with S. 149, I. P C. As regards the latter offence, the jury returned a unanimous verdict of not guilty and the Sessions Judge disagreeing with this verdict, has referred the case under S. 307, Criminal P C., to this Court. In this judgment, therefore, I dispose of the criminal appeals stated as well as of the above reference.

The present offence is alleged to have occurred on the 5th day of September last in the course of the communal rioting between Hindus and Muhammadans, which was, at the time, rife in Nagpur. In the particular riot with which I am concerned, no less than five Muhammadans, Budhu, Piru, Zahed Ali, Fateh Khan and Pir Khan met with their death, while others were seriously injured. A house, to be referred to hereafter, was also set on fire, and the circumstances of the case are admittedly such that, if the present appellants are guilty or innocent of the offence under S. 436, I. P. C, they are equally guilty or innocent of the offence under S. 302, read in each case as already stated with S. 149, I. P. C.

In a confused riot of the kind I am concerned with here, all that the prosecution desires or needs to establish is that the appellants were voluntarily members of the crowd of rioters who committed the offence alleged. In dealing, therefore, with the evidence in this case, I have to consider it, both as regards the appeals and the reference, on the principles which I have adverted to in *Emperor* v *Kankaya* (1), viz, that this Court will only interfere with a verdict of a jury when such verdict is obviously perverse or manifestly wrong or unreasonable, and it is from this point of view that I propose examining the evidence in the present case. The case, although a voluminous one, is, from the point of view stated comparatively simple, the one vital question in the case being a mere one of fact as to whether the evidence of certain of the prosecution witnesses, who profess to have seen the various appellants amongst the crowd, should be accepted, or the evidence of the defence witnesses, who depose in each case to alibi on the part of the appellants should, on the contrary, be preferred.

Before, however, entering on an examination of the evidence, I desire to dispose of certain law points which have been raised on behalf of the appellants One of the counsel, who appeared on behalf of the appellant Dharma, raised what appears to me to be a somewhat unsubstantial question of law. As is obvious from the Sessions Judge's judgment and his order on the reference, when read together, the Sessions Judge was of opinion that the opinion of the assessors and jurors as to the innocence of the appellants was a perverse one. It must be noted in this connexion that all the five jurors and assessors were Hindus. The Sessions Judge has given his reasons for

(1) A.I.R. 1926 Nag. 308=22 N.L.R. 42.

his view in this connexion in para 13 of the judgment. Whether that view is correct or not is not a question I am concerned with at the moment. The argument offered in this connexion has been a somewhat novel one. It is that, as the Sessions Judge holds the jurors' verdict and assessors' opinion to be a perverse one, there was no properly constituted Court for the trial of the case in question. I am wholly unable to accept this contention for which I know of no sound basis, either in law or even in common sense. Very obviously the fact of whether a jury is going to return a perverse verdict cannot, in the normal case, appear until the verdict has been given and, even if an individual juror or assessor is, at the inception of the trial, prejudiced in a communal case like the present because of the fact that persons belonging to his own community are being tried for an offence against members of a rival community, the Court can, in the normal case, have no means of finding this out until his verdict or opinion, as the case may be, is given in the matter I have referred to an unofficially reported case, apparently a Madras one, in which it was laid down that where, in the course of a trial, it is found that one of the assessors is interested, and is so unfit to sit, the duty of the Court is to refer the case to the High Court to set aside the order appointing the incompetent assessor and all subsequent proceedings in the trial. Even if this case could be accepted as laying down a correct exposition of the law, it is obvious, on the face of it, that it has no application to the circumstances of the present case, and, as a matter of fact, another counsel, who appeared for the same appellant (Dharma) admitted in his reply that the Court, as constituted, was a proper one I see no reason, therefore, to devote further time to this contention which seems to me to have no sound basis, either in law or in reason

The second question of law, which has been raised in this case, is that the statements of witnesses like Harvey (P. W. No. 17), Mr. Deoskar, P. W. No. 22 and other officers, who give evidence with regard to the identification parades which were held in this case and who depose to certain of the appellants having been identified by the relevant prosecution witnesses, are inadmissible having regard to the provisions of S. 162, Criminal P. C.; I am wholly unable to accept this proposition, in support of which a single decision of the Rangoon High Court Full Bench reported in an unofficial publication has been quoted. The witnesses, who depose to certain of the appellants having been identified by certain of the prosecution witnesses, are not, in my opinion, deposing to a statement made to the police. They are, on the contrary, deposing to an actual fact or circumstance seen and observed by themselves This type of evidence is, after all, only of a corroborative nature, the essential witnesses to the identification being the prosecution ones who identified certain of the appellants; but, even so, the evidence of witnesses like Mr Harvey and others does not relate to any statement made to the police but is a simple exposition of a fact or circumstance witnessed by themselves This contention, therefore, seems to me to be entirely without basis, and I have been unable to see that the decision quoted in support of it, in any way, affords justification therefor

I now turn to the facts of the present case; for the purposes of this judgment, it is unnecessary to repeat, in great detail, the story of this lamentable riot in which the majority party showed not only appalling savagery but, at the same time, also despicable cowardice Five Mahomedans were killed in the riot, viz., Budhu, his brother Piru, his nephew Zahed Ali, one Ragehkhan and his nephew Pir Khan. Husaini, another nephew of Budhu was severely injured, and three other men, Shaikh Kallan, Jafar Khan and Jawahar Khan, also were wounded. Budhu lived in a hut made of tattas with a corrugated iron roof in the Imambada Mohalla of Nagpur, cf. the map (P. 33.) Fateh Khan lived in a hut a short distance away from Budhu. All the appellants lived in the neighbourhood, their houses being shown in the map. There had been trouble in Nagpur on the previous day (4th September 1927), and, on the morning of Monday the 5th September, a crowd of Hindus came to the house of Budhu and enquired whether Fateh Khan and Pir Khan were inside. I am not directly concerned with the anxiety of the Hindus to come in touch with Fateh Khan in particular, but there are indications on record that this man had

incurred the special dislike of the Hindus at the time and that enquiries had been made for him, even on the previous evening. Fateh Khan and Pir Khan were as a matter of fact, concealed in the house of Budhu from the previous evening. On the first visit of the crowd on the Monday morning, Budhu came out on being called; he denied that Fateh Khan and Pir Khan were in his house; the crowd started to beat Budhu and he took shelter inside again. There were six Mahomedan men inside the house and it would appear that they made a courageous sally out, armed with what was described as "iron swords," but were some species of iron bands or the like, and drove the Hindus back twice. The crowd, however, once more came up in great numbers; the estimates vary but there must have been at least 500. Kerosene oil was deliberately thrown on the tattas and the house set on fire, and all the six male inmates some of whom had received severe burns in the meantime were forced by the fire to fly outside; they were at once set upon and killed with the exception of Husaini who was left lying unconscious and presumably was considered to be dead, or as good as dead. Shaikh Kallan, who was also in the house, bolted for the Imambada but was pursued by some of the mob and beaten there

In the Imambada there was also one Jafar Khan and he was similarly assaulted. Budhu's wife Jubedunnisa and his daughter Habiban as well as Fateh Khan's wife Maktumbi and his adopted daughter Munirbi then went to the Imambada for shelter, while Mt Kallo, the mother of Budhu, remained near the house, where the dead bodies were lying, and was found sitting there in the evening by Punia Kotwar (P. W. No. 2) who made the first report of the offence That the crowd, as a whole, was bent on murder and arson and succeeded in their object has not been denied by the defence; nor can it be denied that these unfortunate Mahomedans were done to death under atrocious circumstances of savagery, purely as a result of communal hatred. If the present appellants are proved to have been voluntary members of the attacking crowd, then their guilt as regards both offences is established; if, on the other hand, the evidence leaves the fact of their having been such members of the crowd in doubt, then they are entitled to be acquitted

Before proceeding to examine the evidence, I desire to make certain general observations Although there can be no diminution of the standard of proof required in a case of serious offence, like the one I am concerned with here, it is pertinent to observe that, as regards the prosecution evidence, considerable allowance must necessarily be made in the case, particularly of the Mahomedan women witnesses who saw their nearest and dearest done to death in the way they were Their state of mental agony and confusion must have been very pronounced indeed, and, in the case of all the witnesses, it is no doubt true that absolute exactitude of detail cannot be expected from them in their account of a confused and prolonged riot such as I am concerned with in this case

As regards the defence, I feel that I am also bound to make one observation. It is obvious that this case has been most strenuously defended and the prosecution witnesses have been subjected to an extraordinarily meticulous cross-examination, in which they have been confronted with their previous statements and cross-examined at great length on even petty points of detail.

As regards the alibi evidence of the appellants, I consider it my duty to make one general observation. Neither in their examination before the Committing Magistrate, nor in that in the Sessions Court, did the appellants disclose what their exact defence was to be. It was only when they entered on their defence that each of the appellants stated, in precise terms, his alibi That the appellants were within their legal rights in so doing, is, of course, obvious, but I am bound to say that a certain presumption arises against them in this connexion. If the appellants or any of them were innocent men, one should have expected them, from the first, to say. "I was not there at all, I was elsewhere." It may be urged, and possibly with some reason, that the appellants were well-advised to take this course in case of either the police or members of the Mahomedan community attempting meanwhile to interfere with the evidence of their alibis. In this, there may be some measure of truth but, on the other hand, if an absolutely innocent man is accused of an offence

one naturally expects him, from the very start, to say: "I was not there at all, I was elsewhere in such and such place"; this the innocent man could do without disclosing in detail who the witnesses as to his alibi would be. However this may be, I have thought it well here to mention the fact as to the late stage of the case at which the alibis were disclosed (The judgment then discussed the oral evidence for the prosecution and proceeded.) Certain general arguments have been also advanced as to why some of the appellants, viz., Ramadhin, Bachho Singh and Bhika are unlikely to have been amongst the rioters It is suggested that, as they were employed in the Ralli Press and as no Mahomedans who took refuge there were molested, it would be unlikely that they would molest Mahomedans elsewhere The argument is about equivalent to saying that boys who are good inside school are necessarily also good outside, and nothing more need be said on this point.

It has also been suggested perfectly reasonably, that the evidence particularly of the Mahomedan women, in this case must be viewed with great caution, as human nature being what it is, they would be naturally anxious to see that some Hindus suffer for the crime committed by members of that community. I fully agree in this connexion that caution must be necessary in accepting the evidence, but after careful examination of the evidence and a serious consideration of the probabilities of the case, I am of opinion that a strong prima facie case has been made out against each of the appellants on the evidence examined above. I am in particular impressed with the consistency of the evidence of the identification and I am in full concurrence with the remarks of the Sessions Judge in this connexion. The position thus is that I am of opinion that there was ample prima facie evidence on record to warrant the conviction of the appellants and it becomes necessary therefore to turn to the defence evidence. (The judgment then dealt with the alibi evidence of the various appellants in turn and proceeded) The case in my opinion thus stands as follows: There is a large amount of prosecution evidence which specifically connects each and every one of the appellants with having been members of the riotous crowd on the day in question which committed these offences. Keeping in mind fully the principle laid down in *Emperor* v. *Kankaya* (1) referred to above, I feel myself forced to the conclusion that the prosecution case against these eight men is a true one and establishes a complete prima facie offence against them. The defence evidence elaborately worked up as it obviously has been and ingenious in certain respects, leaves on my mind only one possible impression and that is of absolute falsity. I find it difficult to imagine that the assessors or jurors, as the case may be, who heard the evidence, could, on any reasonable and bona fide grounds, come to the conclusion that these appellants were innocent. I am not concerned now with the motives which led the assessors or jurors to give a verdict which was either perverse, or obviously wrong or unreasonable It may be that they were actuated by mere communal bias, or it may equally be that, though they thought the appellants to be guilty, they were afraid to give an opinion or, in turn, a verdict accordingly, because of what they possibly feared would at least be said or thought of them by many members of the Hindu community. That one or other motive of such a kind operated on these assessors or jurors I have not the slightest doubt.

I have already pointed out that, if the appellants are guilty of the offence under S 302 read with S. 149, I. P. C, they must equally be held guilty of the offence under S 436 read with S 149. As regards the former offence, for the reasons given the appeals of all eight appellants are dismissed, the sentence imposed upon them being the least allowed by the law and one which, I may add, in the circumstances of this case, is certainly not an over-severe one As regards the reference made by the Sessions Judge under S. 307, Criminal P C., I accept it and I convict all the appellants of an offence under S. 436 read with S 149, I. P. C. For this offence, they will suffer ten years' rigorous imprisonment each, the said sentence to run concurrently with that of the transportation for life in the case of all eight men.

A.L./R.K. *Order accordingly.*

A. I. R. 1929 Nagpur 41

FINDLAY, J. C.

Balaji Jagannath Kalar—Plaintiff—Appellant.

v.

Sarfrajkhan—Defendant—Respondent.

Second Appeal No. 216 of 1927, Decided on 24th February 1928, from judgment of Dist. Judge, Nagpur, D/- 10th January 1927, in Civil Appeal No. 173 of 1926.

Wajib-ul-arz—Express provision that tenant of 30 years can transfer his house site—No consent of lambardar was held necessary—C. P. Land Revenue Act, S. 203 (8).

Where wajib-ul-arz provided that such of the tenants as are in possession of village sites from before the thirty years settlement are fully entitled to transfer the said sites and it was contended that lambardar's consent was necessary to a transfer of a house in abadi.

Held : that no consent was necessary in view of the explicit language of the wajib-ul-arz : 11 *N. L. R.* 126, *Dist.* [P 41 C 1]

S. K. Barlingay—for Appellant.

R. N. Padhey—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the lower Court's judgment and the question involved is in reality a most simple one. The plaintiff-appellant's contention is that as lambardar his consent was necessary to any subsequent transfer of the house in the abadi in question. It is difficult to say how such a contention can be seriously urged in face of the explicit language of the wajib-ul-arz (Ex. D. 1). That language is as follows :

" Tenants are entitled to get abadi land free for building houses or cattle-sheds. Such of the tenants as are in possession of village sites from before the thirty years settlement are fully entitled to transfer the said sites. Transfers of the houses on land which was vacant at the time of the 30 years settlement, however, shall be made only with the consent of the malguzar."

It is the middle sentence of the wajib-ul-arz which is the crucial one in this case.

The pleader for the appellant has urged that in view of the principles laid down in *Narain* v. *Behari* (1), as well as of the provisions contained in S. 203, Land Revenue Act of 1917, it should have been held that the transferees in this case became mere licensees and that the consent of the landlord to any further transfer of the abadi site or house was necessary. I find it extremely difficult to see any substance in this argument. So far as the ruling of Stanyon, A. J. C., is concerned, it must be remembered that the only principle laid down is that prima facie every tenant or other village resident is a licensee so far as the portion of the abadi site occupied by him is concerned. Here, however, in this connexion the words "prima facie" must not be overlooked. In the present case the wajib-ul-arz obviously gave a complete and full right of transfer to such tenants as were at the time of the 30 years settlement in possession of village sites. If it had been intended that any subsequent transferee from such a tenant should have a lesser right than his transferrer, most undoubtedly the wajib-ul-arz (Ex D. 1) would have provided something to the effect that although the original class of tenants had a full power of transfer the subsequent transferee would become a mere licensee and he could not in his turn transfer without the consent of the landlord. There is, needless to say, no such provision in the wajib-ul-arz It is equally futile to appeal to the provision in S 203, Land Revenue Act of 1917, for the simple reason that that provision cannot by any stretch of imagination be deemed to be a retrospective one which was intended to upset what had been done in the past. A reference to sub-S. (8) thereof makes this sufficiently obvious. But, even if sub-S. (8) were not on the statute book, the ordinary presumption that the statute in the absence of anything expressly declaring it so, was not intended to be retrospective, would apply. *Nova constitutio futuris formam imponere debet, non praeteritis.* Perfectly obviously in this case the original tenant and ipso facto in the absence of express condition or provision of law to the contrary, his subsequent transferee had a full and complete right of transfer to the site in question.

The appeal, therefore, fails and is dismissed. The appellant must bear the respondents' costs Costs in the lower Courts as already ordered.

R.K. *Appeal dismissed.*

(1) [1915] 11 N. L. R. 126=31 I. C. 807.

A. I. R 1929 Nagpur 42

STAPLES, A. J. C

Raotmal—Applicant.

v.

Sampat—Non-Applicant.

Criminal Revn. No. 199-B of 1928, Decided on 16th October 1928, from order of 1st Class Magistrate, Khamgaon, D/- 27th July 1928, in Criminal Case No. 28 of 1928.

Criminal P. C, S. 344—Adjournments—Case fixed for a future date can be taken at an earlier date if notice is given to the accused or his pleader—Procedure is not illegal or irregular.

When a case is fixed for a future date, it can be heard at an earlier date, provided due notice is given to the accused or his pleader. The intention of the Code is that a criminal trial should proceed forthwith and should be continued from day to day until its termination. The changing of the date is not even a technical irregularity and the procedure is not illegal or irregular. [P 43 C 1]

G. R. Deo—for Applicant.

A. Razak—for Non-Applicant

Order.—This is an application for revision of the order of the Tahsildar and Magistrate, 1st Class, Khamgaon, dated 27th July 1928 ordering summons to issue to the prosecution witnesses and fixing the criminal case for hearing on 11th August 1928. It appears that the First Subordinate Judge, 1st Class, Khamgaon, made a complaint against the appellant Raotmal for an offence of perjury under S. 193, I. P. C., and forwarded that complaint under S. 476, Criminal P. C., for trial to the Special Magistrate 1st Class, Khamgaon. That complaint was received on 9th May 1928. The present applicant whose suit was dismissed by the First Subordinate Judge, 1st Class, Khamgaon, filed an appeal against that decree to this Court Admittedly the criminal complaint arose out of the suit and he, therefore, on 21st June 1928 made an application to the criminal Court that, as he had appealed to the High Court and the appeal was fixed for hearing on 18th January 1929, the criminal trial should be stayed pending the decision of that appeal. The Magistrate, therefore, adjourned the hearing of the case to 23rd January 1929 and ordered the accused to be present on that date, binding him over for a sum of Rs. 500. The applicant, however, had previously applied to this Court for stay of the proceedings on 14th June and Kinkhede, A. J. C. passed an order on the same date, to the following effect :

"In the meantime a copy of the above order be sent to the criminal Court directing it to stay its hand pending receipt of final orders."

The application was fixed for hearing and came up for hearing before Hallifax, A. J. C, on 12th July 1928. On that date, the following order was recorded :

"Mr. G. R. Deo appears on behalf of Mr. M. K. Chande and states that the Magistrate has himself stayed the criminal trial till the decision of the civil appeal. That is fortunate for him. In cases of this nature it is usually doubtful whether it is at all necessary to stay either trial, and almost always certain that, if it is, the civil trial should be stayed and not the criminal. The application is rejected."

The case was received back by the Magistrate on 27th July and the Magistrate saw that the application was rejected and considered that it was unnecessary to order stay of proceedings of the case. He therefore decided to proceed with the case, issued summons to the prosecution witnesses and fixed a date for hearing as already stated above.

The applicant then made an application for revision to the Sessions Judge, Akola, but that application was dismissed on 21st August. A further application was then made to this Court. It seems to me, however, that there is very little force in the application. It is true that the Magistrate did originally fix the hearing of the case for 23rd January 1929, but he appears to have done so under a mistake, whether it was a mistake induced by the applicant or not. The order passed by Kinkhede, A. J. C. on 14th June was that the proceedings should be stayed until final orders had been passed on the application for stay and not till the decision of the civil appeal fixed for hearing in January 1929. That order does not seem to have been communicated to the Magistrate when he passed the order on 21st June, but either a misrepresentation was made by the applicant or the Magistrate thought that he should grant stay until the decision of the appeal. Then again, the applicant appears to have made a similar mistake when he appeared before Hallifax, A. J. C. on 14th July. There it is stated that the Magistrate had granted stay and that statement being accepted the application for stay in this Court was rejected. The learned advocate for the applicant contends that he would have pressed the application and would not

have allowed the application to have been rejected in that way had he not been under the impression that the stay had been granted by the Magistrate pending the decision of the appeal. It appears, however, that Hallifax, A. J. C , did not think it necessary to grant the stay ; he believed that the stay had been granted and he did not wish to interfere.

The case is a somewhat curious one and the only point to be decided is whether the Magistrate has power to change his former order fixing the case for hearing on 23rd January 1929 and to fix it now for an earlier date. A reference was made to S. 344, Criminal P. C , which is the section dealing with the adjournments of trials, and it was argued that a case can be adjourned to a future date, but a case once fixed for a future date cannot be heard at an earlier date. I know of no authority for that contention and see no reason why a case cannot be heard at an earlier date provided due notice is given to the accused or his pleader. The intention of the Code is that a criminal trial should proceed forthwith and should be continued from day to day until its termination. S. 344 only provides for adjournments for definite reasons, but when there is no longer any reason for an adjournment the trial should proceed. I do not agree with the Sessions Judge that the changing of the date is even a technical irregularity. The date, 23rd January 1929, was only fixed under the impression that the proceedings should be stayed pending the decision of the civil appeal. But when once the Magistrate saw that the application for stay had been rejected by this Court and Hallifax, A. J. C. held that it was not necessary to stay the criminal trial, he fixed another earlier date and I do not think that the procedure is either illegal or irregular.

The mistake, if any, is due to the applicant's own conduct in applying to two Courts for stay simultaneously and not informing the criminal Court that he had applied to this Court for stay of the proceedings. The result was that separate orders were passed by the Magistrate and by this Court, namely, the Magistrate first of all fixed the case for 23rd January 1929 while Kinkhede, A. J. C., passed an order for stay pending further orders. In a case like this when two orders are passed, the order of this Court must prevail and, therefore, the order governing the case was the order of Kinkhede, A. J. C. staying proceedings until further orders. When, then, further orders were passed by Hallifax, A. J. C., and the application for stay was rejected, the order for stay ceased to exist, and, therefore, the Magistrate was not only authorized to proceed with the case but, as a matter of fact, was bound to do so. The Magistrate presumably in passing his first order was acting under S. 476, sub-Cl. (3), Criminal P. C., but the Magistrate is given discretion by the Code, as is clearly laid down, and I see no reason why a mistaken order so passed and a date so fixed for January 1929 should not now be revised in view of the rejection of the stay application by this Court and the Magistrate could proceed with the hearing of the case forthwith I do not, then, consider that there is any sufficient reason now for interfering with the order of the Magistrate fixing the case for hearing, and the application is, therefore, rejected The order of this Court staying criminal proceedings pending further orders is cancelled.

A L/R K. *Application rejected.*

A. I R. 1929 Nagpur 43

KINKHEDE, A. J. C.

Muhammad Ibrahim — Accused—Applicant.

v

Emperor—Opposite Party.

Criminal Revn. No. 46-B of 1928, Decided on 30th June 1928, from order of Sess. Judge, Akola, D/- 13th February 1928, in Criminal Appeal No 384 of 1928.

(a) Criminal P. C., S. 154 — First information is not a statement under S. 162 and can be used to contradict or corroborate its author (*obiter*)..

A first information under S. 154 is not a statement within S. 162, which is inadmissible in evidence : *A. I. R.* 1927 *Cal.* 17, *Rel. on.* ; such a statement though not substantive evidence can be used to corroborate or contradict its author : 17 *C. W. N.* 1213, *Foll.* [P 45 C 1]

(b) Evidence—Admissibility—Prosecution need not formally prove against accused document produced by him.

A document produced by the accused in support of his own defence need not be formally proved by prosecution as against the party producing it. [P 45 C 1]

(c) Penal Code, S. 96—Assembly unlawful from beginning—Question of self-defence does not arise.

Where the object of an assembly was from the very outset unlawful and every one of the accused was clearly a member of an unlawful assembly, no question of self-defence arises in the case : 20 *All.* 459, *Appr.* [P 48 C 1]

(d) Penal Code, S. 147—Scope.

Assembly does not become unlawful by reason of its lawful acts exciting others to do unlawful acts. [P 47 C 1]

A. Razak—for Applicant.

G. P. Dick—for the Crown.

Order.—This order will govern the disposal of the Criminal Revisions Nos. 47-B to 63-B of 1928 also.

The counsel for the Muhammadan applicants says that they were improperly prosecuted as aggressors and rioters. The argument is that the Hindus had assembled at the Padamtirth to take out kamdees of the tajias immersed there, and thereby wounded the religious feelings of the Muhammadans, and that they themselves were prompted to go there by their desire to retaliate what they call, was a provocating action of the Hindus. On the other hand, it is contended on behalf of the prosecution that the Hindus had gone to the Padamtirth for the performance of their usual evening ablutions, sandhia and prayers at the bank of the sacred tirth, that this act of assembling on the banks of the tirth for the performance of such religious duties on the part of a small orthodox section out of the large Hindu populace of the town was not unusual and afforded no proof of an intention to commit riot ; that amongst the people so assembled were persons such as, school masters, patwaris and others who were on their way home from Court, office or their usual places of business, and that their stoppage at the tank must be to enjoy rest on the way after the day's toil and labour, and not to further any premedtiated common object of taking out the kamdees of tajias from the tank, as insinuated by the Muhammadans, much less to get themselves involved in a fight. The prosecution, therefore, suggests that from the mere presence of a large crowd of Hindus at the tirth no inference, that they assembled in a mood to take out the kamdees from the tank and thus give further cause for provocation to the Muhammadans, could be drawn

The trying Magistrate, as also the Sessions Judge, have rejected the version given by accused 1, Muhammad Ibrahim, in his examination as an accused, to the effect that the Hindus were seen by him engaged in taking out the kamdees from the tank ; that as he protested against it, he was assaulted by some of the Hindus, and on one Muhammad Yasin Butcher coming to his rescue the Hindus assaulted him as well, and that when he called out for help, a band of Muhammadans appeared on the scene for rescuing him and Yasin, and beat the Hindus. The question, therefore, is whether this was a fact and if so whether the decision of the Courts below is based on legally admissible evidence on record. The trying Magistrate's reasoning regarding this matter is that, had this been a fact, and had the Muhammadans including Muhammad Ibrahim been simply attracted to the scene of occurrence by the sight of the kamdees taken out or in the process of being taken out by the Hindus from the tank, that fact was bound to find a prominent mention in Ibrahim's first information report dated 5th August 1927, (Ex. D-12) made to the police thana regarding the injuries received by him there. The correctness of this line of reasoning is not open to doubt unless Ex. D-12 itself is inadmissible in evidence and has no evidentiary value. Since it is a fact that it was omitted from Ex. D-12, a doubt naturally arose in the mind of the trying Magistrate as to why such an important circumstance, if it was a fact, came to be omitted. The omission obviously led him to doubt the veracity of those witnesses for the defence who deposed that the Hindus were seen taking out the kamdees. Naturally such evidence would be suspected as an improvement and afterthought and rejected as being inconsistent with the probabilities, as ordinarily an informant would not omit such an important event which attracted him to the spot, from his report. As it appears that, this omission from the first information report of a material circumstance, was the principal reason which led the trying Magistrate to disbelieve the oral evidence adduced in support of the defence, and to treat the defence based on it as untrue, the applicants have naturally focussed their attack in this revision on the legal objection that Ex. D-12 was wrongly admitted into evidence. The relevance and evidentiary value of the said first information report (Ex. D-12) must, therefore, be examined before dealing with the merits of the case.

It is said on behalf of the applicants that, as Ex. D-12, was a statement to police, it was not admissible under S. 162, Criminal P. C. But a first information report is information received under S. 154, Criminal P. C. It is not infor-

mation received after the commencement of investigation so as to come under Ss. 161, 162, Criminal P. C. It is information given on the initiative of an informant, on which, an investigation is commenced, and which, though not substantive evidence, is yet of acknowledged value, because, it shows materials on which the investigation commenced, and the manner in which the occurrence was related when the case was first started. It may be used to corroborate or contradict the author of it, as held in *Autar Singh* v *Emperor* (1). This Court's Criminal Circular 1-7 also clearly lays down that this

"information is the basis of the case, and whether it be true or false it, at any rate, usually represents what was intended by the informant to be the case set up by him at the time. In view of the notorious tendency in this country to improve upon the original statement of facts to strengthen the case as it proceeds, and sometimes to add to the persons originally named as offenders, it is of great importance to show what was said in the first instance."

The Circular lays down the necessity of taking down word for word the information in every cognizable case, and the substance only with sufficient detail in the case of a non-cognizable offence. The words of S. 154, Criminal P. C, are also clear :

" Every information relating to the commission of a cognizable offence, if given orally . . . . shall be reduced to writing . . . and be read over to the informant ; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it . . . ."

In *Azimaddy* v. *Emperor* (2) it was held that a first information under S. 154 of the Code is not a statement within S. 162 The objection based on S. 162, Criminal P. C, therefore, fails

In this case the document having been produced by the accused in support of their own defence, there was no need for the prosecution to formally prove it as against the party producing it. The offence in respect of which the information was laid by Muhammad Ibrahim was a cognizable offence, and, therefore, I am entitled to hold that the requirements of law and of the Criminal Circular had presumably been duly complied with The original of Ex. D-12, which is a certified copy of the first information report, purports to be signed by the informant. There is, therefore, no room for the argument that it did not reproduce word for word the information given by the informant Muhammad Ibrahim, or that the omission about the kamdees was due to the neglect of the police officer to record it. I, therefore, hold that the document was legally admissible against the accused and was rightly used against them.

The trying Magistrate was thus perfectly justified in using the first information report for discrediting the present story or the author of it, and in drawing adverse inference against the accused from the absence therefrom of this most important piece of information that the informant had seen the Hindus actually engaged in taking out of the kamdees at the Padamtirth. It, therefore, seems quite natural that the further story of the accused to the effect that Muhammad Yasin came to Muhammad Ibrahim's rescue, that the other Muhammadans subsequently came to Muhammad Yasin's rescue, and that everyone was there in right of self-defence, should also appear to the Magistrate, under the circumstances of the case, as an improvement or invention designedly put forward to escape from the punishment which the law provides for rioters The applicants' legal objection, therefore, fails.

Referring to the pre-riot history, the learned counsel argued on behalf of the applicants that they were not in fact, nor were they likely to be, the aggressors, but that it was the Hindus alone who were the aggressors and were the really provocative people, from the very beginning, that the Muhammadans, however, all along maintained an attitude of non-violence, and acted as law-abiding citizens, especially as they always succeeded in obtaining the support and help of the executive authorities to secure to them the due exercise of their privileges, although sometimes late ; that the Hindus very often met with a defeat at the hands of the authorities, as, almost every effort which they made to assert their rights in a manner causing annoyance to the Muhammadans was foiled and caused them much disappointment and anguish. The learned counsel wanted to suggest by adopting this line of argument, that the Muhammadans must have been dragged to the several scenes of occurrence more in self-defence than as assailants or per-

(1) [1913] 17 C. W. N. 1213=21 I. C. 882=14 Cr. L. J. 642.
(2) A.I.R. 1927 Cal. 17=54 Cal. 287.

sons taking the initiative in the riots, and that they would not, looking to their past attitude, resort to force or violence on 4th August, for the first time, because, although the religious susceptibilities of the Muhammadans were being violently injured by the offence and obstructive attitude of Hindus, they had admirably kept themselves under control in the past, and sought the help of the authorities in critical times, and observed great self-restraint and avoided, as far as possible, fracas with the provocative Hindu population of Basim, which, as they say, was practically up in arms against them. It is, therefore, strenuously urged that the Sessions Judge erred in law in holding that the Muhammadans were the first to start the rioting by causing or inflicting injuries to some of the Hindus at the Farsi; that even if they did so, they were perfectly within their right of private defence of person and property, in order to prevent any trespass on the graveyard of Bannusha the inam certificate-holder, and that at no moment did they exceed its proper limits.

On the other hand, it is argued on behalf of the Crown that the incidents which had occurred at the Farsi sounded the bugle for riot In this connexion it is necessary to know what the learned trying Magistrate found on the point I may usefully quote a relevant passage from the trying Magistrate's unparagraphed judgment·

"It was certainly a very childish and unreasonable thing for Ibrahim to have stopped the Hindus from using the footpath especially as there was water over the Farsi and as the Hindus had often used the path and had gone to the tank by that very path. Under normal peaceful conditions even, one would expect these older men (meaning Panwelkar and other Hindu passers-by) would have just told Ibrahim not to be such an ass as to object and then to have used the path without paying any further attention to Ibrahim." * * "The Hindus now come across Ibrahim, the nephew of Bannusha who is the inam certificate-holder. Here was a chance of paying back the debt over the graveyard dispute. I am inclined to believe that they actually beat him. At any rate Ibrahim now raised an outcry and Mussalmans from the direction of the 'Bhatti' came rushing up to the rescue of Ibrahim, and attacked the Hindus at the 'Farsi' and so the riot began."

The following extracts from paras. 17 and 18 of the judgment of the Sessions Judge make the position still clearer:

"* * It is clear that the first beating seen by the Mahomedans at the Bhatti was that at the Farsi, and the prosecution story about the altercation over the crossing and the thorn-obstruction there must, I imagine, have a basis in truth. * * It seems clear that the quarrel started at the Farsi itself, and that it was due to the obstruction of the thorn-fencing. I believe that Ibrahim had put the fencing there and was sitting near it, and that the Hindus got annoyed with him and threatened to beat him, or may have actually started to do so when Ibrahim called for assistance. I do not think that Ibrahim would have dared to start the beating when he was so outnumbered by the Hindus including truculent persons like Panwelkar. * *"

"* * After all, a quarrel usually starts through some incident, however trifling, and the mere fact that Yasin was passing and was recognized by the Hindus would probably not lead them to attack him entirely unprovoked. On the other hand, the little matter of the obstruction at the Farsi was quite sufficient to lead to an attack. I have no reason to doubt that Yasin came up by that road. But I think that he arrived just after the beating started, and was rushing up to help the other Mahomedans when he was intercepted and beaten by the rear guard of the Hindus at the tank * * Being outnumbered he would quickly be disposed of, and the tide of battle having passed on, he might have made his escape * * and may * * have swooned or been again beaten and finally collapsed. That being the most probable sequence of circumstances, it is clear and in fact admitted that no right of defence existed after the first few minutes, and both sides who continued fighting afterwards were guilty of rioting."

But it is argued that, by itself, the placing of the thorn-obstruction does not lead to the inference that Ibrahim was sitting there in furtherance of any common unlawful object, as he had a right to be there; and that, his cry for help, when beaten or threatened to be beaten, was sure to attract others who had assembled at the Bhatti in the neighbourhood, more, for his rescue than, for taking revenge on the Hindus; and that, unless and until it were shown by the prosecution that the assemblage was animated by the same common purpose with the intention of furthering it, and that the said purpose was unlawful, the assembly could not be termed unlawful. Law discourages a combination of men for a common purpose if such combination is conducive to rioting and disorder. Certainly, as observed in *Queen-Empress* v. *Peelimuthu Tevan* (3) it is for the prosecution to show that the common object of a crowd was such as would constitute it an unlawful assembly as defined by S. 141, I. P. C. In that case, nothing more of the assemblage was known than that they were

(3) [1901] 24 Mad. 124=1 Weir 53.

in a large crowd and were armed with bill-hooks and sticks and that they dispersed at once on seeing the police, it was held that though these facts, in the absence of any proof of common intention, raised a strong suspicion that the men had not assembled with any harmless or innocent intention, they did not afford proof that the intention of the members of the crowd was to use criminal force or to commit criminal offence. In that case, no evidence was given as to the disturbed condition of the district and especially as to the relations existing between Shanars and the Maravars in the neighbourhood, and the action taken by the Maravars about the same time. Benson, J., therefore observed :

"Had such evidence been given it might . . . have been sufficient to lead to an inference as to the unlawful character of the assembly, though it would not necessarily do so, for it might be that the crowd had come together for a lawful purpose such as to discuss the situation or to petition the authorities, and had armed themselves with sticks and bill-hooks for protection against anticipated violence from the Shanars. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances."

It is true that an assembly does not become unlawful by reason of its lawful acts exciting others to do unlawful acts: *Beatty* v *Gillbanks* (4) Even an assembly lawful in its inception may become unlawful by its acts: cf *Queen* v. *Khemee Singh* (5). In *Queen-Empress* v. *Prag Dutt* (6), it was observed:

" When a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men, who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other."

In such a case the claim of right becomes reduced to a mere pretext for fighting. The assembly is unlawful not because the claim of right is immaterial but because it was not the real object of the fight.

In view of the facts held by the Courts below to be proved against the applicants in this case, it could most appropriately be inferred that, as both the communities were in a state of extreme tension, from before and also at about the time when the riot took place, such of the Muhammadans as were in a mood to fight must have been actuated by a desire to bring the matter to a head and must have manœuvred to bring about the crisis by putting up the kati or thorn-fencing on the footpath and thus stopped the usual passage, and posted Ibrahim the nephew of the inam certificate-holder at the crossing to protest against its use. As remarked by the Sessions Judge this slight incident was sufficient to start the attack. It appears to me that it could very well have been anticipated that the Hindus who were accustomed to use the footpath as found by the Magistrate would not brook this opposition, and the boy though armed with lathi would be overpowered by the Hindu passers-by ; and that this incident would well serve as an occasion for those assembled at the Bhatti to rush to Ibrahim's rescue at the Farsi and to commence the fight. Under these circumstances, I am not surprised to find that the Muhammadans whom the learned counsel for the applicants has given the compliment of possessing the capacity to be more easily provoked to action than their Hindu neighbours proved themselves so true to that high compliment as to begin the riot by using force against their opponents at the Farsi

It is needless to mention that the present case is easily distinguishable from the cases quoted above on the short ground that evidence answering the test laid down in *Queen-Empress* v *Peelu muthu Tevan* (3) is quite abundant on the record of this case, and the acts and utterances of the applicants as also the surrounding circumstances satisfy the requirements of the other legal tests laid down in the other cases, and prove beyond doubt that the applicants one and all shared the common intention to beat the Hindus I must remark that the conduct of Ibrahim and of those who rushed to the Farsi in response to his cry judged by their subsequent acts of violence, both at the spot and in the other parts of the town to which the riot extended, could not but lead to the only inference that, the posting of Ibrahim at the Farsi to guard the thorn-fencing obstruction put up there, as also the assemblage of the Muhammadans at the Bhatti and their rushing to the Farsi,

(4) [1884] 9 Q. B. D. 308 = 51 L. J. M. C. 117 = 46 J. P. 789 = 15 Cox. C. C. 138 = 47 L. T. 194 = 31 W. R. 275.
(5) 1 W. R. Cr. 19.
(6) [1893] 20 All. 459 = (1893) A. W. N. 117.

was pre-arranged with the one common unlawful purpose of taking revenge on the Hindus. The Sessions Judge's finding that the prosecution evidence leaves no possible doubt as to the presence and participation of the applicants before him, in the riot fully supports this remark

The question of the right of Bannusha or his nephew to put up the thorn-fencing obstruction at the Farsi thus becomes material only in connexion with the further question whether the acts of the accused persons were justified by a right of a private defence of person or property. In the absence of any authoritative adjudication of the civil Court, I assume for the sake of argument that the trying Magistrate's finding, that the act of Muhammad Ibrahim was childish and unreasonable, is correct, and I, therefore, conclude that it was an unjustifiable and sham excuse for fight, and that the Hindus being in a sullen mood as found by the Sessions Judge had cause to be further offended at the unlawful obstruction to the lawful exercise of their usual right of way over the Farsi As soon as some Hindus attempted to cross the Farsi and remove the thorn-fencing, Ibrahim, in his turn, tried to prevent them from doing so by use of force, as it appears Ibrahim was then armed with a lathi. The turn which the events actually took, fully justifies the conclusion that the putting up of the thorn-fencing was a sham excuse to provoke the fight; and the several acts of violence on the part of the applicants point to the common intention on their part to take revenge on the Hindus who crossed the Farsi as well as those whom they may meet thereafter in the other parts of the town to which the riot rapidly extended. Under these circumstances the object of the assembly was from the very outset unlawful and everyone of the applicants was clearly a member of an unlawful assembly, and consequently in their case no question of self-defence could have arisen.

From the way in which the arguments were addressed before him the Sessions Judge seems to have concluded that the counsel made no attempt to dispute that the applicants 2, 4 to 6, 8 to 15, 17 and 18 were guilty. He had, therefore, no reason to consider the case of each of those persons individually. The only attempt made before him in the interest of individual applicants, was as regards the applicants 1, 3, 7 and 16. The learned Sessions Judge after dealing with the case of each of these four persons came to the conclusion that applicants 1 and 3 besides being guilty of rioting had committed the offence of causing grievous hurt to certain Hindu gentlemen; that applicant 7 was one of those who was fighting and guilty of riot; and that No. 16 was moving into the riot instead of away from it and in fact encouraged the Muhammadan rioters. In view of this clear decision it was useless to argue that the applicants were not guilty, or that they were acting in the exercise of their right of private defence of person and property. The convictions of all the eighteen applicants for rioting under S. 147 and of such of them as committed other offences with which they were charged under S. 325/149, I. P. C., must, therefore, be upheld.

The Magistrate awarded sentences of imprisonment for varying periods to individual accused persons, and the Sessions Judge, in his turn, has remarked that

"they are not really heavy, and in view of the serious nature of the riot they cannot be further reduced."

I am, however, asked to reduce the sentences, firstly, because the offence happened to be committed in the heat of communal tension and not deliberately; and secondly, because the pre-riot history itself showed that the existence of civil disputes between the two communities of Basim regarding the exercise of their respective civil rights or rights to property was the root of all the future evil which befell them on 4th August 1927. The sentences are, therefore, said to have gone beyond the legitimate needs of the occasion, and it is submitted they require to be considerably moderated, due weight being given to the circumstance that the civil disputes form the back ground of these riots, and that the two communities must long since have been pacified and possibly reconciled as between themselves. Lastly, it is submitted that this Court may, in view of the provisions of sub-S. (2), S. 562, Criminal P. C, give them the benefit of being released on probation, as contemplated by sub-S. (1) of the said section, on the ground that they are first offenders.

I have anxiously considered the question of sentences of imprisonment and fine imposed on the accused-applicants, in the light of the argument addressed at the

Bar I feel myself constrained to observe that although the Courts below have in order to bring the guilt home to the applicants given full consideration to the facts brought out in the pre-riot history, which form the back ground of the riot, they have failed to give full weight to the same facts, while measuring out punishment to the culprits. It will be seen that the principal points of dispute between the two contending parties were: (1) the right of the Hindus to carry their procession attended with music along the public streets running in front or by the side of the mosques ; (2) the right of the Muhammadans to immerse their tajias in the Padamtirth tank, and that too, from all, or, some of its sides, without interference to its lawful use by the Hindus ; (3) the fixing of the right boundary line between the limits of the Padamtirth tank and its catchment area, and, of the graveyard of Bannusha Fakir, the inam certificate-holder thereof ; and (4) the right of the Muhammadans claiming to be related to Bannusha's family to bury their dead within the limits of the said graveyard so as to cause no nuisance to the Hindus visiting or using the Padamtirth tank for the performance of their religious rights and observances.

These disputes have given trouble in the past few years and disturbed the amity which is said to have once existed between the two communities residing at Basim But looking to their nature, anyone can say, (and there can be no two opinions on this point), that they are all matters purely of civil nature fit to be setted by an amicable settlement outside Court, if the contending parties were so minded, or to be more effectively and satisfactorily decided by an adjudication of a civil Court, should they, or any of them, be advised to take such a step. A mere resort to petitions to the Executive or Revenue Authorities, or, for the matter of that, to the Magisterial Courts, with a view to bring their pressure to bear upon one party or the other, for occasional wrongs which may be caused by one community or its individual members, to the other community or its individual members, in the heat of its or their momentary enthusiasm to support a cause believed to be good and beneficial in the interests of the public or section of the public to which it or they belong, can never bring about a satisfactory solution of such disputes, although it may serve only as a temporary make shift.

I dare say, had good sense prevailed, and any of these contending communities been rightly advised in time to resort to civil Court, these matters would have been settled by a decree of the civil Court long ago, and the incidents of 4th August 1927, would not have found place in the annals of Basim. The riot which took place, is only a manifestation of a sudden outburst of a momentary passion or desire to seek redress for wrongs, by taking the law into one's own hand, when the feelings of animosity rankling in the hearts of the contending persons or communities actually get the better of their reason, for the time being Their reason becomes so far eclipsed that individual persons are led to magnify, owing to communal tension, every slight thing done by the members of the opposing party into an unpardonable wrong committed against themselves or their community as a whole, although, in calmer moments, they could realize that it has really nothing in them to object to. The intensity of such feelings of animosity or of communal tension must, very often, be only momentary, and I may not be far from correct if I were to presume, that the ill-feeling which once characterized the Muhammadans of Basim must have by the lapse of time become almost non-existent, or at any rate very much subsided, and the desire to take revenge considerably subdued and brought under the control of reason by now The normal mental condition of the citizens of Basim may now have in all probability been completely restored so as to make them law abiding and fully alive to the dire consequences which may follow, if they were to commit offences against public tranquillity once again. The very fact that all the present applicants had to procure their own temporary release by furnishing heavy bails during the trial of their case in all its stages, to enjoy their freedom of life as ordinary citizens, must not have failed to produce its educative effect on them. It must have by this time awakened in them their true sense of responsibility as such citizens to maintain peace and order, and made them keenly alive to the great danger of breaking the law which they are expected to respect if they want to avoid incurring the heavy penalties and expenditure, and,

suffering the inconvenience, anxiety and loss of peace of mind, which they must surely have incurred or suffered in connexion with this prosecution. With this experience, I trust they are bound to reform themselves and also to refrain from thereafter engaging themselves in communal fights Looking then, at the case of the applicants, from the perpective of the back ground of civil disputes the offences of of riot and also of causing grievous hurt incidentally during its progress to individuals in particular, though serious, were technical and I think deserve lighter treatment than what has been meted out, in the circumstances of the case.

Taking into consideration the above extenuating circumstances, and also the fact that most of the persons involved are friends and relations of Bannusha the owner of the graveyard over which the first fight took place, and that amongst them there are both adult or grown-up men as also boys of immature age and understanding against none of whom were any previous convictions proved at the trial, and who may be, therefore, safely treated as not being previous convicts, I think that this is pre-eminently a fit case in which I should deem it expedient that the offenders should be released on probation of good conduct

In the exercise of my powers under S 562 (2) of the Code, I accordingly direct: (1) That each of the 18 applicants excepting applicants Nos 3, 12, 13 and 16 shall be released on his entering into a bond for Rs 500 with two sureties, each of the like amount, to appear and receive sentence when called upon during the period of 1½ years from this day, and in the meantime to keep the peace and be of good behaviour, as required by S 562 (1) of the said Code; (2) that each of the applicants Nos 3, 12 and 13 shall be similarly released on his giving a similar bond for Rs 700 with two sureties, each of the like amount, to appear and receive sentence when called upon during the period of two years from this day, and in the meantime to keep the peace and be of good behaviour as required by the aforesaid section; (3) that the applicant No 16 Safdar Ali shall be similarly released on his giving a similar bond for Rs 2,000, with two sureties, each of the like amount, to appear and receive sentence when called upon during the period of 2½ years from this day; and in the meantime to keep peace and be of good behaviour as required by the aforesaid section; (4) that as instead of sentencing the applicants at once to any punishment, I have directed their release on probation of good conduct, the fine, if any, realized in the meantime from the applicant No. 16 shall be refunded to him

As the applicants were already released on bail, I direct each of them to appear before the District Magistrate, Akola, on 6th July 1928, to hear the order, and to enter into the bond and furnish the sureties ordered of him, to the satisfaction of the said officer, within such time as he may, by order, fix

M N/R.K *Order accordingly.*

** A. I. R. 1929 Nagpur 50
Full Bench

FINDLAY, J. C. PRIDEAUX AND KINKHEDE, A J. Cs

Commissioner of Income-tax, Nagpur —Applicant

v.

S. M. Chitnavis—Non-Applicant.

Misc Jull Ref No 33 of 1927, Decided on 13th December 1928

**** (a) Income-tax Act (1922), Ss. 24 and 10—Assessee has unqualified right to write off debt as bad debt both as regards the year and the amount.**

Bad debts are deductible from business profits at the option of the assessee, the deduction need not be of only such as are proved to the satisfaction of the income-tax authorities to be bad debts. The assessee's right to debit the loss sustained on account of bad debts written off by him, against the profits or gains of any year, is unqualified and absolute as regards the amount to be debited and the choice of time at which to write it off: *A. I. R.* 1922 *All.* 402 and *A. I. R.* 1924 *All.* 551 (*F.B.*), *Cons.* [P 54 C 1 & 2]

**** (b) Income-tax Act (1922), Ss. 6, 4 and 13—Interest unrealized, but credited in accounts is not income accruing, or received for income-tax purposes—Test is whether it is available to assessee at his pleasure.**

It is not just and equitable to treat the unrealized interest, although formally credited to the kasar khata, as income, profits or gains derived accruing or arising or received, for purposes of the Income-tax Act. The test to be applied is whether any profits in the shape of interest have become due to the creditor (assessee) in such a manner as to be immediately available to him in the account year so as to be capable of being received by him at his choice and pleasure. If the interest money has become due to the assessee in the

manner and in the sense that it was so completely under his control that, he by an act of his will, could receive it in cash without greater trouble than is involved in cashing a cheque, then only it could be called "income" such as would be liable to payment of tax, otherwise not : *A. I. R.* 1926 *Nag.* 180 ; *Gresham Life Assurance Society* v. *Bishop* (1920) *A. C.* 287 ; *St. Lucia Usines and Estates Co.* v. *St. Lucia* (1924) *A. C.* 508, *Cons* ; *Sadasiva Ayyar, J., in. A. I. R.* 1921 *Mad.* 427 (*S. B*), *Foll., A. I. R.* 1927 *Lah.* 512 ; *J. P. Hall & Co. Ltd.*, v. *Commissioners of Inland Revenue* (1921) 3 *K. B.* 152 , *Gresham Life Assurance Society* v. *Styles* 3 *T. C.* 185 *Rel. on; A. I. R.* 1928 *Nag* 241, *Appr.* [P 56 C 1, 2]

D. N Choudhri—for Applicant

V. Bose, *M. R Bobde* and *A V. Zingerde*—for Non-Applicant

Order of Reference (*Findlay, J. C.*, and *Prideaux, A J. C.*)— We have heard arguments in this reference. In our opinion the question of whether sums entered as credits on account of interest and re-entered as debits in the assessee's account books, sums not actually received or proffered to the assessee, should be treated as income, profits or gains and should be taken into account in computing income for the year to which the entries relate, is of such importance that it is desirable that this reference should be heard by a Full Bench. The decision in Reference No 27 of 1927 by Hallifax and Mohiuddin, A J Cs , *A. I R.* 1928 *Nag.* 241, is one which, in our opinion, may possibly require reconsideration The question of when a debt becomes a bad debt, which arises in this reference, is also of importance Both questions are likely to arise frequently We, therefore, recommend that a Full Bench should hear this reference as a whole.

Opinion

Kinkhede, A J. C—This is a reference under S. 66 (2), Income-tax Act (11 of 1922). The following two points have been referred to this Court for decision by the Comissioner of Income-tax :

(1) Has not the assessee got the option of declaring debts bad when he finds after sufficient waiting that from the circumstances of the debtors he is unable to recover them ? Can the Income-tax authority deprive the assessee of this option ? Should not the Income-tax Officer and the Assistant Commissioner have allowed Rs. 7,481-13-9 to the assessee on the same consideration on which the remaining amount out of Rs. 17,982 claimed by him was allowed ?

(2) Could the Income-tax Officer and the Assistant Commissioner treat Rs. 16,031-4-6 on account of unrealized interest and merely credited in the books to equalize the sides of the khata of the debtors, as "income" coming into the hands of this assessee for the purposes of Ss. 4 and 6, Income-tax Act, and under ruling reported in *Pandurang* v. *Commissioner of Income-tax* (1) especially when the major portion of the amount is made recoverable under the terms of the bonds in several future years ? Cannot the recoveries of this interest be taxed in future and not treated as income in the year under assessment ?

The Commissioner of Income-tax has in stating the case, answered the first question in the negative and the second in the affirmative

The reference was originally heard by a Bench of two Judges of this Court on 10th April 1928, but as the questions raised were considered to be of such importance as to necessitate a decision by a Full Bench, the reference as a whole was set down for hearing by a Full Bench duly constituted The points for decision concisely stated in the order of reference to the Full Bench are :

(1) When does a debt become a bad debt ?

(2) Whether sums entered as credits on account of interest and re-entered as debits in the assessee's account books, sums not actually received or proffered to the assessee should be treated as income, profits or gains and should be taken into account in computing income for the year to which the entries relate ?

A few facts which occasioned this reference under S 66 (2), Income-tax Act, may be stated here The assessee submitted a return showing Rs. 74,668 as his total taxable income for the previous year for purposes of assessment of income-tax for the ensuing year 1926-27. The Income-tax Officer after looking into the accounts assesssed him on an income of Rs 1,16,480, but in the appeal the Assistant Commissioner of Income-tax, Nagpur, reduced the assessable income to Rs 1,13,012. This included Rs. 86,307-11-0 under the head of business profits taxable under S 10 of the Act The assessee complains that in fixing the business profits at this amount the item of Rs. 7,481-13-9 out of a sum of Rs 17,982 debited on account of bad debts was wrongly disallowed, and, the sum of Rs. 16,031-4-6 which represented unrealized interest, was wrongly treated as 'income' in the accouut year.

It will be seen from the Assistant Commissioner's order, dated 25th April 1927, that in all Rs. 17,982 were claimed to be debited or written off as bad debts

(1) A. I. R. 1926 Nag. 180=21 N. L. R. 175.

against the income of the account year Lists were called for showing details of dates when these amounts had become due, with a view to ascertain when they were really found to be bad On examination of the lists it was found that Rs 7,481-13-9 were on account of old bad debts which had become time-barred long before the account year The Assistant Commissioner overruled the contention of the assessee that it should be left to him to declare when particular debts became bad debts; and that the Income-tax Department should not go on a presumption that the amount had become time barred in previous years. According to him the right criterion to know is to see whether and when the assessee's all legal remedies to recover it failed.

As to the other item of Rs. 16,031-4-6, the Assistant Commissioner has observed that this amount of interest is shown in the profit and loss account, i. e, kasar khata as interest receipts although no actual recovery was made; and that, as the assessee's books are on the book profit system and not on cash basis, the assessment has to be made on interest accrued and due, and, it has nothing to do with what the assessee actually recovered He opines that there can be no unfairness in this kind of assessment, because when bad debts are claimed interest is already included in them.

In stating the case the Commissioner has pointed out that this sum of Rs 16,031-4-6 represented the interest which was debited to the accounts of seven debtors whose bonds had been renewed during the year with corresponding credit to the kasar khata These bonds are said to provide that the debts were payable by instalments in several future years

Taking the point of bad debts first, I may refer to page 98, Part 3, Vol. 1, Income-tax Manual, Edn 2, where in sub-para. (3), para. 35, notes and instructions regarding the method of accounting for purposes of assessing income, profits and gains under Ss. 10 to 13 are set forth. It is pointed out there that

"under the mercantile accountancy system . . . an entry is made on the receipt side when a sale is concluded, although the money on account of such a sale has not been paid and in making up the accounts at the end of the year such entries are treated as receipts, and the tax is levied on these 'book profits'. It may happen that some of these 'book profits' cannot be recovered; they are written off as 'bad debts'" when found to be irrecoverable; and since such 'book profits' have been included in the income assessed to income-tax the 'bad debts' must be written off against the 'book profits' *in the year in which they are written off in the accounts as irrecoverable*. Where the cash system is adopted, there can be no 'bad debts'."

I have underlined (italicized) the important words.

On the statement of the Assistant Commissioner and the Commissioner that the assessee maintains his books on mercantile system of accountancy, the assessment of the business profits under S. 10, Income-tax Act, made by the Assistant Commissioner on Rs 86,307-11-0 must be on what are treated as 'book profits' of the account year It is, therefore, argued by the assessee's counsel that if the tax is to be levied on 'book profits' he is entitled to write off against them, such book profits to the extent of Rs. 7,481-13-9 as have been found, or adjudged by him, to be bad debts, and, as such, irrecoverable in the account year Even according to the aforesaid instructions where

"'book profits' have been included in the income assessed to income-tax, the 'bad debts' must be written off against the 'book profits' in the year in which they are written off in the accounts as irrecoverable."

I think that this line of reasoning based upon the instructions themselves ought to be assumed as correct. It entitles the assessee to urge that in deducing the taxable income in the shape of book profits of the account year the whole of the amount of bad debts written off by him in his account as irrecoverable in the account year must be deducted. The receipt side of the account represents the aggregate of receipts not merely on account of the year's new business but also those on account of the accumulated balances of business carried over from past years' accounts and, therefore, the debits against it must necessarily comprise the balance of outstandings actually carried over to the next year's books of accounts, and also the aggregate of such balances of the past years' businesses as have either turned out to be bad or irrecoverable in that year, or, were considered by the creditor, for several reasons, to be unfit to be carried over any further

It is common knowledge that no creditor, ordinarily, likes to write off a debt and, thereby create evidence, in his account books, of its having been treated by him as a bad and irrecoverable debt, un-

less he has lost all hope of its recovery, whether he has lost his limitation for a suit in respect of it or not Amongst Hindu debtors a notion prevails that it is a sin to die indebted to others, and several instances of debtors executing bonds, and pro-notes, and even alienating joint properties for the satisfaction of even time-barred debts are often noticeable in Courts A creditor, therefore, naturally hesitates voluntarily to enter as given up a debt, which by change of circumstances, his debtor or even his legal representative may arrange, or, be expected, to pay even after the expiry of limitation An entry in the creditor's account-books writing off a debt as a bad debt in any particular year is under such circumstances likely to be interpreted by the debtor as prima facie good evidence of conduct on the part of the creditor wherefrom an abandonment of his right to demand it might reasonably be inferred so as to serve as a good answer to any future demand, on the occasion of any adjustment or fresh loan. Such an entry is, in my opinion, a conscious act on the creditor's part whereby he determines his election, once and for ever, to treat the debt referred to therein as bad or irrecoverable It, therefore, stands to reason that the creditor must have full discretion in the matter; because, it is he, and not the Income-tax Officer who knows or must be deemed to know, the circumstances and risks as well as chances of recovery from his debtor. The Income-tax Officer cannot, therefore, legally insist that the assessee must subordinate his own will or discretion and even his decision in the matter to his decision. The creditor, merely because he happens to be an assessee liable to pay income-tax to the Crown, cannot be asked completely to surrender his own judgment and allow it to be overridden by that of the Income-tax Officer.

In the absence of any legislation to that effect an Income-tax Officer cannot, in my opinion, dictate to the assessee that he must write off a certain amount due to him after the lapse of the prescribed period of limitation Nor can he lay down that in a given set of circumstances the assessee will show the amount as outstanding, at his own risk, since it will no longer give him any right to set it off as a bad debt against his profits. The Hindu law does not recognize any rule as to the extinction of claims by efflux of time: *Ram Kishan Rai* v. *Chhedi Rai* (2). The older the debt the greater the responsibillty of the descendants of the man who leaves the debt unpaid. Vrihaspati accordingly lays down :

" The father's debt must be first paid, and next the debt contracted by the man himself, but the debt of the paternal grandfather must even be paid before either of these . Kanhaiya Lal, J., in the Full Bench case of *Gajadhar* v. *Jagannath* (3) observed at pp. 782-83 (*of* 46 *All.*), "

that

" The Hindu law did not recognize any rule of limitation for the recovery of debts . . . . A debt may become irrecoverable under the law now in force by reason of the lapse of the period of limitation, but the debt exists all the same, and if a person chooses to pay a time-barred debt in the manner permitted by S. 25, Contract Act, the debt which he chooses to pay remains the same debt, though by reason of the contract which he enters into, it assumes a new garb and gains a fresh vitality. "

Mere loss of limitation for a suit cannot, therefore, be regarded as a criterion of universal application in the matter of writing-off debt.

Sometimes it may happen that when a loan is taken by a debtor he may be quite solvent and the creditor may entertain no doubt as to his ability to pay In the next year of the advance, and, perhaps, several years before the due date, he may become involved in a financial crisis, for which he is not responsible, as a result of the bank or firm, with which he may have been crediting his surplus money, failing. There may thus be no prospect in that year, or in the near future, of any recovery from such a debtor. If as argued on behalf of the Crown, this creditor were to make it his practice to debit as bad or irrecoverable debt, every loan or its balance on the expiry of three years from its due date, and not earlier, how and when is he to debit the amount of the debt to the kasar khata, although he is quite satisfied as to the debtor's inability to liquidate it Is he to wait until the whole debt falls due, and also for a period of three years thereafter, to become entitled to debit the said debt as a bad debt for purposes of income-tax ? Or, should he debit it in the year in which the debtor's liability to pay becomes clear to his mind ? The Income-tax Department might in the latter case come down on him for having departed from his system of book-keeping and may therefore disallow that debit. It is no use

(2) A.I.R. 1922 All. 402=44 All. 628.
(3) A.I.R. 1924 All. 551=46 All. 775 (F.B.).

multiplying instances to expose the absurdity of the contention Several anomalous results will follow, if the assessee's discretion or election in the matter of the choice of the proper time to write off a debt advanced by him as a bad or irrecoverable debt were allowed to be overridden by the taxing officer's decision in this way.

The assessee must for obvious reasons be the sole arbiter of his own rights and privileges as regards the business he conducts in his own interest What is to his interest, and what is prejudicial to him, must depend upon his own decision. It, therefore, follows that, on the question whether to treat any particular debt as bad or irrecoverable, his word or decision must be final for he alone is or can be the judge of the risks, chances and circumstances which may affect the recovery or non-recovery of that debt from his debtor

There is nothing in the wording of S 24, Income-tax Act of 1922 which militates against this view. That section does not authorise the Income-tax Officer to investigate and determine the year in which any loss sustained is to be deducted from profits All that it enacts is that the loss sustained in any year under any of the heads mentioned in taxing sections shall be set off against his income, profits or gains under any other head in that year, so that loss under one head of income can be charged against profits under another in the same year A reference to Lord Halsbury's Laws of England, Vol 16, para. 1310, dealing with the subject of income-tax, shows that in England no deduction is allowable

"for any debts except bad debts proved to be such to the satisfaction of the Commissioners."

I do not find such a prohibition either in S 10 or S 24 or anywhere else in the Indian Income-tax Act of 1922 In the absence of words "proved to be such to to the satisfaction of the Commissioner" or words to that effect, in the Indian Statute, I am inclined to take the view that bad debts are deductible from business profits at the opinion of the assessee, the deduction need not be of only such as are proved to the satisfaction of the Income-tax authorities to be bad debts. I do not find any restriction in the Indian Statute as to the year in which the bad debts could be deducted by the assessee. In the absence of words in the statute, restricting the assessee's option, and, prescribing, the time for writing them off, or, the quantum of proof required, as a condition precedent, for doing so, or, imposing the condition that the Income-tax authority should be consulted before writing them off, I think the assessee's right to debit, the loss sustained on account of bad debts written off by him, against the profits or gains of any year, must be held to be unqualified and absolute, as regards the amount to be debited and the choice of time at which to write it off His decision to write bad debts off the account cannot be regarded as conditional upon his proving them to be bad debts to the satisfaction of the Income-tax authorities, as is the case under English Statute

In the absence of any express provision in the Income-tax Act, 1922, either authorising or prohibiting the deduction of bad debts from the profits of a business carried on by an assessee, and in view of the fact that the specific directions in S 10 of the Act are subsidiary to the underlying principle that only profits ascertained according to the mercantile system of accounting, are taxable, there can be no two opinions that bad debts actually written off the account as such by a creditor would form a proper deduction What is usually done is to square up the debtor's personal ledger account by entering a corresponding credit to wipe out, wholly or partially, as the case may be, the debit standing against his name. Thus, once these personal ledgers of the debtors are squared up, or the balance due reduced by the amount written off, the sums written off can no longer be carried over to the next year's books as outstanding assets of the business These aggregate sums written off, must, therefore, necessarily go to reduce the receipts of the business profits in the year in which they are written off and thus reduce the balance of outstandings to be carried over to the next year It, therefore, follows that, unless and until the bad debts are written off the account no right to claim a deduction on their account, even though they may have been ascertained in the past years, accrues to the assessee. If the assessse has failed to sort out in the past the bad debts from the good or doubtful debts

and indiscriminately carried over the whole of the outstandings to the next year's account, it does not stand to reason that he should be compelled for ever, at least for purposes of income-tax assessment, either to treat what are admittedly bad debts of some standing as good debts because of his omission to sort them at such time as the income-tax authorities may think, was the proper time for that purpose, or to take the risk of being called upon to pay tax on business profits by ignoring bad debts altogether. For these reasons I am of opinion that the item of Rs 7,481-13-9 was wrongly disallowed in computing income under the head of "business profits."

I now proceed to consider the second point referred. As pointed out by the Bench of this Court in *Pandurang* v *Commissioner of Income-tax* (1) the word "income" has nowhere been defined in the Income-tax Act of 1922 The learned Judges of the said Bench referred to the Privy Council decision in *St Lucia Usines and Estates Co* v. *St Lucia* (4) and in particular to Lord Wrenbury's following observations as regards the true meaning of the word "income" as used in the taxing statute which was involved in that case, and the provisions whereof are more or less analogous to those of the Indian Statute in this respect:

"The words "income arising or accruing" are not equivalent to the words "debts arising or accruing." To give them that meaning is to ignore the word "income." The words mean 'money arising or accruing by way of income." There must be a coming in to satisfy the word "income." This a sense which is assisted or confirmed by the word "received" in the proviso at the end of S. 4, sub-S. 1. If the taxpayer be the holder of stock of a foreign Government carrying say 5 per cent interest and the Government is that of a defaulting State which does not pay the interest, the taxpayer has neither received nor has there accrued to him any income in respect of that stock. A debt has accrued to him but income has not. It does not follow that income is confined to that which the taxpayer actually receives. Where income-tax is deducted at the source the taxpayer never receives the sum deducted but it accrues to him. It is said, and truly, that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts, does not prepare a mere cash account : but values its book debts and its stock in trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so, but is far from establishing that *income arises or accrues from* (as above instanced) *an investment which fails to pay the interest due.*"

I have underlined (italicized) the words which seem to me to be important for the purposes of this reference.

In the aforesaid case their Lordships of the Privy Council had to interpret the words "accruing or arising" as also the words "derived" or "received" as used in relation of the words "income, profits or gains" in an Income-tax Ordinance. 1910, of St. Lucia where also income-tax was leviable on an assessment made on the basis of a return of the assessee's income for the previous year, as is the case under the Indian Income-tax Act. Their Lordships held that the appellant company had not derived or received any "income" in the account year, as the purchaser from that company had not paid the interest payable in that year on the unpaid part of the purchase price which became due then They thus distinguished "income" from "debt" for the purposes of assessment and held that the word "income" is not equivalent to the word "debt" and unless "money arising or accruing by way of income" actually "comes in," there is no "income" in the strict sense of the term

In *Gresham Life Assurance Society* v. *Bishop* (5) Lord Lindley has observed that a sum of money may be received in more ways than one, e. g , by the transfer of a coin or a negotiable instrument or other document which represents or produces a coin and is treated as such by the business men. Even a settlement of account may be equivalent to a receipt of a sum of money although no money were passed His Lordship further observed that to constitute a receipt of anything there must be a person to receive, and a person from whom he receives, and something which is received by the former from the latter must be a sum of money, and that

"a mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

If the principles underlying the two Privy Council cases quoted above for determining what is "income" were applied to the facts and circumstances of this case, I think that the arrears of rent, which were calculated and went to form the consideration of the several renewed bonds then accepted, having been allowed to remain unpaid and locked up again in

(4) [1921] A. C. 508.

(5) [1920] A. C. 287.

the hands of the debtors for a further period stipulated in each bond, could not be treated as "income derived accruing, arising or received" at the time. To become "income" of that year it had then to "come in," which admittedly it had not A mere entry in the account, therefore, under the kasar khata, with a view to equalize or square up the old debit of the amount outstanding against the debtor and also to make fresh entries in the debtor's personal ledger account only to tally them with the terms of the contracts concluded in the shape of renewed bonds does not and cannot, in my opinion, entitle the debtorto say that the said amount or the interest included therein was paid by him to the creditor on the date the bonds were renewed Since the amount of prospective sawai debited to the debtor's personal ledger account cannot be regarded as an outgoing sum of money advanced to him actually on the date he executed a bond for a consolidated sum a mere credit of that sawai in the kasar khata cannot be treated as "income" under that date. Similarly, arrears of interest included in the consideration of the renewed bonds and debited to the debtor's personal ledger account with a corresponding credit thereof to the kasar khata imports no "outgoing" or "coming in" of any sum of money.

Moreover, the sawai as well as the interest though credited the same day in the kasar khata was admittedly in the future under the terms of the renewed bonds. Consequently, so long as the amount of sawai or interest so included in the consideration does not become overdue to the creditor, he cannot be regarded as having even realized it, as it were, for purposes of income-tax assessment simply because he credits it in the kasar khata If the terms of the contract disentitle the creditor from demanding the interest until after the lapse of a certain period of time, and if when interest becomes due, the creditor may not succeed in realizing it, I think it would not be just and equitable to treat the unrealized interest, although formally credited to the kasar khata, as income, profits or gains derived accruing or arising or received, for purposes of the Income-tax Act.

The mere conclusion of a contract is not always sufficient to yield a business profit. It is the performance of its terms that leads to the accrual of a claim to, or to the receipt of, profits of the business. If on the occasion of taking the renewal bond the creditor expressly agrees to give time to the debtor to pay up the arrears of interest at a future date, he by his own contract precludes himself from demanding or realizing it at once, even within a reasonable time usually necessary to cash a cheque on a banker, In other words, the test to be applied is, whether any profits in the shape of interest had become due to the creditor in such a manner as to be immediately available to him in the account year so as to be capable of being received by him at his choice and pleasure If the interest-money has become due to the assessee in the manner and in the sense that it was so completely under his control that, he by an act of his will, could receive it in cash without greater trouble than is involved in cashing a cheque, then only it could be called "income" such as would be liable to payment of tax, otherwise not; cf. Sadasiva Ayyar, J's. observations in *Secy. to the Board of Revenue Income-tax, Madras* v. *Arunachalam Chettiar* (6). Although this *Madras* case was under the Act of 1918 and the present is a case under S. 13 of the Act of 1922, it does not make any difference in the principle applicable Simply because, while under S, 5 of the Act, 1918, only "income" was made chargeable to income-tax, and under S. 6 of the Act of 1922, not only "income" but "profits" and gains" are made chargeable, the addition of the words 'profits" and "gains" makes no difference as regards the matter now under consideration as I will show in the following paragraphs.

In *Tora Gul Bai* v. *Commissioner of Income-tax* (7), the sale-proceeds of goods sold in England by the Amir of Bukhara through a commission agent were credited to the agent's banking account in London and then transferred to his order at Bombay. There was no definite agreement fixing the rate of commission payable to the agent. The dispute as to the commission was settled in a suit at Peshawar in accordance with a compromise executed at Kabul and the Peshawar Court decreed that two lacs of the sale price was the property of the agent. The agent was assessed to income-tax on that

(6) A. I. R. 1921 Mad. 427=44 Mad. 65 (S.B.).
(7) A. I. R. 1927 Lah. 512=8 Lah. 395.

sum. On the question being referred to the High Court at Lahore as to whether the Peshawar Court's decree resulted in the receipt by the assessee of the two lacs in British India for purposes of S 4 (1), Income-tax Act of 1922, it was held that as the assessee had received the price for the goods in England not as owner but merely as agent, notwithstanding his right to detain a portion of the money as his remuneration, he was not competent to convert the same to his own use before he had settled with the Amir, and thus, for the purposes of Indian Income-tax, the assessee received his two lacs after it had been allotted to him by virtue of the compromise.

In *J. P. Hall & Co Ltd*, v. *The Commissioners of Inland Revenue* (8), it was held that, for the purposes of Excess Profits Duty, profits from the contracts for the purchase and sale of the control gear arose to the appellant company in the accounting periods in which the gear was actually delivered and not in the pre-war period ending the 30th June 1914, in which the contracts were made The following observations of Lord Sterndale, M. R, are important:

"* * * These profits were neither ascertained nor made at the time that these two contracts were concluded. There are any number of contingencies that might have happened, by which the profit would not have turned out what it appeared on the face of it when the contracts were made. Any number of complications might have occurred that might have caused quite a different result to have accrued from these two contracts."

Atkin, L J., also observed that

"the profits for Excess Profits Duty are to be assessed on the same basis of profits for income-tax purposes, and the word "profits" for income-tax purposes is to be understood in accordance with the words of Lord Halsbury in the *Gresham Life Assurance Society* v. *Styles* (9) "in its natural and proper sense, in a sense which no commercial man would misunderstand"

and he says

"that profits and gains must be ascertained on ordinary principles of commercial trading." * * * It seems to me that no person here trying to ascertain profits on the principles of ordinary commercial trading would dream of including profits in his yearly balance-sheet, which would not be made until the goods had actually been delivered in respect of some contract which was to run over a period of at least two years, possibly more. To my mind the procedure of the company was the ordinary commercial procedure in taking the profits that they made as and when the goods were delivered. Anything else, it appears to me, would be quite contrary to commercial procedure, and would not be profits in the natural and proper sense."

The principles deducible from these ruling are that unless and until the preliminary conditions necessary for earning the benefit of any business contract as a profit are settled, or performed the profit does not even arise, or accrue To treat it as a profit, in its real sense the assessee must be "competent to convert the same to his own use;" he cannot therefore, be regarded as having received any income in the shape of profits of the particular business contract until the contract is performed. Further a mere conclusion of a contract is not sufficient, nor will a receipt of money on somebody else's account be sufficient pending settlement with him It, therefore, follows that a mere credit of the amount of interest in the kasar khata, in the year when the contract is concluded, pending the actual receipt thereof after it falls due, is not sufficient to charge the amount so credited as "income." Not only this but a credit of the anticipated profit in the very year in which the contract is made, i. e, before the performance, or delivery, contemplated by it, falls due, or, is given, is "contrary to commercial procedure" and would not reflect the real "income" of the assessee, or "be profits in the natural and proper sense."

Reading the credit entries in the kasar khata in conjunction with the debit entries in the debtor's personal ledger accounts the only legal inference deducible therefrom is that what is shown as received under the kasar khata is really not received at all but is only expected to be received or perhaps may never be received and the amount so credited can therefore be regarded merely as an unrealized asset of the business, and not as "income" or "profits" or "gains" of the business. What is only a jama kharchi kasar, i. e profit by book adjustment cannot be confused with profit derived from cash realizations of interest, merely because both are lumped together under one ledger head kasar khata."

A Bench of this Court had occasion to decide in *Commissioner of Income-tax* v. *Nanhelal* (10) a more or less similar question upon a reference by the Commissioner of Income-tax. It was there

(8) [1912] 3 K. B. 152.
(9) 3 T. C. 185 (188).
(10) A. I. R. 1928 Nag. 241.

held that sums shown in the accounts as having fallen due but not received could not be treated as "income." I think that the said decision in no way contravenes the provisions of S. 13, Income-tax Act of 1922. For these reasons I am of opinion that the item of Rs 16,031-4-6 which represents unrealized interest was wrongly treated as "income," "profits" or "gains" under the head of "business" by the Assistant Commissioner of Income-tax in taxing the present assessee.

As a result of the above conclusions I recommend that the answer to the first point should be in the affirmative, and that to the second should be in the negative

Findlay, J. C.—I have had the advantage of perusing the opioion of Kinkhede, A. J. C, in this case and I fully concur therein

Prideaux, A J. C—I have had the advantage of perusing the opinion of Kinkhede, A. J C, in this case and I agree with him in his decision on both questions.

R K. *Reference answered.*

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KINKHEDE, A J. C

G I P Ry—Applicant

v

Harakchand Hemchand — Non-Applicant.

Misc Appln No. 14-B of 1927, Decided on 20th June 1928 for review of the order of Kinkhede, A J. C, D/- 30th November 1926, reported in *A I. R.* 1927 *Nag.* 77

(a) Civil P. C., O. 47, R. 1—Mistake of law.

A mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review of judgment · *A. I. R.* 1922 *P. C.* 112 and *A. I. R.* 1925 *Nag.* 266, *Foll.* [P 58 C 2]

(b) Railways Act, S. 72—Reweighment.

The Railway Company is not under legal obligation under all circumstances to reweigh the goods at the sweet will of the customer : *A. I. R.* 1927 *Nag.* 77, *Expl.* [P 59 C 1]

B. D Desai, A. V. Khare and *W. B Pendharkar*—for Applicant.

G. G. Hatwalne—for Non-Applicant

Order.—This is an application for review of my decision. The learned counsel for the applicant has in a very long and elaborate argument tried to urge that the view taken by me in the case as regards the obligation of the Railway Company to reweigh is opposed to that taken by the Judges of the Calcutta High Court in *Janki Das* v. *B N. Ry. Co.* (1), and *Ram Jas Agarwal* v *Indian General Navigation & Ry. Co. Ltd.* (2) and *Jagannath Marwary* v. *E. I. Ry. Co.* (3) and that I should not have preferred the view expressed in *R. & K Ry. Co* v. *Ismail Khan* (4), by the Judges of the Allahabad High Court, to their view. In other words the review is sought on the short ground that there is an error of law in my decision. But as held by their Lordships of the Privy Council in *Chhajuram* v *Neki* (5), the mere fact that a judgment proceeded upon an incorrect exposition of the law is no valid ground for review. This view has been followed by this Court in *Ramchandra* v. *Govindrao* (6), where it is distinctly pointed out that a mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review of judgment. Even assuming that there is an error or mistake of law in the decision under review, I think I, as a single Judge, am bound by the Bench decision of this Court especially as it is based on the Privy Council decision just quoted above I am, therefore, constrained to reject the petition for review on this technical ground.

Lastly, I am asked to hold that some of my remarks as regards the scheme and intention of the Railways Act are mere obiter and unnecessary for the actual decision of the case This may be so, I may say it is natural in a judgment which was somewhat long. But the correctness or otherwise of this remark of the applicant must depend upon the actual observations made, or upon the construction of word that may have been used or might have crept in the course of writing a decision. If the observations were unnecessary, as the company thinks for supporting the actual finding or decision given in the case and it could be otherwise supported on the evidence on record, then the Railway Company is at

(1)]1912] 16 C. W. N. 356=13 I. C. 509=13 C. L. J. 211.
(2) [1918] 22 C. W. N. 310=41 I. C. 387.
(3) [1918] 22 C. W. N. 902=45 I. C. 933.
(4) [1915] 13 A. L, J. 417=29 I. C. 207.
(5) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I A. 144 (P. C.).
(6) A. I. R. 1925 Nag. 266=23 N. L. R. 53.

perfect liberty to ignore my obiter remarks, without the necessity of asking for a review of my decision and obtaining a pronouncement to that effect from me. All that I can say, for the benefit of the Railway Company, if it benefits the company at all, is that on the facts and circumstances which were proved in the case, the refusal and neglect of the Railway Company to comply with the plaintiffs demand for reweighment was prompted by improper motives and was not justified It was, therefore, actionable in the circumstances of the case. It was far from my intention to lay down as a matter of abstract proposition of law that the Railway Company was under a legal obligation under all circumstances, to reweigh the goods at the sweet will of a customer If there was any generalization and reference to the provisions of the Railways Act, the same must be with the object of lending more support by way of an additional proof rather than as the main stay for the decision, which was arrived at and based by me, on the evidence adduced in the case

Under these circumstances, I see no reason to interfere with the decision as given by me. The application for review stands rejected with costs. I fix pleader's fee Rs 20.

A.L./R.K. *Application rejected.*

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KINKHEDE, A. J C

Dattatraya Balwant Bharade — Appellant

v.

Wamanrao Rustamrao — Respondent.

Second Appeal No 118 of 1928, Decided on 27th September 1928, from decree of Addl. Dist Judge, Nimar, D/- 15th December 1927, in Civil Appeal No. 46 of 1927.

(a) C. P. Land Revenue Act, S. 203 (1)— A tenant has right to transfer site subject to exceptions without landlord's consent.

A tenant has a right of transfer subject to certain exceptions mentioned in the section. A transfer of a site to a person entitled to and not already in possession of it being perfectly legal is not voidable at the instance of the landlord, because the transferrer and the transferee settled the bargain without reference to him. [P 59 C 2]

(b) C. P. Land Revenue Act, S. 203 (8)— Word "contract" does not include entry in wajib-ul-arz.

The word "contract" cannot be so liberally or widely interpreted as to include within its scope an entry in the wajib-ul-arz that the landlord's permission is necessary for the validity of a transfer. [P 59 C 2]

W. R. Puranik—for Appellant.

Judgment.—Mr. W. R Puranik, advocate, for the appellant heard. I think the provisions of S. 203 (1) and sub-S. (3), C. P. Land Revenue Act have been rightly interpreted. In using the words "A person holding a site shall be incompetent to transfer it except to a person entitled to and not already in possession of such site the legislature must be considered to have recognized a right of transfer subject to the exceptions. In other words the capacity to transfer was circumcribed and limited duly to the two exceptional cases: In laying down a general bar against transfer, the legislature conferred a limited right of transfer by making it possible to the transferring person to choose his own transferee within the statutory exceptions. The circle of persons who could be transferees was thus limited If the transferee was within the exception the transfer was legal and it gave to the landlord no right of re-entry. If the transferee did not satisfy those conditions, there was no right at all created in his favour in respect of the site, much less would he be classed as a licensee of the landlord. I think, the legislature never intended to lay down that a transfer which was perfectly legal was voidable at the instance of the landlord, because the transferrer and the transferee settled the bargain without reference to him.

I am asked to treat sub-S. 8 of the Act as sufficiently wide to bring the present case within the operation of an entry in the village administration paper which is said to be in the nature of a contract between the proprietor and the holder of the abadi site. I am not prepared to interpret the word "contract" so liberally or widely as to include within its scope the so-called implied covenant in the wajib-ul-arz that the landlords' permission is necessary for the validity of a transfer I cannot read into the section any provisions of the wajib-ul-arz in the absence of express words to that effect. If the legislature wanted to make any such exception in favour of an entry in the village administration paper, there was nothing to prevent it from doing so expressly in this section itself while enacting the exception in favour of a contract. It could have equally excepted

such an entry in the village administration paper also The fact that in S 96, C P Tenancy Act of 1920 and in sub-S. (5) of S. 203, C P. Land Revenue Act of 1917, such exceptions are made is clearly indicative of an intention that wherever the legislature thought fit to enact an exception it did so expressly.

I therefore hold that the permission of the landlord was not necessary for the legality of the transfer in question and that the plaintiff's claim has been very rightly dismissed in the Courts below. The appeal fails and is dismissed without notice to the respondent

M.N./R K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 60

MACNAIR, A. J. C.

Kamtaprasad and *others*—Defendants —Appellants.

v

Madhorao—Plaintiff—Respondent

Second Appeal No. 422 of 1927, Decided on 20th November 1928, from decree of Addl. Dist. Judge, Bilaspur, D/- 22nd April 1927, in Civil Appeal No. 191 of 1926.

(a) Hindu Law— Alienation— Necessity— Recitals are insufficient to prove inquiry into legal necessity.

Recitals in a sale-deed are ordinarily insufficient in the absence of other independent evidence to establish that the vendee made sufficient enquiries into the existence of legal necessity : *A. I. R.* 1921 *Nag.* 14, *Rel. on.* [P 61 C 1]

(b) Hindu Law—Alienation — Father—No legal necessity—Whether the sale as a whole was justified should be found.

Where a sale by a father is impeached on the ground of want of legal necessity by a son, the question to be decided is not whether his share of the property sold might have been justified by legal necessity but whether the sale of the whole property actually effected was so justified : *A. I. R.* 1927 *P. C.* 37, *Foll.* [P 61 C 2]

(c) Hindu Law—Joint family—Alienation —Purchaser of undivided share is not entitled to joint possession.

A purchaser of an undivided share of a joint Hindu family, if out of possession, should not be given joint possession with the other coparceners but should be left to his remedy of a suit for partition : *A.I.R.* 1926 *Bom.* 399 and 39 *Mad.* 265, *Rel. on.* [P 61 C 2]

(d) Hindu Law— Alienation— Father—No necessity—Purchaser is liable to be dispossessed of whole by son—Decree should declare purchaser's share.

A purchaser of an estate from a Hindu father, when the sale was not binding on the share of the son, is liable to be dispossessed by the son of the whole and every part of the undivided estate while the family remained undivided, though the purchaser may have remained in possession for many years : 9 *N. L. R.* 18, *Foll.*; 39 *Mad.* 235, *Rel. on.*; *A. I. R.* 1926 *Bom.* 399, *Ref.* But a declaration in favour of the purchaser about his right to the father's share should form part of the decree : 3 *Cal.* 198, (*P.C.*) *Foll.* [P 62 C 1, 2]

(e) Hindu Law — Alienation — Father— Son's share not bound—Son is entitled to get his share at date of suit.

A Hindu father's alienation of certain property was held to be not binding on his son's shares. One of his two sons had died .

Held, that the other son is entitled to a half share of the property sold, that being his share of the property when he impeached the sale. 2 *C. P. L. R.* 141, *Dist.* [P 62 C 2]

J Sen—for Appellants.

M. R. Bobde—for Respondent

Judgment — The judgment in this appeal will govern the decision of the cross-appeal No 470 of 1927—*Madhorao* v *Kamtaprasad and others* At the beginning of 1914 one Ramrao held a two annas share in Mouza Lachanpur in the Bilaspur District as his ancestral property He had two sons, Baburao since deceased and Madhorao, the plaintiff in this case On 14th February 1914 he sold the share to Mt Pilibai, the predecessor-in-title of the defendants. In the suit out of which this second appeal arises Madhorao sought possession of the entire two annas share alleging that the consideration was taken for immoral purposes, or in the alternative, was not supported by legal necessity He stated that Baburao is dead and Ramrao could not be traced so that he was entitled to possession of the entire share. The defendants urged that the right to avoid the transfer so far as Baburao's share was concerned abated on his death and that Ramrao was alive and the plaintiff could not claim his share. They alleged that the sale to Pilibai was supported by legal necessity and also that Pilibai made due enquiries regarding the existence of legal necessity before purchasing the property.

The lower appellate Court has held in para. 3 of its judgment that the sale was not effected to obtain money for immoral purposes but was not justified by legal necessity ; out of the purchase money Rs 450 was used for the acquisition of tenancy right in certain lands at Mohtari; there was no legal necessity to acquire these lands, but as the plaintiff was in

possession of the lands the sale was valid against him to the extent of Rs 450; there was no proof that the remainder of the consideration was obtained in order to benefit the family estate; it is not proved that Mt Pilibai made any enquiries regarding necessity; Ramrao was alive and still entitled to his share; and the right of Baburao to avoid the sale abated on his death

The conclusion from these findings was that the plaintiff was entitled to a decree putting him in joint possession of his share amounting to eight pies on payment of Rs 150 "as his share of the amount supported by legal necessity"

I first deal with the second appeal filed by the defendants, S. A No. 422 of 1927. It is first urged that the entire consideration of the sale-deed was taken for legal necessity and for the benefit of the estate. This ground attacks a finding of fact. Apart from the recitals in the sale-deed, there is no good evidence in support of the ground Ramrao has admittedly been a spendthrift and the recitals in the sale-deed carry a little weight I see no reason to interfere with the finding of the lower appellate Court on this point.

It is next urged that the vendee made proper and bona fide enquiries as to the existence of legal necessity and took the sale-deed after reasonably satisfying herself as to the existence of such necessity As pointed out in *Ganba* v. *Shri Vishveshwar Deosthan* (1), recitals in the sale-deed are ordinarily insufficient to establish that the vendee made sufficient enquiries into the existence of legal necessity As I have stated above, the fact that Ramrao was a spendthrift diminishes the value of these recitals. There is no independent evidence on record to show that Pilibai made any enquiries. This ground, therefore, fails.

The last ground is that as the sale is justified to the extent of more than one-third and the share of the plaintiff is only one-third, the plaintiff is not entitled to have the sale set aside. Now the finding of the lower appellate Court, although it contains a statement that there was legal necessity to the extent of Rs 450, appears clearly to be that there was no legal necessity for any sum. The reason for ordering the plaintiff to deposit part of the Rs 450 before the sale was set aside is that the plaintiff is actually in possession of the land purchased with the proceeds of the sale of the village share and that in equity he should not obtain both his share of the purchase-money and his share of the property sold. Apart from this, his father Ramrao was clearly not entitled to sell that part of the joint property, which would ultimately form his son's share for legal necessity, reserving the part which would form his own share for other purposes. Again, as pointed out by their Lordships of the Privy Council in *Sri Krishan Das* v *Nathu Ram* (2), the true question which has to be answered in cases like this is: "Whether the sale itself was one which was justified by legal necessity." I have not to consider whether the sale of a one-third share of the property might have been justified for legal necessity but whether the sale of the whole property actually effected was so justified For all these reasons the last ground must fail.

The appeal is, therefore, dismissed. Costs on appellants.

I proceed with the appeal filed by Madhorao, S A. No. 470 of 1927. This raises several interesting questions of law. I first deal with the argument that as the sale was not for legal necessity the plaintiff, a joint cosharer in the share sold, is entitled to possession of the entire share, while the purchaser can only be given a declaration that he is entitled to stand in the shoes of his vendor and work out his rights and remedies in a partition suit

There can be no doubt what a purchaser of an undivided share of a joint Hindu family, if out of possession, should not be given joint possession with the other coparceners but should be left to his remedy of a suit for partition This is settled law. I need only refer to *Bhau* v. *Budha Manaku Dhor* (3) and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (4), and the cases cited therein. But the Bombay High Court in the case cited above has held that if such a purchaser is already in possession and a suit for recovery of possession is brought by an excluded coparcener, the purchaser need not necessarily be ejected: the Court has discretion to declare him entitled to hold

(1) A. I. R. 1921 Nag. 14=17 N. L. R. 194.

(2) A. I. R. 1927 P.C. 37=49 All. 149=54 I.A. 79 (P.C.).

(3) A. I. R. 1926 Bom. 399=50 Bom. 204.

(4) [1916] 39 Mad. 265=25 I. C. 585=27 M. L. J. 409.

(pending a partition) as a tenant-in-common with the other coparceners.

In the present case the purchaser has been in possession for many years in virtue of a sale which is good until the sons exercise their personal rights to set it aside It does appear a somewhat cumbrous procedure to deprive the purchaser of the possession of land which he has held for many years under a voidable title when he has still a right to regain possession of a part of the land by means of a partition suit But, in reality, the adoption of this course does not involve greater hardship on the purchaser than the alternative course involves upon the coparcener who has set aside a sale In the former case, the purchaser can file a suit for partition immediately and will very possibly be entitled to a share of the mesne profits during the pendency of the suit, whereas in the latter case, the coparcener will very possibly be driven to a suit for partition before obtaining physical possession of the share which he has every right to possess.

Clearly the fact that the purchaser has been so fortunate as to remain for many years in possession under a voidable title is not a strong reason for inflicting inconvenience on the coparcener in order to avoid possible hardship to the purchaser.

In *Mohanlal* v. *Tekchand* (5) the facts were very similar to those in the case which I am dealing There was a sale by the father and even if the father did not represent himself to be acting as manager the son had only a personal right to set aside the sale and the purchaser remained in possession of the entire share for many years It was decided that the plaintiffs were entitled to possess the whole and every part of the undivided estate while the family remained undivided. I see no reason to dissent from this view In *Maharaja of Bibbili* v. *Venkataramanjulu Naidu* (4) it is stated

"The Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the coparceners who are not bound by the alienation."

The view taken by the Bombay High Court is to the effect that a purchaser already in possession should in some cases be ejected and in some cases allowed to hold, till a partition, as a tenant-in-common I agree with the opinion of Stanyon, A. J C., in *Mohanlal* v *Tekchand* (5), that it involves undue hardship on the coparcener to drive him into the anomalous position of joint possession with a stranger or compel him to carry out a partition for the benefit of the vendee.

This ground of appeal, therefore, succeeds, and I hold that the plaintiff is entitled to eject the defendants, though, as was ordered in *Deendyal Lal* v *Jugdeep* (6), a declaration in favour of the defendants should form part of the decree

It is next urged that the lower appellate Court erred in holding that the right of Baburao to impeach the sale abated on his death and the plaintiff could not recover the share which could have been recovered by Baburao. I agree with the appellant's counsel that the decision in *Sardar Sing* v *Ajit Sing* (7), does not apply to the facts in this case It is not the case that the plaintiff Madhorao has a right to set aside the sale with respect to one-third of the estate while his brother Baburao had an entirely separate right to avoid the sale with regard to a separate one-third share. The plaintiff has a subsisting right to set aside the sale. In *Sardar Sing* v *Ajit Sing* (7) there was at the time of the suit no person in existence who had a right to set aside a sale. After the sale is set aside the defendants remained purchasers of the undivided share of the plaintiff's father, Ramrao. They can sue for partition and the share which they will get depends upon the state of the family at the time of partition. Had other sons been born to Ramrao the share would have been diminished. After the death of Baburao the share which they can get has increased. From the admitted facts it would appear that the share which the defendants will receive on partition will be a half share if they now file a suit The lower appellate Court is wrong in thinking that the plaintiff is only entitled to a one-third share and the aphellant's contention that he is entitled to a two-third share is incorrect.

It is last urged that the plaintiff should not have been held liable to make reimbursement before recovering the property sold. Ramrao sold property which

(5) [1913] 9 N. L. R. 18=18 I.C. 826.

(6) [1883] 9 Cal. 198=4 I. A. 247=1 C. L. R. 49=3 Suther 468=3 Sur. 730 (P.C).

(7) [1889] 2 C. P. L. R. 141.

was liable to be attached by creditors and spent Rs. 450 in obtaining possession of occupancy lands; he entered the names of his minor sons as tenants of that land. The plaintiff is in possession of the lands, either solely or at least to the extent of one-half. It has not been urged that the lands are of a less value than the sum expended in their acquisition I see no reason for disturbing the order made under the principles of equity that the plaintiff should make reimbursement before recovering the property sold It has not been urged that he should make the reimbursement of the whole of the Rs 450 and it is clear that he must pay half that sum before he gets a decree for possession of the whole of the property sold This ground therefore fails.

The decree of this Court is therefore that if the plaintiff pay Rs 225 to the defendants within a period of two months from this date,the defendants shall deliver possession of the 2 annas share in suit . but it is declared that the defendants have acquired the share and interest of Ramrao in that property and are entitled to take such proceedings as they may be advised to have that share and interest determined in partition If the plaintiff fails to pay the Rs 225 his suit shall stand dismissed The plaintiff will bear one-fourth of the costs in all Courts, the defendants the remainining three-fourths. Counsel's fee in this Court Rs 50

M N /R.K *Order accordingly*

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* A. I. R. 1929 Nagpur 63

MACNAIR, A. J C.

Sobharam and *another* — Plaintiffs—Appellants

v

Ramprashad and *another*—Defendants—Respondents.

Misc Appeal No 29 of 1927, Decided on 15th December 1928, from decree of Dist Judge, Hoshangabad, D/- 29th March 1927, in Civil Appeal No 207 of 1926.

*** (a) Civil P. C., O. 41, R. 23 — Appeal from mortgage decree — First Appellate Court deciding all points except amount due and directing pleadings thereon—Order of remand is not one under R. 23, nor is it a decree, and is not appealable—Remand was under Civil P. C. S. 151.**

In an appeal from a mortgage decree the first appellate Court decided all the points in dispute except those which related to the amount due to the defendants as mortgagees. The decree of the first Court was reversed and that Court was directed to take proper pleadings with regard to the sum due to the mortgagees. In an appeal from the remand order,

Held, that the order was under S 151. It being neither an order under O 41, R. 23 nor a decree, no appeal lay 12 *N. L. R.* 126 *Expl*; 44 *Cal.* 929 (*F.B.*), *A. I. R.* 1927 *Pat.* 296 and *A. I. R.* 1925 *Mad.* 229, *Appr.* [P 63 C 2]

(b) Civil P. C., O. 41, R. 23—Remand not under R. 23 should be sparingly granted.

The power of remanding a case, when O. 41, R. 23, does not apply, should be most sparingly used by the Court of first appeal 12 *N. L. R.* 126, *Foll.* [P 64 C 1]

C B Parekh—for Appellants.

J. Sen—for Respondents

Judgment. — The lower appellate Court decided all the points in dispute except those which related to the amount due to the defendants as mortgagees, The judgment states·

"The pleadings and issues as to what should be the price of redemption are however left incomplete and defective and no proper adjudication can be given on it."

The decree of the first Court was reversed and that Court was directed to take proper pleadings with regard to the sum due to the mortgagees The plaintiffs in appeal to this Court attacked the findings of the lower appellate Court on the point in dispute

The respondents urge that no appeal lies In *Jagannath* v. *Maruti* (1) it was pointed out that a remand such as this is not a remand under O 41, R 23, Sch, 1 Civil P C, as the first Court had not disposed of the suit upon a preliminary point It is stated that such a remand was an exceptional course followed under the powers given by O. 41, R. 33 I prefer the view taken by a Full Bench of the Calcutta High Court in *Ghuznavi* v *Allahabad Bank Ld.* (2) that S 151 of the Code authorises such a remand, but it is not very material whether the power to make remand is given by S 151, or by O 41, R. 33, as in either case no appeal lies from an order which is not a decree The order of remand is not a decree, as it does not conclusively determine the rights of the parties with regard to all or any of the matters of controversy in the suit any more than a finding on some issues given in the course of the suit This has been held in *Chandrika Prasad Singh* v *Mithu Rai* (3) and I agree with the reasoning of the Judges who decided that case. In *Radha Krishna Rao* v.

(1) [1916] 12 N. L. R. 126=36 I C. 241.
(2) [1917] 44 Cal. 929=26 C L. J. 49=41 I.C. 598=21 C. W. N. 877 (F.B.).
(3) A. I. R. 1927 Pat. 296=6 Pat. 380.

Venkata Rao (4), also, it was held that no appeal lay from an order of remand made without reliance on the provisions of O 41, R. 23. I add that in *Jagannath* v *Maruti* (1) the order regarding refund certificate justified Stanyon, A J C in treating the remand order as an order improperly passed under O 41, R. 23, and entertaining an appeal from that order

The appellants do not urge that the remand is improper and though I fully agree with Stanyon, A J C., that the power of remanding a case, when O 41, R. 23 does not apply, should be most sparingly used by the Court of first appeal, I see no reason to interfere with the procedure of the lower appellate Court.

I have been asked by the appellants to make it clear that this Court if and when the appellate Court finally decides all the matters in dispute and a second appeal is filed, will consider the propriety of the findings which the lower appellate Court has already reached.

I hold that this appeal does not lie and, therefore, dismiss it Costs of this appeal will be borne by the appellants Counsel's fee Rs 40.

R.K. *Appeal dismissed,*

(4) A I. R 1925 Mad. 229=48 Mad. 713.

A I R 1929 Nagpur 64

MACNAIR, A J. C.

Premdas—Plaintiff—Appellant.

v

Balkishan—Defendant—Respondent.

Second Appeal No. 533 of 1927, Decided on 29th November 1928 from decree of Addl. Dist Judge, Saugor, D/- 21st July 1927, in Civil Appeal No 34 of 1927

Central Provinces Land Revenue Act (1917), S. 203 (3)—Person having site insufficient for his agricultural needs can purchase abadi site without landlord's consent—Civil Court can decide validity of transfer.

The words "such site" in Cl. (3) do not refer to the site which it is desired to transfer. They refer to the words "a house-site of reasonable dimensions in the abadi." A person having a site insufficient for his requirements as agriculturist is, therefore, entitled to purchase an abadi site without the permission of the landlord. Cl. (4), S. 203 does not prevent civil Court from deciding whether such a transfer is valid. [P 64 C 2]

A. V Vazalwar—for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—The judgment in this appeal governs the disposal of Second Appeal No 534 of 1927. *Mahant Premdas* v *Balkishan*: both appeals arise from a single decree of the original Court. The facts found by the lower appellate Court are that the defendant-respondent had a portion of a house in mouza Tili, but this portion was totally insufficient for his requirements as an agriculturist. He purchased another house in the village without the consent of the plaintiff malguzar. The malguzar's suit for possession of the site has been dismissed. There is an order, against which the defendant has filed no appeal, that the defendant should pay Rs. 150 to the plaintiff as compensation.

It is urged in appeal that the civil Courts had no jurisdiction to decide whether the site already in possession of the defendant was insufficient for his requirements; and even if that site was insufficient, the defendant could not purchase another site without reference to the landlord. S 203, Cl. (3), Land Revenue Act is as follows:

"A person holding a site under sub-S. (1) shall be incompetent to transfer it except to his next heir or to a person entitled to and not already in possession of such site."

The words "such site" cannot refer to the site which it is desired to transfer, as a rule permitting a person to transfer a site to a person entitled to it is obviously unnecessary. It follows that the words "such site" must refer to the words "a house-site of reasonable dimensions in the abadi," in Cl. (1), S 203 The defendant was admittedly entitled to such a site and it has been held, for excellent reasons, that he did not possess such a site. Cl. (3) then does not prohibit the transfer of the site to him

The question whether a transfer to him was competent is clearly not a dispute regarding the allotments of sites in the abadi Cl. (4), S. 203, which directs that such disputes shall de decided by a revenue officer, does not prevent a civil Court from deciding whether the transfer with which I am concerned was valid. S. 203, Land Revenue Act, then does not render the transfer of a house to the defendant invalid, although the plaintiff's consent was not obtained. It is not suggested that the transfer was for any other reason invalid. The appeals therefore fail and are dismissed. Costs on appellant.

R.K. *Appeals dismissed.*

A. I. R. 1929 Nagpur 65

MOHIUDDIN, A. J. C.

Maksudan Singh— Plaintiff— Appellant.

v.

Darbargir and *others*—Defendants—Respondents.

Second Appeal No. 552 of 1926, Decided on 11th August 1928, from decree of Addl. Dist. Judge, Bilaspur, D/- 13th October 1926, in Civil Appeal No. 67 of 1926.

(a) C. P. Tenancy Act, S. 105, (c)—Unregistered sale-deed of occupancy holding for over Rs. 100—Purchaser is trespasser—Civil Court has jurisdiction to try suit for possession.

Where an occupancy holding is sold by an unregistered document for more than Rs. 100, the sale being for more than Rs. 100, registration is necessary and as the document cannot be registered, there is no transfer and the vendee is a trespasser and the civil Court has jurisdiction to entertain a suit to recover possession : *A. I. R.* 1927 *Nag.* 30, *Rel. on.* [P 65 C 2]

(b) C. P. Tenancy Act (1920), S. 13—Tenant living and his right existing—Lambardar has no preferential right to possession.

The lambardar as such has no preferential right and cannot be allowed to take possession of the land sold to stranger, when the tenant is alive and his tenant right has not come to an end. [P 66 C 1]

N. G. Bose—for Appellant,

B K. Bose and *P. N. Rudra*—for Respondents.

Judgment.—The plaintiff Muksudan Singh, malguzar of Kacharbod, filed this suit on 26th March 1925, against Darbargir who had purchased by means of an unregistered sale-deed dated 2nd October 1922, 8·53 acres of occupancy land for Rs. 256 from Mt. Premkuar, the tenant of the land in suit. Darbargir was put in possession in accordance with the sale. Mangal Singh, a nephew of Mt. Premkuar, was made a defendant, because he used to live with Mt Premkuar, was her heir, had signed the sale-deed and had thus given his consent to the sale. Mt. Kala applied on 17th July 1925, to be made a defendant, as she alleged that she was the daughter of Mt. Premkuar and was added as a defendant The defendant Darbargir stated that he purchased the land for Rs. 481, after obtaining the consent of the plaintiff, that he had been in possession since 2nd October 1922, that as plaintiff did not apply under S 13, C. P. Tenancy Act for setting aside the transfer, his remedy is barred and this Court has no jurisdiction. Mt. Kala put in a written statement in which she stated that she was the heir of Mt. Premkuar and not Mangal Singh, and that plaintiff had no right to bring the suit.

The trial Court found that plaintiff had not consented to the sale, that Darbargir was in possession of the land in suit from 2nd October 1922, that Mt. Kala was Mt. Premkuar's daughter, that civil Court had jurisdiction to try the suit, that the sale-deed was inadmissible for want of registration, that Mangal Singh signed the sale-deed as an attesting witness, that Mt Kala's claim had become barred and passed a decree for possession in favour of the plaintiff. The lower appellate Court held that the malguzar's consent was not proved, that the civil Court had no jurisdiction to entertain the suit, that Mt Kala's claim was not barred against the plaintiff who was not in possession, that the landlord had no right of re-entry unless it was proved that the tenant right had ceased to exist and accordingly dismissed the plaintiff's suit.

The first point which is urged in this appeal is that the civil Court has jurisdiction to entertain this suit under S. 9, Civil P. C., and S 105 (c), Tenancy Act, has no application to such a suit. In this case the transfer, which is by an unregistered deed, is invalid and the intended tranferee is not a transferee at all and is a trespasser at civil law and can be ejected from the land by a suit. In *Chindhu* v. *Rameshwarnath* (1), Kotwal, A. J C., and Prideaux, A. J. C., in a similar case, held as follows :

"We are of opinion that registration in contravention of any provision of law whatever be the cause that led to the contravention is ineffectual and must be ignored. We agree with the view taken in *Nilkant* v. *Ghulya* (2) and the reasons given in support of that view. If the registration is ignored there is no transfer in cases where registration is necessary and the jurisdiction of the civil Court is not barred."

In this case the sale being for Rs. 481 registration was necessary and as the document could not be registered there was no transfer and the vendee is a trespasser and the civil Court has jurisdiction to entertain the suit.

(1) A. I. R. 1927 Nag. 30=22 N. L. R. 128.
(2) [1917] 13 N. L. R. 165=42 I. C. 384.

The next point which is urged is that the plaintiff is entitled to possession though Mt Kala, the daughter of Mt. Premkuar is a defendant in the suit, because Mt. Kala never undertook to cultivate the holding, pay rent to the landlord and was never in possession of the holding Mt. Premkuar died in June 1924, and she was the tenant of the land in suit at the time of her death. She was succeeded by her daughter Mt. Kala who on Mt. Premkuar's death, became the tenant of the land in suit and is still the tenant The plaintiff's case against defendant 3 was that she was not the daughter of Mt. Premkuar and in the alternative he had pleaded, that in case it was held that she was Mt. Premkuar's daughter, she could not claim the land in preference to the plaintiff's right who was the lambardar. The lambardar as such has no such preferential right and, therefore, cannot be allowed to take possession of the land, when the tenant is alive and her tenant right has not come to an end. The posision of Darbargir is that of a liecensee and Mt. Kala is the tenant of the land in suit. As the tenant is a party to this suit, the plaintiff cannot be put in possession, and, therefore, his suit for possession must be dismissed.

Considering the fact that the appellant hae succeeded on the main point involved in the appeal, though his suit fails for other reasons because Mt. Kala is also a party to this suit, it seems fair and proper that each party should bear his costs as incurred in this Court and the Courts below. The plaintiff's suit for possession is dismissed and the appeal is rejected.

R.K. *Appeal rejected*

A. I R. 1929 Nagpur 66

PRIDEAUX, A. J. C.

(*Sheikh*) *Mahomad*—Objector—Applicant.

v.

Pandurang and *others*— Non-Applicants.

Civil Revn. No. 123-B of 1928, Decided on 30th October 1928, from order of 2nd Class Sub-Judge, Pusad, D/- 27th February 1921, in Misc. Case No. 138 of 1927.

(a) Civil P. C., O. 21, R. 58—Possession only is to be determined—Question of title should not be gone into.

What the Court has to find out in objection cases under O. 21, R. 58, is who was in possession. It should not go into questions of title as finding as to title in a summary enquiry does not bind the Court in the regular suit brought by the aggrieved party : 15 *Cal.* 521 (*P. C.*) ; *A. I. R.* 1924 *Cal.* 744 and 14 *Cal.* 617, *Rel. on.* [P 67 C 1]

(b) Civil P. C., S. 115 — Other remedy open—Finding of fact not opposed to evidence should not be interfered in revision.

When another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from High Court's refusal to act, High Court will not interfere in revision with a pure finding of fact when the finding is not opposed to the evidence on record or is not based on meagre or little evidence or on disregard of evidence: *A. I. R.* 1922 *Nag.* 115 and *A. I. R.* 1926 *Nag.* 290, *Appl.* [P 67 C 1]

M. Y. Sharif—for Applicant

D. R Baxi—for Non-Applicants.

Order.—In this case the non-applicant (decree-holder) obtained a decree in Civil Suit No 379 of 1927 on 22nd June 1927 against Sheikh Nur and Sheikh Hayat. He attached in execution of that decree fields S. Nos. 40, 69 (half-share) and 210 (one-third share) and houses situated at Dhanki as the property of the judgment-debtors. Against this attachment the objector, brother of the judgment-debtors, filed an objection under O 21, R. 58, on the contentions that the judgment-debtors had transferred their shares on partition by a souda-chitthi dated 10th January 1927 and subsequent sale-deeds dated 13th January 1927. These sale-deeds were said to be for consideration, and his story is that he is in exclusive possession of the above property as owner from 10th January 1927.

The decree-holder admitted that the objector had a one-third joint share in the attached property and asked that that share be released. The partition set up was denied by the decree-holder and the sale-deeds were said to be bogus, fraudulent and executed with intent to defeat the claim of the creditors of the decree-holders.

The objector has failed, and the lower Court finds that the sale-deeds were not for consideration and that consequently no title passed from the judgment-debtors to the objector who acquired no interest in the property described in the

sale-deeds. Dealing with the point of possession the Judge writes :

"I believe the evidence of decree-holder and hold that judgment-debtors were in possession of the property under attachment."

The words of their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Prasad* (1), are pertinent in these cases. They state :

"The Code does not prescribe the extent to which the investigation should go, and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Court at the time, leaving the aggrieved party to bring the suit which the law allows him."

And virtually what the Court has to find out in these cases is who was in possession, for the finding as to title in a summary enquiry does not bind the Court in the regular suit brought by the aggrieved party. It was held by the Calcutta High Court in *Najimunnessa Biti* v. *Nuzharuddin Sardar* (2), that Rr. 60 and 61, R 21, Civil P. C., provide for a summary investigation into possession as distinct from a trial of ultimate right. The same conclusion was come to in an earlier case of the same High Court in *Hamid Bakhut* v. *Buktear Chand* (3), and it seems to me that in the present case the lower Court went further than was necessary in deciding the question of title But there is a clear finding on the part of the lower Court as to possession. It has long been held that, though S 115, Civil P. C. forbids revision only in cases in which an appeal lies, it will not ordinarily be granted where there is some other remedy open to the aggrieved party, see *Ramchandra* v *Shridhar* (4). In *Samsherkhan* v. *Abdul Sattarkhan* (5) I held that it is not the practice of this Court to interfere in revision when another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from its refusal to act, and I do not think that in the present case I should interfere with the pure finding of fact as to possession, for it cannot be said that that finding is based on meagre or little evidence or on disregard of evidence.

I think the lower Court has come to a right conclusion in the matter and I, therefore, dismiss this application for revision The applicant will pay the non-applicants' costs. I fix pleader's fees at Rs. 15.

R.K. *Application dismissed.*

(1) [1888] 15 Cal. 521=15 I. A. 123=5 Sar. 172 (P.C.).
(2) A. I. R. 1924 Cal. 744=51 Cal. 548.
(3) [1887] 14 Cal. 617.
(4) A. I. R. 1922 Nag. 115=18 N. L. R. 71.
(5) A. I. R. 1926 Nag. 290=22 N. L. R. 30.

A. I. R. 1929 Nagpur 67

MACNAIR, A. J. C.

Gopal—Plaintiff—Appellant.

v.

Bajrang and *others*—Defendants—Respondents.

Second Appeal No. 357-B of 1927, Decided on 8th December 1928, from decree of Addl. Dist. Judge, Khamgaon, D/- 9th August 1927 in Civil Appeal No. 18 of 1927.

(a) Will—Maintenance.

It is doubtful whether more right to maintenance can be given by a will. [P 68 C 1]

(b) Will—Construction — Testator giving legatee field for maintenance and house for residence—Legatee restrained from alienating but descendants of legatee made entitled to enjoy property after legatee—Not mere right to maintenance but absolute estate was given, restraint on alienation being invalid.

A testator by his will gave a field for legatee's maintenance and a house for his residence. The legatee was forbidden to transfer the property by sale, mortgage or gift and the will contained a clause that if he did so the heirs of the testator would be entitled to claim the property. There was, however, a clause whereby the descendants of the legatee were to enjoy the property after him.

Held : that the will did not give a more right to maintenance but the legatee was to get absolute estate and the restraint on alienation was invalid and ineffectual: *A.I.R.* 1925 *P.C.* 176, *Dist.* [P 68 C, 1 2]

D. T. Mangalmurti—for Appellant.

M. K. Chande—for Respondents.

Judgment.—The only question which I have to consider is the nature of the estate conferred on the legatees by the will of Sitaram. Sitaram had been adopted by one Jairamdas and the legatees were his natural brother and nephews. The will states that the legatees had no claim to the testator's property ; they were in poor circumstances and out of pity for them a field was given for their maintenance and a house for their residence The will is very clear on the

point that the field was given for cultivation, though it might be leased for a short period, and the house was given only for residence. The legatees were forbidden to transfer the property by sale, mortgage or gift and the will contains a clause that if they did so the heirs of the testator would be entitled to claim the property. There is, however, a clause which is admitted to mean that the descendants of the legatees should enjoy the property after them.

The lower appellate Court has held that this will must be construed as giving an absolute estate to the legatees, the conditions restraining alienation being invalid and ineffectual In appeal it is urged that the will does not transfer the entire rights in the property; it merely gives the legatees and their descendants a right of maintenance from the property, the remaining rights in the property devolved at the testator's death on his heirs. It is argued that a right to maintenance out of an estate enjoyed on the part of a person and his descendants is a right known to Hindu law: for instance, such a right may be enjoyed by the younger brothers of a zamindar where the zamindari is impartible.

It is quite clear that the legatees have not got a right to maintenance It is at least doubtful whether such a right could be given by a will and even if this could be done what was given to them by this will was either full rights in the property or something in the nature of a charge on the property. The heir of the testator is in no way bound to maintain the legatees The facts in *Rajindra Narain Singh* v. *Sundara Bibi* (1) were entirely different. In that case the appellant was declared to have a right of maintenance in certain villages by a compromise decree between himself and his brother There was apparently no suggestion that before the decree the brother had no right of maintenance and the decree appears merely to have fixed the manner in which the maintenance was to be received; the rights of the appellant in certain villages represented his right to maintenance and could not be attached in execution.

After careful consideration I have come to the conclusion that the legatees took an absolute estate under the will. The will cannot be considered merely to carve out an estate in the property mentioned leaving the testator's heirs with the remaining rights in the property for the provisions of the will deprive the testator's heirs of any real interest in the property. There is no attempt to define with exactness the heirs of the legatees who were to enjoy the estate after the death of the legatees and there is no clear statement that on failure of these heirs the estate will revert to the heirs of the testator. The provision that the testator's heirs will be entitled to possession if the property is improperly alienated appears designed to prevent alienation, not to secure any benefit to the testator's heirs. The will then must be read as depriving the heirs of the testator of the property given to the leagtees. The legatees then take absolute estate and the restraints on alienation are invalid and ineffectual The appeal therefore fails and is dismissed Costs on appellant.

S.N /R.K *Appeal dismissed.*

(1) A.I.R. 1925 P.C. 176=47 All. 385=52 I.A. 262 (P.C.).

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* A. I. R. 1929 Nagpur 68

MACNAIR AND MOHIUDDIN, A. J. Cs.

Mt. Gawarjabai—Applicant,

v.

Hariram—Non-Applicant.

Misc. Petn. No. 31-B of 1928, Decided on 20th November 1928, for leave to appeal to Privy Council, from decision, D/- 12th January 1928, in First Appeal No. 59-B of 1927.

*** Civil P. C., O, 41, Rr. 11 and 31—Appeal dismissed under R. 11—Writing judgment is not obligatory though advisable.**

No doubt in some cases it is desirable to give full reasons for an order of dismissal under O. 41, R. 11. e. g., when the order is likely to be attacked in second appeal, but the provisions of O. 41 do not make it obligatory on a Judge to write a judgment when the appeal is dismissed under O. 41, R. 11: 30 *All.* 319; 36 *Bom.* 116 *Foll.*; 37 *Bom.* 610 (*F.B.*) and 25 *Cal.* 99, *Expl.*; 3 *Mad.* 1 *Expl. and Dist.*

[P 69 C 2, P 70 C 1]

G. P. Dick, *G. L. Subhedar* and *Abdul Razak*—for Applicant.

M. B. Niyogi and *M. B. Marathe*—for Non-Applicant.

Order.—The applicant asks for leave to appeal to the Privy Council from what she terms the judgment and decree of this Court in First Appeal No. 59-B.

of 1927, decided on 12th January 1928. She was the the defendant in the suit, filed by Hari Ram for a declaration that he (Hari Ram) was the adopted son of Ganeshdas The first Court in a careful judgment found that Hari Ram had been adopted by Ganeshdas and passed a decree in his favour. The appeal to this Court, First Appeal No 59-B of 1927, was dismissed by a Bench without notice to the respondent. The decision of the appeal was termed by the Bench a judgment but no decree was drawn up ; it is the pratice of this Court not to pass a decree when an appeal is dismissed under O. 41, R 11, Civil P C. As the judgment or final order of this Court affirmed the decision of the Court immediately below leave to appeal to the King in Council cannot be granted unless the appeal involved some substantial question of law.

It is urged before us that it was necessary for this Court to pronounce a judgment containing the matters set forth in O 41, R. 31, Civil P. C. and that the judgment pronounced does not contain these matters and " is really no judgment at all. " We first consider the question whether a Court dismissing an appeal under the provisions of O. 41, R. 11, Civil P. C., is bound to pronounce judgment containing the matters detailed in O. 41, R 31.

Order 41, R. 30, Civil P. C. directs the appellate Court to pronounce judgment after hearing the parties or their pleaders. It has no reference to dismissal of the appeal at an earlier stage under R. 11. R 31 clearly refers to the judgment pronounced in accordance with R 30, but we are unable to see that it has any application to an order of dismissal passed under R. 11 The rulings in which the point has been discussed at length are in consonance with this view. In *Samin Hasan* v. *Piran* (1) it was held that a Court dismissing an appeal under S. 551 of the old Procedure Case was not bound to record a judgment complying with the provisions of S 574 of the Code In *Tanaji Dagde* v. *Shankar Sakharam* (2) two Judges of the Bombay High Court held that in dismissing an appeal under R 11 it was not obligatory upon the lower appellate Court to write a judgment This decision was considered by a Full Bench in *Hanmant* v. *Annaji Hanmanta* (3) The Judges of that Bench apparently considered that the judgment in *Tanaji Dagde* v. *Shankar Sakharam* (2) would have been correct but for the existence of a Civil Circular published under the provisions of the High Courts Act giving directions to the lower Courts of appeal in Bombay. Scott, C. J., states:

" There is much to be said for the reasoning in *Tanaji Dagde* v. *Shankar Sakharam* (2) upon the materials which were then before the Court "

and Beaman, J. would have adhered to the view expressed in *Tanaji Dagde* v *Shankar Sakharam* (2) if the Bench had had nothing more to do than to give a true construction of O 41

In *Royal Reddi* v. *Linga Reddi* (4) two Judges took the opposite view with regard to the provisions of a former Procedure Code, but the short reasoning which supported their view appears to have no application to the provisions of the new Code. In *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (5) Macpherson and Ameer Ali, JJ , took the same view of the provisions of the old Code as that taken in the Madras case, but they are careful to say that they think this is the correct view and do not discuss the point at length.

We are of opinion that the provisions of O. 41, Sch 1, Civil P. C do not require a Judge to write a judgment when the appeal is dismissed under O. 41, R. 11. In S. 2, Civil P. C , " judgment " is defined as a statement given by the Judge of the grounds of a decree or order. It is optional for a Judge to write a judgment whenever he passes an order: but it seems clear that the provisions of O. 41, R 31, do not apply to every statement given by the Judge of the grounds of an order. Apart from this if it is unnecessary for the Judge to write a judgment, the order of dismissal is not invalidated if he writes something which " is really no judgment at all. "

We hold, therefore, that if the judgment of this Court had not been in accordance with O. 41, R 31, Civil P. C. the dismissal of the appeal would not have been invalidated.

(1) [1908] 30 All. 319=5 A. L. J. 300=1908 A. W. N. 115.
(2) [1912] 36 Bom. 116=12 I. C. 564=13 Bom. L. R. 1002.
(3) [1913] 37 Bom, 610=20 I. C. 966=15 Bom. L. R. 765 (F.B).
(4) [1881] 3 Mad. 1.
(5) [1898] 25 Cal. 99.

To avoid misconception we add that in some cases it is desirable to give full reasons for an order of dismissal under O. 41, R. 11, this is frequently so desirable when the order can be attacked in second appeal.

The judgment of this Court, however, does contain the matters mentioned in O 41. R. 31 It states the only point for determination, namely, whether Hari Ram was duly adopted by Ganeshdas, it gives a decision thereon and an entirely adequate reason for that decision, viz:

"there is a mass of conclusive evidence proving that the adoption was made and in the course of an address lasting over four hours the learned counsel for the appellant has not been able to mention a single item of real evidence to the contrary effect."

The first ground put forward by the applicant therefore fails.

The remaining grounds really urge that undue weight was attached to a certain evidence produced by the plaintiff, while proper weight was not given to numerous circumstances, which, it is asserted, favour the defendant's case. We consider that no question of law either as to construction of documents or to any other point arises on the judgment of this Court.

This application must therefore be dismissed. Costs on applicant. Pleader's fee Rs. 200

R.K. *Application dismissed*

A I.R. 1929 Nagpur 70

MACNAIR, A. J. C.

Village Sanitation Panchayat Committee—Applicant.

v.

S. R. Deshmukh—Non-Applicant.

Civil Revn. Appln No 146-B of 1928, Decided on 27th November 1928, from order of Small Cause Court Judge, Chandur, D/- 26th March 1928, in Small Cause Suit No. 800 of 1927

(a) Civil P. C., S. 80—Village Sanitation Panchayat is not Public Officer—Civil P.C., S. 2 (17) (f) and (g).

Village Sanitation Panchayat is not a Public Officer within the meaning of S. 80 and hence in the absence of notice, a suit is not untenable: 34 *Bom.* 583, *Dist.* [P 70 C 2]

(b) Provincial Small Cause Courts Act, S. 25—Scope.

High Court's jurisdiction under S. 25 is discretionary and cannot be exercised except to remedy injustice. [P 71 C 1]

W. R. Puranik—for Applicant.

V. N. Bapat—for Non-Applicant.

Order.—The applicant is the Village Sanitation Panchayat of Chandur. The Panchayat on 31st July 1926 passed a resolution dismissing the non-applicant. The non-applicant in the Small Cause Court sued for damages caused by his sudden dismissal. He stated that he was not able to secure employment for a period of three months and thus sustained a loss of Rs. 120. The learned Small Cause Court Judge in a very careful judgment has awarded this sum to the plaintiff with interest.

It is first urged before me that the applicant Panchayat was a public officer within the meaning of S. 80, Civil P. C., and hence in the absence of notice the suit was untenable. Reliance is placed on S 2, Cl 17 (f) and (g), Civil P C In *Cecil Gray* v. *Cantonment Committee of Poona* (1) it was held that the Cantonment Committee was a "public officer" The learned Judges state that a "public officer" means, in the first place, a "person" and the word "person" includes any body or association of individuals. I must, with all respect, disagree with a finding that a committee can be a "public officer." In S. 2, Cl. 17, Civil P C., it is stated that "public officer" means a person falling under any of the descriptions which follow; and while "a person" includes any body or association of individuals, it does not follow that any body or association of individuals need fall under any of the descriptions given. A "committee" cannot be described as an "officer" or "a person who holds any office." In my opinion it would be impossible to discover in any standard work an instance of the use of the common word "officer" to denote an association of individuals.

The duties and powers of committees such as Municipal Committees, Village Sanitation Panchayats and Cantonment Committees are derived from special Acts. Where it is considered necessary such Acts, e. g., the Municipal Act, contain sections making notice necessary before a suit is instituted: and the existence of such sections confirms the view that the provisions of the Civil Procedure Code with regard to public officers do not

(1) [1910] 34 Bom. 583=7 I. C. 579=21 Bom. L. R. 615.

apply to such committees. The first point urged, therefore, fails.

On the next ground it is argued that, as a matter of fact, the plaintiff was rightly dismissed I do not see any reason to interfere with the finding of fact.

On the last ground it is urged that the lower Court erred in law in holding that at least three months' notice was necessary. It is perhaps difficult to hold that the applicant could not have given the non-applicant a month's notice when they proposed to dispense with his service, but the claim of the plaintiff was that after his dismissal he could not obtain employment for three months. It may well be that had he not been dismissed he would have found it more easy to obtain employment. Even assuming that the Small Cause Court Judge erred in law in thinking that three months' notice was necessary, my jurisdiction under S 25, Small Cause Courts Act, is discretionary and cannot be exercised except to remedy injustice. I am not satisfied that the damages awarded are excessive and refuse to interfere.

This application is, therefore, dismissed. Costs on applicant. Pleader's fee Rs. 25.

R.K. *Application dismissed.*

A. I. R. 1929 Nagpur 71

MACNAIR, A. J. C.

Baburao and *others*—Plaintiffs — Appellants.

v.

Balajirao—Defendant—Respondent

First Appeal No. 119 of 1927, Decided on 20th November 1928, from decree of 1st Cl. Second Sub-Judge, Raipur, D/- 20th July 1927, in Civil Suit No. 84 of 1926.

Specific Relief Act, S. 42—Suit for declaration that a document does not affect plaintiff's title is one for declaration with consequential relief—Court-fee must be paid under Court-fees Act, S. 7 (4) (c).

A suit for a declaration that a registered deed does not affect plaintiff's title, is one clearly made under the provisions of S. 39, Specific Relief Act, and such a suit is a suit for a declaratory decree with consequential relief and Court-fee must be paid under Court-fees Act, S. 7 (4) (c). The relief claimed is really the same whether the plaint purports to ask that a document should be adjudged voidable or declared not to affect the plaintiff's title or be set aside or cancelled : 38 *Mad.* 922 (*F.B.*), *Foll.* ; 30 *Cal.* 788, *not Foll.* ; 16 *N.L.R.* 84, *Rel. on.* [P 71 C 2 ; P 72 C 2]

M. R. Bobde—for Appellants.

P. S. Kotval—for Respondent.

Judgment.—The plaintiff-appellants put their signatures on a sale-deed. The document was registered under S. 74, Registration Act. The plaint states :

"Plaintiffs pray that a decree be passed declaring that the plaintiffs are proprietors of one anna four pies share of patti I of mouza Mohda and that the document registered on 20th October 1926 does not affect their title."

The plaint bore a ten rupees stamp and the value of the relief was stated to be Rs. 6,000. The defendant urged that the suit as framed is really one for declaration of title and cancellation of a sale-deed and therefore Court-fees ought to be paid on Rs. 2,000 under S. 7 (4) (c) and (d), Court-fees Act The plaintiffs in reply to this plea submitted that the consequential relief such as cancellation of the document was not necessary, but added that if the Court held otherwise they would amend the plaint, claim the relief and pay Court-fees. The learned Judge held that the claim was not properly valued for purposes of Court-fee and jurisdiction and that the proper value of the claim for the Court-fee and jurisdiction should be Rs. 2,000. The plaintiffs refused to pay the additional Court-fee and the plaint was therefore rejected under O. 7, R. 11 (c), Civil P. C.

Before me it is urged that the plaint as framed is properly stamped ; it does not ask for cancellation of the deed, and if it contravenes the provisions of S. 42, Specific Relief Act, the plaintiff should have been given an opportunity to amend the plaint. Now, under S. 42, Specific Relief Act, a suit may be instituted asking solely for a declaration that the plaintiff has title to any right over property. But the plaint in this case as framed does not only ask for this relief ; it asks for a declaration that the registered deed does not affect their title. This claim is clearly made under the provisions of S. 39, Specific Relief Act, which allows a person to sue to have a written document adjudged void or voidable against him.

I cannot distinguish between a declaration that a document does not affect a person's title and an adjudgment that the document is void or voidable against that

person. Now if a person sues under the provisions of S. 39, Specific Relief Act, he must be deemed to ask for the remedy given by that section, namely, that the Court should adjudge the document void and order it to be delivered up and cancelled. It does not appear that under S. 39 the Court can adjudge a document void without ordering it to be delivered up and cancelled, except in the contingency mentioned in S 40. The relief claimed in the plaint was the relief which the Court could give under S 39, Specific Relief Act. The whole tenor of the plaint is to this effect, para. 20 alleges that the sale-deed is void and does not affect the title of the plaintiffs and para 19 states that the cause of action arose when the defendant attempted to make use of the deed.

There are several reported cases in which it has been held that a suit, in which the only prayer is to have it declared that a decree or deed is ineffectual and inoperative against the plaintiffs, is a suit for a declaratory decree without consequential relief ; I instance *Zinnatunnessa Khatun* v. *Gobinda Nath Mukerjee* (1). The reason for the decision in this ruling is that the plaint merely asks for a declaratory decree and that all that need be looked at is what the plaintiff asks for in his plaint There are a number of other reported cases in which it has been held that such a suit is a suit for a declaratory decree with consequential relief. The ratio decidendi in these cases is that the relief claimed is really the same whether the plaint purports to ask that a document should be adjudged voidable or declared not to affect the plaintiff's title or be set aside or cancelled I instance the Full Bench decision in *Arunachalam Chetty* v. *Rangaswamy Pillai* (2) There the question referred to the Full Bench related to :

"a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him (p. 925 of the report)."

The Full Bench, after discussing the law with regard to a suit for a declaration and an injunction, proceeded, on p. 926, to deal with the case where a declaratory decree was asked for without any relief such as an injunction. Their opinion is stated as follows :

"We are of opinion that a suit of the nature indicated in the reference which merely asks for a declaration is none the less a suit for a declaratory decree with consequential relief within the meaning of Cl. 4 (c)."

I agree with this opinion and think it can be justified on the short ground that a suit of this nature is a suit permitted by the provisions of S. 39, Specific Relief Act, for the reliefs mentioned in this section. It seems clear that a prayer to set aside or cancel a document is a prayer for a consequential relief. This has been held by a Bench of this Court in *Baldeoprasad* v. *R. S. Seth Ghasiram* (3).

It is next urged that, as the plaintiffs were at liberty to value the relief of cancellation at Rs. 130, the plaint was sufficiently stamped. The plaint valued the relief at Rs 6,000. The defendant urged that the value of the relief was Rs 2,000 and the plaintiffs did not urge that the value was less It must be taken as admitted that the value of the relief was at least Rs. 2,000. The rejection of the plaint was then proper.

This appeal therefore fails and is dismissed. Costs on appellants.

R K. *Appeal dismissed*

(1) [1903] 30 Cal. 788.
(2) [1915] 38 Mad. 922=28 M.L.J. 118=28 I. C. 79=(1915) M.W. N. 118 (F.B.).
(3) [1920] 116 N.L.R. 84=56 I.C. 360.

* A. I. R. 1929 Nagpur 72

PEIDEAUX, A J. C

Ramji—Defendant—Applicant.

v.

Anjaniprasad—Plaintiff— Non-Applicant.

Civil Revn. No. 234-B of 1928, Decided on 20th November 1928, from order of 2nd Class Sub-Judge, Kelapur, D/- 26th July 1928, in Civil Suit No. 172 of 1927.

*** Civil P. C., O. 23, R. 1 (2)—Claim based on particular pro-note—After evidence, plaintiff finding it to be based on other note—He cannot be allowed to withdraw.**

Under O. 23, R. 1, the words "formal defect" refer to cases of misjoinder either of parties or matters in contest in the suit, or to cases in which a material document has been rejected because it has not borne a proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. But where the plaintiff comes into Court contending that his claim is based on a particular note of hand and, after evidence has been recorded, finds that it is not based on that but based on another note altogether, it can hardly be said to be a "formal defect," and he cannot be allowed

to withdraw the suit with permission to bring a fresh suit 40 *All.* 612; *Rel. on.*; *A. I. R.* 1922 *Nag.* 84 *Appr.* [P 73 C 1]

K V. Deoskar—for Applicant.

Abdul Razak—for Non-Applicant.

Order.—This suit is based on a pronote dated 21st April 1924. The defendant contended that this had been renewed by another note dated 28th July 1925 and was therefore cancelled. The latter note he also contended, had been paid off and he produced it. The plaintiff stated that the second note of 1925was not genuine but when examined as a wiitnses he said that his claim was based on the note of 1925 and not on that of 1924. He then applied for withdrawal of the suit, and the lower Court holding that there was a formal defect in it permitted it to be with drawn

In my opinion the lower Court is wrong Under O. 23, R 1, Civil P C,, the words "formal defect" refer to cases of misjoinder either of parties or matters in contest in the suit, or to cases in which a material document has been rejected because it has not borne a proper stamp, and to cases in which there has been erroneous valuation of the subject of the suit. Those are cases which fail by reason of some point of form, but where the plaintiff comes into Court contending that his claim is based on a particular note of hand and after evidence has been recorded, finds that it is not based on that but based on another note altogether, it can hardly be said to be a "formal defect." It was held in *Jhunku Lal* v, *Bisheshar Das* (1) that a Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits In the present case the plaintiff seeks to recover a sum of money upon certain allegations which are admittedly untrue, and in a case like this I do not think he should be allowed to withdraw It was held by Batten, O.J. C., in *Singhai Rajilal* v. *Kanhai* (2) that

"the object of R. 1 (2), O. 23, Civil P, C., 1908, is not to enable a plaintiff, after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and so to prejudice the opposite party."

This finding has my concurrence

I set aside the order permitting the plaintiff to withdraw the suit with permission to bring a fresh suit and dismiss the present suit with costs. The plaintiff will pay the defendant's costs both in the Small Cause Court and here I fix pleader's fees at Rs 15.

R K. *Order set aside.*

(1) [1918] 40 All. 612=46 I. C. 71=16 A. L.J. 495.

(2) A. I. R. 1922 Nag. 84=18 N. L. R. 30.

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* A. I. R. 1929 Nagpur 73

MACNAIR, A J. C

Mukundsa—Appellant.

v.

Motiram and *others*—Respondents.

Misc Appeal No. 48 of 1927, Decided on 21st December 1928, from decree of Addl. Dist Judge, Hoshangabad, D/-15th October 1927, in Misc Judicial Case No. 8 of 1927.

*** (a) Civil P. C , O 43, R. 1 (w)—R. 1 (w) enables party to appeal on grounds other than those mentioned in Civil P. C., O. 47, R. 7.**

Order 43, R. 1 (w), enables a party to appeal on grounds other than those mentioned in O. 47, R. 7, since there is nothing in the Code which expressly limits the grounds of an appeal under O. 43, R. 1 (w) : *A. I. R.* 1926 *Bom.* 121, *Foll.* [P 74 C 1]

*** (b) Civil P. C., S. 21—Review is entertainable if judgment fails to notice S. 21—Civil P.C., O. 47, R. 1.**

The failure to notice the provisions of S. 21, bears an analogy to a mistake or error apparent on the face of the record and is a ground for review . *A. I. R.* 1922 *P. C.* 112, *Rel. on.* [P 74 C 2]

J. Sen—for Appellant

S B. Gokhale—for Respondents.

Judgment.—The suit out of which this appeal arises was filed in the Court of the 1st Subordinate Judge, Hoshangabad The defendants, among other pleas, urged that the suit should have been filed at Burhanpur and that the Hoshangabad Court had no jurisdiction The first Court held that the suit was properly filed at Hoshangabad. Mukundsa appealed. In appeal it was held that the suit should have been filed at Burhanpur ; the decree of the lower Court was set aside and the plaint was returned to the plaintiffs for presentation to the proper Court.

The plaintiffs applied for review of this order, on the ground that one of the provisions of S. 21, Civil P. C., had been overlooked, as the question whether there had been a failure of justice had not been considered The Judge who

had decided the appeal directed that notice should issue. The successor of that Judge granted the application and directed that the appeal should be heard again, first with regard to the question whether there had been a failure of justice, and later if necessary on the merits. A defendant has appealed to this Court.

The respondents put in a preliminary objection to this appeal. Mr. Gokhale points out that under O 47, R. 7, Civil P C, an order granting an application for review may be objected to by an appeal on certain grounds and that the present appeal is not based on any of these grounds. He cites *Sundar* v. *Habib Chik* (1) and *Munnu Lal* v. *Kunj Bihari Lal* (2). Mr. Sen for the appellant points out that an appeal from an order granting an application for review is given by O. 43 R 1 (w), Sch 1, Civil P C. O 47, R. 7, does not state that no appeal shall lie on any of the grounds mentioned in that order The position, therefore, is that O. 47, R. 7, authorizes an appeal on certain grounds and O 43 R. 1 (w) authorizes an appeal on any ground.

The provisions of O. 47, R 7, have been reproduced from the former Code : O. 43, R 1 (w) is new. It seems clear that the existence of O. 47, R. 7 must have escaped notice when it was decided to insert O. 43, R 1 (w). I agree with the reasoning in *Daso Keshav* v. *Karbasappa* (3) and hold that O. 43, R 1 (w), enables a party to appeal on grounds other than those mentioned in O. 47 R. 7 since there is nothing in the Code which expressly limits the grounds of an appeal under O. 43 R. 1 (w) I hold, therefore, that an appeal lies.

The first argument in appeal is that the Judge who tried the first appeal may have considered the question whether a failure of justice took place. I think the absence of any reference to this question in the appellate order and the fact that the same Judge when an application for review was filed issued notice justify the inference that the point escaped the Judge's attention

It is next urged that the omission to consider the effect of S. 21, Civil P C, is a mere mistake of law and not a ground for review. Their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (4) held that the words " any other sufficient reason" in R. 1, O 47, mean

" a reason sufficient on grounds at least analogous to those specified immediately previously."

I have, therefore, to decide whether the failure to notice the provisions of S. 21, Civil P. C., bore an analogy to a mistake or error apparent on the face of the record. In the case with which their Lordships of the Privy Council were dealing the Court which granted the review had dealt on the merits with a judgment brought before it under the Code for review, treating the view of the law taken by the Judges who had decided the appeal as a matter that was open to them as if on an appeal, and coming to the conclusion that the previous decision of the case had proceeded upon an incorrect exposition of the law. It is obvious that the reason for which the review was granted was in that case not analogous to a mistake or error apparent on the face of the record.

The case I am considering is very different. Clearly the order of remand is defective : it omits all mention of failure of justice whereas S. 21, Civil P. C., clearly prohibits the passing of the order unless it is found that a failure of justice occurred. The omission is apparent if S 21 is known or is consulted. If the omission is not a mistake apparent on the face of the record, it is something analogous to it.

The lower Court was entitled to entertain the application for review. This appeal is, therefore, dismissed. Costs on appellant, counsel's fees Rs. 40.

S.N./R.K. *Appeal dismissed.*

(1) [1920] 42 All. 626 = 60 I. C. 81 = 18 A. L. J. 898.
(2) A. I. R. 1922 All. 206=44 All. 605.
(3) A. I. R. 1926 Bom. 121.
(4) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P.C.).

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* A. I. R. 1929 Nagpur 74

MOHIUDDIN, A. J. C.

Nandu—Defendant—Appellant

v

Bhuwanoo—Plaintiff—Respondent

Second Appeal No. 486 of 1927, Decided on 21st December 1928, from decree of Addl. Dist.; Judge, Raipur, D/- 16th June 1927 in Civil Appeal No. 178 of 1926.

(a) Interpretation of Statutes—Statutes of limitation must be strictly construed against claimants.

The statutes of limitation are intended to check the tendency which litigants have of dilatoriness and such statutes must have strict operation. [P 75 C 2]

*** (b) Limitation Act, S. 5—Scope.**

Ignorance of law cannot be sufficient excuse for not filing an application in time. 13 *Cal.* 266 *Dist.*; 12 *Bom.* 320 and 12 *All.* 461, *Foll.* [P 75 C 2]

P. N. Rudra—for Appellant.

V. N. Herlekar—for Respondent.

Judgment—This appeal was filed by Nandoo on 19th September 1927 and was fixed for hearing parties on 14th December 1928. The appellant Nandoo died on 8th August 1928, leaving behind sons and grandsons of predeceased sons but no application on their behalf was made within 90 days the period prescribed by law, for bringing the legal representatives of the deceased appellant on record, and accordingly the appeal abated so far as the deceased appellant was concerned. The legal representatives of a deceased appellant can apply within 60 days from the date of abatement to set aside the dismissal and if it is proved that they were prevented by any sufficient cause from continuing the appeal, the Court shall set aside the abatement upon such terms as to costs or otherwise as it thinks fit. In this case, three out of thirteen legal representatives filed an application on 12th December 1928, stating:

"that they were not aware that an application for substitution of the legal representatives of the deceased appellant had to be made within 3 months of his death"

and prayed that, in the circumstances, the delay in making the application be condoned. In short, the applicants plead ignorance of law, and put forward this ignorance of law as sufficient cause for not making the application earlier.

The learned pleader for the applicants argued that the mistake was bona fide and was not due to wilful negligence and cited *Hero Chunder* v *Surnamoyi* (1) The learned pleader for the respondent cited *Sitaram Paraji* v. *Nimba Harishet* (2) and *Bechi* v. *Ahsanullah Khan* (3), and argued that ignorance of law cannot be considered sufficient cause for extending time. In the case reported in *Huro Chunder Roy* v. *Surnamoyi* (1), the appeal was filed late, because the appellant was under the impression that the appeal would lie to the High Court, while, as a matter of fact, on account of the reduction of the claim from 18,000 to 5,000 by the Court of first instance, the appeal could not lie to the High Court but to the Court of District Judge. There was thus a mistake of fact as well as a mistake of law in that case. The case is not on all fours with the present case and therefore is not applicable. West and Birdwood, JJ, held in *Sitaram Paraji* v. *Nimba Valad Harishet* (2). that:

"mere ignorance of law cannot be recognized as a sufficient reason for delay under S. 5, Lim. Act.

The same point was considered by Mahmood, J. in *Bechi* v. *Ahsanullah Khan* (3) and he made the following observation in that case:

"A bare mistake of law is not a sufficient cause within the meaning of S. 5, Lim. Act, for extending the period of limitation."

The statutes of limitation are intended to check the tendency which litigants have of dilatoriness and such statutes must have strict operation. Ignorance of law cannot be sufficient excuse for not filing the application in time and, therefore, the abatement cannot be set aside The application is rejected I allow Rs. 10 as costs which will be paid to the respondent by the applicants.

S N./R K *Application rejected.*

(1) [1886] 13 Cal. 266.
(2) [1888] 12 Bom. 320.
(3) [1890] 12 All. 461=(1890) A. W. N. 149 (F.B.).

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* A. I. R 1929 Nagpur 75

KINKHEDE AND STAPLES, A. J. Cs.

Seth Bhawarlal and *others* — Defendants—Applicants.

v

Lachmandas — Plaintiff —Non-Applicant.

Misc Petn. No. 87 of 1927, Decided on 22nd December 1928, for leave to appeal to Privy Council, from decree of A. J. C., Nagpur, D/- 12th September 1927, in 1st Appeal No. 49 of 1926.

*** (a) Civil P. C., S. 110 (1)—Under Cl. 1 besides value of subject-matter as given in plaint, value of subject-matter in dispute of appeal to His Majesty at the date of decree to be appealed against must be considered.**

In a case coming under Cl. (1), S. 110, the conjunction "and" cannot be read as "or," so that, besides the value of the subject-matter of the suit in the Court of first instance at the date of the institution of the suit, the value of the subject-matter in dispute on appeal to His Majesty in Council at the date of the decree

tion from which the appeal to His Majesty in Council is to be made, must be taken into consideration 24 *All.* 174 (*P. C.*); 8 *M. I. A.* 169 (*P. C.*) and 42 *All.* 445, *Foll.* [P 76, C 2]

(b) Civil P. C., S. 110 (2)—Value must be determined as on date of decree to be appealed against.

In a case coming under Cl. (2), S. 110 the value of the property referred to in it must be determined with reference to the date of the decree from which the appeal to His Majesty in Council is to be made. 44 *Cal.* 119 and 44 *Bom.* 104, *Rel. on.* [P 76, C 2, P 77, C 1]

*** (c) Civil P. C., S. 110, Cls. (1) and (2)—"Subject matter" and "property" used in Cls. 1 and 2 respectively are not synonymous—"Property" indicates property not in suit or dispute.**

The words "subject-matter" and "property" used respectively in Cls. 1 and 2 cannot be treated as synonymous terms. The word "property" in Cl. (2) is used there with a view to indicate property not in suit or dispute, which may be, directly or indirectly, involved: *A. I. R.* 1925 *P. C.* 159, (*P. C.*), *Foll.* [P 77, C 1]

*** (d) Civil P. C., S. 110—Interest allowed but not claimable as of right cannot be included in value.**

The amount of interest which a Court may allow in the exercise of its discretion but which is not claimable as of right, cannot be included in the value under S. 110: 42 *All.* 445, *Rel. on.* [P 78, C 2]

(e) Civil P. C., S. 110—Contract of sale—Consideration or price payable under contract is its value.

The consideration or price payable under the contract of sale must alone determine the value of the subject-matter in dispute on appeal to His Majesty in Council. [P 79, C 1]

(f) Civil P. C., S. 110—Suit mainly for specific performance of contract—Relief for possession only ancillary — Possession need not be separately valued.

Where a suit is one for obtaining the main relief of specific performance of the contract of sale, and the relief of possession is regarded as an ancillary relief flowing from the main relief, relief of specific performance need not be separately valued. [P 79, C 1]

*** (g) Civil P. C., S. 110 — New machinery brought on property during pendency of suit for specific performance—No mention of it in pleadings, evidence or argument—Its value cannot be taken into account.**

If during the pendency of a suit for specific performance of a contract of sale, new machinery is brought on the premises in suit, of which no mention is made in the pleadings or in evidence, or even at argument, its value cannot be taken into account. *Nag. Misc. Petn. No.* 58 *of* 1927, *Dist.* [P 79, C 2]

Order.—This is a petition by the defendants under S. 110, Civil P. C, for leave to appeal to His Majesty in Council against the decree passed by this Court in First Appeal No. 49 of 1926, directing the specific enforcement of the contract which the defendants had made to reconvey and deliver into plaintiff's possession certain property, and also payment of monetary compensation. The first Court had refused to grant the relief of specific performance of the contract, and had granted him the alternative monetary relief by way of damages. The plaintiff came up in appeal to this Court, and succeeded in obtaining the appropriate decree. The defendant-appellants now urge that the case fulfils the requirements of S. 110, Civil P. C, and that they should be granted the necessary certificate. The plaintiff on the other hand, contends that it does not, and that the certificate should be refused. Therefore the question to be considered is whether this is a case which fulfils the requirements of either Cl. 1 or Cl 2, S 110 of the Code As the decision of this Court is not an affirming decision we need not consider the applicability of Cl. 3 of the said section.

It has to be borne in mind that, whereas, Cl 1 of the said section makes reference to the value of the 'subject-matter of the suit' and also of the 'subject-matter in dispute on appeal to His Majesty in Council,' the second looks only to the value of 'property' to or respecting which some claim or question is involved in the decree appealed against. It will thus be seen that in a case coming under Cl. (1), S. 110, Civil P. C, the conjunction 'and' is very important. Both the values must be looked to. The word 'and' cannot be read as 'or': *cf. Molichand* v. *Gunga Pershad* (1). So that, besides the value of the subject-matter of the suit in the Court of first instance at the date of the institution of the suit, the value of the subject-matter in dispute on appeal to His Majesty in Council at the date of the decree from which the appeal to His Majesty in Council is to be made must, as held in *Gooroopersad* v. *Juygut Chunder* (2) and *Sahu Ram Kumar* v. *Muhammad Yakub* (3), be taken into consideration. On the other hand, in a case coming under Cl (2) of the said section the value of the property referred to in it must be determined with

(1) [1902] 24 All. 174 = 29 I. A. 40 = 8 Sar. 247 (P. C.).
(2) [1860] 8 M. I. A. 166 = 3 W. R. 14 = 1 Sar. 742 = 1 Suther 399 (P.C.).
(3) [1920] 42 All. 445 = 55 I. C. 976 = 18 A. L. J. 445.

reference to the date of the decree from which the appeal to His Majesty in Council is to be made : cf. *Surendra Nath Roy* v. *Dwarka Nath Chakravarti* (4) and *Raoji Bhaikaji* v. *Laxmibai* (5). Cl 2 which is the alternative to the whole of the requirements of Cl. 1 does not take into account the value of the subject-matter of the suit in the Court of first instance, as it existed at the date of the suit; the same is necessary only for the purposes of Cl. 1. Moreover, the words "subject-matter" and "property" used in the two clauses cannot, for obvious reasons, be treated as synonymous terms referring to the property in dispute in the suit or appeal. The absence of the words "in suit" or "in dispute" after the word "property" in Cl. 1 suggests the inference that the word "property" is used there with a view to indicate property not in suit or dispute, which may be, directly or indirectly, involved : cf. *Udoychand Pannalal* v. *Guzdar & Co.* (6).

The first question to be considered is whether the case fulfils the requirements of Cl. 1 of the said section As already observed, for the purposes of this clause, two things are material : (1) the value of the subject-matter of the suit at the date of its institution ; and (2) the value of the subject-matter in dispute on appeal to His Majesty in Council at the date of this Court's decree. In connexion with the first value, our attention is drawn by the applicants to the valuation as given by plaintiff (non-applicant) in para. 10 read in conjunction with para. 13 of his plaint ; and with regard to the second to the account as made by this Court in para 29 of its judgment in first appeal No. 49 of 1926 Both these are reproduced in an annexure to this petition marked statement A for ready reference They also refer to their own valuation as given in their affidavit.

A reference to para. 1 of the judgment of the first Court will show how the plaintiff's claim was laid in the plaint. He wanted a decree directing the defendants to specifically perform the contract of sale by executing a sale-deed and delivering possession of the land and buildings to him and also to pay him Rs. 2,930.

(4) [1917] 44 Cal. 119=24 C. L. J. 350=35 I. C. 605=21 C. W. N. 530.
(5) [1920] 44=Bom. 104=55 I. C. 972=22 Bom. L. R. 243.
(6) A. I. R. 1925 P. C. 159=52 Cal. 650=52 I. A. 207 (P.C.).

The following account will show how this amount was arrived at :

Value of entire concern	Rs.	52,000-0-0
Deduct value of entire machinery and value of moveables	,,	44,111-0-0
	,,	1,819-0-0
Total	Rs.	45,930-0-0
The net value of land and buildings	Rs.	6,070-0-0
Price of machinery and moveables payable to plaintiff for his ¼th share	Rs.	11,482-8-0
Price payable by plaintiff to defendant for ¾th share of land and buildings	,,	4,552-8-0
	Rs.	6,930-0 0
Deduct earnest money received	,,	4,000-0-0
Balance	Rs.	2,930-0 0

It will thus be seen that the value as put by the plaintiff on the main relief of specific performance of the contract of resale with a stipulational for possession, was Rs 4,552-8-0 and the additional monetary relief he claimed was Rs 2,930, their total being Rs 7,482-8-0 : see items 1 and 2 in Part 2 of the annexure marked statement *A* to the petition. But in case it were held that he was not entitled to specifically enforce the contract and obtain possession, he asked that a decree awarding him the following alternative relief may be passed

Rs. 7,482-8-0	For money due to him, made up of Rs 4,552-8-0 and Rs, 2,930
,, 751-7-0	as his share of profits
,, 1,100-0-0	as damages
,, 1,517-8-0	As the price of his own ¼th share of land and buildings which in that case might be retained by defendants
Rs. 10,851-7-0	Total

In para. 10 of the plaint the plaintiff distinctly stated that, as the value of the subject-matter of his suit so far as he claimed the specific enforcement of the contract of resale and the monetary relief

(which together amounted to Rs. 7,482-8-0) was less than the value of the alternative relief regarding the return of his ¼th share of land and buildings and the monetary claim, (which together amounted to Rs 10,851-7-0), he valued the relief for purposes of Court-fees and jurisdiction and paid Court-fee on the higher of the two alternative reliefs, viz., on Rs. 10,851-7-0. The contention advanced in one of the grounds of the petition, that the aggregate of the two reliefs determines the value of the subject-matter of the suit and that S. 17, Court-fees Act applies to such a case, has not been very wisely pressed at the hearing. It is altogether untenable. If, for purposes of S. 110, Civil P. C., the words "value of the subject-matter of the suit in the Court of first instance" are taken as refering only to the main relief of specific performance of the contract of resale and the monetary claim, then, the value must be taken to be Rs. 7,482-8-0 (4,552-8-0 + 2,930) only, or at the most at Rs 9,000 (6,070 + 2,930) if the value of the whole 16 annas of land and buildings taken in place of ¾ths. If the value of the subject-matter of the suit is to be preferably determined with reference to the higher alternative relief only, then we think, Rs. 10,851-7-0 will represent that value But, even then, this alone will not serve the applicants's purpose, as besides it the value of the subject-matter in dispute on appeal to His Majesty in Council with reference to the date of the decree of this Court has also to be taken into account for purposes of Cl. 1 as the use of the conjunction "and" shows. This must necessarily refer to the relief granted by the decree of this Court by which the applicants are aggrieved and which they wish to dispute in appeal to His Majesty in Council. We must, therefore, ascertain the value of the subject-matter in dispute in appeal to His Majesty in Council.

The Court held the plaintiff entitled to the main relief of specific enforcement of the contract to reconvey and deliver possession, which was valued in the plaint at Rs. 4,552-8-0, namely, at ¾ths of Rs. 6,070 the total value of the land and buildings payable under the contract of resale. But according to this Court the plaintiff was liable to pay to defendants Rs. 5,916-12-0, as representing the ¾th share of Rs. 7,889, which it fixed as the total value of the land and buildings to be reconveyed instead of Rs. 6,070: so, this sum of Rs. 5,916-12-0 set out to represent the value of the first relief by the decree, namely, the specific enforcement of the contract of resale and possession of ¾th share of land and buildings. The value of the second relief, namely, of possession of the remaining ¼th share of the land and buildings granted by this Court's decree, as set forth in the plaint is Rs. 1,517-8-0, but on this Court's calculation it would be Rs. 1,972-4-0 (¼ of 7889). Adding to these two values, (i. e., Rs. 5,452-8-0 + Rs. 1,517-8-0 or Rs. 5,916-12-0 + Rs 1,972-4-0) Rs. 1,566 on account of monetary relief decreed in this Court, the total value of these reliefs granted by the decree of this Court would come to Rs. 7,636 or Rs. 9,455. From these calculations, we have left out the interest which this Court allowed from the date of the suit upto the date of its decree in the exercise of its discretion. The value of the subject-matter in dispute on appeal to His Majesty in Council exclusive of such interest falls short of Rs 10,000. Thus the second requirement of the first clause is not fulfilled. It will thus be seen that it is only if the interest, which works out at Rs 750, is included, that the said value may exceed Rs 10,000. But in the absence of any express or direct authority of a Privy Council decision to that effect, we do not feel ourselves justified in including in such value the amount of interest which a Court may allow in the exercise of its discretion but which is not claimable as of right: cf. *Sahu Ram Kumar* v. *Muhammad Yakub* (3).

The applicants, however, contend that the value of the land and buildings at the date of the decree of this Court was Rs 15,000 and have filed an affidavit in support of their assertion. The non-applicant disputes this valuation and urges that it is unnecessary to go into the question of the value of the property, as the suit is one for specific performance of the contract to resell and deliver possession and the value of the subject-matter of such a suit is determined not by any artificial rule as to valuation adopted for the purposes of Court-fees or jurisdiction, but by reference to the price of consideration actually payable under the contract of sale, as S. 7, Cl. 10 (a), Court-fees Act, would

show. The consideration being the price of the property must, it is urged be treated as its value. We accept this contention. Since the consideration for the sale determines the value of the subject-matter of the suit for purposes of both Court-fees and jurisdiction in view of S. 8, Suits Valuation Act, we think, the consideration or price payable under the contract of sale must alone determine the value of the subject-matter in dispute on appeal to His Majesty in Council. In this view of the case Rs. 5,916-12-0 would represent such value In a suit for specific performance of the contract of sale as here, where, the relief of possession is claimed, as flowing from, and not independently of, the relief of conveyance of title, we think, the suit must be regarded as substantially one for specific performance, and as such governed by S. 7 (10), Court-fees Act, and the relief for possession must be treated only as a relief ancillary or leading to the substantial relief of specific performance. Where, however, the possessory relief is claimed as a relief independent of the contract, not flowing from the grant of the relief of specific performance of such contract, the reliefs of specific performance and possession would in that case have to be separately valued, and their aggregate value would have to be considered as the value of the subject-matter in dispute in appeal. But as we have held that the present suit was one for obtaining the main relief of specific performance of the contract of sale, and the relief of possession is regarded as an ancillary relief flowing from the main relief, we think there is no need to order any investigation in regard to the market value of the land and buildings, at the date of this Court's decree. It will thus be seen that the case does not fulfil both the requirements of Cl (1), S 110, Civil P. C.

The applicants next invite us to apply Cl 2 to this case, as they urge that in carrying out the directions of this Court's decree, they will have to remove the new machinery, which they say, they had brought upon the premises subsequent to the institution of the suit and which according to them is worth Rs. 60,000, as alleged in para. 4 of their application for stay dated 10th October 1927, and their affidavit dated 8th October 1927 (in file B of First Appeal No. 49 of 1926 dated 12th September 1927). We find it stated in the judgment in First Appeal that the machinery, which was purchased by the defendants from plaintiff and his partners, as per first contract in suit, for Rs. 44,111, had already been removed by them to Sanawad; if, as they say, they thereafter brought any other new machinery on the premises during the pendency of the suit, of which absolutely no mention is to be found in the pleadings or in evidence or even at the stage of arguments in appeal, they must be deemed to have done so at their own risk; and we think, that, in law, they cannot make that an excuse for urging that the decree of this Court, directly or indirectly, involves, a claim or question, to, or, respecting, property namely, the new machinery of the value of Rs 10,000 and upwards. We are referred to the decision of another Bench of this Court in Miscellaneous Petition No. 58 of 1927 in this connexion, but it is not clear from that decision that the superstructure standing on the plots in dispute there was property brought upon the premises during the pedency of the litigation as in the present case. We, therefore, think that that decision does not help the applicants In this view of the case it is unnecessary to take into consideration and determine the value, of the new machinery said to be involved, at the date of this Court's decree, or, the costs of its removal. We, therefore, hold that the present case does not fall under Cl. (2), S. 110, Civil P C., as well.

The application for leave to appeal to His Majesty in Council being thus untenable, we refuse to grant the certificate of fitness under S. 110, Civil P. C We accordingly reject the petition with costs. Councel's fee Rs. 50

S.N./R.K. *Petition rejected.*

A. I. R. 1929 Nagpur 79

KINKHEDE, A. J. C.

Uttamchand—Appellant.

v.

Saligram—Respondent.

Second Appeal No. 72-B of 1927, Decided on 11th September 1928, from decree of 1st Addl. Dist. Judge, Akola, D/- 24th January 1927, in Civil Appeal No. 236 of 1926.

(a) Decree—Validity of — Mortgagee abandoning his claim against one mortgagor—His name retained on record and decree passed against him also—Decree is not binding on that mortgagor.

A voluntary and unqualified abandonment by a mortgagee of his claim against one of the mortgagors operates as unqualified dismissal of his suit so far as that mortgagor's interest is concerned although his name is retained on the record and the decree is passed as against him also. The mortgage should be deemed to have been wiped out of existence as against that mortgagor's interest. [P 80 C 2]

(b) Evidence Act, S. 115—Scope.

Where a person has successfully opposed an application under S. 47, Civil P. C., on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47. [P 80 C 2]

D. W. Kathalay and *M. R. Bobde*—for Appellant

G. R. Pradhan—for Respondent.

Judgment.—This is a second appeal by the defendant who is an assignee of a mortgage-decree dated 6th January 1922 passed on the basis of a mortgage dated 29th March 1906 Ex. P-1 in mortgage suit No. 28 of 1921 brought by the legal representatives of the original mortgagee Sukhdeo against the legal representative of the original mortgagor, Gangaram and Devsing and Balaram The preliminary decree which was passed, was based on a compromise effected As the result thereof the present plaintiffs were exonerated from the decree and the then plaintiffs were content with accepting a decree for foreclosure against Balaram and Sheoram The property in suit was mentioned in the decree as foreclosed and the then plaintiffs obtained a final decree and foreclosed and got possession of the field with standing crops on 14th October 1923. Hence this suit by the plaintiffs for recovery of possession of the fields No. 21/4 with crops on the ground that the defendant had no right to the same under the decree assigned to him.

The defence was that the plaintiffs though discharged were retained on the record, and that the decree was made absolute against them as well and that the suit was barred by S. 47, Civil P. C. The first Court held the suit not barred and passed a decree in plaintiff's favour for possession and crops worth Rs 400. The defendant's appeal was dismissed by the Additional District Judge, Akola. Hence he appeals. I think the appeal must fail. In spite of the fact that the present plaintiff's father Gangaram was one of the mortgagors of the field in suit, the then plaintiff's elected to obtain a decree against the other mortgagors and voluntarily abandoned their right to obtain a decree, binding the interest of the present plaintiffs, who were defendants to the former suit. This was a voluntary and unqualified abandonment of their claim which must operate as an unqualified dismissal of that suit so as to bar a second suit by them on the same cause of action. If the suit having been thus dismissed, the then plaintiffs attempted to dispossess the present plaintiffs from possession of property belonging to them the latter is entitled to show that they have acquired immunity from all further claim based on the mortgage The defendant cannot urge that he has a right to retain possession of the land until the plaintiffs offer to redeem him. So far as the plaintiffs are concerned the mortgage must be deemed to have been wiped out of existence. I think the Additional District Judge was right in holding that the defendant could not take up inconsistent position and urge the defence of bar of S. 47, Civil P. C., as when the plaintiffs came in under that section he successfully maintained that that section did not apply and the remedy was by regular suit. The defendant cannot blow hot and cold in the same breath as it were.

The sole question on which the plaintiff's heir therefore depended was that they were owners of the field in suit It is clear from the documentary evidence on record that the field in suit was the exclusive property of Gangaram and after him of his sons of the plaintiffs by virtue of a partition. The defendant's predecessor or for the matter of that, the defendant acquired no interest in the property in suit by virtue of the foreclosure decree as his judgment-debtor has ceased already to have any interest in the property. The appeal must therefore fail with costs to be paid by the appellant who will bear his own.

S.N./R K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 81

KINKHEDE, A. J. C.

Kaluram and *others*—Appellants.

v

Nagulal and *others*—Respondents

Second Appeal No. 571 of 1926, Decided on 6th September 1928, from decree of 1st Addl. Dist Judge, Nimar, D. 17th August 1926, in Civil Appeal No. 34 of 1926

(a) Hindu Law—Religious office—Right of parsaipan is moveable property.

The right to parsaipan in Nimar is similar to the pala or turn of worship at a temple and is not immovable property but is moveable property : 4 *Cal.* 683 ; 30 *Cal.* 227 and 46 *Cal.* 455, *Rel. on.* [P 81 C 1]

(b) Hindu Law—Religious office—Right to receive fees as parsai is not mere possibility—It is transferable even beyond transferrer's lifetime when transferee is possible heir and cosharer in parsaipan—Transfer of Property Act S. 6 (a).

The right to receive remuneration or fees for the performance of certain services as a parsai is not "a mere possibility" and can be the subject of transfer 39 *All.* 196, *Appr.*; 43 *Cal.* 28, *Ref.* [P 82 C 1]

It is transferable beyond the lifetime of the transferrer when the transferee, besides being a relation and a possible heir, is a holder of a share in the parsaipan in his own right and has his own turn by rotation of enjoying the remuneration : 6 *Bom.* 208, *Rel. on* ; 5 *N. L. R.* 15, *Dist.* [P 82 C 1]

S K Ghosh—for Appellants

W. B. Pendharkar—for Respondents

Judgment—The right of parsaipan in Nimar is held by the Court of first appeal to be transferable but its operation was limited to the lifetime of the transferrer on the analogy of the right of joshipan in Berar on the authority of *Rajaram* v. *Waman* (1). I think, the lower Court erred in extending the analogy of the right of joshipan in Berar to this right To the joshipan watan referred to in *Rajaram* v. *Waman* (1) case certain property was attached This one circumstance distinguishes that case from the present one. Here there is no such thing. The lower appellate Court ought to have held that the right to parsaipan was similar to the pala or turn of worship at a temple That a right to pala or turn of worship is not immovable property but is moveable property has been established in *Eshan Chunder Roy* v. *Monmohini Dassi* (2) and *Jato Kar* v *Makund Deb* (3) cited with approval in *Narasingha* v. *Prolhodman* (4). In view of these recent decisions I do not think the view to the contrary effect that the right to officiate as a president at funeral ceremonies of Hindus is in the nature of immovable property can be held to be saved.

In *Sukhlal* v. *Bishambhar* (5) it was held that there is nothing in the law to prevent a Mahabrahmin mortgaging his right to offerings recoverable by him in his personal capacity. The Mahabrahmins are members of a sect which perform certain ceremonies and duties at funerals of Hindus It was remarked at p. 199 that the offerings at a temple do not stand on the same basis as remuneration which Mahabrahmins receive for the services they perform at Hindu funerals. The S. 6, T P. Act, was quoted in support of an argument that the so-called right was at least a mere possibilty within the meaning of Cl. (a) of that section and that the mere possibility was incapable of being transferred. Before me reliance is placed by the respondents on the case of *Puncha Thakur* v. *Bindeshwari Thakur* (6) and it is argued that the chance that future worshippers will give offerings is a mere possiblility and as such it cannot be transferred. The argument is that no man can compel another to make voluntary offerings, and as offerings are made to a deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right in which he is entitled to traffic. But as pointed out in *Sukhlal* v *Bishambhar* (5) at p. 198 where the remuneration is received for certain duties and the amount largely depends upon the surrounding circumstances, the generosity of the person getting the duties and services performed at the funeral and very probably the wealth and position of the deceased, the offering could not be called purely voluntary No doubt there is no obligation on any person to employ any particular Mahabrahmin No Mahabrahmin could bring a suit to compel any person carrying out the funeral to employ him and it is probable that in the absence of a special agreement a

(1) [1900] 5 N. L. R. 15=1 I. C. 244.
(2) [1879] 4 Cal. 683.
(3) [1912] 39 Cal. 227=14 C. L. J. 369=11 I. C. 884=16 C. W. N. 129.
(4) [1919] 46 Cal. 455=47 I. C. 25=22 C. W. N. 994.
(5) [1917] 39 All. 196=37 I. C. 661=15 A. L. J. 41.
(6) [1915] 43 Cal. 28=28 I. C. 675=19 C. W. N. 580.

Mahabrahmin could not bring a suit against another Mahabrahmin for fees received. This shows that the right to receive remuneration or fees for the performance of certain services as a parsai is not "a mere possibility" and can be the subject of transfer. If it is property of a transferable nature, and is moveable property the provisions of S. 54, T. P. Act, has no application to its transfer.

The next question is whether it is transferable beyond the lifetime of the transferrer. This question is well discussed in *Mancharam* v *Pran Shankar* (7) where it was held that that such rights are heritable, partiable and even transferable. Alienation by divided member of a Hindu family to his relations of the right of worshipping a goddess and receiving a share of the offering was upheld, on the principle that the purchasers were persons standing in the line of succession In that case the purchaser was not the next heir but only a possible heir. This condition is duly fulfilled in this case by the appellant who besides being a relation and a possible heir is a holder of an 8 as share in the parsaipan in his own right and has his own turn by rotation ef enjoying the remuneration "fees payable for the services to be rendered." In view of the existence of the special agreement as to enjoyment of their rights by rotation, I think the present appellant had every right to acquire the rights of the deceased Nana by the transfer dated 21st February 1921 and to sue the defendants for their obstruction to the exercise of his rights to realize the fees which were wrongfully received by them, in so far as they related to the 4 as. share purchased by him from Nana. The death of Nana could not put an end to the right of the transferee The plaintiff had therefore every right to maintain the suit. For all these reasons I hold that the lower appellate Court's decree dismissing the suit should be reversed and that of the first Court decreeing the claim to the extent it did, restored with proportionate costs in all the three Courts to be paid by the defendants who will bear their own.

M.N./R.K. *Appeal allowed.*

(7) [1881] 6 Bom. 238.

* A. I. R. 1929 Nagpur 82

MACNAIR, A. J. C.

Kundanmal Hansraj—Appellant

v.

Mt Aziz Begam and *others*—Respondents.

Misc. Appeal No. 22-B of 1928, Decided on 1st November 1928, from order of Addl. Dist. Judge, Khamgaon, D/- 13th April 1928, in execution case arising out of Civil Suit No 1 of 1926, D/- 4th February 1926.

*** Civil P. C., O. 21, R. 57 — Execution proceedings struck off after attachment at instance of decree-holder—Attachment is ended in spite of contrary direction.**

An executing Court passed the following order. Decree-holder by pleader. Judgment-debtor absent. Case struck off as infructuous at decree-holder's instance. Costs on judgment-debtor. Property to continue under attachment.

Held, that the order passed cannot possibly be interpreted as an order adjourning the proceedings to a future date in spite of the erroneous direction that the property should continue under attachment. The attachment is at an end and it must be held to be an order dismissing the application. 41 *All.* 157 *Foll.*; *A. I. R.* 1922 *All.* 62, *Dist.* [P 82 C 2]

M. B. Niyogi—for Appellant.

Judgment.—The point which I have to decide is whether the attachment of certain property subsisted after the executing Court had passed an order on the following terms:

"19th February 1927. Decree-holder by Mr. Shembeker. Judgment-debtor absent Case struck off as infructuous. Costs on judgment-debtor. Property to continue under attachment."

In *Dildar Husain* v *Sheo Narain* (1) Richards, C. J, and Tudball, J. decided that the effect of an order in very similar terms was that the attachment came to an end. I agree with the reasoning contained in this report. When a decree-holder does not desire to proceed with an application for execution, the Court under O 21, R, 57, Sch. 1, Civil P. C must either (1) dismiss the application, with the result that the attachment ceases or (2) for any sufficient reason adjourn the proceedings to a future date. The order passed in this case, cannot possibly be interpreted as an order adjourning the proceedings to a future date in spite of the erroneous direction that the property should continue under attachment. It must be held to be an

(1) [1919] 41 All. 157 = 49 I. C. 113=17 A. L. J. 52.

order dismissing the application. In *Muhammad Mubarak Husain* v. *Sahu Bimal Prasad* (2) the order was to the effect that the execution case should, for the time being, be dismissed but the attachment should remain in force. It may well be that an order in those terms though not a proper order, bears a closer relation to an order adjourning the proceedings to a future date than it does to an order finally dismissing the application The learned Judges, who held that the order which they were considering did not cause the attachment to cease, based their decision on the word "filhal", for the time being, in the order.

I therefore find that the effect of the order in the present case was that the attachment ceased The appeal before me is, therefore, dismissed without notice to the respondents

M N./R K. *Appeal dismissed.*

(2) A. I. R. 1922 All. 62=44 All. 274.

A I. R 1929 Nagpur 83

STAPLES, A J. C

Mahasingh and *another*—Defendants—Appellants.

v.

Man Singh—Plaintiff—Respondent

Second Appeal No. 705 of 1927, Decided on 24th September 1928, from decree of Dist Judge, Hoshangabad, D/- 8th November 1927, in Civil Regular Appeal No. 94 of 1927.

(a) Landlord and Tenant—Malguzar is entitled to rent from person in possession in absence of rent-free grant.

A malguzar of a village is entitled to recover rent from a person in possession of the land in the absence of proof of rent-free grant 15 *C. P. L. R.* 9, *Foll.* [P 83 C 2]

(b) Family settlement—It cannot be presumed from pleadings unless proved.

A family arrangement must be proved as well as pleaded, and it cannot be presumed in the absence of any evidence: *A. I. R.* 1928 *All.* 65, *Ref.* [P 84 C 1]

(c) Landlord and Tenant—Land given for maintenance muafi khairati to a person by family arrangement—Settlement entry that land will continue as such till village continued with the then malguzar's family does not create perpetual rent-free grant—Heirs of such person are liable to pay rent.

A settlement entry itself is no evidence of title. Where, therefore, a land has been given by family arrangement to a certain person for maintenance muafi khairati, a note by the Settlement Officer in the wajib-ul-arz, during the lifetime of such person that the land will be according to the condition of wajib-ul-arz until the village is held by the then malguzar or his descendants, does not prove that a perpetual rent-free grant was made and the landlord is entitled to recover rent from the heirs of the person. 13 *N. L. R.* 179, *Dist.* and 15 *C.P.L.R.* 9, *Rel. on.* [P 84 C 1, 2]

S. B. Gokhale—for Appellants.

J. Sen—for Respondent

Judgment.—This second appeal is with regard to a suit brought for arrears of rent of certain land. The contention was, that the defendant-appellants were entitled to hold that land free of rent That, however, has been held against them in both the lower Courts, and they have now preferred a second appeal. Admittedly the plaintiff-respondent is the malguzar of the village and the appellants are in possession of the land for which the rent is claimed. Appellants, however, contend that this land is muafi khairati, and they are entitled to hold it free of rent. It is admitted that the village belonged to one Kalu Patel, that on his death there appears to have been some agreement or settlement between one Hamir Singh and Rajo Patelan, the widow of Kalu, and Jasodi, the daughter of Kalu. Mutation of the village was effected in the name of Hamir Singh in that year and according to the agreement fields Nos. 20 and 22, of an area of 20.25 acres, in the village were granted to the daughter, Jasodi, for her maintenance as muafi khairati The plaintiff's case was that the grant was only for the life of Jasodi, whilst the appellants contended that it was a grant free of rent to Jasodi and her descendants for as long as the malguzari remained in the family of the plaintiff.

I am of opinion that the view taken by the lower Courts is correct, and the plaintiff-respondent is entitled to demand rent from the appellants. There is no justification for the plea put forward by the appellants that their mother Jasodi was entitled to succeed to her father as his daughter nor has evidence on that point been adduced. Similarly, there is no evidence for the alleged family arrangement and no witnesses have been examined. A reference was made to the recent ruling in *Sidh Gopal* v. *Bihari-lal* (1), about family arrangement, but in any case a family arrangement must be

(1) A.I.R. 1929 All. 65=50 All. 284.

proved as well as pleaded, and it cannot be presumed in the absence of any evidence

It may be noted that the first ground in the memorandum of appeal was admitted in argument to be a mistake and was given up. The argument put forward, however, was that the muafi khairati was to continue as long as the malguzari remained in the plaintiff's family Reliance was placed on Ex P-6 which is a copy of an order in a revenue case in the Court of the Settlement Officer and on Ex D-3 which is a copy of the wajib ul-arz in which there is a note made by the Assistant Settlement Officer I do not think, however, that either of these documents by themselves support the appellants' case In Ex P-6 it is simply stated that unless the malguzars recover rent actually through the Court or even privately the muafi khairati tenure cannot be extinguished and the attestation entry will therefore stand but this is surely what the plaintiff has done in the present case. In Ex. D-3 there is a note by the Assistant Settlement Officer that the land will be continued to be according to the condition of the wajib-ul-arz until the village is held by the present malguzar and his legal descendants On the other hand, this is a note by the Assistant Settlement Officer, and cannot by itself confer any title. A settlement entry itself is no evidence of title and at the time when that note was made Jasodi was still alive The question of title was, therefore, not decided by the Settlement Officer nor, in fact, was it to be decided, and the entry of muafi khairati was repeated from former papers as it was not shown to be incorrect Nor do I think the ruling in *Ramprasad* v. *Mt Jagoti* (2), will really support the appellants, because in that case the order of the Settlement Officer clearly stated that the petitioner should be recorded in the wajib-ul-arz as a privileged occupancy tenant holding rent-free in lieu of haq in the village income. In the present case there is no such entry nor has it been held that there was any such haq. On the appellants' own showing the muafi khairati was only granted as a family arrangement and that arrangement was to hold good during the lifetime of Jasodi. I agree with the lower Courts that there are no grounds for holding that a perpetual rent-free grant was made.

(2) [1917] 13 N. L. R. 179=42 I. C. 292.

In that case, then, the plaintiff is clearly entitled to recover rent and the lower Courts rightly followed the ruling in *Tikaram* v. *Budhu* (3). I am of opinion that the matter has been correctly decided. There is no force in appeal. The appeal is dismissed with costs

R K. *Appeal dismissed*

(3) [1902] 15 C. P. L. R. 9.

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* A. I. R. 1929 Nagpur 84

MOHIUDDIN, A. J. C.

Emperor

v.

Tukaram—Non-Applicant.

Criminal Ref. No 235 of 1928, Decided on 11th September 1928, made by Addl. Session Judge, Nagpur, on 14th June 1928, in Sessions Trial No. 8 of 1928

*** (a) Criminal P. C., S. 307—Jury unanimously returning verdict of not guilty—Judge disagreeing—He must ask jury to give reasons for disbelieving prosecution evidence for High Court's information.**

Where a jury returns a unanimous verdict of not guilty against the accused and the Judge is of opinion that the verdict of the jury is manifestly wrong, he ought to ask the jury to state their reasons for disbelieving the prosecution evidence, and ought to record it for the information of the High Court. [P 85 C 1]

(b) Criminal P. C., S. 307—Scope.

Criminal Procedure Code does not put the opinion of the jury on any higher plane than the opinion of the Judge, and both should be given due weight . *A.I.R.* 1928 *Cal.* 732, *Foll.* [P 85 C 2]

G. P. Dick—for the Crown.

Jems—for Non-Applicant.

Judgment.—This is the case of Tukaram Patil, which has been referred to this Court, under S 307, Criminal P. C., by the learned Additional Sessions Judge of Nagpur. Tukaram was tried on two charges, one under S 147, I. P. C., and the other under S 307/149, I. P. C. The jury unanimously found him not guilty under both the sections. Besides Tukaram, there were 27 other persons who were also tried on the same charges, for which Tukaram was tried. The jury returned a unanimous verdict of guilty against 16 accused. The learned Sessions Judge accepted the verdict of the jury against 27 accused and disagreed with the

jury, so far as their verdict against Tukaram was concerned. He was of opinion that Tukaram was guilty under S. 147 and 325/149, I. P. C.

This case has been referred to this Court, under S. 307, Criminal P. C., and in dealing with the case, I have to keep in view, sub-S. (3), S. 307, Criminal P. C., which runs as follows :

"In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinion, of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, and, if it convicts him, may pass such sentence as might have been passed by the Court of Session."

The terms of the section are fairly clear. This Court is first called upon to consider the entire evidence, and then give due weight to the opinion of the Session Judge and to the opinion of the jury I must therefore consider the entire evidence first. (Here the judgment discussing the evidence concludes). Tukaram's presence at the scene of the occurrrence has been satisfactorily proved. He was a member of the unlawful assembly, which came from Khairi to Marajghat bridge and assaulted the ten persons who received injuries. The assailants were armed with lathis and guns, which were used. Grievous hurt was caused to Sadoo and Sitrya The members of the unlawful assembly knew it to be likely that grievous hurt will be caused Tukaram has thus committed the offences under Ss 147 and 325 read with S. 149, I. P. C

In a case of this sort, where a jury returned a unanimous verdict of not guilty against the accused and the Additional Sessions Judge was of opinion that the verdict of the jury was manifestly wrong, he ought to have asked the jury to state their reasons for disbelieving the prosecution evidence, and ought to have recorded it, for the information of this Court The reasons, most probably were the same or similar, as were urged before me, by the learned counsel for the appellant. The point of view from which reference under S. 307, Criminal P. C should be considered by the High Court has been the subject of numerous judicial decisions and the learned counsel for Tukaram cited *Emperor* v. *Kankaya* (1), *Emperor* v. *Dhananjoy Raha* (2), and *Emperor* v. *Akbar Moola* (3). These cases lay down rules of guidance, which may be followed in deciding references under S. 307, Criminal P. C., but the law on the point is very clear and explicit, as laid down in S. 307 (3), Criminal P. C. As pointed out by Cuming and Gregory, JJ., in *Emperor* v *Ram Chandra Roy* (4), " the Code would not seem to put the opinion of the jury on any higher plane than the opinion of the Judge, and both should be given due weight. "

The jurors accepted the prosecution story regarding the riot and rejected the defence version about it, by giving a verdict of guilty against 16 persons. There was overwhelming evidence on record finding conclusively the presence of Tukaram with the rioters, and, therefore, no other conclusion was possible except that he was also guilty. The verdict of the jury was not only manifestly wrong but perverse.

I have considered the entire evidence and have given due weight to the opinion of the Sessions Judge and the jury, and find that Tukaram is guilty, under S. 147, and under S. 325 read with S. 149, I. P. C. In view of the serious nature of the offence, and also taking into consideration th fact e that Tukaram is a respectable man, who had to bear the anxiety and worry of a protracted criminal trial, I sentence Tukaram to undergo rigorous imprisonment for six months and to pay a fine of Rs. 2,500, and in default of payment of fine, to undergo further rigorous imprisonment for three months, for each offence. The sentence of imprisonment shall run concurrently The accused must surrender to his bail to serve out the sentence.

S N./R K *Order accordingly.*

(1) A.I.R. 1926 Nag. 308=22 N.L.R. 42.

(2) A.I.R. 1924 Cal. 321=51 Cal. 247.
(3) A.I.R. 1924 Cal. 449=51 Cal. 271.
(4) A.I.R. 1928 Cal. 732=55 Cal. 879.

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* A. I. R. 1929 Nagpur 85

FINDLAY, J C.

S. R Pandit—Applicant.

W. R. Pandit—Non-Applicant

Misc. Petn. No 7 of 1928, Decided on 28th April 1928, for leave to appeal to Privy Council from decree of Findlay, J. C , in First Appeal No 64 of 1926.

***(a) Civil P. C., S. 110—Claim in suit for less than Rs. 10,000—Findings on questions relating to other property valued at more than Rs. 10,000 recorded but not necessary for decision of suit — Subject-matter of suit is not more than Rs. 10,000.**

Where the real claim in suit is not more than Rs. 10,000, the mere fact that the Court has recorded findings on other questions relating to other property worth more than Rs. 10,000, not at all necessary for the decision of the suit, does not make the subject-matter of the suit, worth more than Rs. 10,000. [P 86 C 2]

***(b) Civil P. C., S. 110 — Trifling account adjustments made—Judgment agreeing with findings of the Court below—Judgment is an affirming one**

Where some trifling account adjustments are made in the matter of interest and the like, but the judgment on all essential points agrees with the findings of the Court below on the merits, the judgment must be treated as an affirming one: *A. I. R.* 1921 *All.* 270; *A. I. R.* 1922 *All.* 89, *Ref.*; *A. I. R.* 1922 *Cal.* 316 and 8 *C. W. N.* 294, *Foll.* [P 87 C 1]

***(c) Civil P. C., S. 110 — Findings on question of law quite immaterial to decision of suit—No point of law for decision of suit itself—No appeal lies.**

Where in a suit some findings involve questions of law, but they are quite immaterial to the decision of that suit which of itself does not involve any question of law, no appeal lies to the Privy Council. [P 87 C 2]

R. N. Padhye—for Applicant

H. S. Gour, and *A. D. Mande* — for Non-applicant

Order.—The applicant desires leave to appeal to their Lordships of the Privy Council against the judgment and decree of Findlay, J. C, dated 8th October 1927 in first Appeal No 64 of 1926.

It is necessary here to repeat the facts of the last-mentioned case As is apparent from the judgment, the suit was one for village profits for three years by a recorded cosharer of mouza Dhaba against the present applicant who was the duly recorded lambardar As is apparent from para. 7 of Findlay, J. C's judgment the case for the village profits, as it was, could have been decided purely on the question of whether these profits were due or not due, the parties admittedly being the recorded cosharers and the present defendant-applicant being the lambardar The Judge of the first Court had, however, recorded findings on many other questions concerning the whole family property and in para. 7 of his judgment Findlay, J. C., also considered these matters in the hope that the said findings might restrict. If not prevent, further litigation between the parties At the same time, the judgment in question made it clear that these findings were not, in reality, necessary for the decision of the suit which was in essence and in reality, purely one for three years' profits of the village in question.

In the present application, it has first of all been urged that the subject-matter of the present suit is Rs 10,000 or upwards. That is, in our opinion, an impossible contention on the record as it stands For this purpose we must only have regard to the amount of village profits claimed in the plaint and this amount was admittedly below Rs. 10,000.

It has next been urged that, in any event, the decree or final order involves, directly or indirectly, property worth Rs. 10,000 or over, and we have been referred to the decision in *Sri Kishan Lal* v. *Kashmiro* (1) in this connexion. Even if we accept that decision as correct exposition of the law, it is obvious that, for the reason above mentioned, findings given on the questions of reunion, the alleged will by the father of of the parties, the family settlement and the like were not in reality, essential for the decision of the suit in question. From this point of view, therefore, it cannot be said that the decree or final order necessarily involves a claim or question relating to property worth Rs 10,000 or over The remaining property belonging to the family is, in reality, not involved at all in the present suit which was tried in a Court of Subordinate Judge with a jurisdiction limited to Rs 10,000 only It is not in dispute that the value of the estate or even of the share which either party to this proceeding may lay claim to would be worth more than Rs. 10,000 Therefore, in our opinion, it cannot be said that the decision of the case by this Court in any way, necessarily involves the remaining question of the property

It has even been urged in this Court that the value of the two anna eight pie share of mouza Dhaba would be worth more than Rs. 10,000. This contention is an utterly impossible one on the pleadings and evidence on record and requires no serious discussion

(1) [1913] 35 All. 445=21 I. C. 617=11 A. L. J. 654.

The next contention urged is that the decision of this Court was not an affirming one. We are also unable to accept this contention. It is true that Findlay, J. C, made some trifling account adjustments in the matter of interest and the like, but the judgment, on all essential points, agreed with the findings of the Court below on the merits and, in our opinion, the present judgment must, therefore, be treated as an affirming one. We are aware of the decision in *Bhagwan Singh* v. *Allahabad Bank Ltd* (2) which so far supports the contention urged on behalf of the applicant, but the present case is, in our opinion, in this connexion much more parallel to the decision of the same High Court in *Kamal Nath* v *Bithal Das* (3) The modifications made in the decree in this Court were trifling ones in favour of then appellant and now applicant In any event, however, we are inclined to the view taken by the Calcutta High Court in this connexion : cf *Chaitanya Charan* v *Mohammad Yusuf* (4) and *Sree Nath Roy Bahadur* v. *Secretary of State* (5) What the applicant desired to do is to appeal to their Lordships against the decision of this Court so far as it affirmed the decision of the first Court This is, in substance, the real motive of the present application and, from this point of view, therefore, the decree of the Court must be held to be an affirming one.

No argument has been offered before to the effect that the case is one which should be certified as a fit one for appeal to His Majesty in Council under S. 109.(c), Civil P C. 1 do not think it necessary to discuss in detail the argument offered as to there being any substantial question of law involved in the present case. It was suggested in this connexion that Findlay, J C, was incorrect in holding that a statutory liability rested upon the applicant as lambardar to keep and render accounts, and the like, but we cannot see that any question of law arises in this connexion in the present case ; only pure questions of facts were, in reality involved.

As regards the arguments that the findings as regards the reunion, the family settlement and the like involve questions of law, we have already pointed out that these questions were, in reality, immaterial in the present suit and, from this point of view, therefore, there cannot be any question of allowing the present application in any such connexion

The grounds given in the application are very largely a pure attempt to contest the various findings of fact arrived at by the Judge of this Court and it is rather unnecessary to consider these grounds. For the above reason we are of opinion that the present application has no sound basis and must be dismissed We order accordingly The applicant must pay the non-applicant's costs. We fix Rs 75 as pleader's fees.

A.L/R.K *Application dismissed.*

(2) A. I. R. 1921 All. 270=43 All. 220.
(3) A. I. R. 1922 All. 89=44 All. 200.
(4) A. I. R. 1922 Cal. 316.
(5) [1904] 8 C. W. N. 294.

A. I. R. 1929 Nagpur 87

MOHIUDDIN, A. J C

Ramchand—Applicant.

v.

Chauthmal—Non-Applicant.

Criminal Revn No. 18 of 1928, Decided on 15th October 1928, from order of Sess. Judge, Raipur, D/- 30th November 1927, in Criminal Appeal No 124 of 1927

(a) Criminal P. C., S. 439—Where acquittal is wrong, High Court can order retrial only.

High Court in revision cannot convert finding of acquittal into one of conviction, but can only order retrial where it thinks that the acquittal is wrong. [P 88 C 1]

(b) Criminal P. C., S 439— Acquittal based on erroneous view of law—No revision lies.

High Court should not interfere in revision on the ground that acquittal is based on an erroneous view of the law applicable to the case ., *A. I. R.* 1927 *Nag.* 170 *Expl.* and *Foll.* ; 6 *C. P. L. R.* 15, *Ci. Rel., on* , 5 *N. L. R.* 4. *Foll.* [P 88 C 2]

K. V Naidu—for Applicant.

G P. Dick—for Non-Applicant

Order.—This is a revision application filed on behalf of Ramchand Sonar who had filed a complaint in the Court of Mr J L. Mishra. Magistrate 1st Class, Drug, on 7th October 1926, against Chauthmal under S. 500, I P. C. The learned Magistrate, found the offence proved and convicted Chauthmal under S 500, I P. C On

appeal, the learned Session Judge held that his assertions made in the Exs. P-1, 2 and 4 were true, that they were defamatory, but the case of the appellant fell under Excep. 10. S. 499, I. P. C and, therefore, acquitted Chauthmal.

There is no doubt that this Court has jurisdiction under S 439, Criminal P. C., to set aside the order of acquittal, but this Court cannot convert a finding of acquittal into one of conviction and, therefore, has no alternative, but to order a retrial, in a case, in which this Court is of opinion that the order of acquittal is wrong. It is the settled practice of this Court not to interfere in revision at the instance of a private prosecutor, except in those cases in which the Local Government is not likely to appeal from the order of acquittal, on account of the nature of the offence and the offence of defamation is one of those offences, in which the Local Government is not likely to appeal. This Court, sitting as a Court of revision and, not as an appellate Court, will not go into facts, and as pointed out by Kinkhede, A. J C. in *Sher Khan* v. *Anwar Khan* (1) :

" will ordinarily confine its interference to cases of exceptional circumstance or where there is error of law, and it will not interfere with the acquittal unless the error has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice".

It was pointed out by Stevens, Offg. J. C., in *Empress* v. *Baiju* (2) that

" a retrial should only be ordered in cases of acquittal in which the trial has been radically and incurably defective,"

and this view was accepted as correct by Stanyon, A. J C., in *Binda Prasad* v. *Ripusudan* (3) which was a case similar to the one now before this Court. In that case the complainant urged that the Magistrate who tried the case had taken an erroneous view of the law of defamation in that he had held to be privileged a grossly defamatory statement which was not protected by law and there was no suggestion that the trial was vitiated by any illegality or irregularity. Stanyon, A J. C., decided that as the acquittal was challenged upon its merits namely, as being based upon an erroneous view of the law of defamation, this Court as a Court of revision could not and should not if it could, exercise its revisional jurisdiction In this case, if the point urged by the learned advocate for the applicant is accepted as correct, that is, the statement contained in the letters are defamatory and Excep 10 does not apply to the facts of this case, in that case, this Court would be practically converting a finding of acquittal into one of conviction, and a retrial, if ordered, will not really be a retrial, but a clear direction to the Magistrate, before whom the case will be retried, to convict the accused, after going through the formality of a de novo trial. The word " error of law " can only mean an error in the procedure adopted in the trial of the case and not an error about the interpretation or application of the law, applicable to the case In this case, no illegality or irregularity is alleged and, therefore, this Court, sitting as a Court of revision cannot interfere with the order passed by the Sessions Judge The application is, therefore, dismissed.

S.N /R K. *Revision dismissed.*

(1) A. I. R. 1927 Nag. 170=23 N. L. R. 40.
(2) [1898] 6 C. P. L. R. 15 Cr.
(3) [1909] 5 N. L. R. 4=1 I. C. 238=9 Cr. L. J. 211.

A. I. R. 1929 Nagpur 88

PRIDEAUX, A J. C.

Waikunthrao and *others*—Plaintiffs—Appellants

v.

Tanba—Defendant—Respondent.

Second Appeal No 258-B of 1926, Decided on 25th September 1928, from decree of Addl. Dist. Judge, Yeotmal, D/- 29th March 1926, in Civil Appeal No. 111 of 1925.

Berar Alienated Villages Tenancy Law—Perpetual tenant though subsequent to 1895 cannot be ejected.

There is nothing to prevent an izardar from giving out fields to tenants permanently and therefore although a perpetual tenant may not actually come within the definition of a permanent tenant, he cannot be ejected from his field. [P 89 C1]

G. L. Subhedar and *M. R. Bobde*—for Appellants.

W. R. Pendharkar—for Respondents.

Judgment.—The plaintiffs are the izardars of mouza Dhotra, taluq Yeotmal, and sue for a declaration that the defendant, who has been recorded a permanent tenant of Survey No. 28 of that village, is not a permanent tenant of that field. They

lost the case in both the lower Courts. One Tanba Wanjari and his son, Jhitru got from the plaintiffs a perpetual lease of this field and another, with power to alienate them with the condition that on foreclosure, sale, gift or lease for a period exceeding 12 years, the plaintiffs would be paid 25 per cent of the price to get their sanction for such foreclosure, sale, gift or lease The field in suit was bought by one Yeshwant, and the defendent purchased it from Yeshwant on 17th February 1922. The lower appellate Court holds that, though the defendant may not be a permanent tenant within the meaning of that expression in the Berar Alienated Village Tenancy Law. yet he is nevertheless a perpetual tenant of the field, and has given very good reasons for the conclusion it has come to.

It is obvious that there can be permanent tenants in an izara village not coming within the term as defined by that law, i. e tenants who have not been in possession since 1895. There is nothing to prevent an izardar who owns fields in his izara village from giving out the same to tenants permanently if he likes to do so ; and therefore, it does not necessarily follow that, because a perpetual tenant does not come within the definition of a permanent tenant, of the law, he can be ejected from his field. The case seems to me to have been properly decided and I decline to interfere. I dismiss this appeal with costs. The appellants will pay the respondent's costs.

R K. *Appeal dismissed.*

A I. R. 1929 Nagpur 89

KINKHEDE, A. J. C.

Trimbak—Plaintiff—Applicant.

v.

Krishna Rao and *others*—Defendants—Non-Applicants.

Misc. Judl. Appln. No 4-B of 1928, Decided on 5th November 1928, for review of decision, D/- 12th October 1927, in Second Appeal No. 114-B of 1927.

(a) Civil P. C., O. 41, R. 17—Appellant's counsel being unprepared to argue is no ground for dismissal.

The mere unpreparedness of the appellant's counsel to argue the appeal is no ground for the Court to dismiss the appeal for default : 17 *C. P. L. R.* 1, *Foll.* [P 89 C 2]

(b) Civil P. C., O. 41, R. 16—R. 16 does not compel Court to permit written argument.

All that R. 16 compels the Court to do is to hear the argument if any addressed and not to permit written argument. [P 90 C 1]

(c) Civil P. C., O. 47, R. 1—Appellant's counsel unprepared — Court refusing adjournment and to file written argument—Judgment not stating that question of limitation was considered—Review was refused.

Where Court refused to grant adjournment because appellant's counsel was unprepared to argue, and did not permit the appellant to file a written argument, and further its judgment did not state that it considered certain aspects of the question of limitation a review was not granted : *A. I. R.* 1924 *Cal.* 774 : 12 *N. L. R.* 57 and *A. I. R.* 1924 *Pat.* 258, *Rel. on.* [P 90 C 1]

G. R. Deo—for Applicant

M. B. Niyogi—for Non-applicants.

Order.—The plaintiff whose appeal was dismissed on 12th October 1927 seeks a review of the decision on the ground that this Court should not have refused to adjourn the case when the advocate who was retained to argue it declined to argue it as the balance of fees promised was not paid and the newly engaged pleader said that he was not prepared with facts and law. within the short time at his disposal after his engagement, and also on the ground that this Court declined to permit appellant 2 who was present in person to file a written argument by way of reply to the argument addressed by the respondents. It is urged that besides this there is an error apparent on the face of the record in that when the appellant was not prepared to go on with the arguments this Court ought to have treated that inability being tantamount to appellant's absence, and refrained from hearing any arguments of the respondent and deciding the appeal on the merits but it should have dismissed the appeal for default of appearance as it were. A further contention is raised that some of the phases of the question of limitation raised in the grounds of appeal have not been at all touched by this Court in its judgment.

I am not prepared to uphold any of these contentions. In view of the case in *Jhackan Singh* v. *Uttamchand* (1) the mere unpreparedness of the appellant's counsel to argue the appeal is no ground for the Court to dismiss the appeal for default. The failure to offer argument in support of the appeal does not relieve the Court of its obligation to decide the appeal on its merits. I therefore think that the applicants' argument that this Court's procedure of hearing the arguments for the respondent, after having called upon the appellant to say what he

(1) [1903] 17 C. P. L. R. 1.

had to say in support of their appeal, was fully justified and according to law. Then it is argued that in not permitting the appellant to file a written argument by way of reply this Court has contravened the provisions of R 16, O. 41, Civil P. C. All that the rule compels the Court to do is to hear the argument if any addressed and not to permit written argument It was open to appellant 2 who was personally in attendance to address such verbal arguments as he may have desired. He was not prevented from doing so.

The fact that the Court declined to grant an adjournment prayed for and decided the case can afford no ground for review : *cf. Bindu Bashini Roy* v *Secretary of State* (2) As to the contention that this Court's judgment does not state that it considered certain aspects or phases of the question of limitation suffice it to say that it does not mean that they were not considered at all in arriving at the conclusion : *cf. Loola* v. *Pyare* (3). At any rate the omission may not be a ground for granting review, just as non-reference to documents in the judgment is no ground for review as held in *Raghu Singh* v *Krishna Dayal Gir* (4). I am not satisfied that there is any error apparent on the face of the record or any sufficient cause for granting the review The application is dismissed with costs Pleader's fees Rs 15

S.N./R.K. *Application dismissed.*

(2) A. I. R. 1924 Cal. 774=51 Cal. 70
(3) [1916] 12 N. L. R. 57=39 I. C. 437.
(4) A. I. R. 1924 Pat. 258=2 Pat. 765

A I R 1929 Nagpur 90

MACNAIR, A. J. C

Dharnidhar—Defendant 2—Appellant.

v

Radhabai and *others*—Plaintiff and —Defendant 1 and 3—Respondents.

First Appeal No 5-B of 1928, Decided on 30th January 1929, against decree of 2nd Sub-Judge, 1st Cl. Akola, D/- 22nd December 1927.

Berar Land Revenue Code, S. 79—Lessor to prove that lease-money became due at close of agricultural year and not before.

In the absence of proof of a custom that the agricultural rents in Berar are payable at the close of the agricultural year, it is for the lessor to prove that the lease-money did not become due till the end of the agricultural year. It is usual when land is leased either to take payment in advance or soon after harvesting : 27 *Mad.* 143, (*P.C.*) *Dist.* [P 91 C 1]

G. G. Hatwalne and *V D Sindekar*—for Appellant.

W. R. Puranik and *W B Pendharkar*—for Respondents

Judgment.—It is not contested that the plaintiff and defendant 3 inherited the lands in suit on the death of their father, Ganesh Narayan, defendant 1, had taken a lease of the lands from Ganesh and remained in possession after his lease expired until the plaintiff filed a suit for partition against defendant 3. In that suit a receiver was appointed and Narayan sent a notice to the receiver stating that he was holding under defendant 2, Dharnidhar, who is the appellant in this Court In this suit the plaintiff claims half the lease-money for the year 1922-23, Rs 1,550, together with half the mesne profits for the next two years, from defendants 1 and 2, alleging that they have been colluding in keeping the plaintiff out of possession. In reply Narayan stated that he was a lessee of defendant 2 from whom he had taken the fields annually for the years in suit Defendant 2, Dharnidhar stated that he was joint with his brother Ganesh at the time of his death and that he had all along been in possession of the land in suit since the death of Ganesh The only other plea which I need consider is that the claim for the year 1922-23 was barred by limitation. The trial Judge held that defendants 1 and 2 had combined to keep out the plaintiff on false pleas and both were liable to the plaintiff for full claim. A decree followed on this finding Narayan has not appealed, this appeal being filed by Dharnidhar

It is first urged that in spite of Dharnidhar's allegation in this suit it should be held that he was not in possession of the land in any way during the years to which this suit relates : it was only in 1926 when the receiver was attempting to take possession that he put forward his false claim to the land. It is urged that in the partition suit the plaintiff stated that she was in possession of the land. I hold that this suit must be decided on the pleadings made in it. Until the appellant came to this Court

he did not deny that Narayan was in possession of the lands as his tenant. Had he stated in the lower Court that he had done nothing to obstruct the possession of the plaintiff during the years in suit the plaintiff might have adduced evidence to the effect that but for the action of the appellant Narayan would have delivered possession to her. I agree with the finding based on the pleadings of the parties that the appellant and Narayan acting in concert prevented the plaintiff from obtaining possession during the years in suit.

It is next urged that the claim for the year 1922-23 is barred by limitation The plaint merely states that the cause of action accrued on the expiry of the year 1922-23. In an oral statement, dated 16th August 1926, Narayan said that lease-money was generally payable on 1st December of each year and Dharnidhar in a written statement stated that the cause of action for this year arose in December 1922-23. The plaintiff made no specific rejoinder to these replies The trial Court merely stated that the date of action accrued at the end of the agricultural year and quoted S 79, Berar Land Revenue Code, which shows that an annual tenancy expires at the end of an agricultural year It was for the plaintiff to prove that the lease-money did not become due until the tenancy expired I am referred to the judgment of their Lordships of the Privy Council in *Rangayya Appa Rao* v. *B. Sriramulu* (1). Their Lordships only say :

"It has been said, and no doubt rightly, that by the custom of the country agricultural rents are payable at or before the close of the fasli year."

Clearly they referred to a custom in Madras. I am not aware of any custom of this nature in Berar In the Central Provinces dates have been fixed for payment of rent by tenants under S. 61, Ten. Act, and these dates precede the expiry of the agricultural year. So far as my experience goes, it is usual, when land is leased, either to take a payment in advance or to agree that payment should be made soon after the crop is harvested. The plaintiff, then, has failed to show that the claim relating to the year 1922-23 is within time. The suit was filed on 1st March 1926. (The judgment here discusses evidence and holding that the finding that the mesne profits for the subsequent years also was Rs. 2,500 was justified, it proceeds). The appeal contains a ground that interest charged is excessive, but 12 per cent per annum is the usual rate to allow on mesne profits: The amount decreed will, therefore, be altered by excluding mesne profits with interest for the year 1922-23 Costs in this Court will be borne as incurred

S N./R.K *Decree altered*

(1) [1904] 27 Mad. 143 = 31 I. A. 17 = 14 M. L. J. 1=8 Sar. 617 (P.C.).

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*A I R 1929 Nagpur 91

FINDLAY, J. C.

Munna Singh Rajput—Plaintiff—Appellant.

v

Narain Singh and *others*—Defendants Respondents.

Second Appeal No. 396 of 1926, Decided on 24th November 1927, against decree of Dist. Judge, Nagpur, D/- 10th April 1926.

*** (a) Evidence Act, S. 92—Consideration being different or nonexisting can be proved by a party.**

In the case of consideration mentioned in a written document, it is open to the party contesting it to show that there was no consideration, or that the consideration was different from that described in the contract: *A. I. R.* 1925 *P.C.* 75, *Appl.* [P 91 C 2, P 92 C 1]

(b) Evidence Act, S. 92—Surrounding circumstances can be taken into consideration to find true meaning and effect of the transaction.

Section 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. *A. I. R.* 1925 *P.C.* 75, *Foll.* [P 92 C 1]

D. T. Mangalmurti—for Appellant.

K P. Vaidya and *M R. Indurkar*—for Respondents.

Judgment.—The facts of this case are fully stated in the judgment of the first Court, by which the plaintiff's claim was dismissed. The learned District Judge, in dismissing the appeal held that it was permissible in the present case to prove that Mt. Gendibai alone was entitled to recover the amount in deposit under the receipt (P-1), and also dismissed the present plaintiff's appeal. He has now come up to this Court on second appeal

The first matter for decision is whether, in view of the terms of P-1, it was permissible for the lower Courts to hold that Gendibai alone without the present plaintiff was entitled to give a complete

discharge for the amount in question. There has been some argument in this Court to the effect that the words of the receipt do not necessarily imply that Gendibai and the plaintiff were co-promisees; I will assume, however, that this was so. It has been urged strongly on behalf of the appellant that, in view of S. 92, Evidence Act, it was not permissible for the defendants to prove, or for the Courts to hold, that Gendibai could give alone a valid discharge as regards the amount covered by P-1. S. 92, Evidence Act, only lays down that in the case of a written contract:

"no evidence of any oral agreement or statement shall be admitted, as between the parties to "

the contract

" for the purpose af contradicting, varying, adding to, or subtracting from, its terms."

In the case of consideration mentioned in such a written document, it is open to the party contesting it to show that there was no consideration, or that the consideration was different from that described in the contract. In the present case, the position of the defendants is that the present appellant joined in the execution of the document at his own request and that he was allowed to do so, being the husband of Gendibai Their Lordships of the Privy Council in *Baijnath Singh* v. *Vally Muhammad Hajee Abba* (1) have remarked as follows:

" It is true, as was laid down in *Balkishen Das* v. *Legge* (2) that under S. 92, Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds of or proving the intention of the parties. But in the view their Lordships take of the circumstances of this case, the section and the ruling have no application to it.

" The preamble to the Evidence Act recites that " it is expedient to consolidate, define and amend the law of evidence," and S. 92 merely prescribes a rule of evidence, it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert."

The position in the present case seems to me to be precisely analogous to that adumbrated in the second passage from their Lordships' judgment just quoted. If the findings of the lower Courts on the questions of fact involved stand, viz.. that this money was, in reality, Gendibai's and that at the time her husband was fully aware of this and never attempted to contest the fact, then it seems to me obvious that. in the circumstances of the present case, it is open to this Court to take into codsideration the evidence which has been produced on behalf of the defendant—version of the circumstances under which P-1 was executed. I do not think there is any necessity to have recourse, as the learned District Judge did, to the analogy of a benami transaction. The analogy may exist, but, at the best, it is a vague and imperfect one. It has, however, been urged before me that the lower appellate Court was incorrect in holding that the money in question was in reality Gendibai's own property. This money, it has been argued, represents the sale-proceeds of the field of Gendibai's father. Gendibai has a son alive and she is now residing with the plaintiff. It is suggested, therefore, that she has only a life-interest in the money and that, in the circumstances, it is incorrect to hold that the money was Gendibai's sole and absolute property.

A further argument has also been adduced that, in any event, Gendibai having allowed her husband to join as a promisee in the note (P-1), the presumption arises that she had made him a gift pro rata of the amount concerned, or had constituted him, so to speak, a partner in the money concerned.

Neither of these arguments seems to me to be of any avail in the present case. We have in the first Court's judgment a careful finding of fact as regards the circumstances under which the present plaintiff executed the receipt, dated 7th November 1923, (3 D-1) The astounding story told by the plaintiff in this connexion only needs to be read to be disbelieved, although it is not more obviously false then various other pleas of fact offered by him, on which the Subordinate Judge has animadverted with well-deserved severity. Holding, as I do, that this document was executed voluntarily, it is perfectly obvious that the plaintiff cannot now be heard to say that the money was his under the ordinary principles applicable to a Hindu woman, or by gift, or by partnership. Even the very receipt, dated 21st May 1923, (1 D-1), was also attested by him. It has, indeed, been suggested on behalf of the appellant that the mere fact that the

(1) A. I. R. 1925 P.C. 75=3 Rang. 106.
(2) [1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P.C.).

plaintiff executed the document (3 D-1) implies that he had been interested in the property concerned. I am unable to accept this suggestion. Considering the relations existing between a Hindu husband and a Hindu wife, third parties may well take the precaution of obtaining the husband's signature on documents like those we are concerned with, and the fact of the appellant's signature being taken, leads, in my opinion, to no necessary presumption that he actually had a title to the property in question.

The case, in short, is, in my opinion, clearly one in which, on the principle laid down by their Lordships of the Privy Council in the case quoted above, the Court is bound to go behind the written terms of P-1 and to elucidate the real facts of transaction. On the findings of fact arrived at by the lower Courts—findings which there is not a shadow of ground for disturbing—it seems to me inevitably to follow that, in the peculiar circumstances of this case, Gendibai must be held to have been capable of giving a valid discharge for the debt as she professed to do. This being so, the plaintiff-appellant is clearly out of Court and I need hardly add, that, from the equitable point of view, he has never had a shadow of case. The appeal fails and is dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

V.V. *Appeal dismissed.*

** A. I. R. 1929 Nagpur 93

FINDLAY, J C., AND STAPLES, A. J. C.

Dada—Appellant.

v.

Chandra Bhaga Bai and *others*—Respondents

Misc Appeal No 6 of 1928, Decided on 18th December 1928, against the order of Dist -Judge, Wardha, in Misc. Judicial Case No. 4 of 1927, D/- 20th September 1927.

***(a) Hindu law—Joint family—Property vested in coparcener—Subsequent insanity does not divest.**

Where the property has once vested in a coparcener of a Mitakshara joint family, he will not lose his interest by subsequent insanity : 22 *Cal.* 864, *Foll.* ; *A. I. R.* 1922 *Nag.* 161, *Expl.* [P 94 C 1]

****(b) Lunacy Act (4 of 1912), S. 71—Hindu coparcener becoming lunatic—Manager can be appointed as to his share—Hindu law—Joint family.**

If a member of a joint Hindu family under the Mitakshara law be a lunatic, where it is shown that his property is being wasted the civil Courts have power to appoint a manager of the lunatic's share under the Lunacy Act, although no doubt a strong case must be made out for the appointment of a manager 6 *Cal.* 539 and 12 *O. C.* 209, *Foll.* (*Case law discussed*). [P 95 C 2].

G S. Lule—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The appellant has been appointed by the District Judge, Wardha, the manager of his father Pandurang, who has been declared a lunatic and incapable of managing his own property, and he has appealed to this Court on the ground that no manager can be appointed for a lunatic's undivided interest in joint family property. The facts of the case are simple and may be briefly stated. The appellant Dada alias Bhimrao and his father Pandurang form a joint Hindu family Pandurang has 2 wives, Mt. Chandrabhaga Bai and Mt. Bhima Bai. These two wives made an application under the Lunacy Act, for the appointment of a manager of their husband's interest in the family property and for the appointment of a guardian of his person. They alleged that Dada was mismanaging the estate since his father became a lunatic The appellant Dada admitted his father's lunacy and his incapacity to manage the estate, but pleaded that he was not guilty of any waste or mismanagement and that the estate was indebted when his father became a lunatic. He admitted that the debts on the property had increased, but stated that the increase was not due to any mismanagement on his part, he further pleaded that, even if mismanagement and misconduct be proved against him, he could not be deprived of his right to manage the estate, and that the wives of Pandurang and Pandurang himself were only entitled to maintenance out of the estate.

The District Judge found that Pandurang was a lunatic and incapable of managing his property, but that he had not forfeited his interest in the joint family property by reason of his lunacy. The District Judge further found that a manager could be appointed for a lunatic's interest in joint family property and that the appointment of a manager was necessary in the present case. He thereupon appointed the appellant

as the guardian of the person of his father Pandurang and as manager of the property The effect of this order is really that the Court will have control over the management of the property, as accounts will have to be exhibited annually and transfers and alienations cannot be made without the sanction of the Court. There is no actual change in the management as the appellant Dada has been managing the whole property for some years and he will continue to do so The only result of the order is that he will now manage the property under the control of the Court

It has not been seriously contested in the appeal that Pandurang has a share in the property. It is true that the 1st ground in the memorandum of appeal contests the finding of the lower Court on this point, but we heard no argument on that ground, and the point was not pressed. It will be sufficient to uphold the finding of the District Judge in this respect, following the ruling in *Abilakh Bhagat* v *Bhekhi Mahto* (1), where it has been held that, where the property has once vested in a coparcener of a Mitakshara joint family, he will not lose his interest by subsequent insanity. The case reported in *Vithoba* v. *Waman* (2) lays down the converse proposition that a member of a joint Hindu family, who is insane at the time the partition is made or when succession opens, is excluded. This, however, does not imply that a member of a joint family who has once obtained a share would lose his share by subsequently becoming insane. We are of opinion, therefore, that the finding of the District Judge, on this point is correct.

The real contest, however, in the appeal is with regard to the 2nd ground in the memorandum of appeal, viz, whether a manager can be appointed for a lunatic's undivided interest in a joint family property. On this point there is certainly a conflict of authority, and the matter is not free from difficulty. The Lunacy Act (Act 4 of 1912) is silent in the mattter. S. 67 of the Act simply states that the Court may make orders for the custody of lunatics and for the management of their estates. S. 68 refers to the estate of a lunatic which consists of property subject to the jurisdiction of the Court of Wards. S. 69 deals with the estate of a lunatic which consists in whole or in part of land or any interest in land which is not subject to the jurisdiction of the Court of Wards. S 71 simply states that in all other cases the District Court shall appoint a manager of the estate of the lunatic and may appoint a guardian of his person. The wording of this section appears to be imperative as regards the appointment of the manager of the property, the section stating that a manger of the estate shall be appointed

The Courts in India, in dealing with such cases have generally applied the analogy of the appointment of a guardian under the Guardian and Wards Act, and several Courts have held on that analogy that a guardian or manager of a lunatic's estate, which consists of a share in the joint family property, cannot be appointed In *Charibullah* v. *Khalak Singh* (3) it has been clearly laid down that a guardian cannot be appointed for a minor's undivided share in joint family property governed by the Mitakshara Law, and following that ruling, the Patna High Court, in the case reported in *Parma Dube* v. *Mahadeo Singh* (4) has held that a manager could not be appointed for a lunatic's share in joint family property, holding that it was impossible to draw any distinction in principle between the two classes of guardians. The Madras High Court, in a case reported in *Govindan Nair* v. *Narayanan Nair* (5) has held that a manager could not be appointed for a share of a member of an undivided Malabar tarwad who had become a lunatic. In the case reported in *Trimbaklal Govindas* v. *Harilal* (6) Farran, C. J., held that, where a manager of a Hindu lunatic's estate had been appointed under the Hindu Lunacy Act then in force (Act 35 of 1858), he was not bound to exhibit accounts under S. 15 of the Act. The learned Chief Justice referred to the ruling in *Virupakshappa* v *Nilgangava* (7). which was on the question of the appointment of a guardian of a minor's estate in joint family property, and seemed to be

(1) [1895] 22 Cal. 864.
(2) A. I. R. 1922 Nag. 161=18 N. L. R. 80.
(3) [1903] 25 All. 407=30 I. A. 165=8 Sar. 483 (P. C.).
(4) [1919] 49 I. C. 907.
(5) [1913] 23 M. L. J. 706=17 I. C. 473=(1913) M. W. N. 79.
(6) [1896] 20 Bom. 659.
(7) [1895] 19 Bom. 803 (F.B.).

inclined to the view that a manager of the joint family property should not have been appointed In that case, however, a manager had been appointed, and, as appears from p. 665 (20 *Bom.*), of the ruling the question whether the manager should or should not have been appointed was not argued before the lower Court and was not agitated in the appeal. There is, therefore, no definite pronouncement on this question, but the learned Chief Justice simply held that, if a manager had been appointed, he was not bound to exhibit accounts. That case is on all fours with the present case in this respect that the manager appointed was himself the joint owner.

On the other hand, in the ruling in *Bhoopendra Narain Roy* v *Greesh Narain Roy* (8) the Calcutta High Court held that they were unable to admit as correct the propositiou that Act 35 of 1858 (the Lunacy Act then in force) could not or did not apply to members of a Mitakshara family. It is true that no definite decision in the matter was given, because the Judges held that the application would fail on another ground, namely that no case had been made out for the appointment of a manager. The following remark was, however, recorded in the judgment :

"It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of any other family."

This case has been followed in the case of *Dalipat Singh* v. *Dy Commissioner, Sitapur* (9). The learned Judicial Commissioners have considered the matter at some length at p 663 (3 *I. C*) and have drawn a distinction between the case of a lunatic, and a minor on the ground that a minor can always bring a suit for partition through his next friend, whereas it has been held that a lunatic has no right to sue for partition. They therefore held that a lunatic must be allowed some remedy, and that, if he cannot sue for partition the Court should have power to appoint a manager of his property. The following passage from p 664 may he quoted :

"It seems to us obviously impossible that a lunatic who is suffering neglect or ill-usage at the hands of the person who has management of his property, or whose property is being wasted by the said manager, should be left without any legal remedy merely because he happens to be a member of a joint family living under the Mitakshara law. He must either be permitted to sue for partition in the same way as a minor, or the Courts must have power to protect him under the provisions of Act 35 of 1858. In view of the wording of S. 2 of the said Act and of the Calcutta rulings already referred to, we are of opinion that the civil Courts have jurisdiction in such a case to take action under the provisions of Act 35 of 1858."

In view of the wording of S. 61, Lunacy Act, and of the fact that a lunatic has no right to sue for partition as a minor has, we prefer to follow the decisions of the Calcutta High Court and the Oudh Judicial Commissioner's Court, and we hold that, if a member of a joint Hindu family under the Mitakshara law be a lunatic, where it is shown that his property is being wasted, the civil Courts have power to appoint a manager of the lunatic's share under the Lunacy Act. We are fortified in this opinion by the fact that it has been consistently held in this Court that a coparcener's share in an undivided ancestral property can be alienated and can be attached by a creditor in execution of a decree against one member of the family. If a share can be attached or alienated, it would seem to follow that a manager can be appointed, even for a share in the property. The law on this subject has been differently interpreted in different parts of India, but the view stated above has been consistently held in these Provinces and may now be regarded as settled law. In this connexion we have been referred to the ruling in *Mukund Ram Sukal* v. *Ram Ratan* (10), and Sarkar's Hindu Law 6th Edn at p 357 We therefore uphold the finding of the District Judge that a manager can be appointed of a lunatic's share in a joint family property.

It remains, then, to decide whether a sufficient case has been made out for the appointment of a manager in the present instance. Both in the Calcutta case *Bhoopendra Narain Roy* v. *Greesh Narain* (8) and in the case of the Oudh Judicial Commissioner's Court *Dalipat Singh* v *Dy. Commissioner, Sitapur* (9) it was held that a strong case must be made out for the appointment of a guardian or manager, and in both cases it was held that no sufficient case for the appointment under the Act had been made out In the present instance no evidence has been led on the question of waste or mis-

(8) [1891] 6 Cal. 539=8 C. L. R. 80.
(9) [1903] 12 O. C. 203=3 I. C. 660.
(10) [1903] 2 N. L. R. 52.

management, and the only witness examined was the Civil Surgeon, Dr. Paranjpe, with regard to the lunacy of Pandurang. At the same time there have been very serious allegations made by the wives of Pandurang against the appellant, and, although these allegations were denied, the appellant did not adduce any evidence, though he had an opportunity of doing so On the other hand he has, to a great extent, admitted waste and mismanagement in his written statement. It is, at any rate, admitted that the debts upon the property have increased from Rs. 5,000 to Rs. 30,000, and the reasons given by him for this increase in indebtedness are not, we think, sufficient to account for such an abnormal increase. The only proper inference that can be drawn from such an increase within a short period is that the appellant has been squandering the property. It is admitted that he is trying to pay off the debt by a mortgage, and there seems every reason to believe that, if left to himself, he will soon alienate the bulk, if not the whole, of the property We are of opinion, therefore, that a sufficient case for interference and for the appointment of a manager under the Act has been made out even on the admissions of the appellant himself. As already noted above, the appellant is not in any way wronged by the order. He has himself been appointed the manager of the property and the guardian of his father's person All that has been done is that the appellant has been made answerable to the Court, which will control and supervise his accounts in future Such control appears to us highly desirable in the circumstances of the case We would therefore confirm the order of the lower Court appointing the appellant guardian and manager of the property and dismiss the appeal.

Costs of the appeal will be borne by the appellant. We fix pleader's fees at Rs 30.

R K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 96

FINDLAY, J. C.

Mahadeo Ganpati Patil—Applicant.

v.

Nabha Vishwanath—Non-Applicant.

Criminal Revn. No 291 of 1928, Decided on 3rd October 1928, against order of Bench of Hony. Mag 2nd Class, Nagpur, D/- 23rd June 1928 in Criminal Case No 35 of 1928

General Clauses Act, S. 10—Principle of S. 10 may be applied to Cattle Trespass Act, S. 20.

Although S. 10, General Clauses Act, only applies to Acts made on or after 14th January 1897, and does not cover in terms, an Act like Cattle Trespass Act passed in 1871, the principle underlying S. 10, General Clauses Act, should be applied to complaints under Cattle Trespass Act, S. 20. [P 96 C 2]

R. B Gadgil—for Applicant.

G P. Dick—for Non-Applicant.

Order. — The Bench of Honorary Magistrates, 2nd Class, Sitabuldi, dismissed a complaint under S 20, Cattle Trespass Act, on the ground that the complaint in question had been filed beyond the ten days allowed under S. 20 of the Act In this, the Honorary Magistrates clearly acted erroneously. The alleged forcible seizure of the cattle occurred on 1st December 1927, and, under S. 9, General Clauses Act, the ten days therefore, ran from 2nd December and would ordinarily expire on 11th idem; 11th December, however, was a Sunday. It is true that S 10, General Clauses Act, only applies to Acts made on or after 14th January 1897, and does not cover, in terms, an Act like the Cattle Trespass Act which was passed in 1871. Nevertheless every consideration of justice and expediency would require that the accepted principle, which underlies S. 10, General Clauses Act, should be applied in the present case also and, as the Courts were closed on 11th December, I am of opinion that this complaint was correctly entertained on 12th December.

The judgment of the Court below is accordingly reversed and the case will go back to that Court for re-disposal. No opportunity for producing further evidence should be given to either side, but, after hearing counsel for the complainant and accused, if necessary, the Bench should proceed to deliver a fresh judgment in view of the finding I have given above on the question of limitation.

P.D./R.K. *Case sent back.*

* * A. I. R. 1929 Nagpur 97
Full Bench

KINKHEDE, MOHIUDDIN AND STAPLES A. J. Cs.

Pilalal—Appellant,

v.

Emperor—Opposite Party.

Criminal Appeal No. 104 of 1928, Decided on 30th October 1928 from judgment in Criminal Appeal No. 3 of 1928, D/- 13th April 1928 in Court of Sessions Judge, Raipur.

*** * Criminal P. C., S. 476-B—Order by District Magistrate under S. 476-A—Appeal lies to the Sessions Judge and not to the High Court—Criminal P. C., S. 6.**

There is no Court of a District Magistrate as such within the meaning of S. 6 of the Code. A District Magistrate's Court is only a Court of Magistrate First Class, and subordinate to the Court of the Sessions Judge for the purposes of S. 195 (3). An appeal, therefore, under S. 476 B lies to the Court of the Sessions Judge, from an order passed by the District Magistrate under S. 476-A and not to the High Court. [P 98 C 1, 2]

Abdul Razak—for Appellant.

G P Dick—for the Crown

Opinion

Kinkhede, A. J. C.—While agreeing with my learned brother, I may add a few words. If the enumeration of Courts given in S. 6, Criminal P. C, is exhaustive as I think it is, it necessarily follows that there is no such Court as a Court of District Magistrate. But all the same the powers, which the District Magistrate, exercises, are really powers which vest in him as a First Class Magistrate supplemented with such others, as his appointment under S 10 or 30, Criminal P. C, clothes him with. His decisions in appeal are principally as a Court of First Class Magistrate, but the appeal against his decision may ordinarily lie under S 408, Criminal P. C, to the Sessions Court or to the High Court according to the duration of imprisonment for which he may pass the sentence (unless it is one of transportation in which case the appeal will lie to this Court only). Judged by the test of the sentence which the District Magistrate may pass, the appellate forum may vary according to the period of the sentence and its nature also. In matters of appeal, therefore, the District Magistrate is subordinate to two Courts, (1) the Sessions Court and (2) High Court. Out of the two appellate Courts the Court of Sessions being of inferior jurisdiction the District Magistrate could well be regarded as subordinate to that Court for purpose of S. 195-(3) read with Ss 476 A and 476-B, Criminal P. C I, therefore, agree with my learned colleague Ghulam Mohiuddin, A. J. C., in the reply he proposes to give to the reference.

Mohiuddin, A. J. C.—This reference is made in an appeal under S. 476-B, Criminal P. C. The necessary facts are given in the order of reference and need not be repeated. The question propounded is in these words :

"To what Court an appeal under S. 476-B Criminal P. C., by the person against whom a complaint has been filed by the District Magistrate shall lie."

According to S. 476-B, Criminal P. C, any person against whom a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3) and the superior Court may thereupon after notice to the parties direct the withdrawal of the complaint. It is thus to be seen, what Court is superior to the Court of the District Magistrate, that is to which Court, the District Magistrate is subordinate within the meaning of S. 195, sub-S. (3), which runs as follows :

"For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appellate decrees or sentences of such former Court. Provided that . (a) where appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate."

Sections 476-A, 476-B and 195 (3), Criminal P C., use the word Court, and, the different classes of criminal Courts are mentioned in S. 6, Criminal P. C., and according to this section, there is no such Court as the Court of District Magistrate. As defined in S. 10, Criminal P. C., a District Magistrate is a Magistrate of the 1st Class, who is so appointed by the Local Government, and on account of his appointment under S. 10, he exercises certain powers which are given to him in the Criminal Procedure Code, but his Court is not a Court of a District Magistrate but is a Court of a First Class Magistrate only. Being a First Class Magistrate he can pass a sentence of imprisonment for a term not exceeding two years under S. 32, Criminal P. C.,

and if invested by the Local Government with powers under S 30, Criminal P. C., he can try all offences not punishable with death but can only pass a sentence, under S. 34, Criminal P. C, of transportation or imprisonment for a term not exceeding seven years. Under S 407, Criminal P. C., a District Magistrate hears appeals and according to S. 408, Criminal P. C., a person convicted on a trial held by a District Magistrate, may appeal to the Sessions Judge, except in the case where the District Magistrate i. e. Magistrate First Class invested with powers under S 30, Criminal P. C, passed any sentence of imprisonment for a term exceeding four years or any sentence of transportation, in which case the appeal lies to the High Court. This shows clearly that a District Magistrate as such is not a Court and is only a First Class Magistrate who exercises special powers with which he is invested either by the Criminal Procedure Code or by the Local Government His Court is that of a Magistrate, First Class, and appeals from the appellable sentence of his Court lie to the Court of Sessions.

According to S 195 (3), Criminal P. C., a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appellable sentences of such former Court, and, as appeals ordinarily lie to the Court of Sessions Judge, from the Court of First Class Magistrate, whether appointed a District Magistrate under S. 10, Criminal P. C., or invested with powers under S. 30, Criminal P. C., his Court, as it is the Court of a First Class Magistrate is subordinate to the Court of Session, for the purposes of S. 195 (3), Criminal P. C. According to S. 17, Criminal P C., a District Magistrate is not subordinate to the Sessions Judge, except to the extent and in the manner expressly provided in the Code, but as a Court, a District Magistrate's Court, is only a Court of Magistrate, First Class, and is subordinate to the Court of Sessions Judge for the purposes of S 195 (3), Criminal P. C. An appeal therefore under S. 476-B, Criminal P. C., will lie to the Court of Sessions Judge, from an order passed by the District Magistrate under S. 476-A, Criminal P. C.

Staples A J. C.—I agree.

D.S. *Reference answered.*

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Full Bench

FINDLAY, J. C, KINKHEDE AND MOHIUDDIN, A. J Cs.

Uttamrao—Plaintiff—Appellant.

v

Daulat and *others*—Defendants—Respondents

Second Appeal No 25-B of 1925, Decided on 19th December 1928 against decision of 1st Addl Dist. Judge, Akola, D/- 27th September 1924, in Civil Appeal No 197 of 1922

*** (a) Precedents—Privy Council — Decision is binding—Indian Courts cannot consider whether or not it is in accordance with the personal law of the parties.**

It is not open to the Indian Courts to consider how far the principle laid down by the Privy Council is in accordance with either the letter or spirit of any personal law as is expounded in the books or as understood by the parties. The Privy Council decisions are binding on the Indian Courts and the latter are bound to follow them . *A. I. R.* 1925 *P. C.* 272 and 32 *Bom.* 499, *Foll.* [P 105 C 2]

**** (b) Hindu law — Adoption — Hindu governed by Bombay School dying leaving a widow and widow of predeceased son—The latter cannot adopt after the widow's death although the estate may vest in her.**

Where the last male holder dies leaving a nearer heir other than the adopting widow, the latter's power of adoption comes to an end, as soon as his estate is vested in the nearer heir, and is incapable of being revived at any future date. [P 106 C 1]

Where a Hindu governed by the Bombay School dies leaving behind him his widow and a widowed daughter-in-law, the power of the daughter-in-law to adopt to her husband comes to an end by the vesting of the estate in the widow and does not revive again by the death of the widow. An adoption of the son by a daughter-in-law, therefore, although the estate has vested in her, after the widow's death is invalid (*Case law discussed.*)

[P 108 C 1]

M V. Abhyankar and *A V. Khare* — for Appellant.

B K. Bose and *P. B. Gole*—for Respondent 1

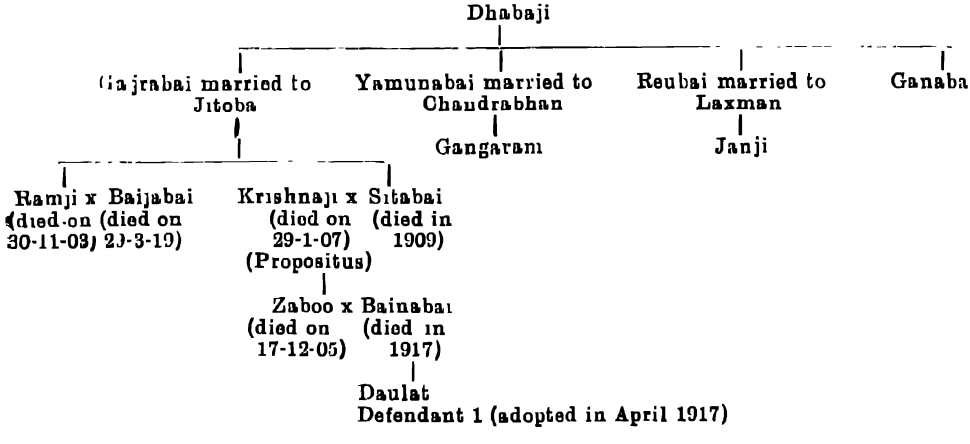
Order of Reference

Kinkhede, A. J. C.—The points involved in the case are of very great importance to the Maratha Hindu community, and particularly to those who regard themselves as governed by the Bombay

School of law. There is a divergence of view on the point and it is therefore very desirable that so far as our subordinate Courts are concerned there should be an authoritative decision of a Full Bench settling the question whether the earlier Bombay decisions which have been reaffirmed by the recent Bombay Full Bench decision in *Ishwar Dadu* v. *Gajabai Babaji* (1) need be followed in our Courts, as precedents on matters of Hindu law governed by the Bombay School, according to the time-honoured tradition of this Court.

Opinion

Kinkhede, A. J. C—The following geneological tree will facilitate the understanding of the facts relevant to the decision of the question referred to the Full Bench.



The property in suit once belonged to a joint Hindu family consisting of Krishnaji, Ramji and Zaboo. Ramji and Zaboo predeceased Krishnaji leaving their respective widows Baijabai and Bainabai behind them. Krishnaji, who was thus the last surviving male coparcener of the joint family, died in 1907 leaving his widow Sitabai as his heir entitled to inherit his property as such widow. She held the property till her death, which took place in 1909. The inheritance next devolved on Bainabai, the widow of Krishnaji's predeceased son Zaboo, who as the widow of a predeceased sagotra sapinda, was entitled to succeed, under the Bombay School of Hindu law, which is in force in Berar, to the estate of her father-in-law, Krishnaji.

Bainabai died in 1917. It is the plaintiff's case that on her death the estate of Krishnaji devolved on Baijabai the widow of his predeceased brother, Ramji as widow of his sagotra sapinda; that she held it as such till her death in 1919, and then the succession went to Krishnaji's mother's sisters' sons, Gangaram and Janji as his bhinna gotra sapindas. The plaintiff, Uttamrao is an assignee, under an assignment dated 19th January 1920, from Janji, of his moiety of the property of Krishnaji. He alleges that he was wrongfully obstructed by defendant 1 in taking possession of the property purchased by him. Hence he filed the present suit for possession against him

Defendant 1's principal defence is that he has a lawful title to obstruct, as a duly adopted son of Zaboo his adoption having been made, in April 1917, by Bainabai, in whom the inheritance had vested; and that it was consented to by Baijabai the next immediate reversioner. The plaintiff's contention is that, the adoption being invalid, created no rights in favour of defendant 1 The validity is challenged by him on the grounds:

(i) that defendant 1 was an orphan,

(ii) that Bainabai had no authority under law to adopt as she did not take the estate as heir of her husband;

(iii) that Baijabai had no authority to give any consent to the adoption

If the adoption be not invalid for any of these reasons, it is clear that Daulat, by virtue thereof, became the grandson of Krishnaji, and as such took his grandfather's estate, from Bainabai his adop-

(1) A. I. R. 1926 Bom. 495=50 Bom. 468 (F.B.).

tive mother, in his own right, with effect from the date of his adoption. Thus, there would, or could, be, no succession in favour of Baijabai, or, Gangaram, or of Janji the plaintiff's vendor, in their capacity of the sagotra sapinda, or, bhinna gotra sapindas, of Krishnaji. On the facts found by the Courts below, defendant 1 was not an orphan, and Baijabai had consented to and acquiesced in the adoption and even admitted the title of the adopted son to the property by acting as his guardian till her own death The first ground is thus no longer available, and the third ground is admitted to be immaterial. It is conceded by defendant 1 also that, if his adoption were held to be invalid in law, on the ground of Bainabai's incompetency to adopt him, the succession would go to Janji and Gangaram as the nearest reversioners of the last male holder, Krishnaji.

The Court of first instance held the adoption by Bainabai to be valid under law and dismissed the suit. The plaintiff went up in appeal to the District Judge, who affirmed the dismissal. He has, therefore, come up in second appeal.

Looking to the importance of the question of the validity of the adoption involved in this appeal, and the apparent conflict of decisions on the point, the appellant moved for a reference of that question to a Full Bench; this was done and the point has been ably argued before it.

On behalf of the appellant it is contended that Bainabai was legally incompetent to adopt a son to her deceased husband Zaboo, as she did not get the estate directly as heir to her husband. The learned counsel deduces four propositions as laying down the view taken by the Bombay School of Hindu law by which he says this case ought to be governed.

1. That, after the death, without issues, of a full owner, the only person, who can adopt, so as to deviate the succession, is, either his widow, or, if he dies without leaving a widow who can adopt and thus continue the lineage, his mother, or grandmother, subject, however, to the proviso that she takes the inheritance directly from her son or grandson, and, not otherwise.

2. That the widow's power to adopt is limited, that limit being reached immediately there is some one else, nearer in degree than herself, to take the estate of the last full owner, and, able to continue his line. Once this limit is reached the power to adopt is extinguished and can never be revived after such extinction. In other words, the widow's power to adopt never remains in abeyance.

3. That a widow cannot adopt so as to divest another person of the property; but that this does not, in view of other limitations, mean that she can adopt, so long as she does not do this.

4 That a widow of a gotraja sapinda can never adopt so as to deviate the line of succession, even if she succeeds directly to the last full owner, much less can she adopt if some one else has taken the property before she succeeds, the mother and grandmother being exceptions.

In this case it is contended that, as Krishnaji was the last full owner and his widow Sitabai succeeded to him before Bainabai took up the inheritance as his daughter-in-law, the only person who could make the adoption and continue the line of Krishnaji was his widow, Sitabai, and not his daughter-in-law, Bainabai. Reliance is placed on the decision of this Court in *Ganpati* v. *Mt. Salu* (2) in support of the first three propositions and on *Ramkrishna Ramchandra* v *Shamrao Yeshwant* (3) which in its turn is based on the three Privy Council decisions of *Bhooban Moyee Debia* v. *Ram Kishore Acharjee* (4), *Padma Coomari* v. *Court of Wards* (5) and *Thayammal* v. *Venkatarama* (6), as supporting all the four propositions The decision of a Bench of this Court in *Baswantrao* v *Deorao* (7) where the right of a daughter-in-law to make a valid adoption was affirmed, is sought to be distinguished on the ground that the daughter-in-law succeeded directly to her father-in-law, and, not after the death of her mother-in-law, as in this case It is, therefore, necessary to examine the cases on the subject decided by their Lordships of the Privy Council as well as by other High Courts and this

(2) A. I. R. 1926 Nag. 15.
(3) [1902] 26 Bom. 526=4 Bom. L. R. 315. (F.B.).
(4) [1863-66] 10 M. I. A. 279=3 W. R. 15 (P.C.).
(5) [1882] 8 Cal. 302=8 I. A. 229=4 Sar. 285 (P.C.).
(6) [1887] 10 Mad. 205=14 I. A. 67=5 Sar. 10 (P.C.).
(7) A. I. R. 1927 Nag. 2.

Court in order to find out the principles limiting a Hindu widow's power to make a valid adoption.

The leading case on the subject is that of *Bhooban Moyee Debia* v. *Ram Kishore Acharjee* (4). The facts of that case were that, one Gour Kishore died, in 1821, leaving a widow Chundrabullee and an only son named Bhowanee Kishore. In 1840, Bhowanee died, leaving no issue, but, his wife Bhooban Moyee Debia who, as his widow, succeeded to the estate left by him In 1843, Bhooban Debia adopted a boy called Rajendro Kishore, and some time after this. Chundrabullee. also, adopted Ram Kishore, as a son, to her late husband, Gour Kishore. The latter filed a suit, as the next friend of Ram Kishore, for possession of the estate left by Bhowanee, against Bhooban Debia and her adopted son Rajendro Kishore In that suit, it was found that, Bhooban Debia had no authority from her husband to adopt, and that, Chundrabullee had been authorized by her husband to adopt a son to him. In view of these findings, it became necessary to consider whether Ram Kishore's adoption was valid, and. whether he was entitled to recover possession of the estate left by Bhowanee Their Lordships held that Ram Kishore was not entitled to succeed, and observed as follows :

" The question is, whether the estate of his (Gour Kishore's) son (Bhowanee) being unlimited, and that son having married and left a widow as his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and to all the principles of Hindu law, as far as we can collect them. It must be recollected that the adopted son, as such takes by inheritance and not by devise. Now, the rule of Hindu law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore. If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule ; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the state of the heir of a deceased son vested in possession, can be defeated and divested."

The above case is an authority for the proposition that, if a Hindu dies leaving a widow as heir, his mother, although duly authorized in that behalf, cannot, during the lifetime of her son's widow, adopt a son to her own husband, and thereby divest her (the son's widow) of the estate acquired by her by inheritance from her own husband. In this case it was not held, in so many words, that Ram Kishore's adoption by Chundrabullee was invalid.

Sometime after this decision, Bhooban Debia died and the estate devolved according to the Hindu law of succession upon Chundrabullee, the mother of Bhowanee Kishore. After the death of Chundrabullee, the reversionary heirs of Bhowanee brought a suit for possession of his estate, then in the hands of Ram Kishore In this second suit, the question arose, whether Ram Kishore's adoption by Chundrabullee to her husband Gour Kishore was valid, and, whether, as such he was entitled to retain possession of the estate. The Calcutta High Court in *Puddo Kumaree Debi* v. *Juggut Kishore Acharjee* (8) held that, Ram Kishore's adoption was valid, and that, he was entitled to succeed to the estate of Bhowanee after Bhooban Debia's death.

With reference to the previous decision of their Lordships in *Bhooban Moyee Debia* v. *Ram Kishore Acharjee* (4), Jackson, J., observed :

" What has happened, being the death of Bhowanee without having either had sons born to him or given any permission to adopt. If, therefore, Chundrabullee immediately on the death of Bhoobumoyee, had made an adoption and so divested her own estate, there would have been nothing in the judgment of the Privy Council, and nothing that we are aware of in the law, to prevent her doing that which her husband authorized her to do, and which would certainly be for his spiritual benefit and for that of his ancestors and even of Bhowani Kishore. . . . Then, if Chundrabullee might have adopted at the date when Boobunmoyee's death caused the inheritance to devolve on her, with the consequence of divesting her own estate, is there any reason why Ram Kishore, if we suppose him to have been regularly adopted, and those who came before him as heirs to Bhowani Kishore out of the way, should not, in that state of things, take the inheritance which the mother gives up to him, and should not, to use the words of Mr. Mayne, be rewarded by the estate for the services which he

(8) [1880] 5 Cal. 615.

renders to the deceased ? We think not. . . . it seems to us, that although as heir to Gour Kishore, he could not displace the widow and heir of a subsequent full owner, and as heir to Bhowani he came after the widow and the mother, he might, without objection, succeed when, by their successive deaths or surrender, he united in himself the capacities of heir of Gour Kishore and heir to Bhowani : *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (8)."

Against this decision, there was an appeal to the Privy Council, and their Lordships reversed the decision of the High Court and held that, Ram Kishore's adoption by Chundrabullee was invalid and that he was not entitled to succeed to the estate left by Bhowani. In doing so, they referred to their former decision in *Bhooban Moyee* v. *Ram Kishore* (4) and observed :

"The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani, the power of adoption (given to Chundrabullee) was at an end, and incapable of execution : *Padmakumari Debi* v. *Court of Wards* (5)."

A similar question came up for decision before their Lordships of the Privy Council in the case of *Thayammal* v *Venkatarama* (6). In that case, one Dorasami died leaving his widow Thayammal and also an only son Kuttisami. Kuttisami married Thangammal and subsequently died without issue leaving his widow Thangammal, who upon the death of her husband succeeded as heir to the property. After Kuttisami's death and during the lifetime of his widow, his mother Thayammal adopted a son to her husband Dorasami with the consent of the sapindas. A question arose whether the said adoption was valid The Madras High Court following the decision in *Padamakumari Debi* v. *Court of Wards* (5) held that the adoption was invalid. On appeal to the Privy Council, it was contended on behalf of the adopted son that all that was decided by the Judicial Committee in *Bhooban Moyee's* case, *Bhooban Moyee* v *Ram Kishore* (4), was that the son adopted by the mother could not recover the estate from the son's widow and that it was not held that his adoption was invalid. Their Lordships overruled this contention and observed :

"This appears to have been the view taken by the lower Courts in *Padmakumari's* case. But this Committee, upon appeal, held that the case went much further. Nothing can be clearer or more explicit than the language used by the Committee in that case."

They also quoted with approval their own observations in *Padamkumari's* case cited above and following them held that the adoption of a son by Thayammal after the estate had vested in her son's widow was invalid.

It is no doubt true that, in the cases of Padmakumari and Thayammal referred to above, the mother of the propositus had adopted a son to her own husband during the lifetime of her son's widow, but a careful perusal of the judgments of their Lordships of the Privy Council in those cases will show that the adoption by the mother was held invalid not on the ground that it was made during the lifetime of the son's widow, but on the ground that the mother's power of adoption came to an end and became incapable of execution upon the vesting of the estate in the son's widow. These cases are, in my opinion, clear authorities for the proposition that a widow's power of adoption is limited, that the vesting of the estate in an heir of the last male holder is the limit of the existence of such power ; that once this limit is reached, the power is at an end and is incapable of execution at any future time, and that, it is not merely suspended and capable of being revived if, after some interval, the widow happens to succeed ultimately as an heir to the last male holder on the death of the immediate heir in whom the estate had vested for the time being.

The above view is fully supported by the Full Bench decision of the Calcutta High Court in *Manikyamala Bose* v. *Nanda Kumar Bose* (9). In that case, one Chandra Kumar Bose died in 1881, leaving his widow Manikyamala and an adopted son Akhoy. Akhoy died in 1893 after having attained majority, leaving a childless widow, Bidhumukhi, who died in July 1898. Shortly afterwards, i. e., on 29th August 1898, Manikyamala adopted a son to her husband, and the question arose whether the said adoption was valid. It was contended that as the same was made after the death of the widow of the last male holder it was

(9) [1906] 33 Cal. 1906=4 C. L. J. 357=12 C. W. N. 12.

valid. The Full Bench overruled this contention and following the two earlier Privy Council decisions, *Bhooban Moyee* v. *Ram Kishore* (4) and *Padma Coomari* v. *Court of Wards* (5), as also the later Privy Council decision reported in *Tara Churn Chatterji* v. *Suresh Chunder Mukerji* (10) to the same effect, held that the adoption was invalid. Mukerjee, J., in his judgment observed as follows at pp. 1315-16 :

"It is contended on behalf of the appellants that, inasmuch as the second adoption was made after the death of the widow of the adopted son and at a time, when the estate was vested in the widow of the original owner, there was no bar to the second adoption as it would divest the estate of the adoptive mother alone. It has been conceded before us, and in view of the decisions of the Judicial Committee in *Bhooban Moyee* v. *Ramkishore* (4) and *Padma Kumari* v. *Court of Wards* (5) it could not possibly be disputed, that the adoption would have been invalid, if it had been made during the lifetime of the widow of the adopted son, because during such period, the power of adoption was incapable of execution. The question, therefore, is reduced to this : Whether the power of adoption, vested in the widow of the original owner, which during the lifetime of her daughter-in-law was incapable of execution, became extinguished upon the death of her adopted son, when the estate vested in his widow or, whether the such power of adoption merely remained in abeyance and was revived and became capable of execution upon the death of her daughter-in-law, when the estate reverted to her. The solution of this question depends upon the principles deducible from a series of decisions of the Judicial Committee in which their Lordships had to consider the limits within which a power of adoption may be exercised by a Hindu widow."

Mukerjee, J., then discussed at length the decisions of the Privy Council and of the Bombay and Calcutta High Courts on the subject and observed at p. 1319 :

"Upon a review, then of the authorities, we must overrule the contention of the appellants, that the widow's death is the limit of time within which and the failure of male issue in the male line and the vesting of the estate in the widow, are the only two conditions subject to which, the power may be exercised, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son."

His final conclusion reported at p. 1321 was as follows :

"On these grounds, we must hold that the adoption of defendant 2 by defendant 1 after she had succeeded as heir to her first adopted son after his death and that of his widow, is invalid."

(10) [1890] 17 Cal. 122=16 I. A. 166=5 Sar. 379 (P. C.).

A similar view of the Privy Council decisions has been taken by the Bombay High Court also. For example in what is known as *Hasabnis's* case *Krishnarao Trimbak* v. *Shankarrao Vinayak* (11) the said High Court held that an adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow, is invalid according to Hindu law. In this case, the mother had adopted on the death of her son and his widow. Again in *Shri Dharnidhar* v. *Chinto* (12) it was held that, where a Hindu died leaving a widow and a daughter-in-law (a widow of his predeceased son), adoption by the latter was invalid. Candy, J., in delivering the judgment of the Court observed as follows :

"There is no suspension of the right to adopt [see remarks of this Court in *Krishnarav* v. *Shankarrav* (11)]. From the moment that Dharnidhar died, and his estate was vested in his widows, the right of his daughter-in-law Venubai to adopt, for the purposes of inheritance, was at an end : see judgment of West, J., in *Keshav* v. *Govind* (13)."

Similarly, in *Amava* v. *Mahadgauda* (14), it was held that the authority of a widow to adopt is at an end when the estate after being vested in her son has passed to his widow.

Again, in the Full Bench case of *Ramkrishna* v. *Shamrao* (3), it was held that, where a Hindu dies leaving a widow and a son and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never be revived In that case, Chandavarkar, J., who delivered the judgment of the Full Bench observed at pp. 529-30 as follows :

"If Mr. Chaubal's contention be correct, a widow can adopt without any limit as to the period within which such adoption may be made and her power is never at an end—it is only suspended so long as the estate is vested in others, but directly it comes to her from those others it is revived. The language of the judgment in *Bhooban Moyee's* case, however, is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached the power 'is at an end.' That language is repeated and emphasized by their Lordships in their judgments in *Padma Coomari's* case (5) and in *Thayammal's*

(11) [1893] 17 Bom. 164.
(12) [1896] 20 Bom. 250.
(13) [1885] 9 Bom. 94.
(14) [1898] 22 Bom. 416.

case (6). We agree, therefore with the Division Bench of this Court which decided *Hasabnis's* case (11), that the language of the Privy Council is 'altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life.' "

He then discussed at considerable length the test of the principle defining the limit to the period within which a valid adoption could be made by a Hindu widow to her deceased husband, and his conclusion, after a review of the case law, was that a widow's power of adoption comes to an end and can never be revived after the inheritance has vested in some heir of her son other than the widow herself It is significant to observe that the principle enunciated by the Full Bench of the Bombay High Court has been approved by their Lordships of the Privy Council in *Madana Mohana* v *Purushothama* (15), and this latter decision has since been cited with approval by their Lordships of the Privy Council in *Pratapsingh Shivsingh* v. *Agarsingji Rajsingji* (16)

The Madras High Court has also followed the view taken in the Privy Council decisions. The case reported in *Suryaprakasa* v *Gangaraju* (17) may be referred to on the point In that case *A* and *B* were two undivided brothers, *A* having predeceased *B*, the family properties vested in *B* by survivorship, and on *B*'s death descended to his widow After *B*'s death, *A*'s widow adopted a son It was found by the lower Court that the adoption was made with the implied consent of and without opposition from *B*'s widow. The adoption so made was held to be invalid, the consent of *B*'s widow not making it valid in any way, as the estate had already vested in her Wallis, J., after discussing the Privy Council cases on the subject observed as follows:

"These decisions of their Lordships have been interpreted by Full Benches of the Bombay and Calcutta High Courts in *Ramkrishna* v. *Shamrav* (9) and *Manikyamal Bose* v. *Nand Kumar Bose* (9), as meaning that a widow's power is absolutely at an end once the estate has vested in the heir of her deceased son, and is not revived even if the widow herself afterwards succeeds to the estate. If the widow having once lost the right to adopt, when her son's inheritance devolves on another, does not regain it on becoming herself the owner of the estate—if, that is to say, she cannot in these circumstances by her consent as owner validate an adoption made by her as widow, it would seem to follow that the consent of the person on whom the estate has devolved by inheritance from the son is ineffective to validate an adoption made by the widow.

* * * * *

Now it is clear that *A*'s widow might, with proper consent, have validly adopted a son to *A* during the lifetime of his surviving coparcener *B*: *Sri Virada Pratapa Raghunadha Deo* v. *Brozo Kishore Patta Deo* (18) and *Chandra* v. *Gojarabai* (19), but in the last case it was held that such an adoption if made after the death of the surviving coparcener and the vesting of the estate in his widow could not divest the estate, as of course it would if valid "

The Allahabad High Court also appears to have taken in *Lachhmi Kunwar* v *Durga Kunwar* (20), a similar view of the Privy Council decisions, though the question of adoption was not directly involved in the said case. Nathmal Das and Pem Raj, who were two brothers constituted a joint Hindu family Nathmal Das died leaving a widow, Lachhmi Kunwar, and, subsequently, Pem Raj died leaving a widow Durga Kunwar Lachhmi and Durga executed an agreement which recited that they were entitled to equal shares in the joint family estate left by Nathmal Das and Pem Raj and the descendants then proceeded to apportion the estate between them Disputes having subsequently arose between the widows, Durga Kunwar sued for a declaration that she had been deceived into executing the agreement, and that it was not binding on her It was contended on behalf of Lachhmi Kunwar that she was proposing to make an adoption, and that the effect of the adoption would have been to divest Durga Kunwar of the estate, or of at least half of it, and that, to avoid this divesting of estate, Durga Kunwar entered into the said agreement. With reference to this plea, the High Court observed as under:

"The plea may be disposed of upon the ground that it does not proceed upon a correct proposition of law. It is sufficient to refer to two cases, *Chandra Bin Bhau* v. *Gojarabai* (19), and *Advi Suryaprakasa Rao* v. *Nidamarty Gangaraju* (17), as authority for the proposition that any adoption which Mt. Lachhmi Kunwar might make, or might purport to make, to her deceased

(15) A. I. R. 1918 P. C. 74=41 Mad. 855=45 I. A. 156 (P.C.).
(16) A. I. R. 1918 P. C. 192=43 Bom. 778=46 I. A. 97 (P.C.).
(17) [1910] 33 Mad. 228=4 I. C. 386=(1910) M. W. N. 251.
(18) [1876] 1 Mad. 69=3 I. A. 154=25 W. R. 291=3 Sar 589 (P.C.).
(19) [1890] 14 Bom. 469.
(20) [1918] 40 All. 619=46 I.C. 566=16 A.L.J. 646.

husband, after the husband and his surviving brother were both dead, could not affect the rights of Mt. Durga Kunwar who had inherited the estate as widow of Pem Raj".

In short, all the four chartered High Courts have taken exactly the same view of the aforesaid Privy Council decisions This Court has also adopted the same view as will appear from the decision of Stanyon, A J. C , in *Narayan* v *Debidas* (21). In this local case it was held that:

"where a Hindu son whether natural or adopted having inherited the property of his deceased father, dies leaving a son or widow or any other person as his heir other than the widow of his father, any power to adopt held by his father's widow, comes to an end."

The learned Judge observed that:

"The Privy Council doctrine of limitation of the power to adopt turns upon a second vesting of the estate and upon nothing else: and where such second vesting is in the widow herself her power to adopt will not be extinguished."

It is urged on behalf of the respondent that the position of a daughter-in-law is the same whether she inherits the father-in-law's estate immediately after his death, or, after the death of his widow In either case it is said she inherits the estate as her father-in-law's heir and in neither case can she make an adoption to him (the last male holder) as, under the Hindu law, a widow can adopt to her husband only. That being so, why should she have no power to make an adoption when she inherits her father-in-law's estate after his widow's death, when she may be said to have that power according to some of the decisions if she succeeds to him direct? It is further argued that the lower appellate Court's view that she is as much able to continue her father-in-law's line in the way of providing him with a grandson by making an adoption to her own husband, as her mother-in-law is by providing him with a son, is correct. Moreover, it is contended that the object of an adoption is not merely the due perpetuation of the lineage but to secure for the adoptive father and his ancestors the spiritual blessings "*Pindodaka kriya hetoh nam sankeertanaya cha*" as laid down by Manu in his text; and that the adoption in question should be upheld as valid at least for spiritual purposes and the vesting of the estate in defendant 1 will follow as a legal consequence thereof as observed in *Yado* v. *Namdeo* (22). It is further said that if a son adopted by a daughter-in-law, on the death of her father-in-law's widow, is as much able to confer spiritual blessing on the father-in-law, as a son adopted by her after the death of her father in-law dying without leaving a nearer heir than herself would, why should the power to make an adoption be supposed to continue in the latter case, and deemed to have been extinguished in the former? Since under the Bombay School a sonless widow is said to have an inherent or in any case a delegated right of adopting a son to her deceased husband, it is argued that she can exercise that right at any time during her lifetime subject only to such restrictions and limitations if any, as her husband may have expressly or impliedly chosen to impose on her in that behalf

In reply to these contentions it may be pointed out that if they are carried to their extreme logical conclusions, we shall have to run counter to the earlier Privy Council rulings in *Padma Coomari* v. *Court of Wards* (5) and *Thayammal* v. *Venkatarama* (6), in which it has been distinctly held that an adoption made by a mother on the death of her son and during the lifetime of the son's widow is invalid; and, also to hold that a sonless widow governed by the Bombay School has, subject to the restrictions imposed on her by her husband, an unlimited right of adoption which she can exercise at any time during her life and that an adoption made by her after her son's death but during the lifetime of her son's widow, is perfectly valid. To do so would involve the ignoring of the Privy Council decisions referred to. The reason why this is not permissible is quite plain As remarked in *Datto Govind* v. *Pandurang Vinayak* (23), it is not open to the Indian Courts :

"to consider how far the principle laid down by these cases was in accordance with either the letter or spirit of the Hindu law as expounded in the books or as understood by the Hindus themselves."

The Privy Council decisions are binding on the Indian Courts, and the latter are bound to follow them as the following remarks of their Lordships of the Privy

(21) Nag. Second Appeal No. 367-B of 1918.

(22) A.I.R. 1922 P C. 216=49 Cal. 1=48 I. A. 513=17 N. L. R. 145 (P.C.).

(23) [1908] 32 Bom. 499=10 Bom. L. R. 692.

Council in *Mataprasad* v *Nageshar Sahai* (24), will show :

" In view of the peculiar course adopted by the Subordinate Judge in dealing with this case, and in order to prevent other Courts in India from falling into the same error their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have the right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case."

In view of these remarks, it will serve no useful purpose to discuss the original Hindu law texts with a view to see whether, and how far the principles as to the limits of a widow's power to adopt laid down by the Privy Council are deducible from them Neither the theory and object which underlies the conception of an adoption by a Hindu male or female to which reference is made in *Sri Virda Pratapa Raghunadha Deo* v. *Sri Brozo Kishoro Patta Deo* (18), nor the spiritual apart from the temporal aspect of an adoption, or its validity purely for spiritual purposes, discussed In *Yado* v. *Namdeo* (22), on which the lower Courts largely depended, therefore, calls for any comment or treatment here.

We have seen above that the Privy Council decisions *Padma Coomari* v. *Court of Wards* (5) and *Thayammal* v *Venkatarama* (6), are based on the principle that, where the last male-holder dies leaving a nearer heir other than the adopting widow, the latter's power of adoption comes to an end, as soon as his estate is vested in the nearer heir, and is incapable of being revived at any future date. In my opinion, the words :

" the power of adoption was at an end and incapable of execution."

as used in *Padma Coomari* v *Court of Wards* (5), leave no room for doubt that this was the principle on which stress was laid by their Lordships in defining the limit of the widow's power of adoption. It is not, therefore, open to the Courts in India to question the soundness of the said principle It is obviously based on the consideration that, when the last male holder dies leaving a widow capable of continuing the line by adopting a son, and that nearer heir does not care to continue the line, the remoter heir cannot claim to continue the line by making an adoption either during, or after, the lifetime of the former widow ; because, it was the right of the former widow to continue the line, and, if for any reason, she chooses not to do so, it should not be within the power of the remoter heir who succeeds to the estate to claim to exercise that power after it became extinguished.

It seems, therefore, clear to my mind that the principle deducible from the Privy Council rulings on the subject of the power of adoption by a widow as interpreted by all the High Courts and this Court is that, when the adopting widow, in a joint family which has ceased to exist on the death of the last surviving coparcener, or, in a divided family, succeeds direct to the last male holder, her power of adoption remains intact, and she can exercise it by making an adoption to her deceased husband ; where, however, she succeeds on the termination of an intermediate estate, her power of adoption comes to an end, as soon as the estate vests in the immediate heir other than herself, and is incapable of being made use of at any future date. On this principle, the cases decided by the several High Courts in regard to the validity or otherwise of an adoption made by a widow succeeding to the estate of the last male holder either directly or after the termination of an intermediate estate, can, in my opinion, be satisfactorily explained.

It is obviously in accordance with this principle that it has been held that a grandmother succeeding direct to her grandson can make a valid adoption · cf. *Narhar Govind* v. *Balwant Hari* (25). This principle also applies to the case of a daughter-in-law succeeding to her father-in-law, direct, and it has been held by a Bench of this Court that an adoption made by such daughter-in-law is valid : *Baswantrao* v. *Deorao* (7), similarly, where a Hindu dies leaving a son and a widow and that son dies unmarried or marries and begets a daughter and his wife and daughter die, and after them he also dies, his mother can make a valid adoption as she succeeds to him direct : cf. *Maharaja of Kolhapur* v. *Sundaram Ayyar* (26), *Tripuramba* v. *Venkataraman* (27), *Anjirabai* v *Pandurang Balkrishna* (28) and *Sheik Dallu* v. *Panjab A I. R.* 1924 *Nag* 344.

(24) A. I. R 1925 P. C. 272=47 All. 883=28 C. C. 352=52 I. A. 398 (P.C.).

(25) A. I. R. 1924 Bom. 437=48 Bom. 559.
(26) A. I. R. 1925 Mad. 497=48 Mad. 1.
(27) A. I. R. 1923 Mad. 517=46 Mad. 423.
(28) A. I. R. 1924 Bom. 441=48 Bom. 492.

Where, however, he dies leaving a widow as his heir, and also a mother and predeceased son's widow, neither of them can make a valid adoption, even after the death of his widow, as their power to make an adoption comes to an end, i. e. is extinguished altogether, as soon as his estate vests in his widow, as his heir, and is not capable of being revived at any future date.

It has accordingly been held by this Court that, where a Hindu dies leaving a widow who could have adopted, his mother has no power to do so on her succession to the estate after the remarriage of his widow: *Ganpat* v. *Mt. Salu* (2) It is true that there is no case decided by this Court in which it has been held that a daughter-in-law succeeding as a gotraja sapinda to her father-in-law, on the death of his widow, cannot make a valid adoption. I am of opinion, however, that, where she does not succeed direct, she has no such power Her power comes to an end as soon as the widow of her father-in-law succeeds as heir to his estate, and cannot be revived after her death. The Bombay High Court has, however, clearly held that where a Hindu dies leaving a widow and a daughter-in-law, the latter on succeeding to the estate, as a widow of a gotraja sapinda on his widow's death, cannot make a valid adoption: *Shri Dharnidhar* v. *Chinto* (12). The same High Court has also gone the length of holding in *Datto Govind* v. *Pandurang Vinayak* (23) that the widow of a predeceased gotraja sapinda succeeding even directly to the last male holder cannot make a valid adoption, a view not accepted in this Court in *Narayan* v. *Debidas* (21) and *Baswantrao* v *Deorao* (7): cf. *Dattatraya Bhimrao* v. *Gangabai* (29), *Yeknath Narayan* v *Laxmibai* (30) and *Shivbasappa* v *Nilava* (31) It may be noticed that the decision of the case in *Datto Govind* v. *Pandurang Vinayak* (23) was sought to be based on the Privy Council decisions referred to above

In that case *Datte Govind* v *Pandurang Vinayak* (20) it was held that a Hindu widow, who succeeds to an estate not her husband's but as a gotraja sapinda of the last male holder under the rule established by *Lullobhoy* v. *Cassibai* (32) and in consequence of the absence of nearer heirs, cannot make a valid adoption In that case Pandurang was adopted by Parvati the widow of Sadashiv the undivided predeceased brother of Antaji the last surviving coparcener of a joint family of two brothers. Parvati succeeded to Antaji as the nearest sagotra sapinda then alive. The reversionary heirs of Antaji sued Pandurang after the death of Parvati for possession of the property urging that this adoption was invalid The Courts below held it to be valid in law, on the ground that, though Patvati's adoption was not one to the last male holder, still that would not make it spiritually invalid, and, as her adoption did not divest any estate vested in third parties and was derogatory of no other estate but her own, the adoption was perfectly valid. This decision was sought to be supported by the respondent in the High Court arguing that a power to adopt was inherent in every Hindu widow and she may be temporarily incapable of acting upon it; that it was in suspension during Antaji's lifetime and that it revived when she got the estate as a sapinda when her act of adoption had not the effect of divesting any estate but her own Chaubal, J., repelled this argument by the following observations at p. 504:

"every one of these considerations applied to the case of the grandmother in the case of *Ramkrishna* v. *Shamrao* (3). It may also be noticed that this was exactly the argument urged before their Lordships of the Judicial Committee by Mr. Mayne in *Thayammal's* case (6), and was not acceded to. I do not think there is any authority for the proposition that the right to adopt is a necessary incident of inheritance."

The latest case wherein the view taken in *Datto Govind* v. *Pandurang Vinayak* (23) has been applied by the same Court was in *Bassangowda* v *Rudrappa* (33) where a stepmother was held disentitled to adopt a son to her own husband although she got the inheritance as the nearest sagotra sapinda of her stepson, after the death of his own mother who directly succeeded to him.

It is true that, in the present case, Krishnaji died leaving behind a widow, a daughter-in-law, who could both continue his line by providing him with a son and

(29) A. I. R. 1922 Bom. 321=46 Bom. 541.
(30) A. I. R. 1922 Bom. 347=47 Bom. 37.
(31) A. I. R. 1923 Bom. 17=47 Bom. 110.
(32) [1880] 5 Bom. 110=7 I. A. 212=4 Sar. 164 (P. C.).
(33) A. I. R. 1928 Bom. 291=52 Bom. 393.

a grandson respectively by means of an adoption. But the right of Krishnaji's widow was superior to that of his daughter-in-law : cf. *Gopal* v. *Vishnu* (34). She could by making an adoption have provided Krishnaji with a son, who would have been in a position to offer oblations to him and to his two immediate ancestors. The daughter-in-law Bainabai could by making an adoption bring only a grandson into existence, who could offer oblations to his adoptive father Zaboo, the last male holder Krishnaji, and only one of his ancestors That being so, there can be no doubt that the widow of Krishnaji had a superior right of continuing the line of the propositus by adoption, and when she did not choose to exercise that right, for reasons best known to herself, it was not open to his daughter-in-law Bainabai to make an adoption in order to continue the line, as her power of adoption came to an end, and became incapable of execution as soon as the estate vested in her mother-in-law on Krishnaji's death I am, therefore, of opinion that the adoption of Daulat, defendant 1 by Bainabai, in the present case, must be treated as invalid, because of her incompetency to make one The vesting of the estate in Sitabai, on Krishnaji's death, was the limit of Bainabai's power to make an adoption to her own husband, Zaboo ; and that, the limit having been reached as soon as Krishnaji's widow got the inheritance, Bainabai's power was at an end and became incapable of execution. Consequently the consent of Baijabai to the adoption of Daulat, defendant 1 could in no way validate an invalid adoption

For all these reasons my answer to the reference is that the adoption of Daulat, defendant 1, should be held to be invalid in view of the principles enunciated in the Privy Council decisions of *Bhooban Moyee* v *Ram Kishore* (4), *Padma Coomari* v. *Court of Wards* (5), and *Thayammal* v. *Venkatarama* (6).

Findlay, J C.—I have had the advantage of perusing and considering the elaborate and interesting opinion recorded by Kinkhede, A. J C., and find myself in complete agreement therewith.

Mohiuddin, A. J. C.—I agree.

R.K. *Reference answered.*

(34) [1899] 23 Bom. 250.

A. I. R. 1929 Nagpur 108

PRIDEAUX AND MOHIUDDIN, A. J. Cs.

Abdul Hai—Defendant—Appellant.

v

Bapu Rao and *others*—Plaintiffs—Respondents.

Second Appeal No 324 of 1927, Decided on 25th October 1928, against judgment of Addl. Dist. Judge, Balaghat, D/- 15th January 1927, in Civ. App. No 38 of 1926

C. P. Land Revenue Act (1917), S. 2—Khudkhast land left under grass—Tenants cannot graze free of charge—C. P. Tanancy Act (1920), S. 2—Agriculture.

Keeping land under grass is " agriculture " within the meaning of that term in the Tenancy Act and therefore where a plot is recorded as khudkhast, villagers are not entitled to graze their cattle free of charge therein merely because it is left under grass.

[P 108 C 2 ; P 109 C 1]

Abdul Razak—for Appellant

M R Bobde—for Respondents

Facts.—The defendant-appellant was the Mukaddam Thekedar of the village of Dhorya-Paraswada On 20th September 1925 he impounded four buffaloes and one she-buffalo belonging to the plaintiffs when they were grazing in plot No 89/2 of the village which was recorded ' khudkhast ' at the last settlement. The plaintiff sued for the recovery, the sum spent for getting the cattle released from the pound, and Rs 2 on account of loss caused by the detention of the cattle on the ground that because the mukadam left the plot under grass, the land fell under the expression " Khali Pad " of the wazib-ul-arz, and that the villagers under the rights conferred by that document had therefore a right to graze in the uncultivated khudkhast field.

Prideaux, A. J C.—The question here is one of general importance, namely, whether the village cattle in this village can graze free in uncultivated khudkhast I would ask for a Bench to decide it.

Opinion.—We have no hesitation in answering the reference in the negative. The land in the present case is admittedly recorded as khudkhast, and as such it is within the power of the malguzar to give it out for cultivation, to cultivate it himself or to leave it under grass, and if he likes to do the last, we do not think villagers are entitled to graze their cattle free of charge therein, though they have a right to do so in the fields specified for

that purpose in the wajib-ul-arz, or on the waste tracks of the village The expression "khali pad" does not, in our opinion, apply to land of the nature we are dealing with. Keeping land under grass is "agriculture" within the meaning of that term in the Tenancy Act.

R.K. *Reference answered in negative.*

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* A. I. R. 1929 Nagpur 109

MOHIUDDIN AND JACKSON, A. J. Cs.

Suratram and *another* — Plaintiffs — Appellants.

v.

Atmaram and *others* — Defendants — Respondents.

First Appeal No. 83 of 1927, Decided on 12th February 1929, against decree of Addl. Dist. Judge, Bilaspur, D/- 30th March 1927 in Civil Suit No. 31 of 1926.

*** (a) Civil P. C., O. 3, R. 4—Vakalatnama authorizing second grade pleader to appoint other pleader does not empower him to appoint other pleader for filing appeal after suit ends.**

Vakalatnama, given to a second grade pleader and authorizing him to appoint another pleader or barrister in case of emergency, does not empower him to appoint a first grade pleader to file an appeal after the suit ends.

[P 109 C 2]

(b) Civil P. C. (amended 1923), O. 3, R 4, —Amended rule does not enable second grade pleader, appointed to conduct suit, to appoint another to file appeal in High Court.

The amendment of the Civil P. C. in 1926 has not extended the power of second grade pleaders who cannot act and plead in the High Court and, therefore, the appointment made under sub-S. (2), O. 3, R. 4 will not enable such a pleader to appoint another pleader to file an appeal in the High Court.

[P 109 C 2]

D. N Choudhry and *G R. Deo*—for Appellants.

P. N. Rudra—for Respondents.

Judgment. — This appeal was filed on 28th June 1927 by a first grade pleader on the authority of a vakalatnama executed in his favour by a second grade pleader who was authorized by Suratram, the appellant, to appear and conduct the case on his behalf, and in whose favour a vakalatnama was executed on 5th October 1926. This vakalatnama does not specifically authorize the pleader named in it, to file an appeal or to authorize some one also to do so. The portion of the vakalatnama, on which the learned advocate for the appellant relied, runs as follows :—

"Wo is vakalatnama ke sariye se wakil mausuf ko ye bhi ikhtiar hasil rahega ke makaddami sadar men wakt sarurat par doosra Wakil ya Barrister makarrar karen."

It was argued that on the authority of the above condition in the vakalatnama, the pleader appointed by the appellant could engage and authorize another pleader to file the appeal. The terms are quite definite and clear and do not allow any such authorization, as is suggested. The pleader could only appoint another pleader or a barrister, in case of emergency and in that suit. There is no authority to appoint another pleader on behalf of the appellant to file an appeal on the termination of the suit. The fact that the appellant appointed a second grade pleader to conduct this case in the trial Court shows that he did not expect the pleader to act for him in connexion with the appeal to be filed in this Court, after the termination of the suit, because second grade pleaders cannot appear and act in this Court We therefore hold that the vakalatnama given to the pleader on 5th October 1926 by the appellant did not contain any authority, authorizing the pleader to file an appeal in this Court.

It was also argued that the appointment of the pleader continued, until all proceedings in the suit were ended, so far as regards the client, and this appeal, according to the amendment of R. 4. O. 3, Sch. 1, Civil P C, as contained in Act No 22 of 1926, was a proceeding in the suit The amendment of the Code has not extended the power of second grade pleaders who cannot act and plead in this Court and, therefore, the appointment made under sub-S (2), O. 3, R. 4, Civil P C will not enable the pleader to appoint another pleader to file an appeal in this Court.

It was next suggested that the pleader appointed on 5th October 1926 was a recognized agent who could engage a pleader on behalf of the appellant. We have already pointed out in para. 1 of this judgment that the pleader had no authority to appoint another pleader. The authorized agent could not possibly have any more authority than what was given to him by the power-of-attorney and as the power-of-attorney did not empower the agent to appoint a pleader to file an

appeal, the pleader as a recognized agent, could not authorize another pleader to file an appeal. We therefore hold that the pleader who filed the appeal in this Court, had no authority on behalf of the appellant to file the appeal and, therefore, the appeal was not properly presented.

An application was made, on the date of hearing, asking this Court to condone the delay and to allow the appellant to file a vakalatnama. It appears from the application that the appellant did not sign any vakalatnama to be given to the pleader, who was to be engaged at Nagpur and did not take any steps to see that he had authorized any one to file the appeal on his behalf We do not find any sufficient cause for extending the period of limitation and therefore reject the application The appeal therefore fails and is dismissed with costs. We fix Rs. 100 as pleader's fees in this case.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 110

JACKSON, A. J. C.

Laxman Singh and *another*—Defendant 2—Appellants.

v.

Binraj and *another*—Plaintiff & Defendant 1—Respondents.

Second Appeal No. 420-B of 1927, Decided on 16th February 1929, against Decree of Addl. Dist. Judge, Khamgaon, D/- 19th September 1927 in Civil Appeal No. 33 of 1927

(a) Civil P. C., S. 100—Lower Appellate Court's conclusion on question of fact—It cannot be attacked in second appeal unless it is inference based on erroneous view of law.

Where the lower appellate Court arrives at a conclusion on a question of fact, which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal but not otherwise : 24 *Cal.* 825 *Foll.* [P 110 C 2]

(b) Transfer of Property Act, S. 53—Debtor selling his property to one creditor intending to defeat other creditors —Creditor knowing debtor's intention — Consideration for sale being part satisfaction of debt—Creditor is prima facie transferee in good faith.

Where the consideration for a sale is part satisfaction of a debt due to the creditor, the creditor is prima facie a transferee in good faith even if the debtor in making the transfer intended to defeat the claims of other creditors, and the creditor had the knowledge of such intention ; and it is for the parties, who allege want of good faith, to prove it : 24 *Cal.* 999, 24 *Cal.* 825, *Foll.* [P 111 C 1]

G R. Deo and *S. C. Dutt Choudhury*—for Appellants.

Y V Jakatdar—for Respondent No. 1.

Judgment.—In the trial Court the plaintiff's suit for possession of Suit No. 89/1 of mouza Ava Yunaspur and Suit No. 19 of mouza Shewaga Khurda was dismissed on the ground that the sale-deed in his favour, dated 12th May 1920, was bogus and fraudulent. This decision was reversed on appeal, and the present appellants, Laxman Singh and Shankar are now appealing against the decision of the lower appellate Court They have each purchased one of the fields, but their purchases were subsequent to the alleged sale to the plaintiff Binraj.

On the date fixed for hearing, an additional ground of appeal was raised on behalf of the appellants, urging that the sale to the plaintiff should have been held void under S. 64, Civil P. C , on the ground that the deed was registered during the attachment of Suit No. 89/1 ; but the ground was subsequently withdrawn when it was found that the actual fact was that registration was effected before the attachment.

The lower appellate Court has found that Binraj, the plaintiff, purchased the fields from Totaram in good faith and for consideration. The first question is whether its finding of fact can be questioned in second appeal. It is urged that it is not the lower appellate Court's findings of fact that are being attacked but the inferences drawn by it from the facts it has found ; but it seems to me that these inferences are no less findings of fact than the findings on which they are based. It has been held in *Ishan Chunder Das* v. *Bishu Sirdar* (1), which, like the present case, was a case under S. 53, T. P. Act, that where the lower appellate Court arrives at a conclusion, which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal. In the present case, the only erroneous view of law that the lower appellate Court can be argued to have taken is as regards the burden of proving the good faith of the sale in favour of the plaintiff All that the

(1) [1897] 24 Cal. 825=1 C. W. N. 665.

lower Court concludes on the point of good faith is that "it has not been proved that the appellant," that is Binraj, "was a party to the fraud, if any, on the part of respondent 2," that is, Totaram

It is urged that Binraj must have known of the other debts owed by Totaram and, as the sale in his favour covered all Totaram's immovable property, he must have known that the sale in his favour would defeat the other creditors. But even assuming that he had that knowledge, it does not follow that he is not a purchaser in good faith. The consideration for the sale to him was part satisfaction of a debt due to him from Totaram, and, in the case I have cited above (p 829), it has been said :

"Where transferee is a creditor of the transferrer, and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his doing so has the effect of defeating other creditors of the transferrer, the transfer may come within the last paragraph of S. 53, T. P. Act."

In that case the Court was not required to give a more definite finding on the point; but in *Lala Hakim Lal* v. *Mooshahar Sahoo* (2) it has been definitely held that a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor in making it intended to defeat their claims and the creditor had knowledge of such intention, if the only purpose of the creditor is to secure his debt and the property is not worth materially more than the amount of the debt. Accepting that view, I hold that Binraj in the present case is prima facie a transferee in good faith, and that it was for the parties who allege want of good faith on his part to prove it. That being so, there is no erroneous view of law taken by the lower Court which entitles me to interfere in second appeal with its findings of fact The appeal fails and is dismissed with costs.

S N./R.K. *Appeal dismissed.*

(2) [1907] 34 Cal. 999=6 C. L. J. 410=11 C. W. N. 889.

A. I. R. 1929 Nagpur 111

FINDLAY, J. C.

Sadasheo Kirad—Applicant

v.

Mahadeo Ganesh Sohani—Non-Applicant.

Miscellaneous Judicial Case No. 3 of 1929, Decided on 4th January 1929, against order of Addl. Dist. Judge, Nagpur, D/- 10th November 1928.

Civil P. C., Sch. 2, Para. 21—Decree in terms of award cannot be challenged in appeal on ground of fraud—Remedy is separate suit—S 151 should not be applied—Civil P. C., S. 151.

A decree passed in terms of award cannot be challenged in appeal on the ground of fraud, nor can it be set aside by the Court by virtue of its inherent powers under S. 151. The remedy of the party lies by a separate suit. *A.I.R.* 1927 *Nag.* 212, *Appl.* [P 111 C 2]

G R. Pradhan—for Applicant.

Order.—I have heard the pleader for the appellant in this case but it seems to me that the present appeal is clearly barred under para. 21, Sch. 2, Civil P. C. Sub-para. 2 thereof only allows an appeal in a case like the present where the decree is in excess of and is not in accordance with the award The applicant's case in attempting to attack the preliminary decree is that it was obtained by fraud. That is obviously not a ground which can be considered under the rule in question ; clearly, the appellant's remedy is by a separate suit. To attempt to invoke S 151, Civil P. C. is an equally futile suggestion I am in full agreement with the decision of Hallifax, A. J. C, in *Sadasheo Rao* v. *Umaji* (1), in that connexion

It has been suggested that, in any event, the appeal might be treated as an application for revision. There is no prima facie reason, either technically or on merits, for allowing this to be done and I am wholly unable to see any ground for allowing the appeal to go further. It is clearly barred for the reasons stated above and, if the appellant has any remedy, it is by a separate suit.

The appeal is dismissed without notice to the respondent.

M.R./R.K. *Appeal dismissed.*

(1) A.I.R. 1927 Nag. 212=23 N.L.R. 79.

A. I. R. 1929 Nagpur 112

JACKSON, A. J. C.

Riwain—Defendant—Appellant.

v.

Mardan Singh and *others* — Plaintiffs —Respondents.

Second Appeal No. 710 of 1927, Decided on 12th February 1929 from decree of Addl. Dist Judge, Damoh, D/- 15th September 1927, in Civil Appeal No. 1 of 1927.

C. P. Tenancy Act, (1920), S. 37—Occupancy rights in malik makbuza acquired before 1884 can be extinguished by S. 37—Such occupancy tenant if not recorded in last settlement before 1920 is a sub-tenant.

Though occupancy rights acquired before the 1st January 1884 were left untouched by Act 9 of 1883 (as amended) they can be extinguished under S. 37 of Act of 1920. The intention of S. 37, as regards occupancy rights under a malik makbuza is that, though a person might have acquired such rights, yet, if he was not recorded in the settlement records of the last settlement made before the Tenancy Act of 1920 came into force, he would be deemed to be a sub-tenant. 6 *C. P. L. R.* 101; 8 *N. L. R.* 39 and *A.I.R.* 1923 *Nag.* 227, *Expl.* [P 112 C 2]

N. G. Bose—for Appellant.

R. K. Manohar — for Respondents 1 and 2.

Judgment. — The appellant in this case has been held to be a sub-tenant of the respondents, who are malik makbuza holders, and the latter have been given a decree for ejectment against him.

He claims to be an occupancy tenant and he bases that claim upon the allegation that he held the land as tenant for more than 12 years before 1st January 1884, the date on which the Central Provinces Tenancy Act, 9 of 1883, came into force. It has been held in *Sheoram* v. *Raghoba* (1) and *Tejsingh* v. *Lalji* (2) that under Act 9 of 1883 (as amended with retrospective effect by Acts 16 and 17 of 1889) no person could become an occupancy tenant of a malik makbuza from and after 1st January 1884, but that the status of a person who was already the occupancy tenant of a malik makbuza before that date remained unaffected. The appellant's case is that by his possession prior to 1st January 1884 he acquired a vested right which could not be taken away by subsequent legislation ; and, therefore, that the lower appellate Court was wrong in holding that he was a sub-tenant, and not an occupancy tenant, because his case falls under the definition of "sub-tenant" in S. 37, Central Provinces Tenancy Act of 1920.

I have been referred to *Hindusingh* v. *Mangal* (3), in which it is laid down that, unless an intention to the contrary is clear, an act is to be construed as operating only on cases or facts which come into existence after the Act, and not retrospectively on cases which had come into existence after the Act. But this ruling cannot be applied to S. 37, Tenancy Act of 1920. As already pointed out, it has not been possible to acquire occupancy rights under a malik makbuza after 1st January 1884. Though such rights acquired before that date were left untouched by Act 9 of 1883 (as amended), it is clear from the wording of S. 37 of the Act of 1920 that they can be extinguished under that section. If this was not the intention of the legislature, the section would simply have provided that

"any person, who holds as a tenant land from a malik makbuza and who is not an absolute occupancy tenant or an occupancy tenant, shall be deemed to be a sub-tenant of such land."

A reference to the settlement records of the last settlement made before the Act came into force would have been meaningless, and the fact that reference has been made seems to me to show clearly that the intention of S. 37, as regards occupancy rights under a malik makbuza, is that, though a person might have acquired such rights, yet, if he was not recorded in the settlement records of the last settlement made before the Tenancy Act of 1920 came into force, he would be deemed to be a sub-tenant. Even assuming, then, that the appellant had acquired occupancy rights, as he alleges, prior to 1st January 1884, he must now be deemed to be a sub-tenant, because he was not recorded as an occupancy tenant in the last settlement made before the Tenancy Act of 1920 came into force.

The lower Court's decision, is, in my opinion, correct, and the appeal is dismissed with costs.

R.K. *Appeal dismissed.*

(1) [1892] 6 C. P. L. R. 101.
(2) [1912] 8 N. L. R. 39=14 I. C. 788.
(3) A. I. R. 1923 Nag. 227=19 N. L. R. 110.

A. I. R. 1929 Nagpur 113

MACNAIR, A. J. C.

Ramdayal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 258 of 1928, Decided on 4th December 1928, against judgment of Sess. Judge Nagpur, D/- 4th October 1928.

(a) Criminal Trial—Convincing proof.

A Judge has not to decide whether the prosecution story is the more probable but whether or not there has been definite and convincing proof. [P 114 C 1]

(b) Criminal P. C., S. 307—High Court should interfere under S. 307 only if jury's verdict is perverse or manifestly wrong.

The High Court while considering a reference under S. 307 should interfere only when the verdict of the jury is perverse or manifestly wrong : *A. I. R.* 1926 *Nag.* 308, *Foll.*; *A. I. R.* 1928 *Cal.* 732, *not Appr.* [P 114 C 1]

A. S. Sathe—for Appellant.

G. P. Dick—for Opposite Party.

Judgment—The judgment in this appeal will govern the disposal of Criminal Appeal No. 266 (*Mohanlal* v. *Emperor*), Criminal Appeal No. 271 (*Bachhusingh* v. *Emperor*) and of Criminal Reference No. 385 of 1928 (*Emperor* v. *Harilal*).

Seven accused were prosecuted for rioting and for offence committed in the course of the rioting. The three applicants have been convicted. Harilal was acquitted by the jury which tried one of the offences, and the Judge disagreeing with the Jury has referred the case ; the remaining accused were acquitted.

The counsel for the appellant and for Harilal do not challenge the finding that a riot took place in Sitabaldi on 5th September 1927. It is urged by the counsel for Bachoosingh that Yusuf (P W. 6) may not have been injured in this riot, but Yusuf did receive injuries and I agree with the learned Sessions Judge that his story of the manner in which he received these injuries is reliabe . Yusuf has all along stated that he received injuries in this riot and it is most improbable that a person who received injuries should, from the beginning, assert he received injuries at a totally different place and time, thereby making no attempt to assist in the conviction of the persons who had injured him. The other counsel who appeared did not contest the finding that the story of the witnesses who have been believed is a fairly correct account of the manner in which they were injured.

I hold, then, that the evidence on which the Sessions Judge relies furnishes a fairly correct account of the manner in which the witnesses received their injuries. I believe also that the witnesses would be certain to mention the names of any of their assailants whom they recognised. It is however, prima facie not improbable that if a witness recognised none of his assailants he might mention the names of persons whom he thought likely to have taken part in the assault, or if he recognised some assailants, might add the names of such other persons.

The question, then, for consideration is whether the witnesses, who mentioned the persons whose cases I am considering, are to be believed on this point. (Here the judgment discusses evidence and confirming the conviction of Ramdayal under S. 147 Penal Code, and setting aside the conviction of Bachchusingh, it proceeds). I next deal with the appeal of Mohanlal. The reasons for Mohanlal's conviction are given in para. 7 of the trial Court's judgment This is based on the evidence of Hasul (P. W. 12) : the learned Judge remarks that there is no independent evidence to corroborate Hasul. There is very strong evidence that Hasul and Mohanlal were on bad terms. In 1919 Harilal's father filed a criminal complaint against Hasul's brother Ex. D-35 shows that Harilal, some three months before the riot, reported that Rasul had encroached upon the public road. Ex. D-36 shows that this complaint which eventually resulted in their having to remove a substantial construction, affected both brothers. It is most probable that at the time of riot Rasul and Hasul knew of the complaint ; Hasul was living with his brother Rasul. The police reports (Exs. P-3 and P-4) and the evidence of Mr Kane clearly shows that there was a heated quarrel between Harilal on one side and Rasul and Hasus on the other on the evening previous to the attacks on Rasul and Hasul. Hasul has not contented himself with stating that Mohanlal caused grievous hurt to him but has also stated that he saw Mohanlal setting fire to the roof of his house and this evidence has been considered to be false for good reasons by the trial Judge. The trial Judge has believed Hasul's evidence

because Hasul received grievous hurt, but, as I have stated above, a man who has received grievous hurt may well add the names of his enemies whom he thinks likely to have been concerned in the riot to the names of any persons whom he recognised. The trial Judge is mistaken in thinking that the identification of Mohanlal by Hasul at a parade adds weight to Hasul's evidence when it is clear that Hasul knew Mohanlal well Again while it may well be that the existence of enmity between witnesses and accused renders it more probable that the accused attacked the witnesses than that he is falsely implicated, this is not material. A Judge has not to decide whether the prosecution story is the more probable but whether or not there has been definite and convincing proof The evidence of Hasul is then insufficient to justify the conviction of Mohanlal and I acquit Mohanlal.

I next come to the reference regarding Harilal. Harilal was acquitted by the jury and I see no reason to dissent from the principles laid down in *Emperor* v. *Kankaya* (1), that this Court should interfere only when the verdict of the jury is obviously perverse or manifestly wrong or unreasonable The principle laid down in *Emperor* v. *Ram Chandra Roy* (2), does appear somewhat different, but it seems clear that the High Court cannot treat a reference under S 307, Criminal P. C, in the same way as it deals with an appeal from a conviction by a Judge sitting without a jury, and with the greatest respect I express my opinion that the principle laid down by the Judges who decided this case results in a most identical treatment of an appeal and a reference The evidence against Harilal is considered in para 6 of the order of reference Rasul was very seriously injured and in a statement made to Mr. Chaoji the day after the assault he has implicated Harilal. There can be no doubt that in that statement he would implicate the persons whom he had recognized, but the prosecution story is that the mob which entered Rasul's house had come to the locality in pursuit of Mahomed Yusuf Many of the persons composing of that mob were strangers to the locality. Rasul has stated that they attacked his house when a neighbour told them that it was the house of a Mahomedan. It is quite possible then that he (Hasul) recognised few or any of his assailants. In such circumstances it is likely that he might mention the name of the person with whom he had a bitter quarrel a night before.

The jury has considered that Rasul is a most unreliable witness and a perusal of his evidence goes far to justify this opinion He says that the report of the previous night's quarrel (Ex. P-3) was wrongly recordsd, he remembers nothing of the statement made to Mr. Chaoji on 6th September 1927, the apparent reason being that in this statement he said that his sons were not present and he now desires that their evidence should be believed. Similarly, he says that he was never examined by a Police Officer

Hasul's evidence does not appear to be more convincing than that of Rasul Hasul has stated that he does not know of any enmity between Harilal and his brother Mohanlal on the one side and Rasul on the other He stated that Mohanlal was setting fire to the roof of his house at the time of the attack on Rasul This statement has been considered to be false by the Sessions Judge. Hasul's statement that Harilal took part in the beating of Rasul does not go far to show that Rasul's statement to the same effect is true It is not the case that each has told a detailed story and there is agreement in the details There is no doubt that Rasul was attacked and if Rasul makes a bold statement that Harilal was in the same, it is naturally easy for his brother to support this statement whether it be true or not

In my opinion then the jury cannot be considered to have come to a manifestly wrong conclusion when they held that the evidence against Harilal was unworthy of belief I, therefore, acquit Harilal.

S.N./R.K. *Order accordingly*

(1) A. I. R 1926 Nag. 308=22 N. L. R. 42.
(2) A. I. R. 1928 Cal. 732=55 Cal. 879.

A I. R 1929 Nagpur 114

MACNAIR, A J C.

Emperor

v.

Harilal Tamboli—Non-Applicant.

Criminal Ref. No. 385 of 1928, Decided on 4th December 1928, made by Ses. Judge, Nagpur.

Criminal P. C., S. 307—Person accused under S. 459—Trial Judge while charging

directing jury to see whether accused, if not guilty under S. 459, was guilty under S. 325 —Jury's verdict being not guilty — Judge agreeing that no offence was committed under S. 459 but considering accused guilty under S. 325—Judge can refer case to High Court.

The trial Judge when charging the jury directed them, if they found that the accused, who was charged with an offence punishable under S. 459 that whilst committing housebreaking he caused grievous hurt, was not guilty under S. 459, to find whether he was guilty of grievous hurt under S. 325. The verdict of the jury was that the accused was guilty of no offence. The trial Judge agreed with the jury that no offence had been comitted under S. 459 but was of opinion that he had committed an offence under S. 325.

Held: that the verdict of the jury on the charge framed included the verdict of the minor offence under S. 325 and so the Judge was entitled to refer the case under S. 307. 41 *Cal.* 662, *Dist.* [P 115 C 1, 2]

G. P. Dick —for Applicant

P. S. Kotval—for Non-Applicant.

Judgment —Harilal was charged with an offence punishable under S 459, I. P. C, that whilst committing housebreaking he caused grievous hurt to Rasul. The trial Judge when charging the jury directed them, if they found that Harilal was not guilty under S 459, I. P C., to find whether he was guilty of grievous hurt to Rasul under S 325. The verdict of the jury was that Harilal was guilty of no offence. The trial Judge agreed with the jury that no offence had been committed under S 459, I. P. C, but was of opinion that Harilal had committed an offence under S 325 and submitted the case in accordance with the provisions of S. 307, Criminal P. C, to this Court.

A preliminary objection has been taken that S. 307 does not authorize the submission of the case in respect of Harilal to this Court. The argument is that it is only when a Judge disagrees with the verdict of the jurors on a charge on which any accused person has been tried that he can submit the case; and in this case the Judge agreed with the verdict of acquittal on the charge framed. Now, S 238, Criminal P C, made it lawful for the jury to return a verdict that Harilal was guilty of the minor offence punishable under S. 325, I. P. C. It was necessary in view of the Judge's charge to the jury that their verdict should include a decision whether Harilal was guilty of the minor offence or not. Their verdict on the charge framed did include such a decision and the Sessions Judge, as he disagreed with this decision disagreed with the verdict of the jury.

The fact that the Judge disagreed with the verdict of the jury on the charge framed is made still more clear by consideration of what the result would have been had the jury convicted Harilal of the minor offence and had the Judge been of opinion that Harilal had committed no offence. It is obvious that the Sessions Judge would have had to deal in some manner with the legal verdict of the jury and the Criminal Procedure Code provides no other course than submittal of the case to the High Court.

The counsel for the accused has referred me to *Emperor* v. *Madan Mandal* (1), but in that case the verdict of the jury was that the accused had not committed the offence of which he was charged but had committed an offence of which they had no power to convict him. Clearly this was a verdict of acquittal and the opinion of the jury on a point which did not arise had to be ignored.

I have therefore to deal with the reference on the merits. For the reasons given in my judgment in *Ramdayal* v *Emperor* (2), delivered to-day, I acquit Harilal

S.N /R K *Order accordingly.*

(1) [1914] 41 Cal. 662=22 I. C. 731=18 C. W. N. 668.

(2) A. I. R. 1929 Nag. 113.

A I. R. 1929 Nagpur 115

JACKSON, A. J. C.

Sukhlal and *others*—Defendants—Appellants.

v.

Bisesar —Plaintiff—Respondent

Second Appeal No 712 of 1927, Decided on 16th February 1929, against decree of Addl. Dist Judge, Bilaspur, D/- 21st September 1927.

(a) Adverse possession — Usufructuary mortgage becoming void—Possession on its strength is not adverse.

Possession taken on the strength of an usufructuary mortgage which, being unregistered, is void from the commencement, cannot be said to be adverse *A. I. R.* 1924 *N.* 222, *Dist.* [P 116 C 1]

(b) Registration Act, S. 49—Scope.

An unregistered document cannot be used to prove the quality of a person's possession. 1 *N. L. R.* 147, *Foll.* [P 116 C 1]

(c) Registration Act, S. 49—Unregistered mortgage deed is not admissible in evidence

to prove consideration for mortgage because consideration is not collateral fact.

An unregistered mortgage deed is not admissible in evidence to prove what the consideration for the mortgage was, because consideration is not a collateral fact i. e., a fact which is independent of or divisible from the purpose to effect which registration is required i. e., from the mortgage transaction : 15 *C. P. L. R.* 33 and 1 *N. L. R.*, 47 *Cons.*; 1 *N. L. R.* 147 and 15 *N. L. R.* 31, *Rel. on.* [P 117 C 1]

D. N. Choudhry—for Appellants.

G. R. Deo—for Respondent.

Judgment—There are two points for decision in this appeal, the first being whether the plaintiff-respondent's claim to possession of his deceased father's occupancy field is barred by time under Art. 1, Sch. 2 to the Central Provinces Tenancy Act, 1920, and the second, whether the defendant-appellants are entitled to use the unregistered mortgage deed, executed in their favour by the plaintiff-respondent's father, to prove the amount of the consideration paid by them.

As regards the plea of limitation, the decision of Baker, J. C., in *Mt. Kasturi* v. *Baliram* (*A I R.* 1924 *Nagpur* 222) has been referred to for the proposition that where an intended conveyance is void from the commencement, the possession taken on the strength of it is adverse; but that case is distinguished from the present as it dealt with an invalid gift, while here it is an usufructuary mortgage that is in question. It has also been argued that at least the appellants' possession became adverse on 21st August 1921, 9 years after the date of the unregistered deed, because that deed gave them possession for 9 years only. I have, however, no hesitation in holding that the deed being unregistered is not admissible in evidence in this connexion. In *Narayan Bisnoi* v *Jaswant Singh* (1), it has been held that an unregistered document cannot be used to prove the quality of a person's possession; and it seems to me to follow that, if the deed in this case cannot be used to prove the appellants' possession as mortgagees, it cannot be used to prove that they ceased to hold possession in that capacity on a particular date. But it has been said that the respondent's admission of facts in his plaint is sufficient to establish the case for limitation. This admission is said to be contained in paras. 3 and 4 of the plaint. What those paragraphs say is that after the plaintiff's father's death about 7 years previously, that is, about the middle of the year 1919, the plaintiff came to Borsi to obtain possession of his father's fields, that he found the defendant-appellants in possession and learnt from them that they had been given possession for 9 years, in lieu of interest on a debt of Rs. 200 owed to them by the plaintiff's father and that the plaintiff accepted this position and left them in possession. Para. 6 of the plaint states that in 1926 the plaintiff again asked the defendants for possession, as the period for which they had been given possession had then terminated, and they refused. The suit was brought on 29th July 1926, and clearly the statements made in the plaint do not show adverse possession before that year and, therefore, do not establish the appellants' plea of limitation.

The appellants seek to prove by the unregistered mortgage-deed that the consideration for it was not Rs. 200 as stated in the plaint but Rs. 400. The lower appellate Court has refused to look at the deed for this purpose and has left unaltered the trial Court's decision that the sum payable by the plaintiff-respondent to regain possession is Rs. 240 based on the finding that Rs. 200 was paid to the respondent's father at the time of the mortgage and Rs 40 on a later bond. In *Durgai Lodhi* v. *Ajab Singh* (2), the facts were very similar to those of the present case, though it was one of lease and not of mortgage, and the learned Judicial Commissioner, in holding that the decree for possession should be conditional upon a refund pro tanto by the plaintiffs of the consideration paid for the lease, remarked that a separate suit for damages would lie and that in such a suit the unregistered lease might be given in evidence; but in *Balaji Teli* v. *Mt. Bana Bai* (3) an unregistered document was held by the same learned Judge to be inadmissible in a suit for damages based on it, though it would be admissible in a suit for damages for breach of an implied contract to execute a lease.

In the ruling already referred to, *Narayan Bisnoi* v *Jaswant Singh* (1), it was laid down that an unregistered instrument, though compulsorily regis-

(1) [1905] 1 N. L. R. 147.

(2) [1902] 15 C. P. L. R. 33.

(3) [1905] 1 N. L. R. 47.

trable, is admissible to prove a collateral fact but that to be collateral the fact must be independent of or divisible from the purpose to effect which the law requires registration, and the same has been laid down in *Kalicharan* v. *Lal Indar Singh* (4). Applying this general principle, I find it impossible to separate the consideration for the mortgage from the purpose to effect which registration is required, that is from the mortgage transaction. It seems to me, moreover, particularly clear in this case that the defendants are seeking to use the unregistered document as evidence of a transaction affecting the property covered by it; for by it they seek to establish the amount they are entitled to as compensation for relinquishing possession of that property. I, therefore, agree with the lower appellate Court that the unregistered mortgage deed cannot be admitted to prove the consideration and the amount adjudged by the trial Court to be payable by the plaintiff-respondent will be left unaltered. The result is that the appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(4) [1919] 15 N. L. R. 31=48 I. C. 923.

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* A. I. R. 1929 Nagpur 117(1)

MACNAIR, A. J. C.

Narayan and *others*—Appellants

v.

Khiwaraj and *another*—Respondents

First Appeal No. 65-B of 1927, Decided on 30th January 1929, against decree of 1st Class Sub-Judge, Khamgaon, D/- 14th July 1927

(a) Civil P. C., S. 100—Scope.

Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses, that they were unworthy of belief. [P 117 C 2]

*** (b) Damdupat—Rule of damdupat applies up to date fixed by Court in preliminary decree for sale.**

Damdupat applies until the date is removed from the domain of contract, that is, until the date fixed by the Court in the preliminary decree for sale. [P 117 C 2]

G. V. Deshmukh—for Appellants.

M. R. Pathak—for Respondents.

Judgment.—It is unnecessary to deal at length with some of the contentions raised in the memorandum of appeal. On the first three grounds it was urged that the defendants proved that defendant 1 was of vicious character and had incurred debts for immoral purposes. This ground was not strongly pressed and clearly extremely strong grounds were necessary for interfering with the finding of the Judge, who heard the witnesses that they were unworthy of belief. Good reasons were given for disbelieving these witnesses.

The ground regarding rate of interest needs no consideration as the rule of damdupat prevents this consideration affecting the decree. The ground regarding repayment was not pressed

The counsel for the respondents admits that the fourth ground must succeed. The rule of damdupat applies until the date is removed from the domain of contract, that is, until the date fixed by the Court in the preliminary decree for sale. Interest should not have been added for the period between the institution of the suit and this date. The decree, then, should have been to the effect that the amount due to the plaintiff, on account of principal, interest and costs calculated up to 14th January 1928, was Rs. 5,374 plus Rs. 634-15-8. That date has now passed and it is agreed that time should be extended to a date three months after this date, interest on the sum found due at 8 annas per cent. per mensem being added. Costs of this appeal will be borne as incurred. The respondent agrees that it is useless to order that defendant 1, if he wishes to satisfy the mortgage, should pay a larger sum and the decree will not contain any direction to this effect.

S.N./R.K. *Decree modified.*

A. I. R. 1929 Nagpur 117(2)

SUBHEDAR, A. J. C

Hari—Plaintiff—Appellant.

v.

Ghisu and *others* — Defendants—Respondents

Second Appeal No. 598 of 1927, Decided on 21st February 1929, against decision of Dist. Judge, Nimar, D/- 29th September 1927.

Hindu Law—Alienation by guardian not for necessity—Disposal of consideration for benefit of minor not proved—Transfer cannot be upheld.

In absence of evidence to show as to how the consideration money was disposed of, a transfer of minor's property by his guardian which is proved not to be for necessity, cannot be upheld as benefiting the minor's estate, because there is no presumption that a debt

contracted by a manager of a Hindu family is for the benefit of the family : *A. I. R.* 1924 *Lah.* 44 and *A I. R.* 1925 *All.* 618, *Applied.*

[P 118 C 2]

W. R. Puranik—for Appellant.

S. K. Ghosh and *S. R. Vaidya* — for Respondents.

Judgment. — Malik Makbuja field No. 117, area 1.88, of mouza Balrampur, tahshil Khandwa, originally belonged to defendants 3 and 4. During their minority their mother sold the same to defendants 1 and 2 by a sale-deed dated 26th March 1918 for Rs 200 for alleged legal necessity as specified in the said deed of sale. After attaining majority defendants 3 and 4 sold the same field to the plaintiff on 16th January 1926 for Rs. 300 The plaintiff, therefore, brought the present suit for cancellation of the sale-deed dated 26th March 1918 and for recovery of possession of the field as against defendants 1 and 2, who were in possession. The defendants resisted the claim on the ground that, as the sale was for legal necessity and benefit to the minors, it was binding upon them and they could not, therefore, re-sell the property to the plaintiff

Both the Courts below have concurrently held that the legal necessity as specified in the recitals in the sale-deed and the pleadings was not proved, but dismissed the plaintiff's claim on the ground that the sale benefited the estate and the minors and was, therefore, binding on them.

In his judgment the learned District Judge states as follows on this point :

"I agree, however, with the argument of the Subordinate Judge in para. 9 of his judgment in support of his finding that the sale was not for necessity, in as much as the debts of the deceased father of the minors, which purported to be the necessity for which the sale-deed was executed were satisfied in other ways and as the other property of the minors was quite sufficient to provide for their maintenance. Nevertheless, prima facie it would be to the advantage to the joint family, consisting of a widow and two minor children to dispose of an old field 20 miles away from their other property, owing to the difficulty in properly managing such field. This fact having been proved by defendant 1 the burden of proof shifted to the plaintiff to show that in spite of the distance, nevertheless, the property was being quite efficiently managed by Mt. Nani Bai, and, therefore, it was not to the advantage of the estate to sell this property. The only evidence on this point is the statement by P. W. 4, Bagwan, the lambardar of Balrampure, who states that, when Hari was sub-tenant of the field he used to pay the rent. As, however, Hari is the son of this witness' wife's brother I do not consider that his statement can be completely relied upon. Hari could, very well, have produced his receipt books to prove that he had paid the rent and not Mt. Nani Bai. Hence, I am of opinion, that he has not discharged this burden. The field was previously sold for Rs. 200 and the minors have again got Rs. 200 from its sale to Hari. It cannot be said that Mt. Nani Bai sold the field for inadequate value. I am, therefore, of opinion that the finding of the Subordinate Judge to the effect that the sale was for the benefit of the minors is correct."

The plaintiff comes up in second appeal and his learned advocate, while not challenging the adverse findings of fact as to legal necessity arrived at by the Courts below, urges that there being no evidence on record that the consideration of Rs 200, which was paid to the mother of the defendants 3 and 4 as manager, was either added to the estate of the minors or spent by her in improving the same the findings arrived at by the two lower Courts that the estate was benefited by the transaction could not be sustained. The learned pleader for the respondents frankly admitted that there was not an iota of evidence to show that Rs 200 received by the mother as consideration went really to benefit the estate, but he asked this Court to presume that which the Courts below evidently did.

In *Khazana Mal* v. *Jagan Nath* (1) it has been held that there is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family. In *Jagmohan Agrahri* v. *Prag Ahir* (2) such a transaction by the manager was upheld because it was proved that the consideration received was, as a matter of fact, employed in the extension of the family business which was not of a speculative nature though it had subsequently failed. Admittedly, there being no evidence on the point as to how the consideration of Rs 200 was disposed of by the mother manager, the findings arrived at by the Courts below that the estate of the minors was really benefited cannot be upheld. I, therefore, allow the appeal and decree the plaintiff's claim with costs in all the three Courts

D S./R K. *Appeal allowed.*

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(1) A. I. R. 1924 Lah. 44=4 Lah. 200.
(2) A. I. R. 1925 All. 618=47 All. 452.

A. I. R. 1929 Nagpur 119

KINKHEDE, A. J. C.

Godoobai—Appellant.

v.

Janabai—Respondent.

Miscellaneous Appeal No 34-B of 1928, Decided on 15th December 1928, against order D/- 3rd November 1928 confirming the ex parte order D/- 31st Octobor 1928, passed in Misc. Judl. Case No. 112 of 1928 by District Judge, Akola.

Guardians and Wards Act (8 of 1890), S. 12—Order appointing a receiver is one under O. 40, R. 1 and is appealable—Civil P. C., O. 40, R. 1.

As an application under S. 12, Guardians and Wards Act, is a proceeding in Court of civil jurisdiction, it is competent to the District Judge to appoint a receiver in such a proceeding under Civil P. C., O. 40, R. 1, and an order passed thereunder is appealable as provided under O. 43, R. 1, Cl. (s) : 36 *Bom.* 20 and *A.I.R.* 1925 *Lah.* 489, *Foll.* ; *A.I.R.* 1924 *All.* 682, *Expl.* [P 119 C 2 ; P 120 C 1]

G V. Deshmukh and *S A. Sohani*—for Appellant.

M. R. Bobde and *M N Deshmukh*—for Respondent.

Judgment — The appellant is the widowed mother of her minor son Narayan and the respondent is her mother-in-law. While the appellant is a young woman of about 23 years of age, the respondent is a very old woman over 55 It appears that the appellant has a brother Shankar Rao whose word reigns supreme in the management of the affairs of the minor's estate Naturally, Janabai the grandmother of the minor resents it, and, consequently, desires that the minor's estate should no longer remain under the management of her daughter-in-law Godubai Various acts of alleged waste and mismanagement by Shankar Rao which led to the institution of these proceedings for the appointment of a proper guardian for the minor's property have been set forth in the application.

Soon after this application was made by Janabai, the District Judge was moved for appointing a receiver to take charge of the minor's estate, pending the disposal of the application for appointment of guardian. The District Judge made an order appointing Mr. B. C. Thakar, Pleader, as a temporary receiver. It is against this order dated 3rd November 1928 for the appointment of the receiver that the appellant Godubai has come up in appeal to this Court contending that the lower Court acted wrongly and without jurisdiction in passing the same.

I was asked to stay the carrying out of the order, pending the decision of this appeal. I, however, declined to grant an unqualified and unconditional stay of the order, but, directed that, if the appellant without prejudice to her right to press the appeal, be prepared to be accountable to the receiver for the crops or income she would collect pending the decision of this appeal, the Court below should permit her to do so, subject to her giving solvent security for the probable value of the crops and the income she was likely to collect But I understand that she has not chosen to give the necessary security, and consequently, the receiver's management has come into force.

The respondent raises a preliminary objection that the order for the appointment of the receiver heing one purporting to be passed under S. 12, Guardians and Wards Act, there is no appeal against it, under S 47, of the said Act, and that the present appeal should, therefore, be thrown out as incompetent In answer to this contention the appellant's learned counsel urges that the order for the appointment of the receiver must be deemed to have been passed under O. 40, R 1, Civil P C., which must, by virtue of S. 141 of the Code, be read as applicable to proceedings under the Guardian and Wards Act, and that, as O. 43, R 1, Cl. (s) expressly provides for an appeal against an order passed under O. 40, R. 1, Civil P C, the present appeal is competent Reliance is placed by the appellant in *In re Bai Janabai* (1), and *Chandra* v *Wati Jagan Nath Singh* (2). I have gone through these cases, and I think that, since, an application under S 12, Guardian and Wards Act (8 of 1890) is a proceeding in a Court of civil jurisdiction, it is competent to the District Judge, to appoint a receiver in such a proceeding, under O 40, R 1. The learned Judge who decided the *Bombay* case has given very good reasons, at pp 26 and 27, in support of his view that a receiver could be so appointed under O. 40, R 1 in proceedings under Guardian and Wards Act The case relied on by the respondent, viz. *Chandra Sahai* v.

(1) [1912] 36 Bom. 20=11 I.C. 554=13 Bom. L.R. 487.

(2) A.I.R. 1925 Lah. 469.

Durga Prasad (3), lends indirect support to the view that the present appeal is competent, because, in that case also, it was laid down that, no right of appeal can be claimed by virtue of S 141, Civil P. C., when O. 43 of the Code makes no provision for such an appeal Here, as we know, O. 43, R 1, Cl (s) makes express provision for an appeal against an order passed under O 40, R 1. For these reasons I overrule the preliminary objection, and hold that, the appeal is competent. In this view of the case, it is not necessary for me to treat this appeal as a revision, and deal with it, under S. 115, Civil P C.

As to the merits, little or nothing need be said at this stage, as the main application for the appointment of the guardian for the minor's property is yet undisposed of, and I do not wish to prejudge the case in any way. I must, however, say that, as between Mr Thakar who is a pleader, and the appellant, Godubai who has to depend upon her brother, the former must necessarily be a better manager There can be no doubt that these proceedings, whether started with a bona fide intention to secure the welfare of the minor, or for self-aggrandizement, seem to be the result of a mere scramble for power to manage the minor's property, between the two opposing widows and their supporters Under these circumstances, the order of the District Judge, putting in a third party as a receiver and manager, of the minor's estate so far as it may come into his hands, is expected to be in the best interests of the minor I, therefore, see no valid reason to interfere with the merits of the order. The appeal fails and is dismissed with costs. Pleader's fee Rs. 25

D S /R.K. *Appeal dismissed.*

(3) A.I.R. 1924 All. 682=46 All. 538.

A. I. R. 1929 Nagpur 120

MOHIUDDIN, A. J C.

Ramlal Ganpatlal — Decree-holder — Appellant.

v.

Ramchandra Shamrao — Judgment-debtor—Respondent.

Second Appeal No. 437 of 1928, Decided on 22nd February 1929, against the order of Second Addl. Dist.-Judge, Burhanpur, D/- 26th July 1928.

C. P. Tenancy Act, S. 39—No notice or order of ejectment is necessary.

No notice and no order of ejectment is necessary after the passing of a decree for arrears before actual ejectment under S. 39 as it is under S. 24. [P 121 C 1]

W. R Puranik and *Kaskhedikar*—for Appellant.

S. B. Gokhale—for Respondent.

Judgment. — The appellant Ramlal, an occupancy tenant, obtained a decree for Rs. 117-15-0 on account of arrears of rent against Ramchandra, the respondent, a sub-tenant, on 3rd February 1929, in Civil Suit No. 282 of 1926. The decree-holder Ramlal filed an execution application on 11th February 1927 and applied for being put in possession of the holding. He was put in possession on 8th March 1927. The judgment-debtor filed an application on 26th March 1927 purporting to be under S. 151, Civil P. C., and prayed :

"that the warrant of attachment and other orders passed by the Court in respect of the fields be annulled and the execution proceedings of the decree-holder be dismissed as fully satisfied."

The learned Subordinate Judge held :

"that looking to the nature of the decree in the present case, the execution of which could be effected, by ejectment of the sub-tenant as laid down in S. 39, Tenancy Act, there was no irregularity or illegality in the proceedings by which the sub-tenant was ejected from the fields in question,"

and therefore rejected the application. The learned Additional District Judge for reasons given in para 4 of his judgment, held that the sub-tenant was entitled to a notice before ejectment, and that it was necessary to pass a formal order of ejectment before issuing warrant of possession and ordered that the sub-tenant be restored to possession of the fields, as he had deposited the full decretal amount on 15th March 1927.

It is urged in appeal that no notice and no formal order of ejectment was necessary, and a decree for arrears due in respect of the holding of a sub-tenant could be executed by his ejectment under S. 39, Tenancy Act. The learned advocate for the respondent argued that the word "may" in S. 39, Tenancy Act, gave a discretion to the Court, to order ejectment and the Court before exercising its discretion, must issue a notice to the tenant, so that the tenant may get an opportunity of paying the arrears and also may put forward facts, on account of which ejectment of the

tenant may be disallowed. It was also suggested that these proceedings after the passing of the decree and before the passing of the order of ejectment, would be under S. 47, Civil P. C., because the question before the Court would be between the parties to the suit and relating to the execution of the decree. There is nothing in S. 39, Tenancy Act, to show that the matter of ejectment is discretionary and can be refused. The section would have been worded differently if any such authority was intended to be given to the civil Court The decree-holder, after obtaining the decree, may execute the decree by ejecting the sub-tenant, or by attaching and selling his property in order to realize the amount decreed or may apply for both. The provision about notice and formal order of ejectment would have been inserted in the section if it was ever intended that the sub-tenant should have a further opportunity of paying rent, after the passing of the decree, if the tenant intended to proceed by ejecting the sub-tenant. The learned Additional District Judge was wrong in thinking that under S 39, Tenancy Act, an order of ejectment must be passed, because under S 24 of the said Act the revenue officer has to issue a notice and then pass an order of ejectment The very fact that such a procedure was laid down in S 24 and was not laid down in S. 39, is a clear indication that no notice and no order of ejectment is necessary in the case of a sub-tenant. Ordinarily an application for the execution of a decree in a civil Court must be made as laid down in O 21, R. 11, Civil P. C., but in the case of execution applications under the Tenancy Act the application must be made as laid down in S. 84, Tenancy Act. The application made in this case is in accordance with law and the ejectment of the sub-tenant, under S. 39, Tenancy Act was correct.

The order, dated 26th July 1928, is therefore set aside and reversed and the order of the Subordinate Judge is restored. The appeal is allowed with costs. I fix Rs 10 as pleader's fees in this case.

R.K. *Appeal allowed.*

A. I. R. 1929 Nagpur 121

MOHIUDDIN AND JACKSON, A. J. Cs.

Kulsambi—Plaintiff—Appellant.

v.

Bilankhan and *others* — Defendants—Respondents.

First Appeal No 69-B of 1927, Decided on 11th February 1929, against decree of Addl. Dist Judge, Amraoti, D/- 3rd September 1927 in Civil Suit No 8 of 1926.

(a) Civil P. C., O. 21, R. 63—Even Mahomedan plaintiff must prove bona fide nature of transaction on which suit is based.

In a suit instituted under O. 21, R. 63, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff and the cases under Mahomedan Law are no exception to the rule. 9 *C. P. L. R* 142, 2 *N. L. R.* 87, and *A. I. R.* 1919 *P. C.* 6, *Rel. on.* [P 123 C 1]

(b) Mahomedan Law—Dower — Husband living—Wife has no lien.

A wife cannot have during the lifetime of her husband any lien on her husband's property not in her possession, for satisfaction of her dower. [P 123 C 2]

(c) Mahomedan Law — Dower — Amount can be fixed out of proportion to husband's means.

It is not uncommon for the dower of a Muhammadan wife to be fixed at a figure which is out of all proportion to the husband's means. [P 122 C 2]

(d) Mahomedan Law—Dower — Transfer in lieu of—Question whether dower prompt or deferred is immaterial.

To determine validity of a transfer the question whether the dower was to be prompt or deferred is of minor importance since satisfaction of a deferred dower debt can be a valid consideration for a transfer between the husband and the wife: 8 *All.* 178, *Foll.* [P 122 C 2]

Abdul Razak and *W. B. Pendharkar*—for Appellant.

M. B. Marathe—for Respondents

Judgment. — The plaintiff-appellant, Kulsambi, is the wife of defendant 1, Bilankhan. The other 5 defendants held decrees against Bilankhan and in execution thereof attached the property now in suit, consisting of five fields and some buildings in mouza Adula Bazar, in the Daryapur Taluk. Kulsambi, the plaintiff, preferred objections in the execution proceedings; but they were disallowed and she has now brought her suit under O. 21, R. 63, for a declaration that the property is hers and in her possession and is not liable to be attached and sold in execution of the decrees obtained by defendants 2 to 6 against defendant 1.

The plaintiff bases her claim to the property in suit on a decree in her favour

passed by the Additional District Judge, Amraoti, on 13th August 1925 in Civil Suit No. 15 of 1925. The circumstances in which this decree came to be passed, according to the plaint, are as follows: At the time of her marriage to Bilankhan Kulsambi's dower was fixed at Rs. 50,000, 100 ashrafis and 50 dinars Subsequently she lent to her husband Rs. 1,000 When she demanded from her husband payment of her dower and repayment of the loan, he raised objections and their dispute was referred to two arbitrators, Mr. Sharfuddin, pleader of Amraoti, and Gulam Dastagirkhan of Kholapur These arbitrators were unable to agree and the matter was referred to an umpire, Syed Muzaffar Husain, pleader of Amraoti. A copy of his award has been filed as Ex P. 6 It shows that the plaintiff and her husband were agreed as to the amount of dower and as to the payment by the plaintiff to her husband of Rs. 1,000, but differed as to the nature of the dower, that is, whether it was prompt or deferred, and as to whether the Rs 1,000 had been given as a loan or a gift. The umpire decided that the dower was prompt and that the Rs 1,000 was a loan and accordingly found that the plaintiff was entitled to recover Rs 53,625. He awarded her the property now in suit in full satisfaction of her claim and directed her to be put in possession as full owner, subject to the right of a mortgagee and to her allowing Rs. 400 annually and a house to reside in to her husband during his lifetime In terms of this award the decree by the Additional District Judge, Amraoti, was passed.

The lower Court has found that the amount of the plaintiff's dower was not as stated by her in the plaint and as admitted by her husband in the arbitration proceedings, but that it was Rs 5,000, 10 ashrafis and 2 dinars. That Court has also found that it was not settled whether the dower was prompt or deferred. It has further found that the award in the arbitration proceedings was not obtained bona fide but fraudulently On these findings the plaintiff't suit has been dismissed.

As regards the amount of the dower, we are not prepared to accept the lower Court's finding Apart from the evidence of the plaintiff herself, three witnesses, Muhammad Azam (P. W. 1), Nur Mohammad (P W. 3) and Mohammad Nazim (P. W. 4), have deposed that the sum fixed was Rs. 50,000 Muhammad Azam says that 100 ashrafis and 50 dinars were also to be paid. Muhammad Nazim apparently does not remember how many dinars were to be paid ; and Nur Muhammad differs as to the number of ashrafis and dinars from the plaintiff and Muhammad Azam ; but we agree that the discrepancies on this point are immaterial and we are not prepared to follow the lower Court in rejecting the evidence because it shows the mehar or dower to have been fixed at an absurdly high figure : it is by no means uncommon for the dower of a Muhammadan wife to be fixed at a figure which is out of all proportion to the husband's means Nor can we accept the evidence of Dulekhan (D. W 1) as sufficient to rebut that of the plaintiff's witnesses. It is on his evidence that the lower Court has found that the dower was settled at Rs. 5,000, 10 ashrafis and 2 dinars, and that it was not settled whether it was to be prompt or deferred. It is true that he is a step-brother of the plaintiff ; but on his own evidence he was only 14 years of age when the plaintiff was married to defendant 1 and his knowledge as to the dower may well be doubted. It cannot be assumed that his evidence is true because it is against the interest of a near relative . as has been pointed out on behalf of the plaintiff, he appears to be at odds with his sister over her claim to a share in their father's property.

We are prepared, then, to accept the evidence that the dower was fixed at Rs. 50,000, 100 ashrafis and 50 dinars. We are also prepared to accept the evidence of the plaintiff's witnesses that it was agreed that the dower was to be prompt ; and it is unnecessary for us to examine the question, whether, in the event of there being no stipulation as to the nature of the dower, as the lower Court finds, the whole of it must be regarded as prompt From one point of view the question, whether the dower was to be prompt or deferred, is of minor importance, as there is the authority of *Suba Bibi* v. *Balgobind Das* (1) for holding that satisfaction of a deferred dower-debt can be a valid consideration for a transfer between the husband and the wife.

The finding, however, that ostensibly there was valid consideration for the

(1) [1886] 8 All. 178=(1886) A.W.N. 51.

transfer of the property in suit from Bilankhan to Kulsambi does not, however, conclude the case. We have been referred to *Raja Seth Gokuldas* v. *Mt. Jankee* (2), *Narayan Ganesh* v. *Bhioraj* (3) and *Ghunsham Das* v. *Umapershad* (4) for the proposition that, in a suit instituted under O. 21, R. 63, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. It has been urged on behalf of the plaintiff that those decisions do not refer to cases under the Mahomedan Law, but there is no force in that contention, as they are of general application.

The question, then, is whether the plaintiff has proved good faith and for this she has relied almost entirely upon the arbitration proceedings and the award therein given. It has been urged in this connexion that there is no reason to suspect that the award was, as the lower Court has held, not obtained bona fide, and reference has been made to the status of the arbitrators and the umpire. There is, however, no question of the bona fides of these gentlemen; they dealt with the case as it was put before them by the plaintiff and her husband. As far as the matter appeared to them, there was a real dispute to decide and there were admissions by the parties and evidence to support the conclusion that was eventually arrived at. The question is whether the representation of the case to them was bona fide and correct. (The judgment then discussed evidence and proceeded.) We hold, then, that the transfer to Kulsambi by Bilankhan was through collusive arbitration proceedings, which were not justified by the existence of any dispute and in which the award was obtained by misrepresentation and concealment of material facts, that there was no real consideration for the transfer, that it has not been given effect to in the matter of possession and, in fine, that the transfer was not bona fide but fictitious.

This concludes the appeal, but there is one argument put forward on behalf of Kulsambi to which reference must be made. The argument is that a Muhammadan wife is a prior creditor in respect of her dower and has a lien on her husband's property. It is based on the undoubted fact of a widow's lien on her husband's estate which entitles her to retain possession of any property of his of which she has obtained possession lawfully and without force or fraud. As to this argument it is only necessary to say that Kulsambi is not a widow and also that she has not been proved to be in possession.

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

M R./R.K. *Appeal dismissed.*

(2) [1896] 9 C.P.L.R. 142.
(3) [1906] 2 N.L.R. 87.
(4) A.I.R. 1919 P.C. 6=15 N.L.R. 68.

A I. R 1929 Nagpur 123

MOHIUDDIN, A. J C

Kampta Prasad—Defendant—Appellant.

v.

Ramsaransingh — Plaintiff —Respondent.

Second Appeal No 208 of 1928, Decided on 31st January 1929, against decree of Addl. Dist Judge, Bilaspur, D/- 16th December 1927 in Civil Appeal No. 138 of 1927

(a) Landlord and Tenant—Non-payment of rent for long period does not raise irrebuttable presumption of rent-free grant.

Non-payment of rent for a long period will not raise an irrebuttable presumption that the tenant hold the plots under a rent-free grant. [P 123 C 2]

(b) Landlord and Tenant—Landlord not claiming rent from tenant for number of years does not entitle tenant to refuse rent—Evidence Act, S. 115.

A tenant cannot refuse to pay the rent, because the landlord for a number of years made no claim for rent for the land occupied by the tenant. [P 124 C 1]

G. R. Deo—for Appellant.

Judgment.—The respondent's claim for compensation for the use and occupation of the four sites in the possession of the appellant has been decreed by Sub-Judge, Janjgir, and the decree has been upheld by the Additional District Judge, Bilaspur, on 16th December 1927.

The respondent had based his claim for compensation for use and occupation, in case it was found that there was no agreement to pay rent. Nothing was stated why the respondent could not claim rent, though he failed to prove the agreement. Non-payment of rent for a long period will not raise "an irrebuttable presumption that the appellant held the plots under a rent-free grant."

The appellant as a matter of fact never alleged any such grant. The sites over

which houses stand are in the abadi of the village Champa of which village the respondent is the zamindar. He is entitled to charge rent for the abadi sites, and the appellant cannot refuse to pay the rent, because the respondent for a number of years made no claim for rent for the land occupied by the appellant. No question of estoppel arises in this case and the claim cannot be time barred.

The respondent has adduced evidence to show that four annas per cubit measured along the road is the rent charged for abadi site in Champa. The appellant has not adduced any evidence on the point. The amount claimed is not excessive The appeal therefore fails and is dismissed under O 41, R 11, Sch. 1, Civil P. C

S N./R K *Appeal dismissed.*

A. I R 1929 Nagpur 124

SUBHEDAR, A J. C.

Ibrahim Khan — Plaintiff — Appellant.

v.

Nagoji and *others*— Defendants—Respondents.

Second Appeal No. 154-B of 1927, Decided on 27th February 1929, from decree of Dist. Judge, Akola, D/ 10th February 1927, in Civil Appeal No. 62 of 1926.

(a) Limitation Act, Art. 120—Dafendant asserting hostile title as permanent tenant for more than six years—Defendants' title recognised by revenue authorities—Plaintiff bringing a declaratory suit to declare defendant as annual tenant—Suit is time barred.

Where a defendant asserted a hostile title as a permanent tenant against the plaintiff six years ago and the same was substantiated by the orders of the revenue authorities, the plaintiff's suit for declaration that defendant was only an annual tenant and not owner as alleged to have been asserted by him is governed by Art. 120 and as such is barred being brought more than six years from revenue Court's order : 31 *All.* 9, *Foll.* [P 125 C 1]

(b) Limitation—Question to be decided not inferentially but from facts established.

The questions of limitation cannot be decided inferentially. It is on the facts actually found and not merely upon those alleged in the plaint that limitation has to be computed. [P 125 C 1]

W. B. Pendharkar—for Appellant.

M. R. Bobde—for Respondents

Judgment.—The plaint in the present case out of which this second appeal arises was filed on 11th November 1925 in the Court of Subordinate Judge, 1st Class, Basim. It is of the briefest kind imaginable and states that the field in dispute is the ancestral property of the plaintiff, that he is the present certificate-holder thereof, that the defendants who are in possession of the field are only annual tenants and that because they asserted their title as owners some 1½ months ago it became necessary for the plaintiff to file the present suit for a declaration that the defendants were not the owners but mere annual tenants of the field in dispute.

The defendants resisted the claim on the ground that the field had been in possession of their family since over 100 years and long before the Government made a grant of it to the plaintiff's family, and that they had acquired rights of permanent tenants in the field. They further stated that at the Record-of-Rights enquiry in 1914 and later on in 1919 the revenue authorities had rejected the plaintiff's contention and had recognized their status as that of permanent tenants, and had referred the plaintiff, if he was aggrieved, to have the question of title settled by the civil Courts It was, therefore, contended that since a hostile title was asserted by them as far back as the years 1914 and 1919 and not 1½ months ago, as alleged by the plaintiff in the plaint, the present suit for declaration was barred by time

On the strength of Exs. D-1 and D-2, which contain the orders of the revenue authorities dated 6th March 1914 and 29th June 1919 respectively, it is clear that on both the occasions the plaintiff wanted the defendants to be recorded as mere annual tenants but he was not only unsuccessful but was distinctly ordered by the revenue authorities to file civil suits to have the status of the defendants determined. In these orders the defendants were adjudged to be wahiwatdars and permanent tenants.

Both the Courts below have held on the facts above stated, that the present suit was governed by Art. 120 , Limitation Schedule and was barred, having admittedly been filed more than six years after the passing of the last order of the revenue authorities dated 29th June 1919.

The plaintiff has come up in second appeal on the following grounds :

"1 The lower appellate Court erred in holding that plaintiff's suit was barred by limitation and that Art. 120, Lim. Act, applied to the facts of the present case.

2 That on the facts as alleged in the plaint the suit was clearly within time.

3 That further statements should have been taken and parties should have been properly examined."

It is contended that on tha facts alleged in the plaint the suit was within time. But it is on the facts actually found and not merely upon those alleged in the plaint that limitation has to be computed. As I have said above, on both the occasions in 1914 aud 1919 when the question of defendants' status arose they unequivocally asserted the right of permanent tenants to the plaintiff's knowledge and in spite of an adverse decision against him by the revenue authorities and clear directions by them to have the question determined by civil Courts, the plaintiff slept over the matter and brought the present suit on the allegations which are undoubtedly false.

It is also argued that if the plaintiff had sued for possession his claim would have been governed by the 12 years rule under Art. 144 of the Limitation Schedule and if that is so it is not just that the present suit for a mere declaration should be barred under the six years rule of Art 120 ibid. But questions of limitation cannot be decided inferentially. They have to be determined by bringing facts admitted or established within the four corners of a particular article of the Limitation Schedule. All declaratory suits come under Art. 120 because there is no specific article in the Schedule for such suits. The present case is like the case of *Akbar Khan* v. *Turaban* (1) wherein a Bench of the Allahabad High Court has held that the suit was governed by Art. 120, Limitation Schedule

The 3rd ground of appeal has no force. It is not pointed out in what way the headings have been defective, and what further examination of the parties was necessary which would have brought the present claim within limitation.

The second appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

(1) [1909] 31 All. 9=1 I. C. 557=5 A. L. J. 687.

A. I. R. 1929 Nagpur 125

MOHIUDDIN, A. J. C.

Undria Dhiwar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 289 of 1928, Decided on 31st January 1929, against finding and sentence passed by Sess. Judge, Bhandara, on 9th November 1928.

Penal Code, S. 302—Two persons, bearing dangerous instruments, assaulting deceased—Blows aimed only at head—Two fatal injuries caused—Injuries being such as could not be caused with same weapon—Each was responsible for one injury and so both were guilty under S. 302.

Where two assailants, bearing dangerous instruments, assaulted the deceased, and all the blows were aimed at the head, with the result that two fatal injuries were caused, and these injuries were such as could not be caused with one and the same instrument.

Held, that each of the two assailants was responsible for one of the fatal injuries and, therefore, both were guilty under S. 302 : 40 *All.* 103, 29 *All.* 282; 36 *Cal.* 659, *Dist.*

[P 127 C 1]

R. W. Fulay—for Appellant

G P. Dick—for the Crown.

Judgment.—The appellants Undria and Mahangia have been convicted under S. 302, I. P. C., for committing the murder of Kishorilal on 13th September 1928, and have been sentenced to transportation for life by the Sessions Judge, Bhandara. This judgment will govern both the appeals.

The facts of the case have been stated at length in the judgment of the learned Sessions Judge and, therefore, need not be repeated in this judgment. The appellants did not make any statements in the Court of the Committing Magistrate, and were not prepared to make statements on 7th November 1928, in the Court of Sessions Judge, and made statements on 8th November 1928. Undria stated that he was working near the tree, on which the deceased was sitting and that the deceased did not permit the men who were working there to go home to take their meals and, therefore, they became angry and attacked the deceased. He admitted that he was not on bad terms with any of the prosecution witnesses and suggested that they mentioned his name because he was there. Mahangia stated that the deceased did not allow the men to go home and beat some of

them with a branch of the tamarind tree, that the deceased went to the place where he and Undria were working and abusing them, asked them to carry on the work, that the deceased fell down as his shoe got entangled in the branches of the tree and the people assaulted and beat the deceassd at the instigation of Karu and Kushan. He suggested that perhaps Kodya, Jairam and Jhingrya had killed Kishorilal, but could not assign any reason why the prosecution witnesses named him as the assailant and admitted that there was no enmity between him and the prosecution witnesses The appellants thus admit their presence at the place where Kishorilal was assaulted, they give different versions of the marpit, and cannot give any satisfactory explanation as to why the prosecution witnesses, 11 in number, who witnessed the assault, implicate them as the assailants.

The offence took place at Tadgaon at about noon and Arjunia the Kotwar who had witnessed the assault, reported at Arjuni at 12 30 p m., that Undria and Mahangia had assaulted Kishorilal with shovels. The distance between Tadgaon and Arjuni is one mile It is impossible to believe that Arjunia would have mentioned the names of the appellants if they had not assaulted Kishorilal.

The deceased had two cuts and two incised wounds on the head and these have been shown in the diagram sent with the post-mortem report. Assistant Medical Officer Ramchandra (P W 21) opined that injury 1 must have been caused by a weapon like kudali and injury 2 by a phaoda or other instrument which would create a broad mark and injuries 3 and 4 by a phaoda, and that injuries 1 and 2 had entered the brain substance and were dangerous to life. On seeing Arts. C and D, he stated that injury 1 could not be caused by Arts C and D, that injury 2 could be caused by either of the instruments, and that injuries 3 and 4 could be caused by Art D and only by Art C In view of the above evidence, the learned pleader for the appellant Undria argued that Undria could not be held responsible for injury 1, as it could not be caused by the kudali Art C, which was said to be in his hand at the time of the assault. This kudali Art. C was seized by the police on 19th September 1928, that is, six days after the murder There is no doubt as pointed out by the learned Sessions Judge in para. 8 of his judgment, that Undria had a kudali in his hand on 13th September 1928 and it is likely that the kudali Art. C which was seized six days after the murder, is not the kudali which Undria had at the time of the assault.

A number of persons were working there at that time and most of them had either phaodas or kudalis and it is, therefore, likely that the witnesses made a mistake about the particular instruments which either of the appellants had at that time. The Kotwar reported that both had phaodas, and it is possible that he may have made a mistake about the particular instrument which either of the appellants had It is clear from the medical evidence that injuries 1 and 2 were inflicted by different instruments, and, therefore, it necessarily follows that these two injuries were not caused by one and the same person, and were caused by both the appellants.

The learned pleader for the appellant Undria stated that there was no evidence on record to show that Undria and Budhia were related Arjunia (P. W. 2) and Paikya (P. W 3) stated that Undria was a cousin of Budhia. It was next argued that S. 34, I P. C.. was not applicable to the case. The simultaneous attack shows that the criminal act was done in furtherance of the common intention. The learned pleader cited *Gouridar Namasudra* v. *Emperor* (1), *Emperor* v. *Bhola Singh* (2) and *Emperor* v *Chandan Singh* (3), in support of the contention that the offence committed by the appellant was one under S. 325, I. P. C., and not under S. 302, I. P C In *Emperor* v *Chandan Singh* (3) three persons attacked a fourth with lathis and there was no evidence to show which of them struck the blow which fractured the skull of the deceased. In *Emperor* v. *Bhola Singh* (2) the facts were similar, and in *Gouridas Namasudra* v. *Emperor* (1), several accused persons struck the deceased several blows with lathis, one of which only was fatal and it was not found who struck the fatal blow. None of these cases, therefore, are of any help in this case In this case

(1) [1903] 36 Cal. 659=2 I. C. 841=13 C. W. N. 680.
(2) [1907] 29 All. 282=4 A.L.J. 207=(1907) A.W. N. 51.
(3) [1918] 40 All. 123=43 I. C. 438=16 A. L. J. 11.

the instruments used were dangerous instruments, and all the blows were aimed at the head, with the result that two fatal injuries were caused and these injuries were not caused by one and the same weapon. As they were only two assailants, each of them is responsible for one of the fatal injuries and, therefore, both are guilty under S. 302, I. P. C.

The same points were urged on behalf of the other appellant Mahangia, and it was argued, on the basis of the statement, said to have been made by Paikya to the effect that Dhimar had killed the master, mentioned in the first information report, that the appellant Undria only had assaulted Kishorilal and not Mahangia. In the same report it was also mentioned that Arjunia saw Undria and Mahangia both striking Kishorilal with shovels. The point has no force. The evidence of eyewitnesses had established beyond doubt the fact that the two appellants assaulted Kishorilal with Articles like C and D, and caused two fatal injuries, which resulted in his death. The conviction of the appellants under S. 302, I. P C., is correct. The appeal is, therefore, dismissed

S.N./R.K. *Appeal dismissed*

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* A. I. R 1929 Nagpur 127

MACNAIR, A. J. C.

Kamtabai—Defendant—Appellant.

v

Umabai—Plaintiff—Respondent.

First Appeal No. 111 of 1927, Decided on 29th January 1929, against decree of 2nd Sub-Judge, 1st Class, Raipur, D/- 30th July 1927 in Civil Suit No. 751 of 1926.

(a) Evidence Act, S. 114—Scope.

Where a wife, alleging that her husband is dead, fails to produce such evidence as she ought to know a presumption arises against her. [P 127 C 2]

(b) Evidence Act, S. 108 — Wife leaving her husband and being in another's keeping is not one who would naturally hear from him if he were alive.

A wife, who left her husband and is in the keeping of another, is not one of the persons who would naturally hear from him if he were alive. [P 127 C 2]

***(c) Hindu Law — Maintenance — Concubines are entitled to maintenance even though connexion is adulterous.**

A concubine is entitled to maintenance from the estate of the paramour even though the connexion with him is an adulterous one 26 *Bom.* 163; *A. I. R.* 1926 *P. C.* 73, *Rel. on.*, *A. I. R.* 1924 *Bom.* 311, *not Appr.*; *A. I. R.* 1923 *Bom.* 130, *Ref.* [P 128 C 1]

(d) Hindu Law—Maintenance.

The existence of debts diminishes the estate out of which the maintenance is to be paid. [P 128 C 1]

S. W. A. Rizvi—for Appellant

D. W. Choudhry—for Respondent

Judgment —The findings of the first Court which I have to consider are. That the first husband of Mt. Umabai is not proved to have been alive during the time of Umabai's connexion with Dayalgir; Umabai, then, as a permanent concubine is entitled to maintenance out of the estate of the deceased Dayalgir; and Rs. 25 per mensem is the proper amount of such maintenance.

It is first urged that it was for the plaintiff to prove that her husband is dead and that she has failed to give such proof. The plaintiff appears to have suppressed evidence She admits that her mother is alive, and that Manrakhan, her near male relation is also alive She states that Manrakhan had told her that she was married to a Rajput and that she never questioned her mother on the point. Clearly it was the plaintiff's duty to find out from her mother and Manrakhan, the name of her first husband and to make a definite statement that he was dead or had disappeared. As she had not produced this evidence, a presumption arises against her. Again S. 107, Evidence Act, is very clear. Umabai gave her age in the plaint as 35 and it appears that her husband was alive 30 years ago The burden of proof that he was dead, therefore, rested upon her S. 108, Evidence Act, has no application as a wife, who left her husband and is in the keeping of another, is not one of the persons who would naturally hear from him if he were alive. I do not follow the reasons for disbelieving the evidence of the defendant, but even if the evidence of the defendant is unworthy of belief and the plaintiff's husband is not Manna Singh, it was for the plaintiff to show that her husband, whoever he may be, is now dead She has failed to do so and it must be presumed that her husband is still alive.

The lower Court was of opinion that unless her husband was dead the plaintiff was not entitled to maintenance. Counsel on both sides consider that the right of the plaintiff to maintenance as a concubine of a deceased Hindu does not

differ on this point from the right of a concubine in Bombay. The law in Bombay does not appear to be settled. In *Anandilal Bhagchand* v. *Chandrabai* (1), Shah, Ag. C. J., and Crump, J , held that a kept mistress whose husband was alive was not entitled to maintenance on the death of her paramour: but these Judges in *Monghibai* v. *Nagubai* (2) had decided another question regarding the right of a concubine to maintenance and this decision was not approved by their Lordships of the Privy Council: *Nagubai* v. *Monghibai* (3) Although their Lordships of the Privy Council had not to deal with the question which I am considering, they expressed approval of the case *Ningareddi* v. *Lakshmawa* (4) where it was held that even if the connexion was adulterous, the estate of the paramour might be liable for her maintenance

In Mayne's Hindu Law, 9th edn., para 450, it is stated that concubines are entitled to maintenance even though the connexion with them is an adulterous one I respectfully think the reasons given by Shah, Ag. C. J., and Crump, J., that a concubine is entitled to maintenance from her husband that she cannot live a chaste life when her husband is alive at the time of her paramour's death are not entirely satisfactory. In my opinion, then, Mt. Umabai is entitled to maintenance although her husband is alive I add that the maintenance in the circumstance should be on a less generous scale than would be awarded to a widow.

It is next urged that the maintenance awarded is excessive The learned trial Judge has stated that a permanent concubine should not receive more than the bare maintenance which would be awarded to unchaste widow reverted to chastity. The estate of the paramour is encumbered with considerable debts and the learned Judge is clearly wrong in stating that this fact does not affect the claim for maintenance. The existence of debts diminishes the estate out of which the maintenance was to be paid. It seems very probable that the liability to pay Rs. 300 per year in cash would be a very heavy burden on the encumbered estate.

(1) A. I. R. 1924 Bom. 311=48 Bom. 203.
(2) A. I. R. 1923 Bom. 130=47 Bom. 401.
(3) A. I. R. 1926 P. C. 73=50 Bom. 604=53 I. A. 153 (P.C.).
(4) [1902] 26 Bom. 169=3 Bom. L. R. 647.

In cross-objection the respondent has stated that the appellant has lost possession of one village and has effected a second mortgage on the other. I am of opinion that Rs. 10 per mensem will provide for the bare maintenance of the respondent in a village in Raipur District and will cast a fairly heavy burden on the estate. It would be well in such cases if provision for maintenance was made by allotment of some fields, but the parties cannot agree to such an allotment. The decree of the first Court will be varied accordingly The direction that the maintenance should be a charge on the two villages Khaira and Kokada will remain as no more satisfactory charge is possible. Costs of the first Court will be borne in proportion to success and failure and the costs of this appeal will be borne as incurred. Costs of the cross-objection with regard to which there was little argument will also be borne as incurred

S.N /R.K. *Decree varied.*

A. I. R. 1929 Nagpur 128

MOHIUDDIN, A J. C.

Gopal Balkrishna— Plaintiff—Appellant.

v.

Amrit Waman — Defendant—Respondent.

Second Appeal No. 354-B of 1927, Decided on 31st January 1929, against decree of Dist. Judge Akola, D/- 27th September 1927 in Civil Appeal No. 124 of 1927

Limitation Act, Art. 11—Scope.

Art. 11 applies also to claims in execution in respect of property attached before judgment: *A. I. R.* 1921 *Mad.* 163, *Foll.* [P 128 C 2]

W. R. Puranik—for Appellant.

Judgment.—The learned advocate for the appellant argued that as the claim related to property attached before judgment, Art. 11, Lim. Act, did not apply, and Art. 120 applied. A Full Bench of Madras High Court decided in *Arunachlam Chetty* v. *Periasami Servai* (1), that Art. 11 applies also to claims in execution in respect of property attached before judgment. The suit was rightly dismissed as barred by time. The appeal is dismissed under O. 41, R. 11, Civil P. C.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1921 Mad. 163=44 Mad. 902. (F.B.).

A. I. R. 1929 Nagpur 129

MACNAIR, OFFG. J. C.

Narbadi—Defendant—Appellant.

v.

Chhoti—Plaintiff—Respondent.

Second Appeal No. 697 of 1927, Decided on 22nd February 1929, against decree of Dist. J., Chhindwara, D/- 19th October 1927 in Civil Appeal No. 90 of 1927.

(a) C. P. Tenancy Act (1920), Sch. 2, Art. 1—Owner wrongfully obtaining possession through Revenue Officer, but subsequently dispossessed—Suit within two years of dispossession is maintainable.

If rightful owner obtains possession though wrongfully through a Revenue Officer and is subsequently dispossessed, a suit brought within two years from such dispossession is not barred. 11 *W. R.* 49; 5 *Bom.* 382; 22 *Bom.* 733; 28 *Mad.* 338 *Dist.* [P 129 C 2]

(b) Guardian and Ward—Minor—Gond—Mother is preferential guardian to grandmother—Hindu Law—Gond.

In absence of any evidence as regards the law which the Gonds follow a mother of a minor is a preferential guardian to a grandmother.

(c) Minor—Alienation not for furthering minor's interest— Minor's rights are not affected.

An alienation of a minor's property by the guardian not effected with a view to further the interests of the minor cannot take away the minor's rights. [P 129 C 2]

A. V. Wazalwar and *V. R. Dhok*—for Appellant.

S. C. Dutt Chowdhry—for Respondent.

Judgment.—The father of Mt. Chhoti, a Gond, was the occupancy tenant of the fields in suit. He died about 1918. In the jamabandis for the subsequent years Mt. Chhoti was shown as tenant through her guardian Anupi. In 1923 Mt. Patoli, the mother of Mt. Chhoti, executed as guardian of Mt. Chhoti a surrender of the fields. The defendant malguzar obtained possession, but proceedings were taken under S. 100, C. P. Tenancy Act, in the Revenue Courts. The Tahsildar reinstated Mt. Chhoti and his decision was upheld in first appeal but was reversed on second appeal and Mt. Chhoti again lost possession on 31st July 1924. The suit was filed on 19th February 1926 and the main defence was that it was barred by time as it was filed more than two years from the date of the dispossession following the execution of the surrender deed. The suit succeeded in the lower Courts.

It is urged before me that, as the plaintiff regained possession under an erroneous order, her subsequent suit to recover possession had to be filed within two years of the date of the original dispossession. The decisions in *Motee Singh* v. *Rajah Leelanund Singh* (1). *Sayad Nasrudin* v. *Venkatesh Prabhu* (2), *Dagdu* v. *Kalu* (3) and *Narayanan Chetty* v. *Kannammi Achi* (4) are cited in support of this contention. It is doubtful whether these decisions are correct. In Rustomji's Law of Limitation (4th Edn. p. 777) the opposite view is held. But it is sufficient for the purpose of this case to say that these rulings refer to cases where a plaintiff regains possession under an erroneous order in a decree of the civil Court. It is now settled law that, if the rightful owner obtains possession by a wrongful entry and is again dispossessed, the limitation for a suit brought by him runs from the later dispossession. In my opinion, it is impossible to distinguish a case where possession is wrongfully obtained with the assistance of a Revenue Officer from a case where possession is obtained by a wrongful entry. I hold, therefore, that the suit was within time

It is next urged that Mt. Patoli was a tenant at the time of the surrender: there is a finding based on good evidence that the malguzar accepted Mt. Chhoti as tenant and this ground cannot be urged in second appeal.

It is next urged that Mt. Patoli's surrender put an end to the tenancy even if no consideration passed. The lower appellate Court has held that, in the absence of evidence regarding the law which the Gonds follow, it must be held that Mt. Chhoti's grandmother, who acted as her guardian, was her legal guardian. I disagree with this finding: in the absence of evidence it can be presumed that according to that law the mother is a preferential guardian to the grandmother although the grandmother was acting as guardian. Mt. Patoli's surrender, however, purported to be made for a consideration of Rs. 600 and it has been held that this consideration has not been proved to have passed. The transaction was not effected with a view to further the interests of the minor and cannot take away the rights of the minor. This ground, therefore, fails.

The appeal therefore fails and is dismissed. Costs on appellant.

M.R./R.K. *Appeal dismissed.*

(1) 11 W. R. 49=2 B. L. R. 173.
(2) [1880] 5 Bom. 382.
(3) [1898] 22 Bom. 733.
(4) [1905] 28 Mad. 338.

* A. I. R. 1929 Nagpur 130

STAPLES, A. J. C.

Tukaram—Plaintiff—Appellant.

v.

Sakharamsa and *another*—Defendants—Respondents.

Second Appeal No. 390-B of 1925, Decided on 21st January 1929, against decree of Addl Dist. Judge, Buldana, D/- 11th August 1925 in Appeal No. 18 of 1925.

*** (a) Civil P. C., O. 21, R. 66—Failure to issue notice is irregularity within Civil P. C., O. 21, R. 90.**

Failure to issue notice under O. 21, R. 66, is an irregularity in publishing the sale within the meaning of O. 21, R. 90. *A. I. R.* 1923 *Lah.* 592, *Foll.* [P 131 C 1]

*** (b) Civil P. C., S. 47—Application to set aside sale made under R. 90, O. 21 dismissed—Suit to cancel sale on ground of fraud in conducting it does not lie.**

Where application to set aside sale is made under O. 21, R. 90, and is dismissed, no suit for cancellation of the sale can lie on an allegation of fraud and irregularity in the publication or conduct of auction sale : 4. *I. R.* 1921 *Mad.* 121; *A. I. R.* 1923 *Lah.* 592, *Rel. on*, *A I. R.* 1925 *P. C.* 146; *A. I. R.* 1924 *Mad.* 431; 1 *N. L. J.* 184, ; 19 *Cal.* 683; 33 *Bom.* 698; 26 *All.* 101 and 28 *All.* 681, *Dist.* [P 131 C 2]

S. A. Ghadgay—for Appellant.

W. B Pendharkar—for Respondents

Judgment.—The appellant had a decree against him and in execution of that decree his property was attached and sold. He made an application under O. 21, R. 90, Civil P. C., that the sale should be set aside, but that application was dismissed. Instead of appealing against the order dismissing the application the appellant filed a suit against the auction-purchaser and the decree-holder for cancellation of the sale and for a declaration of his title. The suit was ostensibly under S. 47, Civil P. C. The trial Court held that no suit would lie and that finding has been upheld by the Additional District Judge on appeal. The appellant now prefers this second appeal. The only question to be decided is whether this decision of the Courts below that no suit lay under O. 47, Civil P. C., is correct.

The trial Court has followed the ruling in *Jaggan Nath* v. *Daud* (1), and that ruling is on all fours with the present case except that in the *Lahore* case no suit was filed and the judgment-debtor only attempted to prefer a second appeal which was held to be inadmissible under S. 104, sub-S. (2), Civil P. C. In appeal it is now contended that the suit was not barred under O. 21, R. 92, sub-R. (3), that no application under O. 21, R. 90, was necessary and that the suit was maintainable under S. 47 of the Code. Reliance was placed upon the rulings in *Bhagwan Das* v. *Suraj Prasad* (2) and *Rajagopala Ayyar* v. *Ramanujachariar* (3), whilst reference was also made to the case reported in *Godhaji Rao* v. *Dnyanoba* (4). I am of opinion, however, that none of these cases will really support the appellant The learned counsel for the appellant has referred to p. 225 (*of* 47 *All.*) of the Allahabad ruling where there is a discussion with regard to the Rr. 89, 90 and 91, O. 21, and the provisions of O 21, R. 92, sub-R. (3). I find, however, that it was held in the *Allahabad* case that the fraud alleged was not merely a fraud in publishing or conducting the sale but a definite conspiracy also was alleged. I would quote the following passage:

"Rule 90 applies to the case where there has been material irregularity or fraud in publishing or conducting a sale. It is true that the plaintiff alleged in the plaint that owing to fraud he was kept in ignorance of the proceedings ending in the sale, but that is only a minor part of his case. He does not seek to have the sale set aside on the ground of material irregularity or fraud in publishing or conducting the sale. The plaintiff's case has already been stated It may be reiterated in brief. His case is that there was a conspiracy by which the plaintiff was to be deprived of the property which he had properly purchased on payment."

It is clear, then, that there was a definite allegation of fraud outside the actual publication and conduct of the sale. Similarly in the case in *Godhaji Rao* v. *Dnyanoba* (4) there was a definite allegation of fraud and collusion apart from the actual publication and conduct of the sale. It may be noted that in this case no question of the applicability of O. 21, R 90, was considered, and the only question considered was whether O. 21, R. 92 applied; with some hesitation Prideaux, A. J. C., held that it did not apply and that the suit was not barred under O. 21, R. 92, sub-R. (3), following the ruling in *Mohamad Najibulla* v

(1) A. I. R. 1923 Lah. 592=4 Lah. 243.

(2) A. I. R. 1925 P. C. 146=47 All. 217.

(3) A. I. R. 1924 Mad. 431=47 Mad. 288 (F.B.).

(4) [1917] 1 N. L. J. 184.

Jainarain (5). The case in *Rajagopala Ayyar* v. *Ramanujachariar* (3) considers the question of notice under O. 21, R. 22, sub-R. (2), and is not therefore, I think, applicable to the present case.

In the present case the only fraud alleged is that no notice was served upon the judgment-debtor under O. 21, R. 66, and that the judgment-debtor was kept in ignorance of the sale. Apart from this fact, though the Court executing the decree has held that the judgment-debtor was served with a notice under O. 21, R. 66, I would hold on the authority of the ruling in *Jaggan Nath* v. *Daud* (1) that the failure to issue notice under O 21. R. 66 is an irregularity in publishing the sale within the meaning of O. 21, R. 90. In any case it is clear, I think, that there was no fraud on the part of either the decree-holder or the purchaser as notice was ordered to issue by the Court and a notice was affixed to the house of the judgment-debtor. The executing Court held that service to be good and the responsibility of holding the service good was that of the Court and no blame could attach either to the decree-holder or to the purchaser. I am clear, then, that no fraud could be alleged against the decree-holder or the purchaser, and even the plaintiff has not alleged, as far as I can see, any fraud apart from the publication of the sale. The rulings quoted by the lower appellate Court in para 3 of the judgment, namely, *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (6), *Harihar Kanta* v. *Rama Pandu* (7), *Sadho Chaudri* v. *Abhenandan Prasad* (8) and *Gaya Prasad* v. *Randhir Singh* (9), do not appear to me to apply to the present case, and I would also point out that all those cases were decided under the Civil Procedure Code of 1882; and at p. 245 of the ruling in *Jaggan Nath* v. *Daud* (1) it has been held that the ruling under the old Code that an application made on the ground of fraud could come only under S. 244 (corresponding to S. 47 of the present Code) must be regarded as obsolete. I fail to see the reason, therefore, for the Additional District Judge quoting those rulings. I have, however, been referrred to another case by the learned counsel for the respondents, namely, *Brahmayya* v. *Appayya Sastri* (10), which is a clear authority for holding that no suit would lie on an allegation of fraud and irregularity in the publication or conduct of an auction sale. The present case is even stronger than the *Madras* case, because it is admitted that in this case an application was, as a matter of fact, made under O. 21, R. 90, and was dismissed. The plaintiff's remedy, therefore, was to appeal against that order, but instead of availing himself of that remedy he chose to let the period of appeal expire and then filed a suit ostensibly under S. 47, Civil P. C.

I am of opinion that the view taken by the Courts below that no suit lies is correct and dismiss the appeal. All costs of the appeal will be borne by the appellant. I fix pleader's fees at Rs. 25 Costs in the Courts below as already ordered.

S.N./R.K. *Appeal dismissed.*

(5) [1914] 36 All. 529=26 I. C. 53=12 A. L. J. 908.
(6) [1832] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P.C.).
(7) [1909] 33 Bom. 698=4 I. C. 253=11 Bom. L. R. 1113.
(8) [1904] 26 All. 101=(1903) A. W. N. 209.
(9) [1906] 28 All. 681=3 A. L. J. 456=(1906) A. W. N. 206.
(10) A. I. R. 1921 Mad. 121=44 Mad. 351.

* A. I. R. 1929 Nagpur 131

MOHIUDDIN AND JACKSON, A. J. Cs

Jaitram and *others* — Plaintiffs—Appellants.

v.

Narottam and *others* — Defendants—Respondents

First Appeal No. 79 of 1927, Decided on 12th February 1929, against decree of Addl. Dist. Judge, Bilaspur, D/- 24th March 1927, in Civil Suit No. 34 of 1925

(a) Evidence Act, S. 32 (3)—Statements of dead persons against their proprietary interest.

(*Obiter.*)—Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statement made by the deceased ancestors of the parties to the effect that there was partition are admissible in evidence as they are statement against the proprietary interest of the person making them. [P 132 C 2

(b) Hindu Law—Partition—Cessor of commensality does not conclusively prove partition and so it has to be considered whether other evidence supports or negatives theory that cessor was adopted with view to partition in legal sense.

Cessor of commensality is an element which may properly be considered in determining the question whether there has been partition of the joint family property but it is not conclusive. It is further necessary to consider whether the evidence in other re

pects supports or negatives the theory that the cessor was adopted with a view to partition in the legal sense of the word ; 14 *M. I. A.* 412 (*P.C.*) and 31 *Cal.* 262 (*P.C.*), *Rel. on.*

[P 132 C 2]

***(c) Registration Act, S. 17—Partition between parties 50 years ago—Parties in possession of their shares accordingly—Document which decided nothing but simply maintained status quo ante need not be registered—Registration Act, S. 49 (Obiter).**

(*Obiter*).—Partition had taken place between the parties 50 years ago and in accordance with it they were in possession of their respective shares. Then a document was executed by them which did not decide anything new but simply maintained the status quo ante of the parties.

Held : that the deed was neither a partition deed nor a relinquishment deed and, therefore, there was no necessity to have it registered.

[P 133 C 2]

W. R. Puranik and *J. Sen*—for Appellants.

D. N. Choudhry, *G. R. Deo* and *S. C. Dutt Chowdhry*—for Respondents.

Judgment.—Gambhir had two sons, Thakurram and Lahuri, and Thakurram had two sons Sardharam and Adli. This suit was filed on 5th November 1925, by a son of Adli, six grandsons of Adli and a daughter-in-law of Adli Mt. Bindramati against the descendants of Lahuri and Sardharam, for a declaration that they were not bound by the agreement dated 29th December 1923, and for being put in joint possession of the villages Malda, Gundru, Turridih, Nagridih and Barekel to the extent of their four-annas share. Defendants 5 to 8 are the great-grandsons of Lahuri and defendant 9 is Lahuri's grandson. They stated that a partition had taken place between Thakurram and Lahuri about 50 years ago and that in that partition Thakurram was given five villages Kaitha, Pison, Deogaon, Basin and Marghati, and the other five villages were given to Lahuri. This statement was adopted by defendants 1 to 3 and defendant 11 also. The learned Additional District Judge held that there was a partition 50 years ago, in which Kaitha, Pison, Deogaon, Basin and Marghati fell to the share of Thakurram, that the agreement Ex. 1 D 1 was not executed by the plaintiffs under fraud, that Ex. 1 D 1 was invalid for want of registration, that the defendants have made improvements in the villages which fell to their share, and dismissed the plaintiffs' suit.

The appellants in this appeal pressed the following two points:

(1) There was no partition 50 years ago as alleged by the respondents.

(2) The document Ex. 1 D 1 was obtained by making fraudulent misrepresentation.

The statement of Girdhari (D. W. 1): "my grandfather used to say that at a partition between Thakurram and Lahuri, each of them got five villages"

and the statement of Pyarelal (D. W. 2) "I used to hear from my ancestors that there was a partition" were attacked as inadmissible in evidence, on the ground, that they were only hearsay The learned advocate for the respondents relied on sub-S. (3), S 32, Evidence Act, and argued that the statements of dead persons against their proprietary interest, disclaiming all rights in the other five villages, were admissible in evidence. These statements are not very material for the decision of the point under consideration, because apart from these statements, there is other evidence, which proves satisfactorily that there was a partition more than 50 years ago. It seems to us that the statements are admissible under S. 32 (3), Evidence Act, as they are statements against the proprietary interest of the persons making them.

It is an admitted fact that the two branches, that is, Thakurram's descendants and Lahuri's descendants have been residing separately, messing separately and managing the villages separately for a very long time. The partition having taken place more than 50 years ago, it was impossible to adduce direct evidence to prove the partition. There is no doubt that the parties have been living separately for a long time and the fact to be found is, whether this separation was on account of partition or not. Cessor of commensality is an element which may properly be considered in determining the question whether there has been a partition of the joint family property but it is not conclusive: *Mt Anundee Koonwur* v. *Khedoo Lal* (1). As pointed out by Sir Andrew Scoble in *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (2), it is necessary to consider whether the evidence in other respects supports or negatives the theory that the cessor in this case was adopted with a view to partition

(1) [1871] 14 M. I. A. 412=18 W. R. 69=2 Suther. 591=3 Sar 50 (P.C.).

(2) [1904] 31 Cal. 262=31 I. A. 10=8 C.W.N. 146 (P.C.).

in the legal sense of the word. The following facts tend to corroborate the defendants' plea of partition:

(1) Payment of land revenue separately by the defendants for the five villages in their possession.

(2) Improvements effected at considerable cost by the defendants in their villages.

(3) Mutation effected in the names of females, after the death of their husbands.

We have carefully considered the evidence adduced by the parties about partition and agree with the lower Court that the plea of partition set up by the defendants is correct. The plaintiffs relied on the entries in the mutation proceedings which indicate that the descendants of both the branches have been recorded as proprietors in all the villages and contended that these entries pointed to a statement of jointness and negatived partition. It also appears from the mutation entries, particularly Ex. P-12, that the names of Mt Bisahin and Mt. Renuka were recorded as proprietors. Their names would not have been so recorded, if the parties were joint. One of the plaintiffs in this suit is Mt. Bindramati, who has succeeded Parasram. These mutation entries do not, therefore, afford a definite and proper guidance in the matter.

Our attention was drawn to the evidence of Jaitram (P. W. 1), Rajaram (P. W. 2) and Jailal (P. W 3) and we were asked to hold on the authority of their statements that the document Ex. D 1 was obtained by the defendants by misrepresentation and fraud. It is difficult to believe that Jaitram and Rajaram signed the document without reading it and on being assured that it was an agreement to have the partition effected by Panchas. On a careful consideration of the evidence on the point, we hold that the agreement Ex. 1 D 1 was not executed by the plaintiffs, on account of any misrepresentation made to them or on account of any fraud practised on them.

In view of the finding that there was a partition 50 years ago between Thakurram and Lahuri, it is not necessary to decide the question, as to whether the agreement is admissible in evidence or not, for want of registration. As there was a partition effected in the family, 50 years ago, the document was not a partition deed. The learned advocate for the appellants argued that it was a relinquishment deed, but as the property was already divided and the parties were in possession of the villages which fell to their share, out of which they did not give up anything, the deed could not be styled a relinquishment deed also. Plaintiffs and defendants 10 to 23 had applied to the Revenue Officer for an imperfect partition of two villages Malda and Kaitha, and this agreement which really did not decide anything but maintained the status quo ante, was executed and signed by the parties. There was no transfer by one party to the other nor was there any creation of fresh title. It only embodied the settlement of a bona fide dispute, each party recognizing an antecedent title in the other. In this view of the circumstances, we are of opinion that there was no necessity to have the document registered. Ex. D 1 is admitted by the plaintiffs and has been signed by all the plaintiffs including Mt. Bindramati, except the minor Bhagwan Dayal, whose eldest brother Kanhaiya has signed it. This document shows that the parties settled their dispute and agreed to abide by it Having done so, the plaintiffs cannot ask for joint possession of the villages, which fell to the share of the defendants. This appeal, therefore, fails and is dismissed with costs. We fix Rs. 500 as pleader's fees in this case.

S.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 133

MOHIUDDIN, A. J. C.

Rujula—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revn. No 173 of 1928, Decided on 8th October 1928, against order of Sub-Divl. Mag., Mungeli, D/- 4th January 1928, in Criminal Case No. 136 of 1927.

Criminal P. C., S. 494—Though reasoned judgment not necessary, Court must record reasons for supporting that discretion was rightly exercised.

Although a reasoned judgment establishing the propriety of the order, as required by S. 367, is not necessary in the case of the order, passed under S. 494, still there must be something on record to show why the Magistrate consented to the withdrawal. The Court should record its reasons in order that the High Court may be in a position to say whe-

ther the discretion vested in the Court has been properly exercised : 22 *C. W. N.* 69 ; *A. I. R.* 1924 *Cal.* 382 ; *A. I. R.* 1921 *Cal.* 259 ; *A I. R.* 1923 *Nag.* 260 ; *A. I. R.* 1924 *Rang.* 168, *Foll.*; *A. I. R.* 1924 *Pat.* 283 ; *A. I. R.* 1923 *Lah.* 163, *Expl.* and *Dist.* [P 134 C 2]

T. G. Chobbs—for Applicant.

D. N. Chaudhry—for the Crown.

Order.—This is a revision application from an order dated 4th January 1928, of Mr. Purshottam Lal, Magistrate, 1st Class Bilaspur, whereby the accused persons, in Criminal Case No 136 of 1927, were discharged. The order was recorded in the order-sheet and was as follows :

All accused in custody. Prosecuting Sub-Inspector for prosecution and defence by Mr. Agnihotri. The Prosecuting Sub-Inspector puts in an application applying for permission to withdraw this case under S. 494, Criminal P. C. The permission is granted and the accused persons discharged. The witnesses present be discharged."

The first ground in the application is to the effect

"that the trial Court has given no reason for giving its consent to the withdrawal of the prosecution and as such has not properly exercised the discretion vested in the Court by S. 494, Criminal P. C".

There is a conflict of opinion, regarding the interpretation of the words "with the consent of the Court" which appear in S. 494, Criminal P. C. The learned pleader for the applicant drew my attention to the following cases : *Umesh Chander* v. *Satish Chandra* (1), *Jagat Chandra* v *Kalimuddi Sardar* (2), *Rajani Kanta Shaha* v. *Idris Thakur* (3), *Suganchand* v. *Chhunnilal* (4) and the learned pleader for the non-applicants relied on the following : *In re Sadayan* (5), *Mul Singh* v. *Emperor* (6) and *Gulli Bagat* v. *Narain Singh* (7).

In re Sadayan, Wallis and Adbur Rahim, JJ., in a very brief judgment, observed the following :

"neither the Public Prosecutor nor the Judge is called on to give any reasons for his action and this Court has no means of ascertaining what the reasons were."

It was a case in which a revision application, against an order of acquittal was filed and the learned Judges thought that they had no power to interfere. The case, *Mul Singh* v. *Emperor* (6) does not really support the non-applicant, on the contrary shows that Abdur Kadar, J., was inclined to the view, that the Magistrate ought to have recorded his reasons for giving his consent, and did not consider that case, a fit case for exceptional treatment, so as to justify the setting aside of an acquittal on revision. The case *Gulli Bhagat* v. *Narain Singh* (7), was also a case in which a revision application was filed against an order of acquittal, passed under S 494, Criminal P. C. In this case the Magistrate had heard the parties and gave his consent after duly considering the matter and the learned Judges, who decided the revision application, expressed the opinion that there was no provision of law, which required a Magistrate to draw up a judgment, such as was prescribed by S. 367, Criminal P. C . and record his reason for allowing the withdrawal. I am in respectful agreement with the view expressed by the learned Judges that

"a reasoned judgment establishing the propriety of the order",

as required by S 367, Criminal P. C., is not necessary in the case of the order, passed under S. 494, Criminal P. C., but it seems to me that there must be something on record to show why the Magistrate consented to the withdrawal. This aspect of the case was not considered in *Gulli Bhagat* v. *Narain Singh* (7).

The other view was expressed in *Umesh Chandra Roy* v. *Satish Chandra Roy* (1), by Teunon, and Shamshul Huda, JJ., in the following words :

"It is clear to our minds that in either withholding consent or in according consent, the Court is acting in a judicial capacity and for its order as for every order judicially made, it ought to give and record its reasons. We are fortified in this view by a consideration of the provisions of Ss. 494 and 437, Criminal P. C. If the consent has been improperly accorded, it is clear that the consequential discharge must also be looked upon as improper. for these reasons we are of opinion that when a Court acting under S. 494 of the Code, gives its consent to a withdrawal from the prosecution, it should record its reasons in order that this Court may be in a position to say whether the discretion vested in the Court has been properly exercised,"

This exposition of the law was quoted, with approval in *Jagat Chandra Roy* v. *Kalimuddi Sardar* (2), *Rajani Kanta Shaha* v. *Idris Thakur* (3), *Saganchand* v. *Chhunnilal* (4) and *Abdul Gani* v. *Abdul Kadar* (8).

(1) [1918] 22 C. W. N. 69=41 I. C. 998=26 C. L. J. 208.
(2) A. I. R. 1924 Cal. 382.
(3) A. I. R. 1921 Cal. 259=48 Cal. 1105.
(4) A. I. R. 1923 Nag. 260.
(5) [1909] 5 M. L. T. 216=4 I. C. 1126=11 Cr. L. J. 193.
(6) A. I. R. 1923 Lah. 163.
(7) A. I. R. 1924 Pat. 283=2 Pat. 708.
(8) A. I. R. 1924 Rang. 168=1 Rang. 756.

I have no doubt that the view expressed in *Umesh Chandra Roy* v. *Satish Chandra Roy* (22 *C. W. N.* 69) is correct. Neither the order of discharge nor the order of acquittal can be passed unless the Magistrate trying the case, gives his consent to the withdrawal of the case, suggested by the Public Prosecutor. The section certainly does not lay down, that the consent must be given ipso facto, soon as application for withdrawal is made by the Public Prosecutor. The Court may either give its consent or refuse to accede to the request made by the Public Prosecutor. The Magistrate certainly cannot form his opinion unless some reasons are put forward, why it is proposed to withdraw the case and he cannot arbitrarily give his consent or withold his consent. The order, giving his consent, must be passed like any other order, which, a Magistrate has to pass under the Criminal Procedure Code, and need not fulfil all the requirements of a judgment, as laid down in S. 367, Criminal P. C.

In this case, the application filed by the Prosecuting Sub-Inspector is missing, and the order dated 4th January 1928 does not contain the reasons, which influenced the Magistrate in giving his consent, to the withdrawal. The order of discharge passed by the Magistrate, can be revised under S 436, Criminal P. C., but there is no material before this Court to enable it to consider the matter and to determine whether the discretion vested in the Court has been properly exercised.

I, therefore, set aside the order, of Mr. Purshottam Lal, granting consent to the Prosecuting Sub-Inspector's withdrawal from the prosecution in question and the consequent order of discharge. The accused will now be replaced upon their trial and the case against them heard and disposed of in accordance with law

D.S./R.K. *Order set aside.*

* A. I. R. 1929 Nagpur 135

MACNAIR, A. J. C.

Narsingh and *another*—Defendants—Appellants.

v.

Nathuji and *another*—Plaintiffs—Respondents.

Second Appeal No. 29-B of 1928, Decided on 4th February 1929, against decree of Dist Judge, Amraoti, D/- 30th September 1927 in Appeal No. 26 of 1927.

*** (a) Civil P. C., O. 23, R. 1—Suit withdrawn on permission of paying costs before fresh suit—Suit does not remain pending until costs are paid nor can fresh suit be dismissed under O. 23, R. 1 (3)—Failure to pay costs before fresh suit is only irregularity—Paying costs after suit is sufficient.**

When the plaintiff obtains permission to withdraw from the suit with liberty to bring fresh suit on condition of paying the costs, before instituting fresh suit, the suit does not remain pending until the costs are paid, nor can fresh suit be dismissed under O. 23, R. 1 (3): *A. I. R.* 1926 *Pat.* 409 and *A. I. R.* 1924 *Mad.* 877, *Diss. from.* [P 136 C 1, 2]

Failure to pay costs before instituting a fresh suit is only an irregularity and the fresh suit should not be dismissed if the payment is made after its institution: 31 *Cal.* 965, *Foll.*; 39 *Mad.* 258, *Dist.* [P 136 C 1]

*** (b) Civil P. C., O. 34, R. 1—Prior mortgagee joined in a suit by puisne mortgagee—He can claim subrogation.**

After the prior mortgagee had decided that it was convenient for him to be joined in a suit brought by the puisne mortgagee and had allowed himself to be so joined he is bound to redeem the subsequent mortgage and he can therefore claim subrogation. [P 136 C 2]

M. R. Bobde—for Appellants.

D. T. Mangalamurti — for Respondent 1.

Judgment.—On 26th June 1916 Narsingh defendant 1 mortgaged certain property to the plaintiff Nathuji for Rs. 800 and a few days later he mortgaged the same property to one Kisni Bai for Rs. 900. A suit was brought on a puisne mortgage It was filed against Narsingh and his minor son Narayan, but Narayan was given up and discharged because the plaintiff thought it unnecessary to make him a party. Nathuji was also impleaded: he stated that he was a prior mortgagee and was willing to redeem. A preliminary decree for foreclosure was passed and Nathuji paid the decretal amount. Nathuji filed a suit against Narsingh and Narayan for recovery of the amount paid but was allowed to withdraw it with permission to bring a fresh suit: he was ordered to pay the defendants' costs in that case before instituting a fresh suit.

The suit out of which this appeal arises was filed on 23rd March 1925 and the costs in the previous case were paid five months later. In this suit the plaintiff sought to recover the amount paid in satisfaction of the puisne mortgage and the amount due on his own mortgage. It has been found that only part of each mortgage debt was incurred for legal necessity. A preliminary decree for foreclosure has been passed on the basis of

the second mortgage and a preliminary decree for sale on the basis of the first mortgage. The defendant Narayan has been allowed to redeem his half-share on payment of sums which have been calculated by excluding the portions of the mortgage debts for which there was no legal necessity.

It is first urged that as the plaintiff did not comply with the condition on which he was allowed to bring a fresh suit, that suit should have been dismissed. I am referred to *Fischer* v. *Nagappa Mudaly* (1). In that case a time was fixed for the performance of the condition and that time had expired when a fresh suit was instituted The learned Judges who decided the case distinguished the case of *Abdul Aziz Molla* v. *Ebrahim Molla* (2) where the facts were similar to those of the present case. Geidt and Mookerjee, JJ., in the latter case held that the failure to pay the costs before the institution of a fresh suit was an irregularity, but that the law did not require that a fresh suit should be dismissed if the payment was made after its institution. I am in respectful agreement with this view. In *Seshayya* v *Subbayya* (3) it is stated that, as O 23, R. 1 (3) definitely precludes a Court from entertaining a second suit when no permission has been granted, failure to comply with the condition on which permission was granted necessitates the dismissal of a fresh suit : but with due respect, I think that the provisions of O. 23, R. 1 (3) apply only when the plaintiff withdraws from a suit without the permission referred to in sub-R (2), R. 1. In the present case, the plaintiff had obtained a qualified permission and his failure to make full compliance with the terms on which the permission was granted does not render Cl. (3), R 1 applicable I hold, therefore. that the trial Judge had power to allow the suit to proceed after the plaintiff had paid the costs of the former suit.

I add that I respectfully disagree with the reasoning in *Mahomed Afzal* v. *Lachman Singh* (4) where it appears to be held that in every case where the plaintiff obtains permission to withdraw from the suit with liberty to bring a fresh suit provided he pays costs, the suit remains pending until costs are paid. The plaintiff has power to withdraw his suit. When a Court grants him permission to withdraw from a suit with liberty to institute a fresh suit, the ordinary course is for him to withdraw at once. In the present case, the plaintiff admitted in his rejoinder, dated 24th August 1925, that the suit was at once withdrawn. I can see no reason for holding that the suit remained pending until the costs had been paid.

It is next urged that the plaintiff, a prior mortgagee, could not, by redeeming the subsequent mortgage, claim subrogation to it. Now O. 34, R 1, states that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the mortgage. There is an explanation which appears to be of the nature of an exception that a puisne mortgagee can sue for foreclosure or sale without making prior mortgagee a party to the suit : and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. But this explanation appears to allow the puisne mortgagee to make the prior mortgagee a party if he chooses. This procedure is convenient if the puisne mortgagee desires to be paid, and the prior mortgagee desires to settle accounts and pay him, in order to avoid the necessity of impleading him in a subsequent suit. After the prior mortgagee had decided that it was convenient for him to be joined in a suit and had allowed himself to be so joined he was bound to redeem the subsequent mortgage : he can, therefore, claim subrogation.

The next point urged is that Narayan, defendant 2, was not a party to the suit brought by the puisne mortgagee and his interest could not be affected by the payment made by the plaintiff. It seems clear that Narayan was discharged because a suit against Narsingh alone would be deemed a suit against Narsingh in a representative capacity After the discharge, then, Narsingh represented the appellant.

Ground 5 is said to be based on misapprehension and is abandoned. Ground 6 must fail in view of the ruling in *Narayan* v. *Nathmal* (5). No objection has been raised to the way in which the decree has been framed, per-

(1) [1910] 33 Mad. 258=6 I.C. 288=7 M.L.T. 226.
(2) [1904] 31 Cal. 965.
(3) A I.R. 1924 Mad. 877.
(4) A.I.R. 1926 Pat. 409=5 Pat. 306.
(5) A.I.R. 1922 Nag. 155=17 N.L.R. 200.

mitting defendant 2 to redeem only half the property on payment of certain sums. The appeal, therefore, fails and is dismissed. Costs on appellants.

Respondent 1 files a cross-objection. It is urged that as the parties lived at the same place the mortgagee was justified in placing confidence in the statements of Narsingh. The learned District Judge has given reason for holding that necessity for the loan of Rs 185 was not established, and there is no particular reason why the mortgagee should have placed implicit reliance on the representation of Narsingh. The cross-objection, therefore, fails and is dismissed. Costs on objector.

P.D./R K. *Appeal and Cross-objection dismissed.*

A. I. R. 1929 Nagpur 137

MOHIUDDIN, A. J. C.

Mulchand and *another*—Plaintiffs—Appellants.

v.

Tarachand—Defendant — Respondent.

Second Appeal No. 273 of 1928, Decided on 9th February 1929, against decree of Dist. Judge, Nimar, D/- 25th April 1928.

(a) Pleadings—Defendant's plea that suit is premature means that it should be dismissed.

The defendant by taking the plea that the suit is premature, certainly means that the suit should be dismissed, if the Court found that the cause of action had not accrued when the suit was filed. [P 137 C 2]

(b) Partnership — Persons carrying on money lending business with object to divide interest arising therefrom are partners.

Where money-lending business is carried on by certain persons with no other object except to divide the interest arising from the transaction, the persons are partners and not mere co-owners : 8 *Cal.* 1011, *Dist.* [P 137 C 2]

(c) Contract Act, S. 63—Consideration is not necessary for agreement to extend time for performance of contract.

An agreement simply extending the time for performance of a contract is exempted under S. 63 from any requirement of consideration to support it : 23 *Bom.* 348, *Dist.* [P 138 C 1]

S B Gokhale for Appellants.

Abdul Razak for Respondent.

Judgment.—This appeal arises out of a suit which the appellant had filed on 23rd June 1927 against the respondent, Tarachand for Rs 3,365-8-6. Sub-Judge 1st Class, Khandwa, passed a decree for Rs. 2,965-8-6 in favour of the appellants, as the respondent had paid Rs. 400 in Court. The learned Additional District Judge held that the suit was premature and dismissed the suit.

The first point which the learned advocate for the appellant urged was that the suit ought not to have been dismissed as the respondent in his written statement did not ask for the dismissal of the suit, though he had stated in para. 4 of his written statment that the suit was premature. The respondent by taking the plea that the suit was premature, certainly meant that the suit should be dismissed, if the Court found that the cause of action had not accrued when the suit was filed. The dismissal, under the circumstances was quite proper.

It was next urged that the two plaintiffs, Mulchand and Gendalal were not partners and it was suggested that they were co-owners. Reference was made in this connexion to Lindley on Partnership at p. 27, *Hyder Ali* v. *Elahee Bux Maloom* (1) and to the Illus. (b), (d) and (e) under S. 239, Contract Act. A perusal of the chapter on co-ownership does not show that there cannot be partership in a case of the nature under consideration, Lindley on p. 29 writes the following:

"If several persons jointly purchase goods for resale, with a view to divide the profits arising from the transaction, a partnership is thereby created. But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits but for the purpose of dividing the goods themselves are not partners and are not liable to third parties as if they were. *Coope* v. *Eyre* (2) is a leading case in support of this proposition."

The money lending business is carried on by the appellants with no other object except to divide the interest arising from the transaction and the parties are therefore partners. *Hyder Ali* v. *Elahee Bux Maloom* (1) was a case in which the plaintiff had filed a suit against the defendant, in his capacity as the owning manager of a river brig, and it was held that the fact that several persons were co-owners of a ship, did not make them partners. The facts of the case reported in *I. L. R.* 8 *Cal* 1011 and the present case are quite different, and, therefore, the *Calcutta* case cited does not afford any help in deciding this case. The illustra-

(1) [1882] 8 Cal. 1011=10 C. L. R. 606.
(2) 1 H. & B. 37.

tions appended to S. 239, Contract Act, make the difference between partners and co-owners quite clear, and the position of the plaintiffs in this case is similar to that of A and B as pointed out in Illus. (a) and (c). Plaintiffs alleged in para. 1 of that plaint that they carry on money lending business at Attar and Khandwa in the name of Mulchand Gendalal and, therefore, no further statement on the point was necessary. The plaintiffs were rightly held to be partners.

Lastly, it was urged that

"the alleged undertaking of Gendalal not to file suit till the next following season was one without consideration and for that reason the same was not binding on any of the two appellants."

According to S 63, Contract Act, a promisee can extend the time for the performance of the promise, which Gendal did in this case. The learned advocate for the appellants relied on *Trimbak Gangadhar* v. *Bhagwan Das* (3) and argued that time could not be extended under S. 63, Contract Act. In that case there was not an extension of the time for the performance of the promise but there was an agreement to refrain from exercising for a stated period the right of sale arising from non-performance. An agreement simply extending the time for performance of a contract is exempted under S. 63, Contract Act, from any requirement of consideration to support it The appeal therefore fails and is dimissed with costs

S.N./R.K. *Appeal dismissed.*

(3) [1899] 23 Bom. 848.

A. I. R. 1929 Nagpur 138

MOHIUDDIN, A. J. C.

Mulchand and *another*— Plaintiffs — Appellants.

v.

Tarachand—Defendant—Respondent.

Order on application for cancellation of the ex parte order passed in connexion with stay of proceedings in Second Appeal No. 273 of 1928, Decided on 9th February 1929, *A. I.R* 1929 *Nag.* 137.

(a) Civil P. C., S. 144—Principle of restitution.

The doctrine of restitution is based on the principle that the Court will not permit an injustice to be done by reason of an erroneous order made by it when that erroneous order has been reversed and the Court will restore the parties to the position which they would otherwise have occupied. [P 138 C 2]

(b) Civil P. C., O. 41, R. 5—Decree varied —Restitution applied for—Restitution cannot be stayed because appeal was filed.

An application for restitution can be made as soon as a decree is varied or reversed and it ought not to be stayed under O. 41, R. 5, because an appeal has been filed. [P 138 C 2]

S. B Gokhale—for Appellants.

Abdul Razak—for Respondent.

Order.—This is an application filed by the respondent Tarachand praying that the ex parte order passed by this Court, staying proceedings under S 144, Civil P. C., pending in the Court of 1st Class Sub-Judge, Khandwa, be cancelled.

The doctrine ef restitution is based on the principle that the Court will not permit an injustice to be done by reason of an erroneous order made by it, when that erroneous order has been reversed and the Court will restore the parties to the position which they would otherwise have occupied.

The question to be considered in this application is whether the restitution proceedings should be stayed, till the decision of the appeal, which is pending, against the judgment of the lower appellate Court, which varied the judgment of the first Court. It seems to me that the language of S 144, Civil P. C., is not capable of any such interpretation An application for restitution can be made as soon as a decree is varied or reversed and it seems to me that it ought not to be stayed under O 41, R. 5, Civil P. C , because an appeal has been filed. According to O. 41, R. 5, Civil P. C , an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, but restitution proceedings are not proceedings under the decree, of the kind contemplated under that order. It therefore seems to me that there is no justification for staying restitution proceedings because an appeal has been filed against the decree which varied the decree of the first Court. The order passed by this Court on 4th July 1928 is therefore withdrawn and cancelled.

The order passed on 25th June 1928 also requires modification. It does not seem necessary that the appellant should furnish security for Rs. 2,000. Execution of the decree for costs will be stayed on the appellant furnishing security for

such an amount, as may be fixed by the Court executing the decree.

The costs of these proceedings will be paid by the appellants who applied to this Court for stay of proceedings. I fix Rs. 10 as pleader's fees.

S.N./R.K. *Order withdrawn.*

A. I. R. 1929 Nagpur 139

MOHIUDDIN AND MACNAIR, A. J. Cs.

Sheoshankar and *others*—Plaintiffs—Appellants.

v.

Lal Indra Shah — Defendant—Respondent.

First Appeal No. 73 of 1927, Decided on 11th December 1928, against decree of Addl Dist. Judge, Raipur, D/- 31st March 1927 in Civil Suit No. 3 of 1926.

(a) C. P. Land Revenue Act (1917), S. 80 (3)—Wajib-ul-arz prepared at the time of granting proprietary rights not restricting them—Restrictions in a subsequent wajib-ul-arz are incorrect—Proprietor was not deprived of any rights ordinarily due.

In 1903, inferior proprietary rights were conferred on the malik makbuza holder of mouza Deosur in Amagarh Chowki which was transferred from Chanda to Drug District in 1907. The wajib-ul-arz of 1904 prepared about the time when the inferior proprietary rights were granted does not record restrictions on the rights of the inferior proprietor.

Held: that the entries in a subsequent wajib-ul-arz which curtail such rights are incorrect and that it could not be presumed that the inferior proprietor was deprived of any rights, which are ordinarily enjoyed by inferior proprietors. [P 140 C 1, 2 ; P 141 C 1]

(b) C. P. Land Revenue Act (1917), S. 220 —Question regarding any engagement with Government or agreement by proprietors not involved—Jurisdiction of civil Courts is not excluded.

Where no question as to the validity of any engagement with the Government for the payment of land revenue or of any agreement entered into by superior or inferior proprietors in a settlement or sub-settlement arises, the jurisdiction of the civil Court is not excluded. [P 141 C 1, 2]

B. K. Bose, *V. Bose*, and *Abdul Razak* —for Appellants.

D. N Chaudhary—for Respondent.

Judgment.—This appeal arises out of a suit which was filed on 23rd January 1926 by the plaintiffs-appellants who are inferior proprietors of mouza Deosur in the Amagarh Chowki Zamindari of the Drug District, for a declaration that they as inferior proprietors have full rights over the forest and the banjar in their village, and that the conditions contained in sub-Cls. (1), (2), (3), (5), (6) of Cl. 6, (A) and (B) of Cl. 7 and Cl. 18 of the wajib-ularz-of 1925, which take away thair rights are not binding on them They claim the right to realize grazing dues in respect of the banjar and the jungle of the village, to appropriate the income from the minor forest produce, and to collect and sell timber. The defendant who is the zamindar of Amagarh Chowki and the superior proprietor of this village, stated that the plaintiffs never enjoyed the rights which they now claim, that the rights now claimed were not recognized in the settlement of 1902-03, and that the plaintiffs were not entitled to the rights claimed because these rights were not conferred on them when they were made inferior proprietors.

The trial Court held that the plaintiffs were not entitled to the rights they now claim on account of the entries in the settlement wajibularz of 1904 and of 1925, that though plaintiffs enjoyed these rights occasionally, they have not enjoyed them as a custom for a sufficiently long time to be entitled to them and that they were bound by the entries made in the previous settlement and could not claim the rights now claimed.

The status of the inferior proprietor in the Saugor and Nerbudda territories, was defined in the following words by the Sudder Board of Revenue in 1854 :

" In landed properties where superior proprietary right of Talookdars or other persons of influence is clearly established to be co-existent with right of inferior land-owners, and the contract of settlement is accepted from the latter, malikana allowance in money only not exceeding 10 per cent on the revised jama shall be an additional item in the contract, payable, by the parties engaging, into the Government treasuries on behalf of the superior proprietors :" Nicholl's Law of the Central Provinces, para. 15, p. 398.

Secretariat letter No. 3784-175 dated 14th November 1874, affirmed the title of every sub-proprietor, in the Bilaspur District,

" not over a due proportion of the village waste but over the whole area, whether cultivated waste or jungle, comprised within the traditional boundaries of the village and over this area the sub-proprietor was declared to possess the same rights as the zamindar himself enjoyed over the rest of his estate."

This decision of the Local Government was challenged by the Zamindar of Lapha in a civil suit and was affirmed by this Court in *Daharaj Singh* v.

Tribhuan Singh (1). An inferior proprietor in the Chanda District must be presumed to have same rights and privileges as an inferior proprietor in the other districts of the province enjoys, unless it could be shown that at the time of the grant, his rights were defined and he was not given the rights which he is now claiming

Amagarh Chowki was formerly in the Chanda District and was transferred to Drug in 1907. The first regular settlement of the zamindari was made in 1862-69 by Col. Lucie Smith. It appears from the following pages, on page 4 of the final report on the re-settlement of the Raipur and Drug Zamindaries in 1921-24 that no inferior proprietors were created in 1862-69 :

"Enquiries into proprietary rights were made but no inferior proprietors were created though considerable areas were given malik-makbuza status, the grantees being mostly thekadars who had held for many years or who had made substantial improvements. Unfortunately in the absence of records, and maps, these grants were lost sight of, so that when survey took place in 1895-96 these holdings were, if cultivated by the thekadar recorded as *sir* and if cultivated by tenants as occupancy land. This mistake was set right so far as possible by Mr. Henmingway in 1903."

In 1903, inferior proprietary right was conferred on the malik makbuza holder of Deosur as appears from the following passage, on p. 21 of the Drug and Raipur Zamindari Settlement Report:

"Twenty-three villages in eight zamindaries are held in inferior proprietary right. Of these, ten in Kaursa are held by a Gond family, the head of which is called the Shikmi Zamindar of Bhurkoni. These villages were originally grants for worship, service or maintenance but at first settlement the holders were found to occupy such strong positions that they were made inferior proprietors. Mouza Deosur in Amagarh Chowki is an exceptional case. Over the whole area of this village malik makbuza rights had been conferred at Col. Lucie Smith's Settlement."

Apart from the wajib-ul-arz of 1904, there is nothing on record to show that at the time of the grant of inferior proprietary right in this village. any conditions were imposed, which curtailed or cut down the rights which an inferior proprietor ordinarily enjoys The appellants have urged that the Settlement Officer could not override the rights of the plaintiffs as inferior proprietors by an entry in the Record-of-Rights (wajib-ul-arz), but before us it is admitted that if the waji-bul-arz of 1904 prepared about the time when the inferior proprietary rights were granted, records restrictions on the rights of the inferior proprietors this will justify a finding that by the grant the inferior proprietor was not given all the rights and privileges which the inferior proprietors usually enioy. The question which we have to consider is, therefore, whether the wajib-ul-arz of 1904 clearly recorded any restrictions on the rights of the inferior proprietor of mouza Deosur. If this question is answered in the negative, the presumption that the ordinary rights of an inferior proprietor were granted in the case of mouza Deosur will take effect.

The first point to be considered in this appeal is whether the wajib-ul-arz of 1904 placed any restrictions on the rights of an inferior proprietor or defined them properly in view of the new right which was conferred in that settlement. The following remarks about the wajib-ul-arz of 1904, which are to be found on p 44, para. 42 of the recent settlement report, give some idea of entries in that record :

"The stereotyped wajib-ul-arz of last settlement has been abandoned. It did not accurately describe village customs and on many points was a dead letter."

A study of the wajib-ul-arz of mouza Deosur shows that it is to a large extent stereotyped, for example Cl. 11, Sub-Cl. (2) gives details of rights of a patel who is not an inferior proprietor, whereas such a statement was not necessary in a wajib-ul-arz prepared expressly for mouza Deosur.

The heading to Cl. 19, Part 2, wajib-ul-arz for mouza Deosur, which defined the relations of the zamindar with the thekadars patels and ryots ran as follows :

"Rights of inferior proprietors, maktadars and mokasdars over the village waste and forest profits."

Nothing hat been recorded under this heading. If the inferior proprietor was not going to exercise any rights over the village waste and the forest profits, the entry in this column would have clearly mentioned that fact. In the absence of such an entry, it cannot be presumed, that the inferior preprietor was deprived of any rights, which are ordinarily enjoyed by inferior proprietors.

(1) [1889] 2 C. P. L. R. 25.

The learned Sub-Judge made a mistake in reading words into the wajib-ul-arz which do not exist there and in drawing an inference from certain figures, which do not mean anything. In Ex. P-8 the following figure " * * * " appears while in Ex. D. 7, a line like this—appears. None of these can be said to mean 'nil.' If the Settlement Officer wanted to say that the inferior proprietor had no rights, he could have easily used the word (नहीं) instead of leaving the entry blank and not writing anything under that heading. Another mistake which the learned Sub-Judge made was regarding the interpretation he put on Cl. 2, sub-Cl. 2, of the wajib-ul-arz regarding village waste The clause runs as follows :

"Waste land may not be enclosed by other patels or tenants except for purposes of cultivation, and provided there has been no express prohibition on the part of the zamindar. An enclosed plot which is not cultivated within six months of its enclosure reverts to the village waste. But patels may enclose waste land for the planting of groves or the formation of fodder reserves or grass birs with the approval of the zamindar, and tenants may do so with the permission of the patel, subject to the veto of the zamindar if the patel does not hold the village as inferior proprietor."

This entry does not mean that the inferior proprietor can reserve land for grass with the permission of the zamindar. According to this entry, the zamindar has got the right of veto, if the necessary permission was given by the patel, but he has not such right if the inferior proprietor gave the permission. The entries in Cls. 2 and 19, wajib-ul-arz of 1904 do not curtail the ordinary rights of the inferior proprietor and therefore the entries in the wajib-ul-arz of 1925, which curtail the ordinary rights of an inferior proprietor are incorrect.

The learned advocate for the zamindar argued that the jurisdiction of the civil Court is barred under S. 220 (h), Land Revenue Act, as the plaintiff in this suit questions the validity of an agreement entered into, in the sub-settlement. The other side asserted that they are not challenging, in this suit, their liability to pay Rs. 90, which they are willing to pay. No question as to the validity of any engagement with the Government for the payment of land revenue or of any agreement entered into by superior or inferior proprietors in a settlement or sub-settlement arises in this case and, therefore, the jurisdiction of the civil Court is not excluded.

We therefore hold that the plaintiffs as inferior proprietors are entitled to the declaration claimed by them. The decree of the lower Court is set aside and in its place, a decree will be passed in plaintiffs' favour, holding that the plaintiffs have full proprietary rights over the forest and waste lands and the zamindar has no right to them.

The appeal succeeds and is allowed with costs. We fix Rs 400 as pleader's fees in this case.

M.R./R.K. *Appeal allowed.*

A. I. R. 1929 Nagpur 141

MACNAIR, A. J. C.

Guman Singh—Appellant.

v.

Pyarelal and *others*—Respondents.

Second Appeal No. 250 of 1927, Decided on 29th November 1928, against decree of Addl. Dist. Judge, Raipur, D/- 22nd March 1927.

Easements Act, S. 60—Part only of a work of permanent character executed—License cannot be revoked.

A license can not be revoked even when part only of a work of a permanent character has been executed by the licensee : *A. I. R.* 1924 *Nag.* 254, *Rel. on.* [P 142 C 1]

N G. Bose—for Appellant.

D N. Chaudhary—for Respondents.

Judgment.—The plaintiff's father, a malgujar, permitted the defendant to build temples on a plot in the plaintiff's village. The lower appellate Court has found that the plaintiff's father granted on express license to build the temples and as the defendant on the faith of that license constructed work of a permanent character and spent about Rs. 1,500, the license cannot now be revoked. The suit for possession of the plot was, therefore, dismissed.

In appeal it is first urged that the defendant pleaded a gift and there was no issue regarding a license. There was a clear issue:

"Did the defendant construct the temples on the site with the consent of plaintiff's father ? "

This ground, therefore, fails.

It is next urged that the plaintiff by a notice, dated 6th August 1923, revoked the license, at a time when the defendant had done little work and the plaintiff was entitled to revoke the license, but it is quite clear that the defendant had incurred considerable expense on the

work of building the temple before the notice was given. The reasoning in *Vithaldas* v. *Goma* (1) will apply when part only of the work is completed at the time the licensor desires to revoke the license. The appeal fails and is dismissed. Costs on appellant.

M R/R K. *Appeal dismissed.*

(1) A. I. R. 1924 Nag. 254=20 N. L. R. 60.

** A. I. R. 1929 Nagpur 142 Full Bench.

MACNAIR, OFFG. J. C. AND KINKHEDE AND STAPLES, A. J. Cs.

Bapu—Appellant.

v.

Gulabchand and *others*—Respondents.

Misc. Appeal No. 34 of 1927, Decided on 21st March 1929 against the order of the Dist. Judge, Wardha, D/- 21st April 1927 in Civil Appeal No. 52 of 1926

** **Civil P. C., O. 22, R. 4—Defendant dying between preliminary and final decree—R 10 and not R. 4, applies—Civil P. C., O. 22, R. 10.**

Rule 10, O. 22, applies in a case in which the death of the defendant occurs between the passing of the preliminary and final decrees of a suit and not R. 4 : *A. I. R.* 1921 *Nag.* 82 *affirmed* ; *A. I. R.* 1924 *P. C.* 198 ; *A. I. R.* 1928 *Mad.* 914, (*F. B.*); *A. I. R.* 1927 *Oudh* 156; *Rel. on* ; *A. I. R.* 1927 *All.* 272, *Diss. from*, *A. I. R.* 1923 *Mad.* 237, *Held overruled by* 51, *Mad.* 701=*A. I. R.* 1928 *Mad.* 914=112 *I. C.* 116, (*F. B.*). [P 144 C 1]

H. D. Mulak—for Appellant.

V. Bose, *G. S. Lule* and *M. R. Bobde*—for Respondents

Prideaux, A. J. C.—It was held by Hallifax, A J. C., in *Tularam* v *Tukaram* (1) that

"the first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving."

My learned brother followed the Calcutta High Court in this view : see *Surendra Keshub Roy* v. *Khetter Krishto Mitter* (2). I have doubts as to the correctness of this case ; for it seems to me that O. 22, R. 4 applies where a defendant dies after the preliminary decree and before the final decree in a suit for dissolution of partnership or for accounts or a suit on a mortgage. In *Ali Bahadur Beg* v. *Rafiullah* (3) two Judges disagree with the ruling in *Tularam* v. *Tukaram* (1) and in support of their opinion they mention *Lakshmi Achi* v. *Subbarama Ayyar* (4), *Subbarayudu* v. *Ramadasu* (5).

I would ask for a Full Bench decision on the question whether R. 4, O. 22 or R. 10 of the same order applies in a case in which the death of the defendant occurs between the passing of the preliminary and final decrees in a suit.

Opinion.

Kinkhede, A. J. C.—The point referred for the decision of the Full Bench by the order of reference made by Prideaux, A. J C., is whether R. 4, O. 22, Civil P. C., or R. 10 thereof, applies in a case in which the death of the defendant occurs between the passing of the preliminary and final decrees in a suit. This Court's reported decision in *Tularam* v. *Tukaram* (1) favours the view that R. 10 applies and that there is no abatement of the suit in such a case.

The point has been discussed at great length before the Full Bench. Having considered the cases cited by the counsel on each side, I am of opinion that the view taken by this Court in *Tularam* v. *Tukaram* (1) is good law, as it has the support of the ruling of their Lordships of the Privy Council in *Lachmi Narain* v. *Balmukund* (6) and is in accord with the view taken in *Lukhpati Kuar* v. *Daulatsingh* (7) and in the Full Bench decision of the Madras High Court in *Perumal Pillai* v. *Perumal Chetty* (8) where the whole case law has been discussed.

My reply to the reference will, therefore, be that the view of law taken by this Court in 17 *N. L. R.* 81 is sound, inasmuch as where the death of a party to a suit takes place after the passing of the preliminary decree, there can be no abatement of the suit for the simple reason that the right to sue merges in the decree and the decree conclusively determines the rights of the parties thereto.

Macnair, Offg. J. C. and Staples, A. J. C.—(After stating the order of reference) the udgment proceeded). The facts of the case are not disputed and may be briefly stated. A preliminary

(1) A. I. R. 1921 Nag. 82=17 N. L. R. 81.
(2) [1903] 30 Cal. 609=7 C. W. N. 517 (F.B.)
(3) A. I. R. 1927 All. 272=49 All. 310.
(4) [1915] 39 Mad. 488=28 M. L. J. 491=29 I. C. 142=(1915) M. W. N. 327.
(5) A. I. R. 1923 Mad. 237=45 Mad. 872.
(6) A. I. R. 1924 P. C. 198=4 Pat. 61=51 I. A. 321 (P. C.).
(7) A. I. R. 1927 Oudh 156=2 Luck. 464.
(8) A. I. R. 1928 Mad. 914=51 Mad. 701 (F. B.).

decree for foreclosure was passed on the 30th October 1920 in favour of Sobhagmal, Ramaji, Krishnaji, Venkappa and Narayan against Sadasheo. The decree-holders Narayan, Ramaji and Sobhagmal died and the names of the first two were struck off from the record as they were represented by the decree-holders already on record. Upon Sobhagmal's death his widow Tulsabai was brought on record and the decree-holders then remaining were Tulsabai, Krishnaji and Venkappa. Sadasheo paid part of the decretal amount and time was extended up to December 1923. No further payment appears to have been made. Meanwhile Tulsabai died and the judgment-debtor Sadasheo also died. On 7th September 1925 Gulabchand, who claimed to be the legal representative of Tulsabai, Krishnaji and Venkappa, made an application for making the decree final and also made another application that Gulabchand should be brought on the record in place of the decree-holder Tulsabai, and that the present appellant Bapu should be brought on the record as the judgment-debtor in place of his deceased father Sadasheo The trial Court held that, as Sadasheo died on 4th November 1924, i. e, more than three months before the application was made, the suit had abated against his legal representative Bapu. The trial Court further held that the suit should be deemed to have abated as far as Gulabchand, the legal representative of Tulsabai, was concerned, as Tulsabai died on 3rd April 1924 The Sub-Judge based his findings on the view that the case was governed by O. 22, R. 4, sub-R (3), and referred to the ruling in *Narayan* v. *Mt. Dhudabai* (9). On appeal, however, the District Judge has held that that ruling had no application and followed the ruling in *Tularam* v. *Tukaram* (1) holding that O. 22, R. 10 applied and not O. 22, R. 4; and that therefore the application was not barred, nor did the suit abate against the legal representative of Sadasheo

The only point to be decided now in this reference is whether O 22, R. 4, should apply in a case of this kind, where the death of a party takes place after the passing of the preliminary decree but before the decree is made absolute; or whether O. 22, R 10 should apply. It may be noted that there is now no room for the contention that R. 10 cannot apply in the case of the death of one of the parties to a suit; and the view taken in the two Bombay cases referred to in *Tularam* v. *Tukaram* (1), namely *Rajaram Bhagwat* v. *Jibai* (10) and *Jamnadas Chabildas* v. *Sorabji Kharsedji* (11), cannot now be considered as correct. The only point in dispute is whether, after the preliminary decree has been passed, it can be held that the right to sue subsists so as to bring the case within R. 4, O. 22 or not. At p 83 of the ruling in *Tularam* v. *Tukaram* (1) Hallifax, A. J. C has held that, after the passing of the preliminary decree there is no further right to sue in the plaintiff; and this view, in our opinion, appears to be correct. It is true that the matter is one upon which there is a conflict of authority, and many rulings can be cited on either side. The matter, however, appears to be decided by the ruling in *Laehmi Narain Marwari* v. *Balmukund Marwari* (6), in which their Lordships of the Privy Council have held that, after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. Their Lordships at p. 66 of that ruling state :

"The parties have on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

In our opinion, their Lordships have made it clear that after a decree has once been made, the right to sue does not subsist and the suit cannot abate. It may be noted that after this decision of the Privy Council the Madras High Court, which formerly took the opposite view, as may be seen from the rulings in *Lakshmi Achi* v. *Subbarama Ayyar* (4) and *Subbarayadu* v *Ramadasu* (5) has now adopted the view that a preliminary decree determines the rights of the parties This has been laid down by the Full Bench of that Court in *Perumal Pillay* v. *Perumal Chetty* (8), which overrules *Subbarayudu* v. *Ramadasu* (5) We would especially refer to the opinion of Coutts-Trotter, C. J., at pp. 709, 710 and 711 of the later ruling. It may be noted that the ruling in *Ali*

(9) A. I. R. 1925 Nag. 209=21 N. L. R. 98.

(10) [1885] 9 Bom. 151.

(11) [1892] 16 Bom. 27.

Bahadur Beg v. *Rafiullah* (3), which has been quoted by Prideaux, A. J. C., in his order of reference, relied upon *Lakshmi Achi* v. *Subbarama Ayyar* (4) and it must be held that that ruling has been overruled by *Perumal Pillai* v. *Perumal Chetty* (8). In the ruling reported in *Lakhpati Kuar* v *Daulat Singh* (7) it has been held that no question of the right to sue can subsist in a suit after a decree is delivered by the Court in that suit. We would quote the following passage from that ruling :

"Decisions of almost all the High Courts in India were cited in support of the view that proceedings after the preliminary decree and before the final decree are proceedings in the suit. We are of opinion that the precise question which arises for determination in the present case is not answered on the view of the rule of procedure taken in those decisions. The question which we have to decide is whether the provisions of sub-R. (3), R. 4, O. 22, Civil P. C., applies to a suit in which a decree of the Court preliminary in its legal characteristics has come into existence and death occurs in the rank of the defendants subsequent to such a decree. According to our judgment the said sub-rule has no application to such a case. The word "suit" in O. 22 must be given a restricted meaning. We think it means only such proceedings as are antecedent to the passing of a decree, preliminary or otherwise. This interpretation is supported by the language and import of the several rules of the said order. The first rule is that the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives. Obviously no question of "the right to sue" can subsist in a suit after a decree is delivered by the Court in that suit. As soon as the Court pronounces judgment the plaintiff's original right to sue disappears if he has failed and it merges in the decree if he has won : *transit in rem judicatam.*"

The view taken, then, by Hallifax, A. J. C , in 1920 is correct according to the later decision of the Privy Council in *Lachmi Narain Marwari* v *Balmukund Marwari* (6) and that decision has now been followed by the Madras High Court and the Chief Court of Lucknow. So far, then, from seeing any reason to dissent from the view taken by Hallifax, A. J. C., in *Tularam* v. *Tukaram* (1) we are of opinion that it is correct and that it should be followed. We therefore answer the reference made to this Full Bench by saying that R. 10, O. 22 applies in a case in which the death of the defendant occurs between the passing of the preliminary and final decrees of the suit, and not R. 4 of that order.

R.K. *Reference answered.*

A. I. R. 1929 Nagpur 144

STAPLES, A. J. C.

Nyajmohomad Khan—Applicant

v.

Babulal—Non-applicant.

Civil Revn. No 214-B of 1928, Decided on 31st January 1929, against order of Sm. C. C. Judge, Darwha, D/- 3rd July 1928 in C. S. No. 385 of 1927.

Provincial Small Cause Courts Act, Art. 35 (ii)—Suit for money—Plaint alleging that wrong figure was inserted in acknowledgment in order to bring suit on previous transaction — Suit does not come under Art. 35 (ii).

A suit was brought for money claim. There was an allegation in the plaint that the defendant had got a wrong figure inserted in the acknowledgment, but that was only made a ground for bringing the suit on the previous account and not on the subsequent acknowledgment.

Held. that the case did not fall under Art. 35 (ii). [P 144 C 2]

V. R. Dhok—for Applicant.

Order.—The Judge of the Small Cause Court, Darwha, after hearing the case and taking evidence returned the plaint to the plaintiff for presentation to the proper Court instead of delivering judgment. The procedure, in any case, seems to be incorrect, and further the order returning the plaint is, in my opinion, wrong. The suit was brought for a money claim, and not for compensation on account of any offence or wrongful act. It is true that there was an allegation in the plaint that the defendant had got a wrong figure inserted in the acknowledgment, but that was only made a ground for bringing the suit on previous account and not on the subsequent acknowledgment. No compensation or damages of any kind were claimed for the wrongful act of the defendant, and only the amount due on the original transaction was claimed. The view taken by the lower Court, that the case fell under Art. 35 (ii) of the Small Cause Courts Act, is clearly mistaken and cannot be upheld. The order of the lower Court returning the plaint for presentation to the proper Court is therefore set aside and instead the Small Cause Court is directed to take back the case on its own file and to dispose of it according to law. Costs of this application will be borne by the non-applicant; but as he did not appear and contest the case I fix pleader's fees at Rs. 10 only.

S.N./R.K. *Order set aside.*

**A. I. R. 1929 Nagpur 145

MACNAIR, OFFG. J. C. AND STAPLES, A. J. C.

Naraindas—Applicant.

v.

Nenu—Non-applicant.

Civil Ref. No. 274-B of 1927, Decided on 5th March 1929, Reference made by 2nd Cl. Sub-J., Chandur.

** Contract Act, S. 134—Omission of creditor to sue principal debtor, within period of limitation, does not discharge surety.

The omission of a creditor to sue the principal debtor, within the period of limitation prescribed for a suit against the debtor, does not discharge the surety under S. 134 : 2 *N. L. R.* 42 ; 11 *All.* 310 ; 24 *All.* 504, *Disappr. A. I. R.* 1924 *Nag.* 411; 33 *Mad.* 308 ; 7 *Bom.* 146; 6 *Cal.* 340; 1 *Mad.* 228; *Carter* v. *White*, (1883) 25 *Ch. D.* 666; *Samuell* v. *Howarth*, 3 *Mer.* 272, *Ref.* 5 *Bom.* 647: 12 *Cal.* 330, *Dist.* [P 148 C 2]

G. V. Deshmukh—for Non-applicant.

Order of Reference:—

Kolhatkar, A J. C.—This is a reference under O. 46, R. 1, Civil P. C., made by the 2nd Class Sub-Judge of Chandur, invested with powers of a Small Cause Court. A creditor instituted a suit in his Court against the surety alone for recovery of the debt due on a pro-note without impleading the principal debtor. On the date of suit claim against the principal debtor was in time, but when the question of the defendent's liability for the debt came for consideration, the said claim against the principal debtor was barred by time. He has therefore referred the following legal point to this Court :

(1) Whether the creditor can sue the surety alone in absence of any provision in the guarantee to the contrary, and is the surety liable in law ?

The Judge who has made this reference observes that the decisions in *Mahomed Shareef* v. *Chaitu* (1) and *Abde Ali* v. *Askaran* (2) are conflicting and cannot be reconciled, and that in his opinion a creditor can sue the surety alone even though his claim against the principal debtor is barred by limitation.

The head-note in *Abde Ali* v. *Askaran* (2) regarding creditor's omission to sue the principal debtor within the statutory period of limitation and discharge of the surety is rather misleading. The matter involved in that portion of the head-note was neither considered nor decided in that case. The observation in regard to them was only incidentally made in the following sentence appearing at p. 141 while dealing with the question of limitation :

"Although the omission of a creditor to sue the principal debtor within the statutory period may not discharge the debtor and the surety under S. 134, Contract Act,: see *Subramania Aiyar* v. *Gopal Aiyer* (3), yet it seems to me that the payment of interest by the debtor within limitation under S. 20, Lim. Act does not give a fresh starting point for limitation against the surety."

It will be quite clear from the above sentence and the absence of any reference in any other part of the judgment to the question whether the creditor's omission to sue the principal debtor within the period of limitation does or does not discharge the surety, that the said question was neither raised nor considered by the learned Judge who decided the case, and that consequently the part of the head-note referred to above cannot be regarded as having reference to a considered decision.

As at present inclined, I find myself in full accord with the view taken *in Subramania Aiyar* v. *Gopala Aiyar* (3) and the several reasons given therein for supporting the view. That view is in direct conflict with that taken in *Mohomed Shareef* v. *Chaitu* (1), a published ruling of this Court. The first and foremost reason for the view that a creditor's omission to sue the principal debtor within the period of limitation prescribed for a suit to be instituted against a debtor does not discharge the surety is that the said omission cannot have the legal consequence of discharging the principal debtor. It is only if the said omission can have such a legal consequence that the surety will be discharged under the provisions of S. 134, Contract Act. It is quite manifest from the provisions of S. 28 Lim. Act that the only rights which are extinguished by virtue of the determination of the period of limitation are those concerning property, possession of which is claimed. It is only in the case of such property that limitation not only bars the remedy by action, but also extinguishes the rights in regard to such property. It has not this double effect in the case of personal actions, such as

(1) [1906] 2 N. L. R. 42.
(2) A. I. R. 1924 Nag. 411=20 N. L. R. 140.
(3) [1910] 33 Mad. 308=7 I. C. 898=20 M. L. J. 693.

an action for recovery of a debt. In case of such personal actions, only the remedy by action is barred by limitation. But the right forming the basis of the action remains unaffected. This view finds material support from S. 60, and Cl. (3), S. 25, Contract Act. The former section speaks of a debt barred by limitation as a lawful debt and as a debt actually due and payable to the creditor towards which a creditor can legally appropriate a repayment. Limitation cannot therefore be regarded as having had an effect of extinguishing the debt. It is only on the extinguishment of a debt that a principal debtor will be discharged. So long as the debt continues to have a legal existence no question of the discharge of a principal debtor can arise. Again under Cl. (3), S. 25, Contract Act, a barred debt constitutes good consideration for a written promise to pay, signed by the party liable to be charged therewith, and cannot consequently be regarded to have been extinguished after the expiry of the period of limitation.

The second reason is furnished by S. 137, Contract Act. The said section provides that mere forbearance on the part of the creditor to sue the principal debtor does not, in absence of any provision in the guarantee to the contrary, discharge the surety. The word "forbearance" is not qualified by a phrase limiting the period of such forbearance. In absence of such a qualifying phrase forbearance may be exercised for any length of period. It may be either for a period of limitation or for a period exceeding it. The mere fact of the illustration to the section mentioning one year as the period of forbearance does not seem to me to involve the implication that the forbearance is to be exercised for a period short of the period of limitation. Had the legislature intended to thus limit the period of forbearance, it would have expressed that intention in the section itself.

The decision in the Madras case rests on both these reasons; while those in *Hajarimal* v. *Krishnarao* (4), *Sankana Kalana* v. *Virupakshapa Ganeshapa* (5) and *Krishto Kishori* v. *Radha Roman* (6) in which the same view is expressed rest on the second reason. There are thus on the one hand the three High Courts of Bombay, Calcutta and Madras in favour of the view that in such circumstances the surety is not discharged from liability to the creditor; while the contrary view is maintained by the Allahabad High Court in *Radha* v. *Kinlock* (7) and *Ranjit Singh* v. *Naubat* (8) and it is adopted in *Mahomed Shareef* v *Chaitu* (1).

For the reasons set forth above I find myself unable to agree with the view taken in *Mahomed Shareef* v. *Chaitu* (1) a published ruling of this Court. My disagreement necessitates a reference to a Bench of the legal question involved. I would therefore refer the following question to a Bench and would request the Judicial Commissioner to constitute a Bench for the purpose and to refer the said question to it:

"Whether the omission of a creditor to sue the principal debtor within the period of limitation prescribed for a suit against the debtor does not discharge the surety under S. 134, Contract Act."

Opinion.

The question referred to the Bench is this:

"Whether the omission of a creditor to sue the principal debtor within the period of limitation prescribed for a suit against the debtor does or does not discharge surety under S. 134, Contract Act."

In a published ruling of this Court *Mahomed Shareef* v. *Chaitu* (1) the question has been answered in the affirmative. In that case Drake-Brockman, then A. J. C., gave full reasons for his decision and these reasons require careful consideration.

At the date of the decision of the case the view that the legal consequence of such omission by the creditor was a discharge of the principal debtor had been taken by the Allahabad High Court in *Radha* v. *Kinlock* (7) and in *Ranjit Singh* v. *Naubat* (8). Sir Frederick Pollock in "The Indian Contract Act." p. 398, considered that this view was correct. The Bombay High Court in *Hajarimal* v. *Krishnarao* (4) did not think it necessary to decide this point. The Calcutta High Court in *Krishto Kishori Chowdharain* v. *Radha Roman* (6) followed the Bombay case, and it appears that in Cunningham Shephard on "The Indian Contract Act,"

(4) [1880] 5 Bom. 647.
(5) [1882] 7 Bom. 146.
(6) [1886] 12 Cal. 880.
(7) [1889] 11 All. 310=(1889) A. W. N. 94.
(8) [1902] 24 All. 504=(1902) A. W. N. 166.

9th edn, the reasoning of the Bombay and Calcutta rulings was approved. There was, therefore, authority for this view and the opposite view was not held by any High Court or approved in any text book.

The main basis of the decision of *Mahomed Shareef* v. *Chaitu* (1) is that this view is correct and that it follows from the plain words of S. 134, Contract Act, that the surety is discharged. There are, however, very strong reasons for holding that the omission of the creditor to sue the principal debtor within the statutory period has not the legal consequence of his discharge. These reasons are well expressed in *Subramania Aiyar* v *Gopala Aiyar* (3), (at p 310). It is there stated :

"Does the running of the statutory period of time extinguish the debt as well as bar the remedy? Mr. Mitra in his 'Tagore Lectures on Limitation,' 4th edition, says at p. 14, 'as to rights in personam, it has been held that a right to receive payment of a debt does subsist even after the remedy by action has been barred.' The decisions in *Mokesh Lal* v. *Busun: Kumaree* (9) are clear authority in favour of this view. See also the learned discussion of the question by Holloway, J, in *Valia Tamburatti* v. *Vira Rayan* (10). There is hardly any room for doubt in the face of the express language of S. 23, Lim. Act, 15 of 1877, which merely extinguishes the right to property when the period is determined for suits for recovery of such property. Whenever personal actions are barred, the rights themselves are not extinguished. That the principal debtor is not discharged by lapse of time may also be gathered from S. 25, Cl. 3, and S. 60, Contract Act, 9 of 1872. A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. It is impossible to regard a debt as discharged by limitation when S. 60, Contract Act, speaks of a barred debt as a lawful debt, actually due and payable to the creditor. Unless a law of limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor. Limitation which merely bars the remedy is never spoken of in works of jurisprudence as a mode of discharging an obligation. Holland, enumerating the modes of termination of rights in personam, does not refer to limitation as one of them: see Holland's 'Jurisprudence,' 10th edition, pp. 303 to 311. Anson in his work on 'Contracts' treating of the 'discharge' of contracts says: 'at common law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character unless either from the nature of the contract, or from its terms, it be limited in point of duration. But though the rights possess this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished' : (see Anson's 'Law of Contract,' 11th edition, p. 343)."

We agree with this reasoning and hold that the omission we are considering is not such an omission as is contemplated by S. 134, Contract Act. We remark that Sir Frederick Pollock has himself taken part in the preparation of the 5th edition of his work on the Contract Act (Contract and Specific Relief Acts by F. Pollock and D. Mulla) and on p. 577 of this edition it is stated that apparently the opinion opposite to that taken by the Allahabad High Court must be accepted as correct.

If S. 134, Contract Act, does not decide the question under reference, there appears no reason why great weight should not be given to the English decisions on the point and to the opinion of commentators on the English Law. The law in England appears to be settled. We again quote from *Subramania Aiyar* v. *Gopala Aiyar* (3) (at 310) :

"Does the omission of the creditor to sue the principal debtor within the statutory period discharge the debtor (sic. probably 'surety is intended)? We think not, says Lindley, L. J., in *Carter* v. *White* (11), (at 672). 'Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary the true principle is that mere omission to sue does not discharge the surety because the surety can himself set the law in operation against the debtor.' Cotton, L. J., expressed himself to the same effect, and Fry, L. J. concurred. This statement of the law has been accepted without question. See 'Chitty on Contracts,' 14th edition, p. 465, and 'Barby and Bosanquet on Limitation,' 2nd edn. p. 177."

Drake-Brockman, A. J. C. considers it to be settled that in ordinary cases it is the business of the surety to see that the principal pays, not that of the creditor ; but he thinks that this principle cannot be extended to cover a case where the creditor has allowed his claim against the principal debtor to become time-barred as such an extension would be difficult to reconcile with S. 135, Contract Act, which discharges the surety if there is a contract between the creditor and the principal debtor whereby the creditor promises to give time to, or not to sue, the principal debtor. Now the reason of the rule laid down in S. 135 is thus stated by Lord Eldon:

(9) [1831] 6 Cal. 340=7 C.L.R. 121.
(10) [1877] 1 Mad. 228.
(11) [1883] 25 Ch. D. 666=54 L.J. Ch. 138=50 L.T. 670=32 W.R. 692.

" The surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract " *Samuell* v. *Howarth* (12).

Under the original contract the surety could, at any time after the debt became due, call upon the principal to liquidate it and if he neglected to do so himself pay the debt and at once have recourse to his remedy against the principal debtor. By the contract to give time, this right is impaired. The omission of the creditor to sue the principal debtor has no such effect: there is no variation of the original contract to the detriment of the surety's rights. We are therefore respectfully of opinion that the provisions of S. 135, Contract Act, furnish no guide to the decision of the question referred to us.

The basis of the decisions in *Hajarimal* v. *Krishnarau* (4) and *Krishto Kishori Chowdharain* v, *Radha Roman* (6) was that S. 137, Contract Act prevented the application of S. 134. We do not need to consider whether this is the case as, in our opinion, there is no inconsistency between the provisions of S . 137 and those of S. 134. It is hardly possible to discuss the question: What would the framers of the Act have intended by the statement that mere forbearance on the part of the creditor to sue the principal debtor does not discharge the surety if they had stated in a previous section that by such forbearance in some cases the surety was discharged? We state, however, that the arguments of Drake-Brockman, A. J. C. appear to us to have great force: there is difficulty in holding that S. 137 was intended to override S. 134 especially as S. 137 appears designed to explain and amplify S. 135.

We respectfully disagree with the decision in *Mahomed Shareef* v. *Chaitu* (1). As we have indicated Drake-Brockman, A. J. C. received no encouragement from existing text books or rulings to reach the decision we consider correct. We consider that, apart from the provisions of S. 137, Contract Act, it must be held that the omission of a creditor to sue the principal debtor within the period of limitation prescribed for a suit against the debtor does not discharge the surety under S. 134, Contract Act. There is no difficulty in holding that S 137 deals with such an omission when this interpretation is entirely consistent with the other provisions of the Contract Act. We add that our opinion is in full agreement with the view taken in English cases and the provisions of the Contract Act so far as they affect this question do not appear to differ in any way from the principles on which the English decisions are based.

K.N./R K. *Reference answered in negative.*

(12) 3 Mer. 272.

** A. I. R. 1929 Nagpur 148

MOHIUDDIN AND STAPLES, A. J. Cs.

Balaji—Defendant—Appellant.

v.

Gopal—Plaintiff—Respondent.

Second Appeal No. 426 of 1927, Decided on 11th March 1929, against decree of Addl. Dist. Judge, Chanda, D/- 11th April 1927, in Civil Appeal No. 8 of 1927.

** **(a) Civil P. C., O. 21, R. 11 (2-j) (v)—Rateable distribution is not a form of execution—Civil P. C., S. 73.**

An application, praying only for rateable distribution is not a valid application for execution. Civil Procedure Code does not recognize an application for rateable distribution as such. A decree-holder, to obtain rateable distribution under S. 73, must make an application for execution praying for execution of his decree in one of the ways mentioned in O. 21, R. 11, before the receipt of assets by the Court: *A. I. R.*-1921 *Nag.* 5, *Appr.* [P 150 C 1]

** **(b) Civil P. C., S. 73—Analogy of what might or might not be done to save limitation under Art. 182, Lim. Act, cannot be applied to application for execution according to S. 73.**

An application which does not specify the way in which the assistance of the Court sought for executing the decree according to O 21, R. 11 is not an application for execution according to law, even though it may be application, which can be considered as a step in aid of execution so as to save limitation. [P 150 C 1]

A creditor, claiming rateable distribution on the strength of a money decree, must himself ask for attachment and sale of the property or for execution of his decree by one of the modes specified in O. 21, R. 11 : *A. I. R.* 1921 *Nag.* 5, 34 *Mad.* 25 and *Appr.*; 11 *C. P. L. R.* 157, *Ref.* [P 150 C 1, 2]

M. R. Bobde—for Appellant.

D. T. Mangalmoorti—for Respondent.

Opinion.

(*Dated 8th February* 1929.)

In this appeal a reference has been made by Prideaux, A. J. C., in the following terms :

"The question is whether the view expressed by Kotval, A. J. C., in *Dwarkadas* v. *Ghasiram* (1) is not too narrow. Is it necessary for a creditor, claiming on the strength of a money-decree rateable distribution from the proceeds of a sale of his debtor's property about to take place at the instance of another creditor, to ask himself for attachment and sale of that property, or is it sufficient to merely ask for rateable distribution? The question is of general importance and I would ask for a Bench to decide it."

The facts of the case have been fully stated in the judgments of the lower Courts and are not disputed. It is admitted that the respondent Gopal was executing his decree against Sakharam in Civil Suit No. 170 of 1924 and that he had attached immovable property belonging to Sakharam, and an auction-sale was held on 22nd May 1925. On the day of the sale the appellant Balaji, who had obtained a decree against Sakharam in Civil Suit No. 217 of 1924, made an application for rateable distribution before the sale proceeds actually reached the Court. It may be noted that the Court, which tried both the Civil Suits Nos 170 of 1924 and 217 of 1924, was the same, namely the Court of the Subordinate Judge, Warora. The Subordinate Judge allowed the application for rateable distribution, and Balaji was awarded a sum of Rs. 198 out of the sale proceeds by way of rateable distribution. Gopal, thereupon, filed a suit for recovery of this amount plus Rs 16-3-0, costs in the proceedings for rateable distribution, on the ground that rateable distribution was wrongly allowed and that this sum should not have been paid to Balaji. The Sub-Judge, 2nd Class, Warora, who tried the suit, decreed the claim in favour of the plaintiff and that decree was upheld by the Additional District Judge, Chanda, on appeal. In second appeal to this Court a reference has been made as stated above.

The only point to be decided is whether the application by the appellant for rateable distribution can be held to be an application for execution within the meaning of S. 73, Civil P. C. In the ruling in *Dwarkadas* v. *Ghasiram* (1) (at p. 144) Kotval, A. J. C., has held that

"one of the conditions which must exist before a decree-holder may be entitled to a rateable distribution is that he must, prior to the receipt of assets, have applied to the Court by which the assets are held for execution of his decree : *Chuni Lal* v. *Jugal Kishore* (2)."

and that

"such an application must be in the form prescribed by O. 21, R. 11 (2)."

In the reference an opinion is called for as to whether this view is too narrow, i. e, it is questioned whether the application for execution must actually ask for attachment and sale of the property, which is already attached, or whether it is sufficient to ask for rateable distribution only. Kotval, A. J. C., has held that the application for execution must be in the form prescribed by O. 21, R. 11; and according to that order it must be stated in the application the mode in which the assistance of the Court is required; namely, whether :

"(i) by the delivery of any property specifically decreed ;

(ii) by the attachment and sale, or by the sale without attachment, of any property ;

(iii) by the arrest and detention in prison of any person ;

(iv) by the appointment of a receiver ;

(v) otherwise, as the nature of the relief granted may require."

It would seem, then, that, for an application for execution to be a valid application, there must be an application for some definite form of execution. Rateable distribution as such is not a form of execution; nor do we think that it can be included in Cl (j) (v) "otherwise, as the nature of the relief granted may require." It may be noted that, under the Civil Procedure Code, there is no application for rateable distribution as such. S. 73 only lays down that the assets shall be rateably distributed among all persons who have made applications to the Court for the execution of their decrees. It is not even necessary, according to that section, for the decree-holders to make an application for rateable distribution. All that is necessary is that the decree-holders shall have applied to the Court, which holds the assets, for execution of their decrees before the receipt of the assets. It may further be noted that the particulars given in sub-Cl. (a) to (i) O. 21, R. 11, Cl. (2), are only particulars which can be obtained from the register of civil suits and which

(1) A. I. R. 1921 Nag. 5=17 N. L. R. 143.

(2) [1905] 27 All. 132=1 A. L. J. 519=(1904) A. W. N. 128.

can be supplied by the reader of the Court. It is with regard to these particulars that applications have to be checked by the readers and returned for amendment, if found to be incorrect. There can hardly ever be a case of an application being amended with regard to the particular mode of execution sought. There is, we think, then, no force in the argument now put forward by the learned counsel for the appellant that the application asking for rateable distribution should have been returned for amendment.

We are of opinion, then, that an application that only prays for rateable distribution is not a valid application for execution within the meaning of O. 21, R. 11, that Civil Procedure Code does not recognise an application for rateable distribution as such and that, in order to obtain rateable distribution under S. 73, a decree-holder must have made an application for execution to the Court, praying for execution of his decree in one of the ways mentioned in O. 21, R. 11, before the receipt of assets by the Court. The learned counsel for the appellant has referred to Art. 182, Cl. 5, Lim. Act, and contended that it has been held that an application, even though it did not mention the way in which the decree-holder sought the assistance of the Court in executing his decree, is a step in aid to save limitation. This point seems to be one of some difficulty and there have been conflicting rulings in the matter; but, in any case, it seems that an application must at least ask for notice to be issued to the judgment-debtor to save limitation. We would refer in this connexion to two rulings of this Court in *Mukund Ram Sukal* v. *Harnarain* (3). The analogy, however, of what might or might not be done to save limitation under Art. 182 cannot, we think, be applied to an application for execution according to S. 73, Civil P. C. In the ruling in *Mukund Ram Sukal* v. *Harnarain* (3), Ismay, Offg. J. C., did not decide whether the application was made according to law for execution or only to take some step in aid of execution. We are of opinion that an application which does not specify the way in which the assistance of the Court is sought for executing the decree according to O. 21, R. 11, is not application for execution according to law, even though it may be an application which can be considered as a step in aid of execution so as to save limitation. We would refer to the ruling in *Arunachellam Chettiar* v. *Haji Sheek Meera Rowthar* (4) which has been referred to by Kotval, A. J. C., in the ruling in *Dwarkadas* v. *Ghasiram* (1), and would quote with approval the following passage from pp. 26 and 27 of the Madras ruling:

"But there is no authority for the view that a mere application for rateable distribution is an application for execution as contemplated by S. 295. On the other hand, it has been held that it is not: see *Ramjash Agarwala* v. *Guru Charan Sen* (5). S. 230 of the Code provides for an application for execution and S. 235 specifies the form and contents of that application. The mere application for rateable distribution, therefore, which does not comply with the requirements of S. 235 in form or substance can not be treated as the sort of application for execution falling within the scope of S. 295."

We are of opinion, then, that the question referred to this Bench must be answered in the negative, that the view expressed by Kotval, A J. C., in *Dwarkadas* v. *Ghasiram* (1) is correct and that a creditor claiming rateable distribution on the strength of a money decree must himself ask for attachment and sale of the property or for execution of his decree by one of the modes specified in O. 21, R 11 (j), Civil P. C.

Judgment.—(11*th March* 1929). In view of the opinion now given by the Bench, to which a reference was made, this appeal must fail. The view taken by the Courts below is correct and the appeal is, therefore, dismissed. All costs will be borne by the appellant.

S.N./R.K. *Appeal dismissed*

(3) [1898] 11 C. P. L. R. 157.

(4) [1910] 34 All. 25 = 7 I. C. 856 = (1910) M. W. N. 688.

(5) [1910] 11 C. L. J. 69 = 8 I. C. 105 = 14 C. W. N. 896.

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SUBHEDAR, A. J. C.

Chandrashekhar—Applicant.

v.

Rajaram—Non-applicant.

Criminal Revn. No. 404 of 1928, Decided on 20th March 1929, against order of Dist. Magistrate, Raipur, D/- 5th October 1928, in Criminal Appl. No 163 of 1928.

(a) Criminal P. C., S. 421 (1)—Appellate Court should give appellant reasonable op-

portunity of being heard in support of his appeal.

The provisions of S. 421(1) are mandatory. Before an appeal, filed under S. 419, is dismissed S. 42, (1) requires that the appellate Court should give the appellant before him or his pleader a reasonable opportunity of being heard in support of the same. [P 151 C 2]

(b) Criminal P. C., S. 421 (1)—Judgment need not be elaborate but must show that the evidence on record has been fully considered.

Judgment, dismissing the appeal summarily under S. 421 (1), need not be elaborate but must be such as to show on the face of it that the appellate Court has applied its mind to the consideration of the evidence on record and the pleas raised by the accused both in the Court below and in the memorandum of appeal : 33 *All.* 338 ; 13 *N. L. R.* 169 ; 36 *All.* 496 ; 8 *N. L. R* 84, *Ref.* [P 151 C 2]

K. A. Potey—for Applicant.

Order.—In this case upon a complaint of non-applicant Rajaram the applicant Chandrashekhar was convicted by the Additional Tahsildar and Magistrate 2nd Class, Mahasamund, of an offence under S 384, I. P C. and sentenced to pay a fine of Rs. 100.

Against this conviction and sentence an appeal was filed on 5th August 1928, in the Court of the District Magistrate, Raipur, and the memorandum of appeal, which is signed by two legal practitioners (Mr. Deshmukh, Bar-at-law and Advocate and Mr. Nalgundwar, pleader), attacked the judgment of the trying Magistrate on the following grounds :

" 1. That the lower Court erred in law in holding that the facts on record were sufficient to make out a case under S. 384, I. P. C. 2. That the lower Court was wrong in convicting the appellant on the mere statement of the complainant without any corroboration. 3. That the lower Court should have held that no injury as required by the I.P.C. was caused so as to bring it under S. 384, I. P. C. 4. That the lower Court should have believed the defence story."

The order-sheet of the appellate Court, as reproduced below, would show that the usual procedure of fixing a date for hearing applicant was intended to be followed in the beginning when the appeal was received in office. But the learned District Magistrate did not think it obligatory on his part to follow the same and rejected the appeal summarily.

" 5-10-28.—Appeal received. Record of the lower Court be put up. The Magistrate has brought out clearly the evidence for the conviction and it is fully justified. The penalty inflicted is not excessive. The grounds of appeal put forward do not justify any alteration of the finding. Appeal is summarily dismissed. D. J. N. Lee."

Against this order the applicant has come up to this Court in revision. In obedience to the order of my learned predecessor, an affidavit of the applicant and a letter of Mr. Nalgundwar addressed to Mr. Deshmukh stating that they were not given an opportunity of being heard by the District Magistrate before he rejected the appeal, have been placed upon the record of this Court. On the rule issued to him to show cause, Mr. Lee, who was the District Magistrate responsible for the summary rejection of the appeal, furnished the following explanation :

" I have the honour to say that I have no recollection whether the counsel was present, but I imagine his statement is correct. The appeal was dismissed after a full perusal of the record and as recorded in the order dismissing the appeal it is clear that the grounds of appeal (such as they were) were considered (see third sentence of the order)."

After hearing the parties and giving my best consideration to the case, I have not the slightest doubt in holding that there has been no disposal of the appeal by the learned District Magistrate according to law, and therefore the case must go back to the lower appellate Court for fresh disposal. In the first place the learned District Magistrate has contravened the mandatory proviso to S. 421 (1), Criminal P. C, This was admittedly an appeal filed under S. 419, Criminal P. C., and before it could be dismissed the aforesaid proviso required that the appellate Court should have given the appellant before him or his pleader "a reasonable opportunity" of being heard in support of the same. Not only no "reasonable opportunity" was afforded by the appellate Court in this case, but none whatsoever was given as the learned District Magistrate, upon receiving the memorandum of appeal and the record of the case, proceeded to and disposed of the appeal at once : *Emperor* v *Gurshida* (1)

Secondly, although the rejection of the appeal was under S. 421 (1), Criminal P. C., which does not require writing of an elaborate judgment, as contemplated by S 424 ibid, still the learned District Magistrate should not have disposed of the appeal otherwise than by a judgment showing on the face of it that he had applied his mind to the consideration of the evidence on the record and of the

(1) [1905] 7 Bom. L. R. 89.

pleas raised by the accused both in the Court below and in his memorandum of appeal : *Emperor* v. *Lal Bihari* (2). In *Ramrao* v *Emperor* (3), this Court has summed up the position in these words :

" A Court of criminal appeal is not bound, when dismissing an appeal summarily under S. 421, Criminal P. C., to write a judgment as defined in S. 367 of that Code. It is, however, advisable that it should give, as concisely as possible, at least the main reasons which govern its order.

In the latest Allahabad decision *Emperor* v. *Kundan* (4), following two earlier decisions of the Calcutta High Court, it was considered expedient to have the reasons for summary dismissal to assist the High Court in dealing with a possible application for revision. But I would add that another equally good argument is this, that the presence of reasons gives information to the appellant that his appeal has received such consideration as it is entitled to have from the appellate Court. So far, the principle advanced by me in *Jairam* v. *Emperor* (5), at pp. 85 and 86 applies."

Applying the principles laid down in the above cases to the order of the lower appellate Court it is manifest that it falls short of the minimum requirements imposed by precedents upon an order passed under S. 421, Criminal P. C. Grounds 1, 3 and 4 of the memorandum of appeal before the lower appellate Court could not be said to have been legally disposed of by the third sentence of the order as suggested by the learned District Magistrate in his explanation to this Court.

I, therefore, set aside the order of the District Magistrate dismissing the appeal and direct that he do re-hear the appeal and dispose of it according to law

K.N./R.K. *Revision allowed.*

(2) [1916] 38 All. 393=35 I. C. 485=14 A. L. J. 445.
(3) [1917] 13 N. L. R. 169=42 I. C. 721=18 Cr. L. J. 993.
(4) [1914] 36 All. 496=24 I. C. 600=12 A. L. J. 850.
(5) [1912] 8 N. L. R. 84=15 I. C. 975=13 Cr. L. J. 559.

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MOHIUDDIN, A. J. C.

Manohar—Applicant

v.

Ramdularey—Non-Applicant.

Criminal Revn. No. 407 of 1928, Decided on 28th February 1929 from decision of 2nd Class Magistrate, Bilaspur, D/- 25th September 1928, in Criminal Case No. 121 of 1928.

(a) Cattle Trespass Act, S. 22—Grazier of cattle is agent within S. 22.

A grazier is entrusted with the charge of the cattle during the period the cattle are with him for the purpose of grazing and therefore he may be presumed to be an agent of the owners of the cattle during the time the cattle are in his charge. Such an authority must be presumed from the circumstances of the case. The person personally acquainted with the circumstances can only be the person in charge of the cattle when seizure is made and therefore comes under the category of " an agent personally acquainted with the circumstances " mentioned in S. 21 : *A. I. R.* 1928 *Nag.* 156, *Ref.* [P 153 C 1]

(b) Cattle Trespass Act, S. 22—Compensation may be awarded to owner of the cattle and not to agent filing complaint.

Where the complaint is lodged by an agent, the Magistrate can award reasonable compensation, which will be paid to the complainant (owner of cattle and not to the agent who filed the complaint. [P 153 C 2]

D. N Choudhry—for Applicant.

S. T. Bhave—for Non-applicant.

Order.—The applicant, Manohar who is a grazier of mouza Deori filed an application under S. 22, Cattle Trespass Act, against the non-applicant, Ramdularey for illegal seizure of cattle which were in his charge on 23rd August 1928. The complaint was filed in the Court of Mr. C. F. Cleophas, 2nd Class Magistrate, Bilaspur, on 1st September 1928, and the learned Magistrate after examining the complainant ordered that a summons be issued to the accused Ramdularey. On the next date of hearing, which was on 18th September 1928, an objection was raised by the pleader for the accused about the valid presentation of the complaint on the ground that Manohar not being the owner of the cattle, could not file a complaint under S. 21, Cattle Trespass Act, as he was not an agent of the owners of the cattle. The learned Magistrate came to the conclusion that Manohar could not file the complaint as he was neither the owner nor the agent, and acquitted the accused under S 5275, Criminal P. C., as process was already issued to the accused who had attended the Court in obedience to the orders of the Court.

The question for consideration now is whether Manohar can be considered to be an agent personally acquainted with the circumstances, within the meaning of S. 21, Cattle Trespass Act. Proceedings under Chap. 5, Cattle Trespass Act, are quasi-civil in their nature, a Magistrate

being empowered to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought. There is no doubt that a complaint under S. 22, Cattle Trespass Act, can be lodged either by the person whose cattle have been seized or by an agent personally acquainted with the circumstances. Manohar is certainly not a person whose cattle have been seized and therefore it must be found whether he is an agent personally acquainted with the circumstances The word " agent " has not been defined anywhere in the Cattle Trespass Act. An agent, as defined under S 182, Contract Act, is a person employed to do any act for another or to represent another in dealings with third persons. The authority of an agent may be express or implied. An authority is said to be implied when it is to be inferred from the circumstances of the case and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case A grazier is entrusted with the charge of the cattle during the period the cattle are with him for the purpose of grazing and therefore he may be presumed to be an agent of the owners of the cattle during the time the cattle are in his charge. Such an authority must be presumed from the circumstances of the case. It is clear from the wording of S. 21, Cattle Trespass Act, that the legislature intended to authorise some other persons besides the owner of cattle to file complaints under S. 22, Cattle Trespass Act The person personally acquainted with the circumstances can only be the person who is in charge of the cattle when the seizure is made, and therefore it seems to me that the person who is in charge of the cattle at the time of seizure is the person to be included in the class of persons who come under the category of

" an agent personally acquainted with the circumstances "

mentioned in S. 21, Cattle Trespass Act. I am fortified in this view of the matter by a decision of Hallifax, A. J. C., who, in *Tuka Ram* v. *Ganpat* (1), held that one of the owners of the cattle which were seized could file complaint on behalf of the other owners.

It was pointed out on behalf of the non-applicant that compensation can only be awarded to the complainant under S. 22, Cattle Trespass Act, and could not in this case be awarded to Manohar who did not incur any expense in procuring the release of the cattle It seems clear from a perusal that the compensation is to be awarded to the complainant and, in a case where the complaint was lodged by an agent, the Magistrate can award reasonable compensation which will be paid to the complainant, and not to the agent who filed the complaint

In view of the fact that the case was not enquired into on its merits and the complaint was thrown out on a technical point, though an order of acquittal had to be passed because summons was issued to the accused, this is a fit case in which this Court must interfere in revision with an order of acquittal and set it aside. The order is accordingly set aside and It is directed that the case should be tried on its merits.

K.N./R.K. *Revision allowed.*

(1) A.I.R. 1923 Nag. 156.

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* A. I. R. 1929 Nagpur 153

MOHIUDDIN AND STAPLES, A. J. Cs.

Commissioner of Income-tax, Nagpur —Applicant.

v.

Radhakishan Ramnarain — Non-applicant.

Miscellaneous Judl. Case No 39-B of 1928, Decided on 15th February 1929, referred by Commissioner of Income-tax, on 10th September 1928

*** (a) Income-tax Act, S. 24 (1)—Actual losses incurred must be proved—Mere showing figures of purchase and sale is not sufficient.**

An assessee is entitled to have his losses set off against his income in any year, but he cannot claim that right unless he proves the losses , and the losses cannot be held to be satisfactorily proved by merely showing the figures for purchases and sales during the year without showing the opening balance in hand at the beginning of the year. [P 155 C 2]

*** (b) Income-tax Act, S. 24 (1)—Burden of proving losses is on assessee, who alleges them—Opening balance must be shown.**

When [redacted] income has been admitted, the burden of proving losses is on the assessee, who alleges them and the losses cannot be said to be satisfactorily proved unless all the particulars with regard to them are clearly shown ; and a very important particular with regard to such losses must be the opening balance at the beginning of the financial year in which the losses are said to have occurred : *A. I. R.* 1924 *Cal.* 937, *Dist.* [P 155 C 1, 2]

D. N. Choudhry—for Applicant.

W. B. Pendharkar—for Non-applicant.

Order.—The Commissioner of Income-tax has stated this case according to the order of Kinkhede, A. J. C. passed in Misc. Judl Case No. 8-B of 1927 on 25th June 1928. The facts have been stated at some length in the reference and need only be briefly repeated. There is a firm at Akola styled "Raghunathdas Rampratap" of which the owner is Radhakisan Laxminarayan. That firm keeps accounts from Diwali to Diwali and submits returns accordingly for the purpose of income-tax. For the year ending in Diwali 1924 the return shown was :

		Rs.	as.	ps.
Income		10,473	12	6
Loss		5,034	13	9
Total income ...		5,438	14	9

The income-tax officer not accepting this return called for accounts and submitted a report to the Assistant Commissioner who, after hearing Radhakisan and examining the accounts, assessed the income at Rs. 44,847-6-0. Radhakisan made an appeal to the Commissioner of Income-tax and some reduction was made by the Commissioner ; but otherwise the assessment was upheld. The assessee then applied for a reference under S. 66 (2), Income-tax Act to the High Court, but his prayer was rejected by the Commissioner on the ground that no question of law arose out of the facts of the case. On an application then being made to this Court, Kinkhede, A. J. C. held that the case involved questions of law and directed the Commissioner of Income-tax to state the case and make a reference.

The only point really in dispute now is whether the item of Rs. 24,528-1-9 shown as loss in the cotton business for the year under assessment is wrongly disallowed by the Assistant Commissioner making the assessment and by the Commissioner in the appeal. The matter has been stated at some length in the order of the Assistant Commissioner, dated 17th December 1925, making the assessment, a copy of which is now on the record as Ex. A. The point seems to be that in the previous year cotton business was carried on in the name of Dongulal Ghisulal. When the books of the firm were called for, Radhakisan produced books of the firm of Raghunathdas Rampratap, but did not produce the books of Dongulal Ghisulal. He stated that he could not find those books and appears to maintain in his appeal and in his application to this Court that the accounts of Dongulal Ghisulal were incorporated in the books of the main firm Raghunathdas Rampratap. The Assistant Commissioner, however, held that he could not accept the loss of Rs. 24,528-1-9 because the closing stock and the sale proceeds of the preceding year were not shown. In the appeal the Commissioner also held that, as the accounts of the business in question, i. e., of Dongulal Ghisulal, were not produced, it could not be known whether there was any opening stock from the preceding year or not. The Commissioner therefore held that the appellant failed to prove that he sustained this loss, and did not allow it.

In his order of reference the Commissioner has pointed out that the grounds given in the application to the High Court under S. 66 (3) of the Act were distinct from the grounds given in the application to the Commissioner under S 66 (2), and contends that no reference upon a question of law not raised by the applicant before the Commissioner can be obtained, referring in this connexion to the case decided by this Court in *Commissioner of Income-tax, Nagpur* v. *Jainarayan Motiram of Shegaon* (1) and to the case decided by the Madras High Court *In the matter of the Income-tax assessment of P Thiruvengada Mudaliar A. I. R.* 1928 *Mad.* 889, decided on 14th December 1927, and also to the decision of the Allahabad High Court *In the matter of Lall Mal Hardeodas Cotton Spinning Mills p.* 266 *of the Income tax cases, Vol. I* and *In the matter of Makham Lal Ram Sarup* (*p.* 416 *of Vol. I of the same reports*). The question whether an assessee can obtain an order of reference from the High Court upon a point of law not raised in his application to the Commissioner under S 66 (2) of the Act need not, we think, be gone into in disposing of the present reference, because, although the grounds given in the application to the High Court were different in form from the grounds given in the former application to the Commissioner, the real point at issue is the same, viz., whether the Assistant Commissioner was right in

(1) M. J. C. No, 20-B of 1927, decided on 30th June 1928.

disallowing the losses amounting to Rs. 24,528-1-9 alleged by the applicant during the year under assessment. The question of the interpretation of the Assistant Commissioner's order does not, in our opinion arise, because the Assistant Commissioner's order is really clear and, in any case, the order of the Commissioner when deciding the appeal is as clear as possible and can leave no room for doubt that the losses were not allowed because they were held to be not proved, and not on account of any imaginary profits or gains which were supposed to have occurred during the year under assessment or the previous year.

The facts of the case are simple as stated above and, in our opinion, the only point of law involved is the question on whom the burden of proof lies to prove losses alleged to have been sustained : on the party alleging the losses or on the Income-tax Department. The Assistant Commissioner and the Commissioner contend that the burden of proving losses is upon the assessee, who alleges them ; whilst the argument put forward by the applicant is that proving losses is proving a negative, and that therefore on the principle of the ruling in *Bishnu Priya Chowdhurani, In re* (2) the burden of proving the negative should not have been cast upon the applicant. This contention is, in our opinion quite incorrect. There is a considerable difference between proving a negative, i. e.,proving that there is no income during a year, and proving that there were, as a matter of fact, actual losses incurred. The applicant in the present case has not denied that there was income during the year under assessment. He has admitted income, but has pleaded that the expenditure exceeded the income and that a loss was sustained. He, however, only stated the figures of purchases and sales, and when asked to give the opening balance, which was surely necessary so as to determine the net income for the year, he has failed to do so. We consider that, when once income has been admitted, the burden of proving losses is upon the assessee who alleges them, and the losses cannot be said to be satisfactorily proved unless all the particulars with regard to them are clearly shown; and a very important particular with regard to such losses must be always the opening balance at the beginning of the financial year in which the losses are said to have occurred.

Under S. 24 (1), Income-tax Act, an assessee is entitled to have his losses set off against his income in any year, but he surely cannot claim that right unless he proves the losses; and the losses cannot, we think, be held to be satisfactorily proved by merely showing the figures for purchases and sales during the year without showing the opening balance in hand at the beginning of the year. Nor are we pressed by the argument that in the present case there is really an assessment for additional income during the preceding year, which view seems to have been taken by Kinkhede, A. J. C., in his order directing the Commissioner to state the case. The income for the preceding year was assessed under S. 23 (4) of the Act as the assessee did not produce his books of accounts. In the year now under review books were produced, but it has been held that those books, although they have been accepted as far as they go, are not sufficient to prove the losses alleged to have been sustained because the opening balance has not been shown. There is no attempt now made by the Income-tax Department to increase the assessment for the preceding year, nor has any action been taken under S. 34 of the Act with regard to the previous year. All that is now held by the Income-tax Department is that during the year under assessment the applicant has really enjoyed income considerably more than the income shown, because the losses which he has alleged in his cotton business have not been proved.

The actual terms of the reference are:

(1) Was the Commissioner of Income-tax right in interpreting the Assistant Commissioner's order to mean that the loss was not proved notwithstanding the facts disclosed by the Assistant Commissioner's order dated 17th December 1925 ?

(2) Was the Commissioner of Income-tax right in interpreting the Assistant Commissioner's order to mean that no imaginary profits from a supposed stock were added in order to set off the loss of Rs. 24,528 sustained by the assessee ?

(3) If not, was not the addition unjustified and bad in law as based on mere suspicion or irregular and hearsay information in the case of the assessee's statement denying the new and imaginary source of income ?

With regard to the first, we are of opinion that the Commissioner of Income-tax was right in his interpretation of the

(2) A. I. R. 1924 Cal. 887=50 Cal. 907.

Assistant Commissioner's order. In para. 2 of his order, a copy of which is filed as Ex. B, the Commissioner has quoted a passage from the order of the Assistant Commissioner and has then pointed out that there was some slight confusion in the latter order. The Commissioner has then gone on to show that the assessment in the preceding year was made under S. 23 (4), as accounts were not shown, and in the year under assessment, as the opening stock had not been shown, the Assistant Commissioner refused to admit the loss of Rs. 24,528. The Commissioner has further explained that the addition of this loss to the income return is not really an assessment of additional income but is only a refusal to accept losses, which were alleged, but not proved. We cannot see that there is anything wrong or illegal in the Commissioner's interpretation of the Assistant Commissioner's order or in his findings.

As regards the second question, which is largely a repetition of the first, we would again hold that no imaginary profits from a supposed stock have been added either by the Assistant Commissioner's order or by the Commissioner's interpretation thereof. All that has been held in both orders is that, as the opening stock was not shown, the losses which have been alleged as a result of the sales and purchases for the year under assessment could not be allowed No imaginary profits or additional income have been assessed. The figures as given by the assessee have been accepted with the exception that the losses shown have been disallowed as not proved.

From these findings it follows that the addition was not unjustified or bad in law. It was not really an addition of income, but only a refusal to allow the alleged losses. Nor has it been shown that these losses have been disallowed on account of any hearsay information, and there is no question of any new or imaginary source of income. All that has been held is that in the ordinary cotton business, which was admittedly carried on by the assessee, the losses shown have not been proved, because the opening balance at the beginning of the year was not shown and only sales and purchases during the year were shown.

We are of opinion, then, that the case now stated for decision should be answered as indicated above and that there are no legal grounds for interfering with or reducing the assessment as made by the Commissioner of Income-tax. Costs of this application will be borne by the applicant. We fix pleader's fees at Rs. 300.

K.N./R.K. *Answered accordingly.*

* A. I. R. 1929 Nagpur 156

STAPLES, A. J. C.

Gulabchand—Defendant 1—Appellant.

v.

Seth Chunnilal—Plaintiff — Respondent.

Second Appeal No 15 of 1928, Decided on 15th March 1929, against decree of Dist. Judge, Jubbulpore, D/- 3rd October 1927, in Civil Appeal No. 87 of 1927.

(a) Practice—Duty of Subordinate Courts.

Subordinate Courts are bonud to follow the published rulings of their High Court and cannot set up their own opinion in the matter or follow the rulings of other High Courts which express a contrary view. [P 158 C 1]

*** (b) Contract Act, S. 11—Contract by minor is void and the minor is not estopped from pleading his minority even though he falsely represented himself of age—Evidence Act, S. 115.**

A contract entered into by a minor is void and the minor is not estopped from pleading his minority as a bar to a contract entered into by him even though he had falsely represented himself to be of age and thereby induced the other party to enter into the contract: 15 *N. L. R.* 149, *Foll.*; *Levene* v. *Brougham*, (1909) 25 *T.L.R.* 265 *R. Leslie Ltd.* v. *Shiell*, 3 *K. B.* 607; 26 *Cal.* 381; 30 *Cal.* 539; 38 *Mad.* 1071, 37 *Mad* 38, *A. I. R.* 1927 *Rang.* 108, *A. I. R.* 1927 *Pat.* 271, *Ref.* 21 *Bom.* 198; 41 *Bom.* 480; *A. I. R.* 1923 *Bom.* 169, *not Foll.*; *A. I. R.* 1928 *Lah.* 609 (*F.B.*), *Appr.*; 1 *Lah.* 389=59 *I. C.* 393, *Overruled by A. I. R.* 1928 *Lah.* 609. and 15 *C. W. N.* 239, *Diss. from in* 20 *C. W. N* 418. [P 158 C 1]

(c) Contract Act, S. 65—Minor —Equitable relief.

Where a minor by fraudulent representation obtained a specific object or property, he can be ordered to make restitution upon the contract being declared void; but when only money has been lent, no decree can be passed against the minor on the contract of loan or for money had and received for his use: 41 *L.T.* 378, *R. Leslie Ltd.* v. *Shill* 3 *K.B.* 607; 15 *N. L. R.* 149; *A. I. R.* 1923 *Nag.* 609, *Ref. Stocks* v. *Wilson*, 2 *K. B.* 235, *Ref.*

Where in a suit on a bond executed by a minor, on fraudulent representation that he had attained majority, in satisfaction of the debt due on old bonds executed on his behalf by his guardian, it is found that the old debts were not for legal necessity:

Held : that the creditor is not entitled to claim return of the old bonds in satisfaction of which the new bond was given by the minor nor to a return of the ornaments, belonging to the minor, pleaded as security in respect of the old debts and returned to the minor when he executed the new bond in suit. [P 160 C 2]

N. G. Bose—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The respondent Chunnilal brought a suit against the appellant Gulabchand, his mother Mt. Goridulaiya and a third party Khalaksingh upon a bond, executed by the appellant Gulabchand, and on previous accounts. The trial Court passed a decree for the claim against the appellant only, discharging the other two defendants. An appeal preferred by Gulabchand was dismissed by the District Judge and he now appeals to this Court. The facts of the case are for the most part admitted, and the only question to be decided in the appeal is whether the appellant is estopped from pleading minority as a defence to the claim, as he had represented himself to be of full age when he signed the bond in suit.

The dealings between the parties began in July 1918 and continued up till 1920. All these dealings were effected by the mother Mt Goridulaiya as guardian of her son Gulabchand, and it is alleged that Khalaksingh, who was her agent, also took part in the transactions. In August 1922 the accounts between the parties were made up and then the bond in suit (Ex. P 1), dated 7th Angust 1922, was executed by Gulabchand in his own name for the amount due on the previous bonds and pledges and for a further sum of Rs. 214-3-6 taken in cash, the total coming to Rs. 1,575. The respondent alleged that Gulabchand and the other defendants respresented to him that Gulabchand had attained majority and was looking after his own business and therefore he had the bond executed by Gulabchand in his own name and not by his guardian. Gulabchand denied any such representation on his part, but both the Courts below have held that the representation was made and that on that representation the respondent took the bond from Gulabchand. As regards Gulabchand's minority it is to be noted that it has been proved that he was born on 20th April 1903 and therefore was over 19 years at the time the bond was executed. His estate, however, had been taken under management under the Guardian and Wards Act and Goridulaiya had been appointed guardian of the property and person of the minor by the District Judge on 1st April 1910. The minor was not discharged until 21st November 1923 when the District Judge found that he appeared to be 21 years of age and capable of managing his affairs Under S. 3, Indian Majority Act, the ordinary age of majority is 18 years, but in the case of a person for whom a guardian has been appointed under the Guardian and Wards Act the age of majority is 21 years. It appears then that Gulabchand had not even attained the age of 21 when he was discharged by the District Judge, and that he was only 19 and was still a ward under the Act when he executed the bond in suit. There can be no doubt then that he was a minor at the time the bond was executed, and this has been found by both the Courts below.

As already noted above, however, both the lower Courts have held that, although a minor at the time of the execution of the bond, Gulabchand is now estopped from pleading his minority as he had represented himself to be a major, and on that representation the execution of the bond was accepted by the respondent It is now to be determined whether this view of the law, which has been taken, is correct.

The first point to be borne in mind is that there is a published ruling of this Court in *Mt. Muliabai* v. *Garud* (1) in which the view has been expressed, following the decisions in *Mahommed Syedol Ariffin* v. *Yeoh Ooi Gark* and *R. Leslie, Ltd.* v. *Shiell* (3), that an infant who had obtained money by falsely representing his age would not be liable on a contract, nor would he be liable for money had and received. The lower appellate Court has referred to this ruling in para 13 of its judgment and has brushed it aside somewhat hastily on the ground that the discussion of the point of estoppel in the case really only amounted to obter dicta. I would draw

(1) [1919] 15 N. L. R. 149=53 I. C. 65.
(2) A. I. R. 1916 P. C. 242=43 I. A. 256 (P.C.).
(3) [1914] 3 K. B. 607=83 L. J. K. B 1145=30 T. L. R. 460=58 S. J. 458=111. L. T. 106.

the attention of the learned District Judge to the fact that he is bound to follow the published rulings of this Court and may not set up his own opinion in the matter or follow the rulings of other High Courts, which express a contrary view. I would also differ from the view expressed by the District Judge that the discussion of the question of the estoppel under S 115, Evidence Act, was in any sense an obiter dictum in the case referred to In that case, as in the present case, the question of estoppel had been directly pleaded; and, though as a matter of fact, the finding of the lower appellate Court there was that the minor had not falsely represented himself to be of age, misrepresentation had been distinctly pleaded and was again urged in second appeal I would therefore strictly draw the attention of the District Judge to the published ruling and to the obligation, under which he rests, of following such rulings in future.

Apart from this, I am of opinion that the view expressed in *Mt. Muliabai* v. *Garud* (1) is correct, and I see no reason whatever to differ from it. The law of estoppel is the same in India as in England, and it may be laid down as a general rule that, where there is a definite piece of statute law, such as S 11, Contract Act, it would not be defeated by a rule of evidence such as S 115, Evidence Act In England it has been distinctly held that in such a case a minor, who falsely represents himself to be of full age, will not be liable on the contract, nor will he be liable to refund money obtained on the contact. I would refer to the cases of *Levene* v. *Brougham* (4) and *R. Leslie, Ltd* v *Shiell* (3) The same view has been taken in India in *Brahmo Dutt* v *Dharmo Das Ghose* (5) and *Mohori Bibi* v. *Dharmo Das Ghose* (6). It is true that the Calcutta ruling in *Brahmo Dutt* v. *Dharmo Das Ghose* (5) was passed on an interpretation of the word "person" in S. 115, Evidence Act, which can hardly be sustained ; but even if that interpretation be given up the view may still be held that a minor is not estopped from pleading his minority when he has entered into a contract misrepresenting himself to be of full age. The Madras, Rangoon and Patna High Courts have also repelled the plea of estoppel in such cases I would refer to *Vaikuntarama Pillai* v. *Authimoolam Chettiar* (7), *Arumugam Chetti* v. *Vellaichami Tevan* (8), *Maung Tin* v. *Ma Lun* (9) and *Ganganand Singh* v. *Rameshwar* (10). The Bombay High Court, on the other hand, has taken the contrary view and has held that a minor would be estopped from pleading his minority when he entered into a contract by misrepresenting himself to be of full age. I would refer to *Ganesh Lala* v. *Bapu* (11), *Dadasaheb Dasrathrao* v. *Bai Nahani* (12) and *Jasraj Bastimal* v. *Sadashiv Mahadev* (13). The lower appellate Court has relied principally on *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (14) and *Wasinda Ram* v. *Sita Ram* (15) Both those cases have this similarity to the present case that the minor was over 18 years of age, but was only a minor as a guardian had been appointed under the Guardian and Wards Act I do not, however, think that that point makes any difference, and the fact that minority is extended in the case of a person for whom a guardian has been appointed under the Guardian and Wards Act does not render him any the less a minor for the purpose of entering into a contract under S. 11, Contract Act. As regards the two cases relied upon by the lower appellate Court, I would point out that *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (14) appears to have been dissented from in *Golam Abdin* v *Hem Chandra* (16), whilst *Wasinda Ram* v. *Sita Ram* (15) must be held to be definitely overruled by the recent case of *Khan Gul* v. *Lakha Singh* (17). In the latter case, where the matter has been dealt with most exhaustively and all the authorities have been reviewed, it has been held by all the Judges constituting a Full Bench that a minor is not estopped

(4) [1909] 25 T. L. R. 265=53 S. J. 243.
(5) [1899] 26 Cal. 331.
(6) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 874 (P.C.).
(7) [1915] 38 Mad. 1071=43 I.C. 733=28 M. L J. 612.
(8) [1914] 37 Mad. 33=21 M.L J. 1077=12 I. C. 568=(1911) 2 M.W.N. 461.
(9) A.I.R. 1927 Rang. 103.
(10) A.I.R. 1927 Pat. 271=6 Pat. 338,
(11) [1897] 21 Bom. 103.
(12) [1917] 41 Bom. 433=41 I.C. 180=19 Bom. L.R. 561.
(13) A I.R. 1923 Bom. 169=46 Bom. 197.
(14) [1911] 15 C.W.N. 239=9 I.C. 110=13 C. L. J. 228.
(15) [1920] 1 Lah. 331=59 I.C. 393.
(16) [1916] 20 C.W.N. 418=33 I.C. 388.
(17) A.I.R. 1928 Lah. 603=9 Lah. 701 (F.B.).

from pleading his minority to avoid a contract even though he has falsely represented himself to be a major and has thereby induced the other party to enter into the contract. I would say that I am in full and respectful agreement with the judgment of Sir Shadi Lal, C. J., as regards S. 115, Evidence Act, and the question of estoppel. It has thus been definitely decided in England that a minor is not estoppel and can plead his minority to avoid a contract even though he had falsely misrepresented his age at the time of the contract; and in India the balance of authority is strongly in favour of the same view. I would therefore again affirm what has been held in *Mt Muliabai* v. *Garud* (1), that a minor is not estopped from pleading his minority as a bar to a contract entered into even though he had falsely represented himself to be of age and thereby induced the other party to enter into the contract.

The question, however, of equitable relief that may be awarded against a minor, even though the contract is held to be void, is one that arises and presents considerable difficulty. In *Mt. Muliabai* v. *Garud* (1) (at 152) the following passage occurs and then a passage is quoted from *R. Leslie, Ltd* v. *Shiell* (3):

"A distinction must be drawn, of course between a case like the present where cash passed and a case in which particular property e. g., a horse or a motor car passed to a minor. In the latter class of cases where restitution is possible, it can, of course, be decreed by the Court. But the position is entirely different when mere money passes."

There have been a number of decisions on this point in England which are reviewed in the judgment of Sir Shadi Lal, C. J., and Tek Chand, J. in *Khan Gul* v. *Lakha Singh* (17) It seems that it would be difficult, if not absolutely impossible, to reconcile all the decisions, but the principle would seem to be that, on the contract failing and being declared void by reason of the minority of one party, the parties should be put, as far as possible, in the status quo ante at the time of the contract. Where, however, the contract consists merely of a loan of money it is difficult to see how the parties can be put back into their respective positions prior to their contract except by a return of the money. My opinion, however, is that such a return or refund cannot be made against the minor defendant apart from the contract; nor can the tort, if any of the fraudulent misrepresentation be distinguished from the contract. Sir Shadi Lal, C. J, has held that the equitable relief may take the form of a refund of money borrowed under the contract, but I would respectfully differ from that view and prefer to follow the dissenting judgment of Harrison, J., on this point. This is the view that has been taken in *Mt. Muliabai* v *Garud* (1). Following the view expressed in that case I would hold that a contract entered into with a minor is void ab initio, and that the question of rescinding the contract under S. 39, or of cancelling the instrument under S. 41, Specific Relief Act, does not really arise in such cases, and no relief can, therefore, be granted under either of those sections.

The only relief, therefore, which the Court could grant in such case would be an equitable relief and, in particular, as already indicated in *Mt. Muliabai* v. *Garud* (1), where specific property has been taken by a minor, restitution can be decreed by the Court In *Lempriere* v. *Lange* (18), a lease entered into by a minor, of a furnished house was declared to be void and the minor was ordered to give back immediate possession to the owner, and an injunction was also granted to restrain him from taking away any of the furniture in the house. *Stocks* v. *Wilson* (19), went further and held that a minor defendant, who had purchased furniture from the plaintiff by representing that he was of full age, was bound not only to restore the furniture but even to account for sums received by him by sale of the furniture: that is, it was held that not only should the furniture be recovered from the possession of the minor but that, as he had disposed of the furniture, the sale proceeds also could be followed. This seems, in my opinion, difficult to distinguish in some respects from a case where money has been borrowed, though in *R. Leslie Ltd* v. *Shiell* (3), it was clearly held that the money could not be followed and that the plaintiff, who had lent money on a fraudulent representation to a minor, could neither claim damages nor sue for money had and received. This point, however, need not

(18) [1879] 41 L. T. 378=16 Ch. D. 675=27 W. R. 879.

(19) [1913] 2 K. B 235=82 L J. K. B. 598= 29 Manson. 123=108 L. T. 834.

be pressed and it will be sufficient to hold that, where a minor by fraudulent representation has obtained a specific object or property, he can be ordered to make restitution upon the contract being declared void, though, when only money has been lent, no decree can be passed against the minor either on the contract of loan or for money had and received to his use.

In the present case it is claimed that, if the bond fails by reason of the appellant's minority, the appellant not being estopped from pleading minority, an equitable relief should be decreed against the appellant and that the appellant should be ordered to make restitution with regard to any benefit which has accrued to him on the void contract. It was argued that the benefit to the appellant consisted of the extinction and cancellation of the former bonds executed by his guardian and the actual return of ornaments that had been pledged to the respondent Chunnilal. As regards the first point, viz., the cancellation of the prior bonds, it is I think clear that no relief can now be granted. Even if the old bonds have been delivered to the appellant, as stated in para. 3 (A) of the plaint, all that could be ordered would be that the appellant should restore those bonds to the respondent Chunnilal; but even if those bonds could, as a matter of fact, now be recovered from the appellant, it is clear that the claim upon those bonds would now be long time barred and the bonds themselves would be worthless. An order, therefore, directing the appellant to return the old bonds to the respondent Chunnilal would be of no avail.

As regards the ornaments, too, there is, I think, considerable difficulty. It is true that the respondent has led evidence to prove that at the time of the execution of the bond (Ex P-1) the pledged ornaments were returned to the appellant, but I hardly think it can be said that those ornaments were properly obtained by the appellant by fraudulent misrepresentation. In the first place, the ornaments admittedly belonged to the appellant himself and were only pledged with the respondent and they were returned to the appellant upon the fresh bond (Ex. P-1) being executed The appellant then got back his own property, and I am very doubtful whether he can now be ordered to make restitution by again returning that property, which had been pledged to the respondent. Nor do I think that Chunnilal has really any very strong claim in equity. He had bonds executed by the appellant's guardian, but instead of choosing to sue upon those bonds, possibly because he may have thought that the appellant would not be liable, as legal necessity could not be proved, he elected to get a fresh bond executed by the appellant himself thinking that by so doing the question of the appellant's liability could not then be disputed. It would seem, therefore, that in equity Chunnilal could have no stronger claim upon the fresh bond than he could upon the original bonds, and his case cannot be strengthened by the fact that the fresh bond has been declared void by reason of the appellant's minority. It may be noted that the trial Court on issue 4 (a) has found that the amount due under (Ex. P-1) was due under old accounts, but that the old debt was not borrowed for legal necessity or for the benefit of the minor. That finding has not, as far as I see, been challenged, nor has the respondent put forward any cross-objection with regard to it. The finding then will stand and on that finding it is clear that the appellant Gulabchand would not be liable upon the old bonds; nor could Chunnilal withhold the ornaments belonging to the appellant that had been pledged to him on those old bonds I am of opinion that even in equity no relief can be given to the respondent.

The defendants Mt. Goridulaiya and Khalaksingh were discharged by the trial Court and no attempt has been made to hold them liable either in the first or in the second appeal. No decree can now be passed against them, as the former bonds, even if they could be produced, would be now time barred, as already stated above. The claim on the bond (Ex. P-1) must fail by reason of Gulabchand's minority and no claim can now be put forward on the strength of the old bonds. As a result, the appeal must succeed. I set aside the decree of the Courts below and instead pass a decree dismissing the suit of the plaintiff-respondent Chunnilal. Chunnilal will bear all costs of the appeals in both Courts and also of the original suit.

K.N./R.K. *Appeal allowed.*

* A. I. R. 1929 Nagpur 161

SUBHEDAR, A. J. C.

Manji Jairam Bhate—Applicant.

v.

Kalekhan and *others*—Non-Applicants.

Criminal Revn. No. 292-B of 1928, Decided on 5th March 1929, on report by Sess. Judge, Akola.

*** Criminal P. C., S. 403 (4)— Persons jointly tried—Some acquitted and some convicted—Appeal against conviction but no appeal against acquittal— Appellate Court declaring trial as void and ordering fresh trial—Acquittal also becomes void—Persons acquitted can be tried for any other offence —Any person added at the fresh trial is not affected by previous acquittals of some accused.**

On a complaint against 11 persons, the Magistrate tried them for offences under Ss. 147 and 379, I. P. C. He acquitted 5 of them and convicted under S. 147 the remaining 6 who appealed to the Addl. Sess. Judge. In the appeal it was held that the Magistrate had no jurisdiction and the whole trial was void. A retrial before a competent Court was ordered. At the fresh trial, the complainant applied for processes to be issued against the 5 accused acquitted at the original trial. On the Magistrate's refusal, he filed a fresh complaint under S. 396, I. P. C., adding one more accused. The Magistrate summarily rejected the complaint on the ground that it could not be entertained as the acquittal of the persons named in the complaint had not been set aside.

Held : that as the whole trial was held to be without jurisdiction and void, the acquittal of the non-applicants was also void. [P 162 C1]

Held further : that a person acquitted or convicted of any offence may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed, if the Court, by which he was first tried, was not competent to try the offence with which he is subsequently charged : 7 *Mad.* 557, *Ref.* [P 162 C 1]

G. G. Hatwalne and *V. D. Sindekar*—for Applicant.

M. R. Bobde—for Non-Applicants.

Order.—This is a reference by the learned Sessions Judge, Akola The facts are briefly these : On a complaint by one Manji Bhate, eleven persons were tried by Mr J. E Solomon, a Subordinate Judge exercising the powers of a 1st Class Magistrate at Akola for offences under Ss 147 and 379, I. P. C. The trial resulted in the conviction of accused 1, 3, 6, 7, 9 and 10 of an offence under S. 147 and in the acquittal of the remaining five accused. The convicted persons preferred an appeal which was heard and disposed of by Mr. M. A. Amraotkar, Additional Sessions Judge, Akola, who set aside the convictions on the ground that inasmuch as the evidence recorded at the trial disclosed an offence of dacoity, an offence admittedly not triable by Mr. Solomon, the whole trial was without jurisdiction and void. Accordingly the learned Additional Sessions Judge directed a retrial of the appellants before him in the Court of a Magistrate of the 1st Class who also exercised the powers under S. 30, Criminal P. C.

The fresh trial accordingly proceeded in the Court of Mr. M A. Subhankhan and an application was put in by the complainant on 3rd October 1928 asking for processes to be issued also against the five persons who were acquitted at the original trial. The learned Magistrate, however, rejected the application on the ground that since there was no appeal preferred against their acquittal, these acquitted persons could not be retried in spite of the fact that the original trial was held to have been void. This order was passed on 3rd October 1928.

The complainant then presented a fresh complaint on 18th October 1928 before the same Magistrate against the aforesaid five accused, who were acquitted at the original trial, and another new person by name Chagganlal and prayed for their trial of an offence under S. 395, I. P. C. On the next day the learned Magistrate without registering the case and without any examination of the complainant passed the following order :

"As these accused were already acquitted of the offence and as that acquittal has not been yet set aside, it is impossible in law to entertain this fresh complaint. The complaint is therefore returned to the complainant."

Against this order the complainant moved the Sessions Judge, Akola, in revision, and the learned Judge has made the present reference to this Court under S. 438, Civil P. C with a recommendation that the Magistrate should be directed to entertain the complaint This reference has been registered in this Court as a criminal revision and the complainant is described as an applicant and the six persons who figure as

accused in the petition, of the complainant, dated 18th October 1928 as non-applicants.

In showing cause against the said recommendation of the Sessions Judge the learned advocate for the non-applicants urged that since his clients were not parties to the criminal appeal preferred by the convicted persons the Additional Sessions Judge, Akola, the findings given in the appellate judgment are not binding upon them and that the order of acquittal of offences under Ss. 147 and 379, I. P C. passed by Mr. Solomon was a bar to their prosecution for an offence of dacoity on the same facts. I have no doubt that the above contention is not sound and that the view taken by the learned Sessions Judge on the facts stated above is a perfectly correct one. When once it was held that the original trial by Mr. Solomon was void as being without jurisdiction even the acquittal of the first five non-applicants went also by the board.

The words of S. 403 (1), Criminal P C., leave no room for doubt that it is only when a person who has been tried by a Court of competent jurisdiction for an offence and acquitted of such offence that he could not be retried for the same offence so long as the acquittal remains in force. Sub-S. (4) of the section is clearer still for it says that a person acquitted or convicted of any offence may notwithstanding such acquittal or conviction be subsequently charged with and tried for any other offence which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. The case of *Virankutti* v *Chiyamu* (1) quoted by the learned Sessions Judge in his order is a sufficient authority for the above proposition. In the present case there was admittedly no trial before Mr. Solomon for offence under S. 395, I. P. C., and it is conceded that he had no jurisdiction to hold a trial for such an offence. It was on this account that the trial held by Mr. Solomon was held by the learned Additional Sessions Judge to have been without jurisdiction and void. Moreover, as the learned Sessions Judge points out along with the non-applicants who is figured as accused at the last trial, there is another accused added in the new complaint and no order of previous acquittal stands as a bar against him.

I, therefore, hold that the previous acquittal of the non-applicants 1 to 5 cannot stand in the way of their fresh trial for the alleged offence falling under S. 395, I. P. C. I accept the reference and setting aside the orders of the Magistrate dated 3rd October 1928 and 18th October 1928, direct him to receive the complaint dated 18th October 1928 and proceed to dispose of the same according to law.

K.N./R K. *Reference accepted.*

1 [1884] 7 Mad. 557.

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* A. I. R. 1929 Nagpur 162

MACNAIR, OFFG.J.C., & STAPLES, A.J.C.

Bhaskerrao and *others*—Appellants.

v.

Balmukund—Respondent.

First Appeal No. 23 of 1928, Decided on 22nd February 1929, against decree of Addl. Dist. Judge, Nagpur, D/- 16th November 1927, in Civil Suit No 8 of 1926

*** (a) Mortgage—Construction—Two interpretations as to rate of interest—Decree should be given at lesser rate—Interest.**

Where the words used in a mortgage-deed are capable of two different interpretations in regard to the rate of interest, the mortgagee is entitled to a decree with interest, at the lesser rate, if it is uncertain which of the two rates is allowed by the document. [P 163 C 2]

(b) Deed—Construction.

Interpretation, which renders the terms of the document probable, is to be preferred to an interpretation which renders the conditions most unlikely. [P 163 C 2]

(c) Interest—Post diem—Presumption is in favour of post diem interest.

Where a mortgage-deed does not refer to payment of interest after the date fixed for the payment of the principal, it must be presumed that interest was intended to run until the principal should be paid. [P 164 C 1]

M. R. Bobde and *M. K. Hardas*—for Appellants.

P. S. Kotval and *A. D. Mande*—for Respondent.

Judgment.—The suit for foreclosure out of which this appeal arises is based on a mortgage-deed, dated 1st May 1889. The consideration of the deed was Rs. 600. The mortgagee has been in possession of the mortgaged property since the date of

the mortgage. Nevertheless he claimed that the amount due on the mortgage at the date of the suit was over Rs. 39,000. Mr. Amardekar in dealing with this case held that the deed provided for interest at 1 per cent. per mensem and it was provided that the usufruct was to be taken in lieu of interest. He directed that the parties should state what the profits were in each year from 1889 onwards. It is admitted before us that in view of the finding that profits were to be taken in lieu of interest accounts were not necessary for the years preceding the date on which the mortgage money became payable. Mr. Bhagade succeeded Mr. Amardekar. He held the deed provided for interest at 2 per cent. per mensem; the usufruct of the property was to be taken as equivalent to interest at 1 per cent. per mensem and the remaining interest was to be paid in cash at the end of 25 years. No accounts were therefore necessary. He found that over Rs. 50,000 was due on the mortgage and passed a preliminary decree for foreclosure accordingly. The defendants appeal to this Court.

The points urged before us are. (1) That the mortgage-deed provided for interest at 1 per cent per mensem only. (2) That if it provided for payment at 1 per cent. per mensem compound interest in addition to the usufruct, the mortgage was a hard and unconscionable bargain which should not be enforced by the Court. (3) That the plaintiff was liable to render an account of the profits after the date on which the mortgage debt became payable.

The first point relates to the interpretation of the mortgage-deed. The provisions of the mortgage-deed do not seem to be consistent: the deed commences by stating that the mortgagor has borrowed a sum of Rs. 600 and will pay interest at 1 per cent. per mensem. It is then stated that the mortgagee has been placed in possession of the mortgaged property but will not be accountable for the profits. The next clause is:" (In lieu of the profits 1 per cent. per mensem interest has been remitted). The next sentence has been translated :

"Now I shall resume possession of fields after 25 years subject to the payment of the amount at Re. 1 per cent. interest."

There is a further clause that:

"however much the debt might amount to at the end of 25 years owing to the taking of yearly accounts, that is, giving interest on principal and interest it would be a charge on the fields."

The difficulty in the interpretation arises from the fact that if profits are set off against interest, there would be no question of adding interest to the original amount and no necessity for provision for this contingency. Mr. Bhagade has considered that the deed, read as a whole, shows that the mortgagor agreed to pay 1 per cent. per mensem in addition to allowing the mortgagee to enjoy the usufruct of the fields which was to be considered in lieu of another 1 per cent. per mensem interest.

We are of opinion that the interpretation given by Mr. Amardekar is the most natural meaning of the deed. The deed states clearly that interest is to be paid at 1 per cent. per mensem. In our experience it is by no means rare to find that, although a mortgage states that possession of the mortgaged property has been delivered, possession, as a matter of fact has remained with the mortgagor. It was not, then, an impossible contingency that interest would be added to the principal, and the statement that such interest would be paid may merely mean that if such interest became due, it would be paid. We do not think it possible to draw any strong inference from the word "now" in the sentence.

"Now I shall resume possession of fields after 25 years subject to the payment of the amount at Re. 1 per cent. interest."

We do not state that the words of the document could not bear the interpretation put upon them by Mr. Bhagade, but this is only a possible interpretation. The plaintiff, who is suing the defendants on the basis of this document, is entitled to the decree with interest at the lesser rate if it is uncertain which of two rates is allowed by the document. Again, the interpretation which renders the terms of the document probable is to be preferred to an interpretation which renders the conditions most unlikely. It is clear from the document that the mortgagee considered the property to be worth at least Rs. 600, for there is a clause that if the mortgagor does not pay he will not be personally liable. The usufruct of the property, then, must have been considered a fair equivalent to the interest on Rs. 600, and there is no reason

why the debtor should agree to pay heavy interest while the mortgagee enjoyed the usufruct. The evidence produced by the plaintiff shows that he appreciated the fact that the deed provided for an unnecessarily high rate of interest for he suggests in the pleadings that the mortgagor intended to put it out of his power to redeem the property as he would have sold the property but for the opposition of the landlord. We agree with the trial Judge that the plaintiff has not shown that the mortgagor had any such intention.

We hold, therefore, that the mortgage deed provided for interest at 1 per cent. per mensem and contained an agreement that the mortgagee should enjoy the usufruct in lieu of such interest.

In view of this finding it is unnecessary to consider whether the terms of the mortgage-deed would be unconscionable if they provided for interest at 1 per cent. per mensem in addition to the usufruct. We are, however, clearly of opinion that the bargain would be such as no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other: as we have stated, the usufruct was obviously at least a sufficient return for the use of the sum lent. We consider that the contract is such that a Court of equity would give relief.

The remaining point urged is that, although it must be presumed that interest was intended to run on after the expiry of 25 years the provision that the profits should be taken in lieu of interest had no application after that period. The deed does not refer to payment of interest after the date fixed for payment of the principal and it is settled law that in such a case it must be presumed that interest was intended to run until the principal should be paid. Now, the main provision of the deed regarding the amount of interest is that profits should be taken in lieu of interest. If the mortgagee remains in peaceful possession, the rate of interest is immaterial. Had the rate of interest not been mentioned it would, in our opinion, have been presumed that the intention of the parties was that the profits should be taken in lieu of interest so long as the principal sum was not paid off: for the reasons which lead to an inference that the parties intended interest to run at the same rate after the date fixed for payment lead to the conclusion that they intended interest to be paid in the same manner as heretofore. We do not consider that the mention of the rate of interest prevents this presumption: the object of this mention is apparently only to provide a method of calculation if the mortgagee does not get, or does not remain in, actual possession. The whole tenor of the deed is to the effect that the land is to be retained in lieu of the sum advanced, primarily for a term of 25 years, but possibly, if the mortgagor does not pay, for ever We hold, therefore, that the intention of the parties was that the mortgagee should receive profits in lieu of interest until the actual date of payment.

There is, then, no necessity for taking any accounts. The decree of the lower Court is varied by fixing the sum due to the plaintiff as principal and interest at Rs 600. The date for payment will be three months after this date. The defendants will pay to the plaintiff costs calculated on a claim at Rs 600 that was due but the plaintiff must pay to the defendants the excess counsel's fee allowed by the lower Court in view of the fact that the fee allowed by the lower Court is liberal. The parties will bear their own costs in this Court.

K.N./R.K. *Decree varied.*

A. I. R. 1929 Nagpur 164

SUBHEDAR, A. J. C.

Ramkrishna and *another*—Judgment-debtors—Appellants.

v.

Laxminarain and *another* — Decree-holders—Respondents.

First Appeal No. 77-B of 1928, Decided on 12th March 1929, against decision of First Class Sub-Judge, Akola, D-/ 1st September 1928.

(a) Civil P. C., O. 23, R. 3 — Compromise decree in money suit passed — Defendant agreeing to transfer certain property to plaintiff on a certain day—Plaintiff to pay conveyance costs—Decree was held not void and merely declaratory — No separate suit was necessary, the decree being executable.

In a suit for money based on simple money bonds, a compromise was arrived at between the parties, whereby, it was agreed among other things, that in lieu of the amount of the claim and plaintiff's costs and interests, the defendant should execute a sale-deed in

plaintiff's favour in respect of certain fields free of all incumbrances on 1st November 1926 and deliver possession of the same on 1st March 1927 and that the plaintiff should pay the costs of the execution of the sale-deed. When the plaintiff applied for the execution of the compromise decree, the defendant objected to the execution on the ground that the Court had no jurisdiction under O. 23, R. 3 to embody in its decree, matters extraneous to the claim and that the decree was therefore, a nullity or at best a declaratory decree not executable and that the plaintiff's remedy, if any, was by a separate suit.

Held that the compromise decree was not ultra vires or void or merely declaratory in nature, that it was executable and that it was not necessary for the plaintiff (decree-holder) to institute separate suit for relief granted by the said decree : 34 *Cal.* 456 ; *A. I. R.* 1919 *P. C.* 79, *Dist.* ; *A. I. R.* 1927 *P. C.* 204 ; *A. I. R.* 1928 *Nag.* 173 ; *A. I. R.* 1925 *Mad.* 1101 ; *A. I. R.* 1921 *Cal.* 202 ; *A. I. R.* 1925 *Nag.* 239, *Appr.* [P 167 C 2, P 169 C 1]

(b) Contract Act, S. 54 — Where agreement has become rule of the Court and passed out of domain of contract, S. 54 does not apply.

Where a judgment-debtor pleaded that no relief in execution of the compromise decree should be granted to the decree-holder because the latter committed a breach by his default in paying the costs of conveyance as directed by the decree and that he was relieved of performing his part of the agreement as embodied in the decree under S. 54 on account of the decree-holder's default.

Held ; that it was not open to the judgment-debtor to invoke the aid of the provisions of the Contract Act and say that because the decree-holder committed the default first he was entitled to avoid his own obligations under the terms of the decree especially when those terms were independent of each other. [P 168 C 1]

(c) Contract Act, S. 55—If time is not of the essence of the contract, contract does not become voidable.

Ordinarily in agreements for the sale of property time is not of the essence of contract, but it is open to a party, if it was not originally of the essence, to make it so by service of notice. Unless the parties to a contract have therefore, expressly or impliedly by their conduct, made time the essence of the contract, delay by itself can never be a valid plea in a suit for specific performance unless the delay on the part of one party, coupled with reasonable notice given to him by the other, disentitles the party delaying from claiming any relief in equity. [P 168 C 1]

Where although by the decree 1st November 1926 was fixed for the execution of the sale-deed, the decree itself was not drawn up and signed up till that date.

Held : that under the circumstances time was not of the essence of performance of the obligations created by the decree and that the judgment-debtors were not therefore entitled to avoid them under S. 55 ; *A. I. R.* 1915 *P. C.* 83 ; *A. I. R.* 1926 *Nag.* 435 ; 33 *Cal.* 633 ; 26 *M. L. J.* 518, *Ref. to.* [P 168 C 2]

(d) Civil P. C., S. 148—S. 148 is no bar to extending time of decree with independent and separately enforceable terms.

Where the terms of a compromise decree are not interdependent and each direction stands by itself and is separately enforceable, the fact that the decree-holder and judgment-debtor have been guilty of failure to perform their respective obligations under the decree, does not disentitle one party from compelling the other to perform his obligations in execution proceedings and in such a case S. 148 does not debar the Court from extending the time fixed by the decree : *A. I. R.* 1923 *Nag.* 210, *A. I. R.* 1926 *Nag.* 280, *Dist.* [P 169 C 1]

M. R. Bobde—for Appellants.

M B. Niyogi—for Respondents.

Judgment —This and the connected First Appeal No. 78-B of 1928 arise under the following circumstances :

In Civil Suit No. 28 of 1926 on the file of the First Class Subordinate Judge, Akola, the plaintiffs' claim based on 4 simple money bonds to recover from the defendants Rs 5,361-8-0 was compromised by the parties and a decree, in the following terms, was passed on 26th October 1928 :

" It is ordered and decreed in terms of the compromise arrived at between the parties that

(1) in lieu of the amount of the claim and plaintiff's costs and interest up to date at 2 p. c. p. m. the defendants 1 and 2 to execute a sale-deed in favour of plaintiff in respect of the fields Nos. 22/1 and 31 of mouza Lonsan on 1st November 1926 free from all incumbrances and after taking the crop of 1926-1927 give possession of the same to the plaintiff on 1st March 1927.

(2) That plaintiff do pay the costs of the execution of the sale-deeds.

(3) That defendants do pay off the mortgage of the fields in favour of Bhagwandin Ramlal and hand over his receipt of full satisfaction to plaintiff and obtain his attestation to the plaintiff's sale-deed.

(4) And that defendants 1 and 2 do pay their own costs of suit.

(5) Defendants 1 and 2 do pay land revenue for 1926-1927. "

It is unfortunate that although there were two plaintiffs the decree in some places describes them as one Similarly in civil suit No. 8 of 1926 on the file of the same Court the plaintiffs' claim to recover from the defendants Rs. 5,400 due on a simple money bond was compromised and a decree passed, on the same day, in plaintiffs' favour on exactly identical terms as the

one passed in civil suit No. 28 of 1926 with the only difference that the property to be conveyed in this case consisted of fields Nos. 15 and 24 of mouza Lonasan. By two separate applications dated 29th June 1927 the plaintiffs decree-holders sought to execute the aforesaid decrees but in each case the defendants judgments-debtors resisted execution on identical grounds and their objections were registered in the lower Court separately, the one arising out of execution case No. 28 of 1926 as Miscellaneous Judicial Case No. 84 of 1927 and that relating to execution case No. 8 of 1926 as Miscellaneous Judicial Case No. 85 of 1927. Exactly identical issues were framed for trial in both these cases.

A very fair idea of the contentions of the parties as advanced in the pleadings will be formed by reproducing the following issues that were fixed for trial by the lower Court :

"1 Whether the decree-holders are not entitled to ask for sale-deed and delivery of possession of the fields from judgment-debtors by way of execution and whether it is necessary for decree-holders to file a separate suit for the purpose ?

2 (a) Whether the term regarding execution of sale-deed and delivery of possession of property could not be embodied in the decree as being matter extraneous to the suit and is this portion of the decree therefore not executable ?

(b) Was it necessary for the judgment-debtors to press the above objection at the time of the passing of the decree and is not the above objection open to them now ?

3 (a) Whether the decree-holders are not entitled to ask for a sale-deed from the judgment-debtors owing to their failure to perform their parl of the contract as embodied in the decree ?

(b) Whether the decree-holders did not purchase stamp for the sale deed owing to judgment-debtors unwillingness to execute the sale deed ?

4 (a) Whether decree-holders allowed judgment-debtors to perform the summer operations and sow the fields on an assurance that they would take a sale deed on Hangam ?

(b) Are the decree-holders on account of the above conduct debarred from asking for a sale deed by the present application which is filed before the expiry of the Hangam ?

(c) Whether the judgment-debtors made over possession of the fields to decree-holders who accordingly did summer operations and whether judgment-debtors subsequently obstructed decree-holders in the cultivation of the fields ?"

In an elaborate order recorded in Miscellaneous Judicial Case No. 84 of 1927 the learned Subordinate Judge answered issues 1, 2 and the first part of issue 3 in the affirmative and the second part of issue 3 and the first and last parts of issue 4 in the negative. No finding was recorded on issue 4 (b). On these findings the lower Court ordered execution of the decrees to proceed. Two separate appeals challenging the correctness of the decision of the lower Court have been filed by the defendants judgment-debtors in this Court and registered as first appeals Nos. 77-B and 87-B of 1928. As the points for decision in both the cases are identical, one set of arguments was addressed by the counsel for the parties, and therefore this judgment will govern both the appeals.

The appellants' learned advocate argued that the subject-matters in the two suits being merely claims for moneys due under simple money bonds the Court had no jurisdiction under the provisions of O. 23, R. 3, Civil P. C., to embody in its decrees, as it actually did, matters extraneous to the claim, and therefore the decrees were nullity or at best declaratory ones and not executable and the plaintiffs' remedy, if any, was by separate suits.

It is contended that the last words of the aforesaid rule "so far as it relates to the suit" exclude the possibility of all matters which are not the subject-matter of the suit and *Jasimuddin* v. *Biswas Bhuban Jellini* (1) and *Hemanta Kumari Debi* v *Midnapore Zamindari Co. Ltd.* (2) have been cited in support of the contention. In the first case cited it appears that a regular suit based on the agreement embodied as part of the decree upon a compromise entered into in the previous suit, was filed and the only question for decision before the Court was if the terms of the solehnama could not be proved on the ground of its being unregistered and the Court held that they could be proved. In the Privy Council case the same question was in issue and their Lordships held that the unregistered agreement which was a part of the compromise decree could be received in evidence. In dealing with the question, whether the de-

(1) [1907] 34 Cal. 456.
(2) A. I. R. 1919 P. C. 79=47Cal. 465=46 I. A. 240 (P. C.).

cree could be given in evidence to affect matters not coming within the scope of the suit for want of registration, their Lordships no doubt remarked that it may be that as a decree it was incapable of being executed outside the scope of the suit, but that it did not prevent its being received in evidence of its contents. The question involved in the present case was not, however, raised or decided in either of the above cases and therefore they cannot be regarded as authority to be followed in the decision of the present case.

In a later case before the Privy Council the question was if a compromise arrived at between the parties in a suit, which embraced within its terms matters extraneous to the subject-matter of the suit could be recorded and given effect to in a decree under O. 23, R. 3, Civil P. C., and their Lordships answered both the questions in the affirmative: vide *Mehdi Ali Khan* v *Ghanshiam Singh* (3). The principle laid down in this case was followed with approval by a Bench of this Court in the case of *Naraindas Bhagwanai and Co.* v. *Kalyanji* (4) in preference to the observations contained in the case of *Rani Hemanta Kumari* v. *The Midnapur Zamindari Co.* (2) and it was held that it was competent to the Court not only to record the entire compromise but to pass a decree in accordance therewith by even including in its operative parts the operative directions thereof, in spite of the suit being merely declaratory in its nature.

Exactly the same view was also expressed by the Madras High Court in the case of *Ramaswami Naidu* v. *Subbaraya Tevar* (5) where the learned Judges held that a decree passed on a Compromise cannot be regarded as ultra vires simply because it goes beyond the subject-matter of the suit and contains other conditions. It was further held in this case that if the terms of the compromise decree which do not relate to the suit appear either directly or indirectly as consideration on which the settlement of the plaint claim was based then such terms may be considered as part of the decree executable with it.

In *Shashi Bhusan Shaw* v. *Hari Narain Shaw* (6) it was observed that where a suit is merely for the recovery of specific properties, the distinction between property in suit and property extraneous to the litigation may be adequate and will be equal to the distinction between matters which relate to the suit and matters which do not, and that in those cases where suits are not for recovery of property but to establish particular claims, facts have to be looked at as a whole to ascertain whether matters have been introduced into the suit which do not relate to the suit. Mr. Mulla in his Commentaries on the Civil P. C., Edn. 8 at p. 773, observed that as a general rule all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. The ratio decidendi of the case of *Mehdi Ali Khan* v. *Ghanshiam Singh* (3) also is that where a compromise completely disposes of a suit and the terms agreed to are such as to be susceptible of specific performance being granted, no party to such a compromise can refuse to be bound by its terms and to escape from his obligation thereunder In *Mt. Sarjabai* v *Dhanraj* (7) where a decree was passed in terms of a compromise which directed that in case of failure in payment upto a certain date, by the judgment-debtor, of the decretal amount, the amount was to be a charge on certain properties of the judgment-debtor, this Court held that the charge was enforceable in execution of that decree and no separate suit was necessary.

On the question whether the decrees were nullity the learned advocate for the appellants frankly admitted that he found no authority in support of his contention Applying the principle discussed above to the facts of the present cases, I have no hesitation in holding that the compromise decrees in Civil Suits Nos. 28 of 1926 and 8 of 1926 dated 26th October 1928 were not ultra vires or void, that the same were not merely declaratory in nature, that the same are executable, and that it is not necessary for the plaintiffs to institute

(3) A. I. R. 1927 P. C. 204.
(4) A. I. R. 1928 Nag. 173=24 N. L. R. 55.
(5) A. I. R. 1925 Mad. 1101.
(6) A. I. R. 1921 Cal. 202=48 Cal. 1059.
(7) A. I. R. 1925 Nag. 289.

separate suits for the reliefs already granted by the said decrees.

It was next contended on behalf of the appellants that assuming that the decrees could be enforced specifically, no relief should be granted to the plaintiffs because they committed a breach by their default in paying the costs of conveyance as directed by the decrees and the defendants are, therefore, relieved of performing their part of the agreement embodied in the decrees S. 54, Contract Act, was relied on in support of this contention. The respondents' learned advocate, however, met this contention by arguing that the provisions of the Contract Act did not come into play in cases where the agreement between the parties had become a rule of the Court and passed out of the domain of the contract and this argument has my entire concurrence. I hold, therefore, that it is not open to the appellants to invoke the aid of the provisions of the Contract Act and say that because the plaintiffs committed the default first, the appellants were entitled to avoid their own obligations under the terms of the decree.

Assuming, however, that the law governing contracts could be applied to the terms of a decree the next question for consideration is whether time was of the essence of the obligations created by the terms of the present decrees Ordinarily, in agreements for the sale of property time is not of the essence of the contract, but it is open to a party, if it was not originally of the essence, to make it of such essence by service of notice : see *Jamshed Khodaram* v *Burjorji Dhunjibhai* (8) referred to with approval in this Court's judgment in *Shahabuddin* v. *Vilayat Ali Khan* (9). Unless the parties to a contract have, therefore, expressly or impliedly by their conduct made time the essence of the contract, delay by itself, can never be a valid plea in a suit for specific performance unless the delay on the part of one party, coupled with reasonable notice given to him by the other, disentitles the party delaying from claiming any relief in equity : see *Kissen Gopal* v. *Kally Prosonno* (10), *Jamshed Khodaram Irani* v *Burjorji Dhunjibhai* (8) and *Suryaprakasarayadu* v. *Lakshminarasimhacharyulu* (11)

It is significant to note that although by the decrees in these cases the 1st November 1926 was fixed for the execution of the sale deeds the decrees themselves were not drawn up and signed up till that date, and I agree with the lower Court in thinking that, under the circumstances, it does not seem at all probable that the particular date mentioned above was of the essence of the contract. I, therefore, hold that time was not of the essence of performance of the obligations created by the decrees in the present case and that the appellants are not, therefore, entitled to avoid them under S. 55, Contract Act.

I am further of opinion that since the decrees contain specific directions as to what each party had to do, these directions must be read as independent of each other For instance had the defendants paid all the costs of conveyance themselves and executed the sale deeds, could they not enforce, by coercive process of execution proceedings, the obligations of the plaintiffs under the decrees of reimbursing them for those expenses? Could the plaintiffs then be heard to say that because they could not find the money in the first instance and pay it over to the defendants, the latter had no business to incur the costs of the sale deeds and ask for reimbursement? I think under the express terms of the decrees each party has to do his bit failing which the other party has a right to have it performed through the machinery provided by the execution proceedings.

Another ingenious argument advanced on behalf of the appellants was that as the date fixed in the decrees for the execution of the sale deeds has passed by, on account of the default of the plaintiffs in paying the costs of conveyance beforehand, the decrees have become incapable of execution, the Court having no power in decrees based upon compromises to extend the time for performance under S. 148, Civil P. C. Reliance was placed on the following two cases of this Court : *Ambadas* v *Laxman* (12) and *Dawlat* v. *Kashirao* (13). The first

(8) A. I. R. 1915 P. C. 83=40 Bom. 289=43 I. A. 26 (P. C.).
(9) A. I. R. 1926 Nag. 435.
(10) [1906] 33 Cal. 693.
(11) [1914] 26 M. L. J. 518=23 I. C. 500.
(12) A. I. R. 1923 Nag. 210=19 N. L. R. 9.
(13) A. I. R. 1926 Nag. 280.

was a case of pre-emption in which there is always an alternative direction given in the decree that if the money is not paid by a particular date the suit would be dismissed. The second was of a consent decree in a mortgage suit where special period of one year was fixed for redemption with an alternative of foreclosure and this Court, under the circumstances rightly held that no further extension of time could be granted. In the present cases the decrees contain no alternative directions that if by the particular dates mentioned therein any party failed to carry out his part of the obligations he would be relieved completely of all obligations imposed upon him by the decrees and the other party would be precluded from enforcing them against the party in default It is, therefore, clear that the cases cited above have no application to the facts and circumstances of the present cases. As I have already said the terms of the present decrees appear to me to be not interdependent, but each direction stands by itself and can, therefore be separately enforced.

There is a clear finding contained in the last portion of the lower Court's judgment, with which I fully agree, to the effect that in the present cases both the decree-holders and the judgment-debtors are guilty of failure to perform their respective obligations created by the decrees, but for the reasons given above this cannot disentitle one party from compelling the other to perform his obligations in execution proceedings. To disallow the plaintiffs decree-holders to execute the decrees would be doing manifest injustice to them under the circumstances of the case

For the reasons set forth above I uphold the orders passed by the learned Subordinate Judge in these cases and dismiss the appeals with all costs. As the subject-matters in dispute in both the cases are valued at more than Rupees 10,000, I fix the counsel's fees in this Court in each case at Rs. 150.

K.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Nagpur 169

SUBHEDAR, A. J. C.

Zingu and *others*—Plaintiffs—Appellants.

v.

Ramji Mahadu — Defendant 1—Respondent.

Second Appeal No. 119 of 1928, Decided on 27th March 1929, against decree of Dist. Judge, Bhandara, D/- 10th December 1927.

*** Transfer of Property Act, S. 106—Agricultural tenancies—Notice to quit.**

A notice demanding an agricultural tenant from year to year to quit the land immediately or forthwith is not a proper and reasonable notice. 14 *N. L. R.* 3; *Nag. S. A.* 201 *of* 1917, *Ref.*; 9 *Cal.* 48.; 12 *Cal.* 82; 7 *Bom.* 759, *Expl.* and *Dist.* [P 170 C 1]

D. T Mangalmurti—for Appellants

P. S Kotval—for Respondent

Judgment—The plaintiffs who are malguzars of patti No. 2 of mouza Usgaon in the Sakoli Tahsil of the Bhandara District sued defendant 1 for possession of *sir* field No. 76 comprised in the said patti. Various defences were raised in the trial Court but they failed and the plaintiffs' claim was decreed on the ground that defendant 1 being merely a subtenant was liable to be ejected. Defendant 1 appealed to the Court of the District Judge, Bhandara, who recorded further pleadings and admitted fresh documentary evidence and ultimately allowed the appeal dismissing the plaintiffs' suit holding that the notice to quit dated 3rd February 1926 (Ex A. D-2) which was given by the plaintiffs to defendant 1, was not a valid and legal notice, because it required the defendant to quit the field at once on receipt of the notice.

The plaintiffs have now come up in second appeal and the only point pressed for them is that the notice (Ex. A. D-2) was a perfectly valid notice and the lower appellate Court was wrong in holding it otherwise. It was argued that the learned District Judge erred in applying the provisions of S. 106, T. P. Act, to the case because by S. 117 agricultural leases were exempted from the operation of Chap. 5 ibid.

It was however, conceded that reasonable notice was necessary to be given in the present case as the subtenancy was from year to year. Reliance was placed

upon the following cases to show that the notice to quit so far as the agricultural leases were concerned need not be 6 months notice terminating with the end of the year of the tenancy, and that it is enough if it requires the tenant to give up possession at a time when there are no crops standing in the field : *Jagut Chunder Roy* v. *Rup Chund Chungo* (1), *Radha Gobind* v. *Rakhal Das* (2), and *Ambabai* v. *Rajaram* (3).

In the first Calcutta case a three months notice to quit was given though it did not expire with the end of the year of the tenancy and it was found that there were no crops on the land at the date of the expiry of the time stated in the notice. In the second case from the same High Court the notice required the tenant to quit after one month and under the circumstances of those cases the period of one and three months were considered reasonable The Bombay case referred to laid down that in cases before the Transfer of Property Act came into operation a tenant other than a monthly tenant, holding over on the terms of his lease was entitled to reasonable, that is to say, in the case of lands and in the absence of usage or stipulation to the contrary to six months' notice to quit. None of these cases is, therefore, any authority for holding that a notice demanding an agricultural tenant from year to year to quit the land immediately or forthwith on receipt of the notice is a proper and reasonable notice within the meaning of the expression used in the case of *Sheomangal* v *Nanhelal* (4). In another case Batten, A. J. C., held that five months notice before the end of the agricultural year was a sufficient one in terminating a subtenancy of an absolute occupancy holding : *Govinda* v. *Chindhu* (*Second Appeal No.* 201 *of* 1917).

In para 2906 of Dr. Gour's Law of Transfer, Vol. 3, 5th Edn., it is stated, following an English case, that a notice to quit forthwith or from henceforth or to quit generally without referring to some distinct time would be invalid and I have been shown no authority to hold that such a notice as is given in the present case could be called a reasonable notice even in the case of agricultural tenancy Agreeing, therefore, with the lower appellate Court I hold that the notice (Ex. A. D-2) was not a valid notice and that the plaintiff's suit was rightly dismissed on that account.

The appeal fails and is dismissed with costs. Costs in the lower Courts will be paid as already ordered by the decree appealed against.

K.N./R.K *Appeal dismissed.*

(1) [1883] 9 Cal. 48=11 C. L. R. 143.
(2) [1886] 12 Cal. 82.
(3) [1896] 20 Bom. 759.
(4) [1918] 14 N. L. R. 3=43 I. C. 392.

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* A. I. R. 1929 Nagpur 170

MACNAIR, OFFG. J. C.

P. P Deo—Defendant—Appellant.

v.

Narayan and *others*—Plaintiffs—Respondents.

Second Appeal No. 461 of 1927, Decided on 27th February 1929.

*** (a) Contract Act, S. 230—Where broker brings face to face vendor with purchaser it cannot be said that he did not disclose his principal's name—But if purchaser does not keep record of seller's names and his account books show that he made payments to broker, broker can sue personally to recover price of goods sold.**

Where a broker brings his principal, the vendor, face to face with the purchaser, it cannot be said that he did not disclose the name of the principal and so the presumption under S. 230 will not arise. But if the purchaser does not keep record of the sellers' names and his account books show that he used to make payments to the broker, the broker shall be deemed to be intended under the contract to have the right to sue the purchaser personally for the price of the goods sold. [P 171 C 2]

(b) Interest Act (32 of 1839), S. 1—Scope.

It is not correct to say that Courts have power to award interest in all cases where money due is withheld : *A. I. R.* 1925 *Nag.* 451; 3 *Cal.* 654 (*P. C.*) ; 42 *Mad.* 661 ; 3 *Cal.* 654 (*P. C.*) ; *A. I. R.* 1916 *P. C.* 46 ; *A. I. R.* 1915 *P.C.* 116, *Disc.* and *Expl.* [P 172 C 1]

Y. V. Jakatkar—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The plaintiff, Narayan is a broker who acts as an intermediary between merchants who purchase cloth and Topiwalas who sell cloth. The learned District Judge has described the prevalent practice as follows :

" The merchants or prospective buyers arrive at a place and desire to buy cloth. They then approach a dalal who collects the Topiwalas or the middle men, who had obtained cloth from the weavers, and the parties meet. The buyers then see the various specimens of cloth and purchase them, but they do not actually purchase direct from the Topiwalas,

but through the dalals or brokers, who charge 1 per cent. commission on the transactions and arrange for delivery to the buyers. The prices are apparently fixed in consultation, but if the buyer himself is not present it is admitted on both sides that the price is fixed by the broker. There is no enhancement of price between the buyer and the seller, the broker's commission being a fixed percentage. The buyers have an account with the broker and so do the sellers."

The plaintiffs have filed the present suit to recover from a merchant the price of cloth which he had purchased for him and delivered to him in this manner together with interest on that price. The defence which I have to consider was that the plaintiff, Narayan was a mere broker and had no right to bring the suit.

The learned District Judge has held that since the buyer does not trouble to make any enquiry regarding the identity of the Topiwala and does not keep any record of his name, it must be considered that the agent has not disclosed the name of his principal : a presumption, therefore, arises in accordance with S. 230, Contract Act, that a contract exists to the effect that the agent can personally enforce contracts entered into by him on behalf of the Topiwala.

In appeal it is urged that since the buyers and sellers came face to face the name of the principal was thereby disclosed. The plaintiff Narayan clearly dealt with the defendant in the capacity of an agent for the seller ; in my opinion, when he brought his principal face to face with the defendant, it cannot be said that he did not disclose the name of his principal. But S. 230, Contract Act, merely says that a presumption arises when the agent does not disclose the name of the principal. If no such presumption arises, the question remains whether or not facts exist to justify an inference that there was a contract allowing the agent to sue personally. I have to consider what was the intention of the parties when the transaction to which this appeal relates took place. The facts proved and admitted clearly justify the inference that the parties did intend that the agent should recover the price of the cloth. It is admitted that the appellant has kept no record of the names of the principals ; he has made payments to the respondent and his account books show such payments as made to respondent 1. It can be safely inferred that it was a term, explicit or implied, of the contract that the appellant should make payments to the respondent.

The appellant next urges that S. 236, Contract Act, prevents the respondents from requiring the performance of the contract; but this section only applies to cases where a person misleads another by describing himself as an agent. Apart from this, I fully agree that respondent 1 was in reality acting as an agent.

I hold, therefore, that, as there was a contract to that effect, the agent can personally enforce the contract for the sale of the goods. It is next urged that interest should not have been allowed. The plaintiffs allege that one of the terms of the contract was that the price should be paid in three months. It is difficult to see how on this pleading a decree for interest for the whole period subsequent to the transaction can be upheld. The learned District Judge has relied on *Haridayal* v. *Sunderlal* (1) The decision in that case appears to be that the general provisions of the Interest Act cannot detract from special provisions such as those of S. 73, Contract Act. This decision may be supported by a reference to *Hurropersaud Roy* v. *Shamapersaud Roy* (2) where their Lordships point out at p. 660 that these words occur in Act 32 of 1839 :

" Provided that interest should be payable in all cases in which it is now payable by law."

In my opinion, it was for the plaintiffs to allege and prove facts by virtue of which it could be held that the interest claimed was payable by law.

In *Abdul Saffur* v. *Hamida Bivi* (3) (at 666) it is stated :

" The cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law."

The cases to which they refer, however, show that interest was allowed for some definite and special reason. In *Hurropersaud Roy* v. *Shamapersaud Roy* (2) interest was awarded on mesne profits for reasons which do not apply to debts other than mesne profits. In

(1) A. I. R. 1925 Nag. 451=21 N. L. R. 16.
(2) [1877] 3 Cal. 654=5 I. A. 31=1 C. L. R. 499=3 Sar. 782 (P.C.).
(3) [1919] 42 Mad. 661=36 M. L. J. 456=52 I. C. 505=(1919) M. W. N. 484.

Hamera Bibi v. *Zubaida Bibi* (4) a widow, who had been allowed to take possession of her husband's estate in order to satisfy her dower-debt from the income thereof, was held to be entitled to some reasonable compensation for forbearing to insist on her strict legal rights to exact payment of her dower on the death of her husband and their Lordships thought it obvious that compensation for forbearance to enforce a money payment was best calculated on the basis of an equitable rate of interest In *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* (5) (at 925 *of* 42 *Cal*) their Lordships state :

"It is well-settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon."

These Privy Council rulings furnish no support for the theory that Courts have power to award interest in all cases where money due is withheld.

In the case I am considering the plaintiffs did not prove their allegation that one of the terms of the contract was that the price should be paid in three months. I need not consider what would have been the result had they pleaded an implied contract that the money should be paid in a reasonable time. They have not then shown that the defendant's failure to pay was a breach of the contract and S 73, Contract Act, cannot apply. There is no question of an agreement by which they forbore to sue I do not know of any provision of law or any settled principle under which they can claim interest. I, therefore, vary the decree of the lower Court by excluding interest. Costs in all Courts will be be borne in proportion to success and failure

S.N./R.K. *Decree varied*

(4) A. I. R. 1916 P. C. 46=38 All. 581=43 I. A. 294 (P.C.).
(5) A. I. R. 1915 P. C. 116=42 Cal. 914=42 I. A. 91 (P.C.).

A. I. R. 1929 Nagpur 172

STAPLES, A. J. C.

K. Fasiuddin—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 59 of 1921, and Misc. Petn. No 13 of 1929, Decided on 12th April 1929, against the order of Sub-Divisional Magistrate, Jubbulpore, D/- 3rd December 1928

(a) Criminal P. C., S. 162—Accused has absolute right to get copy of statement of prosecution witness.

The Court cannot refuse to grant copies to the accused of the statements of prosecution witness, which have been previously reduced to writing, because on a persual thereof it considers that there is no contradiction of the depositions recorded in Court. Although the statement previously recorded into writing may only be used to contradict a witness, the Court cannot, on that ground, refuse to grant a copy because there is apparently no contradiction. *A. I. R.* 1928 *Pat.* 215, *Ref.* [P 174 C 1]

(b) Criminal P. C., S. 162—Scope.

An accused person has a right to apply for copies as soon as a witness is called for prosecution either in an inquiry or in a trial. [P 174 C 1]

(c) Criminal P. C., S. 526 — Magistrate refusing copies of statements of prosecution witnesses—His order bona fide and under genuine mistake of law—No bias on his part —Application for transfer is not entertainable.

Where the Magistrate was clearly wrong in refusing to grant copies of statements previously recorded and made by prosecution witnesses but where his order was a bona fide one made under a genuine mistake of law.

Held: that the Magistrate did not act under any bias or prejudice and therefore an application for transfer on that ground could not be granted. [P 174 C 1, 2]

(d) Criminal P. C., S. 526—In cases of doubt of personal impartiality of the Judge or where his acts and orders create reasonable apprehension in accused, transfer should be granted but not otherwise.

Where any doubt can be shown as regards the personal impartiality of the presiding Judge of the Court, a transfer should immediately be granted; but where no such personal grounds can be shown a transfer should only be granted when the Magistrate has shown by his acts or orders that there is a possibility that he may be prejudiced against the accused or, at any rate, that the accused might have a reasonable apprehension that he is so prejudiced. Such an apprehension should not arise from the ordinary acts of a Magistrate performed in the course of a case. During the conduct of a protracted trial it necessarily happens that many points arise upon which the Magistrate has to give a decision, and the fact that he makes a deci-

sion against the accused is not sufficient to warrant any apprehension of impartiality if the order is passed in good faith and the reasons for the order are duly stated: 10 *N. L. R.* 15; *A. I R.* 1926 *Nag.* 448, 23 *Cal.* 499; 19 *All.* 64; 10 *C W. N.* 441; 1 *N. L. R.* 134, 2 *Q. B. D.* 558, *Ref.* [P 175 C 2]

(e) Criminal P. C., S. 540—Scope—No bias unless Court guides or assists prosecution—Criminal P. C., S. 526.

Court has power to summon any person as witness if his evidence appears essential for the just decision of the case. And no question of bias against the accused can arise unless it is shown that the Court was guiding or assisting the prosecution. [P 174 C 2]

Fida Hussain—for Applicant.

G P. Dick—for the Crown

Order.—This is an application by seven persons, who are being prosecuted under S. 307, I. P. C. in the Court of Mr Wickenden, Sub-Divisional Magistrate, Jubbulpore, for transfer of the case from that Magistrate The application is fairly long, but in argument the learned counsel who appeared for the applicants put forward only three grounds in support of it. The first was that the Magistrate had persistently refused to grant bail to the applicants although he was not justified in doing so; the second was that the Magistrate refused to grant copies of statements made by witnesses for the prosecution though the applicants had applied for such copies under S. 162, Criminal P. C; and the third ground was that the Magistrate of his own motion called further medical evidence in addition to that adduced by the prosecution. It is alleged that from these circumstances the applicants had a reasonable apprehension that the Magistrate was biased against them and that they would not get a fair and impartial hearing.

As regards the first ground, there is, I think, absolutely no case The only order by Mr. Wickenden as regards bail is contained in the order-sheet of 15th October 1928. In that it is stated that the Magistrate could not grant bail owing to the nature of the case and the Dasehra festival. It may be noted, however, that prior to that order bail had been refused by Thakur Chhattar Singh, Magistrate First Class, on 15th September, by Mr. Dewey, Magistrate First Class, on 29th September, by Mr. Woodward, Sessions Judge, on 22nd September and by Mr. Jawahir Lall, Additional Sessions Judge, on 1st October 1928. In view of these previous orders Mr Wickenden cannot be held to have been wrong in refusing bail. It is true that bail was allowed by this Court on 31st October, but, as it had been previously refused not only by the two Magistrates to whom applications had been made, but also by the Sessions Judge and the Additional Sessions Judge, Mr. Wickenden was, in my opinion, right in refusing bail on 15th October 1928. At any rate, no possible bias can be inferred from his refusal.

As regards the refusal to grant copies, Mr. Wickenden has made a report in his explanation to the District Magistrate, and in his order of 5th December Mr. Wickenden has given reasons for not granting copies It is true that he made a mistake in the matter and was not right in refusing to grant copies; but the Magistrate appears to have made a bona fide mistake and also, if his explanation can be believed, he was following a practice which had apparently been followed by the Sessions Judge The application was made on 26th November On that Mr. Wickenden has endorsed:

"I will peruse the diary and give statements accordingly. On further consideration, as the case is a committal one and at this stage no question of further examination for purposes of contradiction arises in this Court, the application does not lie to me. In case of committal the Sessions Judge may be approached."

In the order dated 5th December the Magistrate has written:

"Copies of the case diary can only be granted for purpose of contradicting a witness. The X examination of the witnesses had been closed. Therefore no question of contardicting the witness in this Court arose Therefore, no application for copies could lie to this Court at that stage."

In the report to the District Magistrate Mr. Wickenden has said that the accused had not an automatic right to copies of the case diary, bnt had only a right for the purpose of contradiction after a witness had been examined, and that the practice of the Sessions Judge was to peruse the diary when asked by the defence counsel and to give a copy of such portion of the statement which would contradict the witness's statement made in Court In his further report to the District Magistrate Mr Wickenden has stated that the rejection of the application was on legal grounds upon a more careful appreciation of S. 162. As already stated above, I think

there is no doubt that Mr. Wickenden was wrong in the matter and, if I may believe him, the Sessions Judge also appears to be labouring under a mistake. According to S. 162 of the present Criminal P. C. the Court is bound, on the request of the accused, to refer to the statements of the prosecution witness, which has been previously reduced into writing, and to furnish the accused with a copy thereof. The only ground on which the Court could refuse to grant a copy is stated in para 3, Cl. (1) of that section. The Court could not, then, refuse to grant copies because upon a perusal of the statements previously recorded it considers that there is no contradiction of the depositions recorded in Court. It is true that according to S. 162 the statement previously reduced into writing may be used only to contradict a witness in the manner provided by S. 145, Evidence Act, but the Court cannot on that ground refuse to grant a copy because there is apparently no contradiction. Under S. 162 of the Code of 1898 there was more discretion left to the Court in the matter, and previous rulings referring to S. 162 would show that the Court could refuse to grant copies for sufficient reasons; but as the section now stands, I am of opinion that an accused person has an absolute right to get a copy of a statement of a witness for the prosecution that has not been refused for reasons stated in the last paragraph of Cl. (1).

I would refer in this connexion to *Ramgulam* v. *Emperor* (1) Nor am I pressed by Mr. Wickenden's reasoning that the application should not be made in his Court but in the Court of the Sessions Judge. An accused person has a right to apply for copies as soon as a witness is called for the prosecution either in an inquiry or in a trial, the word "inquiry" being expressly mentioned in para. 2, S. 162. At the same time, although Mr. Wickenden was, in my opinion, clearly wrong in refusing to grant copies, there can be no doubt that his order was a bona fide one made under a genuine mistake of law and apparently following a practice which was adopted by the Sessions Judge in the matter. There can be no ground, then, for supposing that Mr Wickenden has acted under any bias or prejudice: on the contrary he seems to have taken considerable pains in the matter, to have read the statements in the diary carefully and to have passed his order after satisfying himself that there was no contradiction. I do not, therefore, think that there can be any reasonable apprehension of partiality or unfairness against the Magistrate owing to his refusal to grant copies.

The third ground is, I think absolutely without foundation. Under S. 540, Criminal P C., a Court has full power to summon any person as a witness, and it has been laid down that the Court shall summon such person if his evidence appears essential for the just decision of the case. Mr. Wickenden has given good rsasons for calling further medical evidence. The case was challaned under S. 307, I. P. C., and it is clear that medical evidence would be important The injured person was examined by Dr. Sampson upon his admission to the hospital, but was not subsequently examined by him. After his examination Mr. Wickenden was of opinion that more medical evidence was necessary and the Public Prosecutor said he would produce further evidence. In calling further medical evidence Mr. Wickenden was clearly acting within the provisions of S. 540, Criminal P. C., and no suspicion of bias of any kind can arise. It cannot be held that Mr Wickenden was guiding or assisting the prosecution. all that he did was to call further medical evidence which, in a case of this kind, was probably most desirable.

I am clearly of opinion, then, that none of the grounds put forward show any bias or prejudice on the part of the Magistrate, nor is the cumulative effect of the circumstances such as would cause any reasonable apprehension in the minds of the applicants that they would not get a fair and impartial trial The applicants are men of some position and education, or, at any rate, they are not merely ignorant villagers, as is often urged in applications of this kind; and this being so they cannot be expected to have any reasonable apprehension, unless the circumstances are such as would warrant such an apprehension in the mind of a man of average intelligence and mental capacity. It is true that, when there does exist a reasonable apprehension in the mind of the accused, a transfer of a case should be ordered even

(1) A. I. R. 1928 Pat. 215=7 Pat. 205.

though the circumstances are not such as would make the Court doubt the possibility of a fair and impartial trial This has been held in several decisions, although it may be noted in passing that according to S. 526 (1) (a), Criminal P. C.. it is laid down that

"whenever it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto . . . . etc."

There is nothing in S. 526 as regards any apprehension in the mind of the accused, and the only criterion is whether the High Court is of opinion that a fair and impartial trial can or cannot be held. At the same time, it has now been laid down in a number of decisions that a reasonable apprehension in the mind of the accused is a ground for ordering a transfer, and that view must, I think, be followed. I would refer to the decisions in *Machal* v. *Matru* (2), *Abdulla* v. *Emperor* (3), *Upendra Nath* v *Khtish Chandra* (4), *Farzand Ali* v. *Hanuman Prasad* (5) and *Narain Chandra* v. *Howrah Municipality* (6) At the same time I would also .refer to the case in *Emperor* v *Jaggan* (7) where Know, J., has taken rather a different view of the matter. Granting, however, that a reasonable apprehension in the mind of the accused is a sufficient cause for transferring a case the Court must be satisfied that such a reasonable apprehension exists, and it can only be so satisfied from the circumstances of the case and from the conduct and behaviour of the accused as well as the accused's character and mental status. Each case must, of course, be decided on its own merits It is in my opinion impossible to determine with absolute certainty whether a reasonable apprehension exists in the minds of the accused or not as, strictly speaking, it is impossible to determine the intention of the accused. Intention, however, as laid down by Ismay, J. C., in *Jhagru Gond* v *Emperor* (8), can only be inferred from the acts of the accused, and every sane person must be presumed to intend the natural and probable consequences of his acts. Similarly, the state of an accused person's mind and the possibility or probability of his entertaining a reasonable apprehension can only be determined from the circumstances, which might give rise to such apprehension and from the conduct of the accused, after taking into consideration the accused's position in life, social status and mental development. I would also quote a passage that occurs in *Narain Chandra Bannerjee* v. *The Howrah Municipality* (6) at 444 :

"The law requires that it should be made to appear to this Court that a fair and impartial trial cannot be had before we take action under S. 526 (1), Criminal P. C., and we think that we should not be doing our duty if we pretended to accept as reasonable grounds which we knew to be insufficient and unreasonable simply because the litigants were foolish enough to entertain them. To extend the rule in the manner suggested by the learned counsel would be to encourage a distrust in the integrity and independence of the magisterial Courts in this country which would amount to a serious evil. We conceive it to be our duty rather to discourage than to encourage it. We are not prepared therefore to apply the rule unless we are satisfied that there is in the present case a reasonable apprehension that the petitioners will not have a fair and impartial trial in the Court before which their case is at present."

I would also point out that in *Serjeant* v. *Dale* (9), a case often quoted in this connexion, the reason for holding that the Court was not impartial was a personal one Such a reason does not apply to the present case or to the majority of cases in which applications for transfer are made. Of course, where any doubt can be shown as regards the personal impartiality of the presiding Judge of the Court, a transfer should immediately be granted; but where no such personal grounds can be shown a transfer should only be granted when the Magistrate has shown by his acts or orders that there is a possibility that he may be prejudiced against the accused or, at any rate, that the accused might have a reasonable apprehension that he is so prejudiced. Such an apprehension should not arise from the ordinary acts of a Magistrate performed in the course of a case. During the conduct of a protracted trial it necessarily happens that many points arise

(2) [1914] 10 N. L. R. 15=22 I. C. 980=15 Cr. L. J. 196.
(3) A. I. R. 1926 Nag. 448=23 N. L. R. 99.
(4) [1896] 23 Cal. 499.
(5) [1896] 19 All. 64=(1896) A. W. N. 177.
(6) [1906] 10 C. W. N. 441.
(7) [1914] 36 All. 239=22 I. C. 996=12 A. L. J. 399.
(8) [1905] 1 N. L. R. 134.
(9) [1878] 2 Q. B. D. 558=46 L. J. Q. B. 78 =37 L. T. 153.

upon which the Magistrate has to give a decision, and the fact that he makes a decision against the accused is not sufficient to warrant any apprehension of impartiality, if the order is passed in good faith and the reasons for the order are duly stated There is a tendency on the part of accused persons to come up for a transfer whenever there is an order which is adverse to them, but such an order can be no ground for a transfer if passed in good faith and in exercise of the Magistrate's jurisdiction. It may be noted that, in some of the cases referred to above, in which a transfer was granted on the ground of a reasonable apprehension existing in the minds of the accused, the Magistrate had either acted upon information outside the record or had acted in some other irregular manner Such irregularity would, of course naturally give rise to an apprehension; but when a Magistrate has not acted irregularly and has only acted in good faith and in exercise of his jurisdiction no apprehension should, as a rule, arise or be presumed to exist. Even when, as in the present case, a Magistrate has made a mistaken order, as pointed out above with reference to S 162, Criminal P C.. it is no sufficient ground for inferring any reasonable apprehension of bias or prejudice, when the order has been passed in good faith and for reasons stated therein. In the case of a very ignorant or unsophisticated person a transfer might be granted more readily, but in the case of persons of ordinary intelligence and character a transfer should only be given upon reasonable grounds. It is not sufficient in such a case for the accused to say that they have an apprehension that they will not get a fair and impartial trial, but it must be shown that, from the circumstances of the case, a reasonable inference can be drawn that such an apprehension does exist in the minds of the accused.

In the present case I am of opinion that the circumstances do not show that any sufficient reason for such an apprehension exists, nor do I think that the accused really entertain any such apprehension: their object in making this application is, I think simply to secure a transfer, and to defeat or delay the ends of justice The application is one that should not be granted and I therefore dismiss it. The Magistrate will now proceed with the trial of the case

K.N./R.K. *Application not granted*

A. I. R. 1929 Nagpur 176

MACNAIR, OFFG J. C.

Mt. Yamunabai—Appellant.

v.

Dist. Judge, Chhindwara — Respondent.

Misc. Appeal No. 14 of 1929, Decided on 24th April 1929, against order of Dist. Judge, Chhindwara

Guardians and Wards Act, S. 39—Notice.

Before removing a guardian, he should be given notice setting out for which of the causes mentioned in S. 39, it is proposed to remove him : 20 *C. L. J.* 231, *Rel. on.* [P 176 C 2]

P. K. Salve—for Appellant.

Judgment.—The record of this case indicates that Yamunabai was an unsatisfactory guardian : she did not file accounts, she expended Rs 1,000 on a marriage without sanction of the Court and she did not obey the orders of the Court. On 25th January 1929, however, she had not been directed to be present in Court ; a report was taken into consideration without giving her an opportunity to offer an explanation. She was removed from the guardianship and the reasons for her removal are not stated She has appealed from this order under the provisions of S. 47, Guardians and Wards Act.

It appears to me that she should have been given notice setting out for which of the causes mentioned in S. 39 of the Act it was proposed to remove her. The course taken in *Mahadeb Mondal* v. *Bidhi Chand Mondal* (1) appears a convenient one. It is highly undesirable that the order removing her from guardianship should be at once set aside The appellant's counsel is informed that she must appear before the District Judge on the day after the expiry of the vacation. She will then be informed of the reasons for the proposal to remove her from guardianship and will be allowed to give any explanation which she desires. In the meantime, however, she will not be guardian of the minor. I make no order regarding costs.

P.N./R.K. *Appeal allowed.*

(1) [1914] 20 C.L.J. 298=27 I.C. 28.

* A. I. R. 1929 Nagpur 177

JACKSON, A. J. C.

Ramchandra—Plaintiff—Appellant.

v.

Harischandra and *others*—Defendants—Respondents.

Second Appeal No. 20-B of 1928, Decided on 28th March 1929, against decree of Second Addl. Dist. Judge, Akola, D/- 1st November 1927, in Civil Appeal No 4 of 1927.

*** Hindu Law — Adoption — Property acquired by partition is not divested by adoption.**

Property acquired at partition in the natural family is not divested by a person's subsequent adoption in another family 29 *Mad.* 437, 1 *C. W. N.* 121, *A. I. R.* 1923 *Bom.* 297, *A. I. R.* 1922 *Nag.* 16; 40 *Bom.* 429, 43 *Bom.* 774, *Disc.* 5 *Cal.* 777 (*P.C.*), *Appl.*

[P 179 C 1]

M. B Niyogi and *G G Hatvalne*—for Appellant.

S. K. Barlingay and *P. B. Gole*—for Respondents.

Judgment. — The appellant in this case, Ramchandra, and defendant 1 Harishchandra, were the sons of Raoji Kunbi. After Raoji's death there was, according to the finding of both the lower Courts, a partition between Ramchandra and Harishchandra. After the partition Ramchandra was taken in adoption by his uncle Bisram, and Harishchandra took possession of the property that had fallen to Ramchandra at the partition. On attaining majority Ramchandra brought the suit, out of which this appeal arises, to recover possession on the ground that the property had vested in him before the adoption and could not be divested by the adoption. The trial Court decreed Ramchandra's claim, but the lower appellate Court has reversed the decree and dismissed the suit.

The first point I propose to deal with, is the contention raised on behalf of the respondents that the lower Courts' finding as to partition having taken place is wrong. This finding is attacked on the ground that a document, Ex. P-16, described as a farkat, is not registered, although it is a deed of partition and, having regard to the value of the property affected, is compulsorily registrable, and should not have been admitted in evidence. It is admitted that there was a division of property between Ramchandra and Harishchandra, but it is said to have been admitted in evidence. It is admitted that there was a division of property between Ramchandra and Harishchandra, but it is said to have been merely a family arrangement. There is, however, adequate evidence, apart from Ex P-16, to show that there was a partition and not merely a family arrangement; and even if the view is accepted that Ex P-16 has been wrongly admitted in evidence, I see no reason to differ from the finding of the lower Courts that Ramchandra and Harishchandra separated from each other.

I now come to the main question to be decided in this appeal, and that is, whether the adoption of Ramchandra by Bisram operated to divest Ramchandra of the property that fell to his share at the partition The principal case relied on by the appellant is *Sri Rajah Venkata Narasimha* v. *Rangayya Appa Row* (1), in which it was held that the adoption into another family of the only surviving member of a joint family, in whom the family estate has vested solely and absolutely, does not in law operate to divest him of his rights in such estate. This view of the law agrees with that taken by Ameer Ali, J., in *Behari Lal* v *Kailas Chunder* (2), and it has been accepted in *Mahableshwar Narayan* v. *Subramanya Shivram* (3), in *Maroti* v. *Laxman* (4), in Gour's Hindu Code and in Sarvadhikari's Principles of the Hindu Law of Inheritance. The respondents contend that this view is wrong, resting their case mainly on the wording of the text of Manu that deals with the position of an adopted boy as regards the family and estate of his natural father, Ch. 9, Verse 142, and on the interpretation of that text in Sarkar's Hindu law, and that learned writer's theory of adoption as tantamount to civil death in the family of birth and rebirth in the family of adoption.

Sarkar's view of the effect of adoption after property had vested in the person adopted was originally the same as that taken in *Venkata Narasimha* v *Rangayya Appa Row* (1) The theory subsequently held by him that adoption is tantamount to civil death and rebirth has been considered in the judicial deci-

(1) [1906] 29 Mad. 437=16 M. L. J. 178.
(2) [1897] 1 C. W. N. 121.
(3) A. I. R. 1923 Bom. 297=47 Bom. 542.
(4) A. I. R. 1922 Nag. 16.

sions and text books referred to above, and has not, for reasons which appear to me to be sound, been accepted as an accurate guide as to the effect of adoption. It has been accepted by Mookerjee, J., in *Birbhadra Nath* v. *Kalpataru Panda* (5), but I cannot find that it has been accepted elsewhere In *Dattatraya Sakharam* v. *Govind Sambhaji* (6), Shah, J., though he dissented from *Venkata Narasimha Row* v. *Rangayya Appa Row* (1), did not proceed upon the theory of civil death and rebirth. Nor is that theory, I think, adopted in *Ramchandra* v. *Manubai* (7), though I note that that decision is referred to in *Maroti* v *Laxman* (4), as supporting the theory.

Coming now to the interpretation of Ch. 9, Verse 142 of Manu, this has been translated in Vol 25 of the Sacred Books of the East as:

"An adopted son shall never take the family (name) and the estate of his natural father, the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

After discussing that text and the interpretation of it by ancient commentators, the learned Judges who decided *Venkata Narasimha* v *Rangayya Appa Row* (1), say:

"We do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption. The more correct view seems to be that by the adoption the filial relationship, as the author of the Chandrika says, is extinguished in one family and is created in the other family, and that thereafter the person adopted cannot claim or take any property in his natural family by virtue of the extinguished filial relationship therein."

As regards the interpretation of the text of Manu they say:

"A great deal of argument was addressed to us with reference to the exact meaning of the Sanskrit word "haret" in the text of Manu which is variously translated "claim," "take," "share" and which Sarkar in his latest work translates "takes away," On the one side it was pointed out that in some of the slokas of Manu the same word is translated and can properly be translated only by the word "inherit," while on the other side, attention is drawn to at least one passage where it cannot refer to inherited property. The arguments do not seem to bring us any nearer to the question which has to be decided."

"We may, however, say that we are not prepared to accept Mr. Sarkar's present view that Manu and the commentators have hitherto not been correctly translated, and that this has led to erroneous views as to the consequences which flow from adoption."

Similar argument has been addressed to me in connexion with which I can adopt the above remarks as my own.

In *Dattatraya Sakharam* v. *Govind Sambhaji* (6), Shah, J., considers that the meaning of the verse above referred to is clearly against the view taken in *Venkata Narasimha* v. *Rangayya Appa Row* (1), and his view appears to be based rather on the interpretation of the expression "the estate of his natural father" than on the meaning of the word "haret." He says that the expression is wide enough to include the estate vested in the person adopted at the time of adoption, provided that it is the estate of his natural father; but he does not explain how the estate already vested solely in the son is still the estate of the natural father. In *Mahableshwar Narayan* v. *Subramanya Shivram* (3), Macleod, C. J., though following *Venkata Narasimha* v. *Rangayya Appa Row* (1), did not dissent from, but distinguished *Dattatraya Sakharam* v. *Govind Sambhaji* (6), the distinction drawn being between the cases in which the person adopted had obtained an absolute estate at partition and those in which he obtained such an estate as the sole surviving member of a joint family. The distinction is not, to my mind, a sound one; but that is not very material for present purposes, as I am concerned with a case of partition. The points I wish to make are, firstly, that the expression "the estate of the natural father" does not necessarily include property vested in the person adopted before the adoption, even though it had been the estate of the natural father prior to its becoming vested in the person adopted, and, secondly, that the Bombay view, as interpreted by Macleod, C. J., does not differ from the Madras view as regards the effect of adoption on an estate vested in the person adopted by reason of partition. It has been said that Macleod, C. J., altered his view in *Manikbai* v. *Gokuldas* (8), but that does not appear to me to be the case, having regard to the distinction drawn by him in *Mahableshwar Narayan* v. *Subramanya Shivram* (3).

(5) [1905] 1 C.L.J. 388.
(6) [1916] 40 Bom. 429=34 I.C. 423=18 Bom. L. R. 258.
(7) [1919] 43 Bom. 774=52 I.C. 695=21 Bom. L. R. 776.
(8) A. I. R. 1925 Bom. 363=49 Bom. 520.

The weight of authority is thus on the side of the view that property acquired at partition is not divested by subsequent adoption. I may say that I consider that a definite answer to the question I am now considering cannot be obtained by interpretation of Ch. 9, Verse 142 of Manu, but that verse, at least, does not require the divesting of an estate already vested in the person adopted and does not establish that such an estate forms an exception to the general rule of Hindu law, stated by the Privy Council in *Miniram Kolita* v *Keri Kolitani* (9) "that an estate once vested by succession or inheritance, is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance."

This general rule was applied in *Venkata Narasimha* v. *Rangayya Appa Row* (1) and in *Behari Lal Laha* v *Kailas Chunder Laha* (2) Applying it to the present case, I hold that in the present case Ramchandra was not divested of the property that came to him at partition by his subsequent adoption by Bisram and is entitled to recover possession of that property. The appeal succeeds and the decree of the trial Court will be restored The defendants will bear the plaintiff's costs in all three Courts.

S.N./R.K. *Appeal allowed.*

(9) [1890] 5 Cal 776=7 I. A. 115=6 C. L. R. 322=1 Sar. 103 (P.C.).

A. I. R. 1929 Nagpur 179

KOTVAL, A. J. C.

Gayaramsao—Objector—Applicant.

v.

Balkishan and *others* — Non-Applicants.

Civil Revn. No 286 of 1926, Decided on 27th January 1927, against order of Addl. Dist. Judge, Bilaspur, D/- 17th August 1926, in Misc. Case No. 6 of 1926.

(a) Civil P. C., O. 21, R. 58 — Defendant discharged not because unnecessary party—He continues party to suit — Civil P. C., S. 47.

A defendant discharged, not because he was an unnecessary party, is discharged not from the suit but from liability and it is the decree itself that discharges him from liability. He therefore continues to be a party to the suit. 15 *N. L. R.* 146 ; 40 *Mad.* 964 ; *A. I. R.* 1925 *Nag.* 118, *Dist.* [P 180 C 1]

(b) Civil P. C., S. 115.— Party's right of particular procedure — Lower Court not allowing the benefit—Revision lies.

If the law gives a party the benefit of a particular procedure and there is failure on the part of the lower Court to exercise its jurisdiction so as to let him take advantage of it the fact that it has held that another procedure is open to him is no reason for not setting it right in revision. [P 180 C 1]

N. G. Bose—for Applicant.

M. R. Bobde—for Non-Applicants.

Order.—This is an application for revision of an order in an objection case in which it was held that no objection lay under O. 21, R. 58, Civil P. C., but that the proper procedure was for the applicant to proceed under S. 47, ibid

Seths Balkisandas and Ramkisandas filed C. S. No. 10 of 1914 against Gajadharsao and the applicant Gayaramsao for a declaration and for the recovery of a sum of money. The suit was proceeding ex parte against Gayaramsao. During the course of the trial a compromise was arrived at between the plaintiffs and defendants Gajadharsao whereby Gajadharsao became liable for the whole of the claim, and defendant 2 was to be discharged (बरी किया जावे). The judgment referring to this compromise states:

"Under the compromise Gayaramsao (defendant 2) is to be discharged from all liability so far as this case is concerned."

The decree contains the names of both Gajadharsao and Gayaramsao as defendants. The part of it now material is as follows :

"It is ordered and decreed in terms of the compromise effected by the plaintiffs and defendant 1 Gajadharsao that * * * the defendant 2, Gayaramsao be discharged."

In this Court reliance is placed on *Laxman* v. *Ganpat* (1), *Krishnappa* v. *Periaswamy* (2) and *Kanhaiyalal Kolar* v. *Lachhi* (3) and it is contended that Gayaramsao ceased to be a party to the suit, and consequently S. 47, Civil P. C , had no application. I am, however, of the opinion that although the word 'discharged' is used in the judgment and decree Gayaramsao continued to be a party to the suit and the suit was meant to be dismissed against him. The case is not one where, for some such reason as his not being a party necessary for the adjudication of the suit, he was removed from the array of defendants so that the

(1) [1919] 15 N.L.R. 146=52 I.C. 796
(2) [1917] 40 Mad. 964=5 M.L.W. 369=39 I. C. 297=32 M.L.J. 592.
(3) A.I.R. 1925 Nag. 118.

position was as if it had never included him The real position here is that Gayaramsao was allowed to continue as a party and the claim was as it were, admitted to be not likely to succeed and sought to be dismissed as against him He was discharged not from the suit but from liability and it is the decree itself that discharged him from liability. There was an adjudication upon the claim against him, it being in accordance with the plaintiffs' wishes or admission The cases cited are thus distinguishable

The non-applicants' preliminary objection that this was not a case where this Court should interfere in the exercise of its revisional powers as the applicant has been held to have another remedy, namely under S 47, Civil P C., cannot prevail If the law gives a party the benefit of a particular procedure and there is failure on the part of the lower Court to exercise its jurisdiction so as to let him take advantage of it the fact that it has held that another procedure is open to him is no reason for not setting it right in revision.

This order governs also Civil Revision No. 509 of 1926 which has not been separately argued Both applications are dismissed with costs. Pleader's fee Rs. 20 in each case.

R K. *Application dismissed.*

A. I. R. 1929 Nagpur 180

KINKHEDE, A. J. C.

Kisan and *others*—Plaintiffs—Appellants.

v.

Tukaram Tidke—Defendant—Respondent.

Second Appeal No. 283-B of 1927 Decided on 29th August 1928, against decree of Dist. Judge, Akola, D/- 30th April 1927, in Civil Appeal No 102 of 1926.

(a) Civil P C., S. 100—Concurrent findings of two lower Courts preclude High Court from interfering in second appeal.

Concurrent findings of the two lower Courts to the effect that a certain decree was in respect of the debts of the widow's husband's time and was not collusive or fraudulent preclude the High Court from interfering with them in second appeal. [P 182 C 1]

(b) Hindu Law—Alienation—Widow—Necessity found as to 9/10 of the value of property sold—Widow acting fairly and purchaser acting honestly—Sale is binding on reversioner.

Where a Hindu widow in order to satisfy debts of her husband's time which amounted to Rs. 9,000 sold the entire property, the value of which was estimated by the lower appellate Court at Rs. 10,000 and the sale was challenged by the reversioners on the ground that property in excess of the actual requirements had been sold by the widow and that she should have excluded a portion of the property from sale.

Held : that in such a case the question to be considered is whether the widow has acted fairly towards the expectant heirs and whether the person who dealt with her, also acted honestly and in good faith, when he entered into the transaction in question after making due enquiry, or under the bona fide belief that an accredited necessity did exist, and whether the price offered by him was "adequate and not unreasonably low." If the answer to this question is in the affirmative, the transaction has to be upheld as binding as against the persons at whose option it is liable to be affirmed or disaffirmed after the death of the widow *A. I. R.* 1927 *P. C.* 37, *A. I. R.* 1927 *P. C.* 121, *A. I. R.* 1927 *P. C.* 246, *Foll.*, 18 *Bom.* 534, 11 *Bom.* 320, *A. I. R.* 1918 *P. C.* 118, *Ref.*

[P 185 C 1]

(c) Hindu Law — Reversioners—Sale by widow—Small portion of consideration not for necessity—Decree conditional on payment of consideration proved for necessity is justified (*obiter*).

Where in a suit by a reversioner to set aside a sale by a widow of her husband's property, it was found by the lower Court that a small portion of the consideration was not proved to have been supported by legal necessity and on that ground the sale was set aside inserting in the decree a condition that on failure of the reversioners within a certain time to pay to the purchaser the amount of the consideration which was proved to have been supported by legal necessity, the suit of the reversioners should stand dismissed with costs.

Held : that the imposition of such a condition was fully justified : *A. I. R.* 1927 *P.C.* 244 *at p.* 246; *A. I. R.* 1925 *Nag.* 325 *Ref.*

[P 185 C 2]

(d) Hindu Law—Reversioners—Necessity not proved as to small portion—Order for repayment by purchaser to reversioner of amount not for necessity cannot be sustained (*obiter*).

Where the major portion of the consideration of the sale effected by a Hindu widow of her husband's estate is found to be supported by legal necessity and the sale is on that ground sustained, an order for repayment by the purchaser to the reversioners who had sued to set aside the sale, of the small and insignificant portion of the consideration not proved to have been supported by legal necessity is opposed to the whole current of authority and cannot be sustained : *A. I. R.* 1927 *P. C.* 37 *Ref.* [P 185 C 1]

M. R. Pathak—for Appellants.

P. B. Gole—for Respondent.

Judgment.—This judgment will dispose of the appeal as also the cross-objections preferred by the plaintiffs and the defendant respectively.

The plaintiffs sued to set aside an alienation made by the widow of one Dhanaji in favour of the defendant, in their capacity as reversionary heirs of the last male holder Dhanaji. Dhanaji died in 1910 and his widow Girji in 1917, and Sarji, who was the only surviving co-widow, died in 1923 She sold the property in suit to the defendant by a sale deed dated 8th May 1918 for a consideration of Rs 9,000. The plaintiffs question the binding character of the sale on the ground that it was not supported by legal necessity, and the transaction was brought about in collusion with Sarji's mukhtiar Narsaji by causing a bogus consideration to be recited in the sale-deed. The reversioners alleged that the property sold was worth Rs. 18,000 at the date of the suit.

The defendant alleged that the amount of consideration was required to satisfy the debts of the deceased Dhanaji and that the sale was therefore valid and binding as against the plaintiffs He denied that the property in dispute was worth more than Rs 9,000. The trial Court framed the necessary issues and came to the conclusion that the sale of the entire property was not justified as the amount of the decree for the debts of Dhanaji's time did not exceed Rs. 9,000, while the value of the property at the date of the sale was Rs. 12,450. The Court further held that it was necessary for Mt. Sarji to satisfy the foreclosure decree for Rs. 6,300 in Civil Suit No 115 of 1917 and money decree for Rs. 2,700 in Civil Suit No. 329 of 1911, and though a sale of property became necessary, the sale of the entire property was not necessary at the time It was also held that Narsaji (P W. 6) who jointly purchased the property along with the defendant under the sale deed (Ex. D. 1) was the relation of the vendor Sarji and being her agent at the date of the sale was in the position of active confidence towards her. This Narsaji subsequently transferred his interest to the defendant by sale deeds marked Exs. D. 4, D. 5 and D. 6. A decree was accordingly given to the plaintiffs for possession of the property on payment of Rs. 9,000 to the defendant within four months.

The defendant being dissatisfied with the decree preferred an appeal to the Court of the District Judge, and the plaintiffs in their turn filed cross-objections. The District Judge came to the conclusion that instead of the total value of the property being Rs 12,450 he would estimate the value of the land at Rs. 10,000, that the same sale was imprudent, that the proper procedure for the widow would have been to retain certain fields and to sell the rest; and that these fields would have sufficed for her maintenance and would not have been lost to the reversioners. He, therefore, upheld the finding of the trial Court that the plaintiffs were in equity entitled to possession of the property on payment of the amount found due for legal necessity As to the binding character of the decretal debts he held that they were debts of Dhanaji's time and personal ones of the widow; that so far as the money decree was concerned Sarji contested the case vigorously until part of the evidence had been recorded and was justified in compromising it; and that as she fully represented the estate she had full power to compromise the dispute with the creditor. The four months time allowed by the first Court for payment of Rs 9,000 having expired the lower appellate Court allowed three months time from the date of its own decree and added the following clause to the decree :

"that on failure to do so (to pay Rs. 9,000 within the time fixed) the plaintiffs' suit will stand dismissed with all costs on them."

The appeal and cross-objections thus practically failed.

The plaintiffs have therefore come up in second appeal and the defendant has filed cross-objections. The object of the plaintiffs' second appeal is to secure exemption from liability to pay Rs 2,700 on the ground that the debt which ripened into the money decree was a personal debt of the widow and the said decree being collusive and fraudulent could not bind them They also appeal from the condition or penalty inserted for the first time by the lower appellate Court in its decree

As regards exemption from payment of Rs. 2,700, suffice it to say that the concur-

rent findings of the two Courts to the effect that the decree was in respect of the debts of Dhanaji's time and was not collusive or fraudulent, preclude this Court from interfering with them in second appeal Grounds 1,2 and 3 of the appeal therefore fail I think it is more convenient at this stage to take up the defendant's cross-objections. In ground 3 of his memo. of first appeal to the District Judge, the defendant asserted that the market value of the field was Rs 9,000 and that the sale was for adequale price. In the absence of any mention of house property in the ground of appeal the use of the word "field" was apt to mislead anybody. What then the appellant meant, however, was that the value of the "property purchased" was Rs 9,000 and this construction is consistent with the assertion that the sale was for adequate price The first Court in paragraph 10 of its judgment recorded a finding that the house property was worth Rs. 4,100 and that Rs. 12,450 was the value of the entire property at the date of the sale This would give Rs 8,350 as the value of the fields and work out a rate of Rs. 950 per tiphan on the assumption that the whole of the land is of the same quality. But the District Judge has, I think, given good reasons for holding that although the sales of a moiety of some of the property by the co-vendee Narsaji to defendant as per Exs. D 4 and D. 5 practically fetched the values at the date of the sale in 1918, the value in 1923 of the other property conveyed by Ex. D 6 for Rs. 4,000 could not have been Rs 4,000 in the year 1918 I also think that the District Judge was right in reducing the value in 1918 to Rs 2,750. Thus the total value of Narsaji's moiety in the property sold as per sale-deeds Exs. D-4, D-5 and D-6 was Rs 4,975 The District Judge, was therefore right in assessing the total value of the entire property at Rs 10,000.

No doubt in stating this conclusion the District Judge used the word 'land' instead of 'property'; this, I think, is a slip. What he meant to find, as I understand it, was that the value of the property covered by the sale-deed Ex. D-1 executed by Sarji was Rs . 10,000 at the date of the sale. I think this finding is binding on this Court in second appeal

The question consequently arises whether the sale in excess of the requirements was prudent and justified by legal necessity. The District Judge has discussed this question in para. 7 of his judgment and drawn the inference that the sale was imprudent and that the widow ought to have retained certain fields and sold the rest. On behalf of the respondent, I am referred to the following recent Privy Council decisions wherein sales of properties by managers of joint families or by a Hindu widow, were upheld in their entirety, as against the other members of the coparcenary, or reversionary heirs, even though legal necessity was not proved in respect of a part of the price paid for the property.. *Sri Krishan Das* v. *Nathu Ram* (*A.I.R* 1927 *P C.* 37), *Niamat Rai* v. *Din Dayal* (*A.I R* 1927 *P.C.* 121), *Gauri Shankar* v *Jiwan Singh* (*A. I. R.* 1927 *P.C* 246) and *Suraj Bhan Singh* v. *Sah Chain Sukh* (*A. I. R* 1927 *P. C.* 244)

The fourth was a case of an alienation by a Hindu widow ; their Lordships of the Privy Council said that that case came within the principles laid down by the Board in the cases of *Sri Krishan Das* v *Nathu Ram* (1) and *Niamat Rai* v *Din Dayal* (2). In the case of *Gauri Shankar* v *Jiwan Singh* (3), their Lordships of the Privy Council made the following weighty observations :

"The real question that has to be considered is this whether the sale itself was justified by necessity. Their Lordships cannot go back upon that decision: *Sri Krishan Das* v. *Nathu Ram* (1). If the purchaser has acted honestly, if the existence of a family necessity for a sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. They, however, take the case even upon the footing, which might well be challenged, that Rs. 500 out of the price of Rs. 4,000 had not been fully accounted for. Granted that it was so, then the balance of Rs. 3,500 out of Rs. 4,000 is surely a justification of a sale for a family necessity proved up to that amount "

Their Lordships of the Privy Council accordingly upheld the sale and dismissed the suit In the case of *Suraj Bhan Singh* v. *Sah Chain Sukh* (4) the sale by a Hindu widow was for a total consideration of Rs 19,000 but Rs 17,000 and odd were found to be for legal necessity. From the judgment of the Allahabad High Court, which was upheld by their

(1) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P. C.).
(2) A. I. R. 1927 P. C. 121=8 Lah. 597=54 I. A. 211 (P. C).
(3) A. I. R. 1927 P. C. 246.
(4) A. I. R. 1927 P. C. 244.

Lordships of the Privy Council in the said case it appears that the Subordinate Judge had found that full value had been paid for the property when it was sold by the Hindu widow. It was also held that the representatives of the widow had succeeded in proving that the debts in lieu of which the property was sold were binding to the extent of Rs 17,378-4-0, and he therefore gave a decree to the plaintiffs subject to the payment of this sum into Court within three months from the date of the decree. The alienees went up in appeal to the High Court and urged that the Court below should have affirmed the sale on the ground that legal necessity had been proved for the entire consideration of Rs 19,000 The finding of the Subordinate Judge that legal necessity for sale was established to the extent of Rs. 17,378-4-0 and no more, was upheld. Ultimately the High Court allowed the appeal and dismissed the suit This dismissal was upheld by their Lordships of the Privy Council on the principle of cases above referred to. They are cases of sales by managers of family property, for sums in excess of the amounts for which actual necessity was proved, and although part of the consideration was not proved to have been required for legal necessity, the sales were upheld.

In *Niamat Rai* v. *Din Dayal* (2) the contention was that the manager should have raised money by mortgage instead of sale As regards this question their Lordships observed that

"it is not clear that borrowing, probably at a high rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide. It was equally a question for the manager whether it would be better to raise more money or to close down the business and it would in their Lordships' opinion, be unreasonable to require a lender or purchaser to go into question of this kind, as to which he would rarely be in a position to form a sound opinion. In the present case the decision to raise more money would seem to have been a wise one, as the business afterwards earned profits with which more lands were purchased".

The Lordships accordingly upheld the sale although the property was sold for Rs. 43,500, to satisfy pre-existing debts to the amount of Rs. 38,000, only. So then, in the present case, also, the sale of property in excess of the actual requirements could be upheld on the same principle.

In *Sri Krishan Das* v. *Nathu Ram* (1) the sale was of property worth Rs 3,500. whereas legal necessity had been proved to the extent of Rs. 3,000. It was found that the sale was for adequate consideration. Their Lordships of the Privy Council after a discussion of the case law, came to the conclusion :

"Where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale".

They, therefore, held "that the mere fact that after long interval of time" the purchaser has :

"not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale."

Accordingly the decree of the High Court was set aside and plaintiffs' suit was dismissed.

Looking at the facts found by the Courts below in the present case in the light of the Privy Council decisions, I think the conclusion is inevitable that the sale by the widow of Dhanaji of the entire property worth Rs 10,000 in order to satisfy the pre-existing debts was bound to be upheld, even though the extent of such debts did not exceed Rs. 9,000. The question whether in the circumstances of the present case it was better that some fields should have been retained by the widow for her maintenance so as to leave them ultimately for the reversionary heirs, than that she should have, acting under the advice of Narasaji (P.W. 6) her agent and relation of her husband who became a co-vendee with the defendant accepted the arrangement made by him for her maintenance for the rest of her life, "was a question" for the widow, like the "manager" in the case of *Niamat Rai* v. *Din Dayal* (2) "to decide" and :

"it would be unreasonable to require a purchaser to go into questions of this kind, as to which he would rarely be in a position to form a sound opinion".

The entire property was covered by the decree for foreclosure and might have been foreclosed and necessarily lost to the widow as also the reversionary heirs, had no arrangements been made to satisfy the foreclosure decree which amounted to Rs. 6,300. Similarly, there was a decree for money outstanding against the widow in respect of the debts due by Dhanaji. Its amount was Rs. 2,700. The equity of redemption in respect of the assets of Dhanaji

in her hands was liable to be brought to sale in execution of the said decree. It was, therefore, absolutely necessary for the widow to have made some arrangement which would not only satisfy the mortgage-decree and the money decree but also secure maintenance to her for the rest of her life.

Assuming for the sake of argument that she could have conveniently reserved property worth Rs. 1,000 consisting of a portion of house property and some land, it is very doubtful whether the 1/10th of the property could have given her more than 3½ acres of land. It is only in the nature of speculation to say that a slice measuring 3½ acres of land would have fetched an annual income in the shape of lease money sufficient to maintain a Hindu widow of a respectable family like that of Dhanaji. Moreover, there is no certainty of a widow securing lessees to cultivate a small piece of land measuring 3½ acres in every succeeding year. One who knows the difficulties of arranging for cultivation of such small pieces of agricultural lands can at once realize how inconvenient it is to keep a private establishment of agricultural servants and cattle for tilling and sowing such small areas The expenses of cultivation and management are out of all proportion to the outturn of the area to be sown and cultivated. As observed in *Venkaji Shridhar* v *Vishnu Babaji* (5), by Sargent, C. J.:

"a widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers provided as West, J., says in *Chimnaji Govind* v. *Dinkar Dhondev* (6) she acts fairly to her expectant heirs. As observed in *Chimnaji Govind* v. *Dinkar Dhondev* *at p.* 324. In the widow's case the coparceners are reduced to herself and the estate centres in her."

Consequently it was held in that case that the widow can

"do what the body of coparceners can do subject always to the condition that she acts fairly to the expectant heirs."

Bearing these principles in view, it must be conceded that it is always very difficult to strike a bargain for sale of just as much property as may be proportionate to the requirements for the time being. Moreover, value of property is not a constant factor. It fluctuates with the time of the sale, the nature and valuation of the property, and the market it commands. The principle of demand and supply for any particular commodity has also its play. The property may possess many potentialities, but there may be no demand for it, or when there is a demand, it may not be either available or the vendor may not be in an urgent need to sell, and vice versa. At other times, the purchaser may take the matter quite easily so that the price offered might not come up to the real price the seller might expect to get. In short, there are so many factors affecting the value of property, that it is difficult to say with certainty that at a given time a certain item of property must fetch a certain amount as its price. It is always a matter of guess work. If the value of certain property at the date of any past transaction has to be estimated in a subsequent litigation, the estimate must always be approximate and not accurate. There is bound to be conflicting testimony, speculation, and even lot of hard swearing one way or the other on the point of the price the property might have fetched The task of fixing the value after the event always involves great deal of approximation and every attempt at deciding the question, whether any particular property has been sold for its full value or not must always involve an element of uncertainty

Similarly, it is difficult to hit with absolute certainty, upon the relation which the value of property might bear to its annual income or productive capacity. Still more uncertain or difficult it may often be to strike the exact proportion of the property to be sold, with reference to your actual requirements, with any decree of accuracy of a weighing machine or scale. You cannot cut off and retain just a slice out of the property to be sold, and make its value exactly correspond to the price or money you may stand in need of, for the time being. There are matters in which prudence alone must be allowed to play its important part, and even regulate the propriety of striking a bargain with such honesty of purpose as a man of ordinary prudence is expected to exercise in his own interest, in a given set of circumstances

Giving sufficient latitude in the matter to the widow the question of im-

(5) (1894) 18 Bom. 534.
(6) [1887) 11 Bom. 320.

portance is whether she, like the manager, has acted fairly towards the expectant heirs :

"and whether, the person who dealt with her also acted honestly and in good faith, when he entered into the transaction in question after making due enquiry, or under the bona fide belief that an accredited necessity did exist, and whether, the price offered by him was "adequate and not unreasonably low". If the answer to this question is in the affirmative, the transaction has to be upheld as binding as against the persons at whose application it is liable to be affirmed or disaffirmed after the death of the widow. In the proved circumstances of the present case, the widow Mt. Sarji, cannot be said to have acted imprudently, or otherwise than fairly towards her expectant heirs."

when she elected to sell the entire corpus of her husband's estate for the satisfaction of his pre-existing debts amounting to Rs. 9,000 and accepted Rs. 9,000 as its full price, over and above, the promise of Narsaji, her own relation to arrange for her maintenance for the rest of her life. I am not, therefore, propared to uphold the conclusion of the District Judge to the effect that the proper procedure for her could have been to retain certain fields and to sell the rest , the sale must in consequence be upheld as prudent and justified by legal necessity and fully dictated by prudence, and I find accordingly

As a result of this finding, I hold that the reversionary heirs, i. e the plaintiffs, are bound by the sale, and their suit to recover possession must stand dismissed. Ground 2 of the cross-objections thus succeeds. It is consequently unnecessary to consider the defendant-respondent's offer, in his ground 1, to pay plaintiffs Rs 1,000 in order that the sale may be upheld Their Lordships of the Privy Council have pointed out in *Sri Krishan Das* v *Nathu Ram* (1) that an order for repayment of a small sum by the purchaser although the sale itself was sustained, is entirely opposed to the whole current of authority.

As to the contention of the plaintiff-appellants that the District Judge was wrong in attaching the penalty of a dismissal of their suit, to a .failure to pay the amount I need not go into this question as I hold that the defendant's sale is bound to be upheld. But if any authority were needed to justify such a form of decree, I may mention that in the judgment of the Allahabad High Court reproduced in the report of the Privy Council case of *Suraj Bhan Singh* v. *Sah Chain Sukh* (*A. I. R.* 1927 *P. C.* 244 *at p.* 246) the Judges had an occasion to remark, in regard to an identical form of the decree for possession on payment and providing that in default the suit shall be dismissed, passed in that case by the Subordinate Judge, that the same (decree) was in proper form. A decree in a similar form was passed in *Suryabahan* v. *Pandu* (7) where a minor sought to recover back property alienated by his guardian during his minority If, as observed by their Lordships of the Privy Council in *Banwari Lal* v. *Mahesh* (8) the alienees (who in that case were purchasers from the father and the manager of joint family property) must be deemed to be "lawfully in possession until the sales are set aside." I think, that the necessary corrollary to this proposition is that if the condition precedent as to payment is not fulfilled, the alienees possession must remain undisturbed, the imposition of the said condition or the attachment of the penalty of the dismissal of the suit to the plaintiffs' failure to reimburse the alienees with the amount found due to them, within the time allowed by the Court would, in this view be fully justified.

The result then is that the appeal wholly fails, and, on the defendant's cross-objections, the suit stands and it hereby is dismissed with all costs to be paid by the plaintiffs in all Courts

K.N./R K. *Appeal dismissed.*

(7) A. I. R. 1925 Nag. 325=21 N. L. R. 43.
(8) A. I. R. 1918 P. C. 118=41 All. 63=45 I. A. 284 (P. C.).

A. I. R 1929 Nagpur 185

JACKSON AND SUBHEDAR, A J. Cs.

Kawdu — Appellant

v.

Berar Ginning Co. Ltd, Akot and *others*—Respondents

Misc. Appeal No. 30-B of 1928, Decided on 23rd March 1929, against the order of the Dist. Judge, Akola, D/- 16th August 1928, in Misc Judicial Case No. 103 of 1927.

(a) Limitation Act, S. 5—S. 5 applies to application for review of order under Companies Act.

The provisions of S. 5, Lim. Act, are applicable to an application for review of an order passed under Companies Act as there is no special period prescribed by the latter Act for such an application. *A. I. R.* 1928 *Nag.* 194 *Ref.* [P 189 C 1]

(b) Civil P. C., O. 47, R. 1—Application barred by limitation should be treated as one under S. 151.

An application for review of an order under O. 47, R. 1, Civil P. C., if found to be barred by limitation, may under appropriate circumstances be treated as an application under S. 151 if the Court is satisfied that there has been a flagrant abuse of its own process and it is also open to the appellate Court under similar circumstances to treat a barred application for review, made to the first Court, as one made under S 151 in order to remove an apparent injustice done to the applicant and to prevent an abuse of the process of the Court: *A. I. R.* 1927 *Nag.* 212, *A. I. R.* 1926 *Nag.* 17, *Dist.* [P 189 C 2]

(c) Companies Act, S. 247 (6) —Registrar Joint Stock Companies is not proper person to represent a company but the secretary or director—Civil P. C., O 29, R 1.

Where an application was made by a shareholder of a company to the Court under S 247 (6), Companies Act, for setting aside the order of the Registrar, of Joint Stock Companies, striking the name of the said company off the register of joint stock companies and made the Registrar alone a party to the application and the Court set aside the order of the Registrar.

Held: that under O. 29, Rr 1 and 2, read with S. 141, Civil P. C, the company could not be said to have been properly represented through the Registrar as the only person who could legally put in appearance on its behalf would either be its secretary or one of its directors, though he was no party to the original proceedings. [P 190 C 1]

(d) Civil P. C, O. 47, R. 1—Director of company is 'aggrieved person' and can apply for reveiw of order, though he was not a party to it.

A director of a company is an 'aggrieved person' within the meaning of O. 47, R 1, and can apply for review of an order made in a proceeding against the company if the said company was not represented by any of its directors or secretary in that proceeding. The fact that he was not a party to the original proceedings does not preclude him from filing an application for review. [P 190 C 1]

(e) Civil P. C., O. 47, R. 1—Failure to notice bar of limitation is sufficient to justify application for review.

Under the mandatory provisions of S. 3, Lim. Act, the Court is bound to notice the statutory bar of limitation and where it has failed to do so and passed an order, that is a mistake or error apparent on the face of the record within the meaning of O. 47, R. 1, sufficient to justify the Court in granting an application for review and setting aside its previous wrong order: *A. I. R.* 1928 *Nag.* 194; *A. I. R.* 1928, *Nag.* 305, *Ref.* [P 190 C 2]

M. R Bobde, and *G. G. Hatvalne*—for Appellant.

V. N. Bapat—for Respondent 2.

Subhedar, A, J. C—The facts necessary for the disposal of this appeal are a little complicated and require a statement insome detail here.

A joint stock company was floated and duly registered on 16th August 1905 with the Registrar, Joint Stock Companies, Central Provinces and Berar, under the name of "the Berar Ginning Company Limited, Akot" with its registered Head Office at Akot. The company carried on its business until the year 1910, when it stopped functioning. Nearly five years later, i. e, on 15th September 1915, the Registrar, Joint Stock Companies acting under S. 247 (5), Companies Act (7 of 1913), struck the name of the said company off the Register of Joint Stock Companies maintained in his office, so that under the last provision of this sub-section the Company stood formally dissolved. Sheikh Kawdu the appellant in the present case was a shareholder and respondent 2 Narayan was one of the directors of the said company

On 16th November 1925, a little over ten years after the passing of the said order by the Registrar, Joint Stock Companies and nearly 15 years after the company ceased to do business, the appellant Sheikh Kawdu took the extraordinary step of presenting an application to the District Judge, Akola, purporting to be made under S. 166 of the Act for winding up the affairs of the said company. This application was registered as Misc. Judicial Case No. 146 of 1925 in the Court of the District Judge, Akola The respondent Narayan, who was cited as one of the non-applicants in that case, opposed the application on various grounds and the District Judge dismissed it on 18th December 1926, on the short ground that the appellant Sheikh Kawdu had failed to prove that he was a shareholder and as such entitled to move the Court for winding up the company.

On 22nd March 1927, an appeal (First Appeal No. 17-B of 1927) was lodged by Sheikh Kawdu in this Court against the said order and it was dismissed on 17th January 1928, by a Bench consisting of

Hallifax and Kinkhede, A. J. Cs., on the ground that the application for winding up was timebarred three times over, the article applicable to such cases being 181 Sch 1, Lim. Act. This judgment deciding, as it did, an important point of law is published as *Sheikh Kawdu* v *Berar Ginning Co. Ltd.*, (1)

Sheikh Kawdu being dissatisfied with the aforesaid decision wanted to challenge it before His Majesty's Privy Council and accordingly applied to this Court for leave to appeal and for the necessary certificate but his application was rejected on 12th September 1928, (Misc. Petn. No 33-B of 1928.)

In order to forestall all possible objections which might be raised in argument at the hearing of the appeal (First Appeal No. 17-B of 1927) Sheikh Kawdu on 24th April 1927, a little over a month after filing the said appeal, presented an application to the District Judge, Akola, (registered as Misc Judicial Case No. 46 of 1927) purporting to be made under S. 247 (6), Companies Act, for setting aside the order of the Registrar, Joint Stock Companies, dated 15th September 1915, and ordering restoration of the company's name to the Register The object of taking this extraordinary step and the reasons assigned therefor are stated in para. 3 of the application in the following words :

"With a view to leave no room for urging a possible doubt or objection that the company ceased to exist in its corporate capacity, because of the order dated 15th September 1915, passed by the Registrar of Joint Stock Companies, C. P. & Berar, it is evidently expedient to use the remedy still open to the applicant even while the appeal is pending in the Judicial Commissioner's Court, to get the order of the Registrar of Joint Stock companies, dated 15th September 1915 revised by this Court and to have the name of the Company restored to the Register of Joint Stock Companies maintained in the office of the Registrar. Almost all the shareholders of the company have been deprived of the share money and shares in the profits by the malpractices and fraudulent conduct of the directors and servants in charge of the management of affairs of the company. The shareholders were not kept informed of the true state and condition of the company's affairs and without resorting to the winding up and dissolution remedies as provided for by the Companies Act 7 of 1913, the assets of the company were allowed to disappear and pass into unauthorized hands to the great prejudice of the body of shareholders. Through want of means and ignorance of the legal procedure to be adopted, none but the applicant seems to have so far moved in the matter. In the circumstances as stated, it is clearly just that the company may be restored to the register and the necessary winding up proceedings taken to ensure that after due investigation and inquiry, true and correct accounts are made of the company's dealings and the rights and liabilities of the shareholders as well as of the managing directors are properly determined and enforced in the winding up proceedings. Hence this application is made. There is no bar of limitation to this application which is otherwise tenable."

It is remarkable to note that in spite of the fact that Narayan was made a party in the winding-up proceedings, Sheikh Kawdu did not make him a non-applicant to this application As a matter of fact none was cited as a non-applicant in the petition However, the District Judge issued a notice on 16th June 1927 to the Registrar, Joint Stock Companies to show cause against the application, but the Registrar merely sent letter No 3369, dated 25th July 1927, intimating to the Court that he had no objection to the restoration of the company's name to the register if the conditions of sub-S. (6), S 247, Companies Act, were satisfied. The learned District Judge while admitting that the first condition of the said section was not fulfilled, as the company was admittedly doing no business at the time when the Registrar removed its name from the register, allowed the application for the following reasons given in para 2 of his order dated 30th July 1927 :

"The first condition is admittedly not fulfilled in the present case. But the application shows that it is made to smooth away legal difficulties in the way of the winding-up, on the allegations that the shareholders have suffered through misapplication of the assets and wrongful acts of one of the directors. It seems just that the company's existence should be restored so that these allegations may be gone into."

Before the hearing of the First Appeal No. 17-B of 1927, Narayan, who had not been cited by Sheikh Kawdu as a respondent, had made an application to this Court on 23rd November 1927 for being joined as a respondent and his application was allowed and he contested the appeal on merits and succeeded in getting it dismissed.

In order to have the ex parte order passed in Misc. Judicial Case No. 46 of 1927, dated 30th July 1927, set aside, Narayan presented an application

(1) A. I. R. 1928, Nag. 194=24 N. L. R. 100.

to the District Judge on 29th October 1927 under O. 47, R. 1, Civil P. C., praying for review of the said order making (1) Sheikh Kawdu, (2) the Berar Ginning Company and (3) the Registrar Joint Stock Companies as non-applicants. The principal grounds in this application for obtaining a review were these :

(a) that Sheikh Kawdu intentionally omitted to issue notice of his application dated 27th April 1927 to him (Narayan) in spite of the fact that he was a director of the company and had, since its dissolution, purchased at Court sales, in execution of several decrees against the company, many of its assets ,

(b) that Sheikh Kawdu's said application was long barred by time ,

and (c) that the order sought to be reviewed was otherwise illegal as the same was not passed after ascertaining all the facts and circumstances of the case.

It was admitted that this application was filed one day beyond the period of limitation, but the delay was sought to be condoned under S 5, Limitation Act, on the ground that the applicant came to know of the order sometime after it was passed.

Sheikh Kawdu alone resisted this application He questioned the locus standi of Narayan to present the application on the ground that he was not a party to the proceedings which resulted in the order sought to be reviewed He also asserted that no notice was necessary to be issued to any one excepting the Registrar, Joint Stock Companies, whose action was being challenged in the petition He also challenged the decision of this Court on the point of limitation given in First Appeal No 17-B of 1927. Lastly, he stated that the application for review was barred by time and should not be granted Further pleadings followed and the following issues were settled for trial :

"(1) Is this application for review maintainable ?

(2) Is it in time ?

(3) Were all the directors of the company necessary parties to Sheikh Kawdu's application ?

(4) Was that application timebarred ?

(5) Should this review application be now granted ?"

The lower Court decided all the issues excepting the 2nd in the affirmative and in favour of Narayan. On the 2nd issue it held that the application was filed one day too late but it condoned this delay and treated the application as filed within time As a result of these findings the District Judge allowed the application for review and set aside his own order dated 30th July 1927. It is against this order that Sheikh Kawdu has preferred the present appeal on the following grounds :

"(1) That the lower Court erred in presuming that there were sufficient grounds for granting a review of its order dated 30th July 1927.

(2) That the lower Court erred in holding that the application for review presented, could be entertained under O. 47, R. 1, when the applicant was not a party to the proceedings in which the order sought to be reviewed, was passed.

(3) That the application presented for review was timebarred

(4) That the reasons assigned by the lower Court for granting the review, are unsound and unconvincing.

(5) That the order of the lower Court granting the review, is otherwise, against law and equity."

In the memorandum of appeal to this Court the respondents are arrayed in the following order :

(1) The Berar Ginning Company Limited, (2) Narayan Udebhan and (3) The Registrar, Joint Stock Companies, Central Provinces and Berar. Narayan respondent 2, alone appeared at the hearing and contested the appeal which was heard ex parte the other respondents

The first contention advanced on behalf of the appellant is that the delay of one day in the presentation of the application for review could not be condoned by the lower Court under S 5, Limitation Act, because by virtue of S. 29 (2) (b) of the Act, S. 5 was inapplicable to an application for review of an order passed under the Companies Act. Mr. Bobde, the learned advocate for the appellant, referred to S 235 (3), Companies Act. which says that an application under sub-S. (1) of the section by the liquidator to recover assets of a company improperly dealt with by its directors or other officers shall be governed by the provision of the Limitation Act "as if such an application were a suit." The argument advanced is that because S. 235 (3), Companies Act, makes special reference to certain provisions of the Limitation Act, it shows that otherwise the provisions of the Limitation Act are not applicable and no period of limitation whatsoever would apply to proceedings under the Companies Act. But this argument, if accepted, would, in my opinion, support the case of the respondent Narayan and place his application

for review outside the bar of limitation pleaded with respect to it by the appellant.

In connexion with this point reference was also made to the following statement of Mr. Rustomji appearing at p. 235 of his Company Law (1926 Edition):

"This clause '(S. 183 Cl. 5) gives a general right of appeal to the Court from the decisions of the Official Liquidator. No time is limited for bringing the appeal. But by analogy to the proviso to S. 68, Provincial Insolvency Act 1920, twenty-one days will probably be the proper time."

I really fail to understand how the above quotation helps to support the proposition contended for by the appellant's advocate.

No other authority has been cited in support of the above extraordinary proposition which assumes for its foundation the existence of a special period of limitation prescribed by the Companies Act for all purposes in general and for an application for review of an order passed under the said Act in particular. Under S. 29 (2), Limitation Act, it is only when any special law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed therefor by Sch 1, Lim. Act, that the remaining provisions of the Limitation Act inclusive of S. 5 shall not apply under sub-Cl. (b), S 29 (2), ibid. Under the Companies Act, 1882, a special period was undoubtedly prescribed by S. 169 for appeals against orders in the winding-up proceedings but this special period has been abrogated by S 202, Companies Act 1913, under which the period within which an appeal must be preferred is governed by the general law. (vide Rustomji's Limitation Act, Edition 4, p. 299, note (4).

Admittedly there is no special period prescribed for anything to be done under the Companies Act 1913, therefore the provisions of the general law of limitation as contained in the Limitation Act must apply. This is exactly the view propounded in *Sheikh Kawdv* v *The Berar Ginning Company Limited* (1). I accordingly hold that the provisions of S. 5, Lim. Act are applicable to an application for review of an order passed under the Companies Act 1913, because there is no special period prescribed by the said Act for such an application.

It was next urged that the lower Court did not properly exercise its discretion in condoning the delay of one day in the presentation of the application for review. In para. 5 of his application Narayan simply alleged that he came to know of the order dated 30th July 1927 after it was passed. He, however, did not give the date on which he came to know of it nor state the reasons explaining the delay of one day in the presentation of the review application. It is regrettable that the lower Court did not clear up this matter and I should have remanded the case for taking further pleadings on the point and for the trial of an issue whether there was good and sufficient cause for the delay in presenting the application for review. But a remand seems to me to be unnecessary, because, for reasons given in the next paragraph, the relief awarded by the lower Court on the application of Narayan fell within the purview of S 151, Civil P. C., for which admittedly, no limitation is applicable.

Under the admitted circumstances of this case, I consider that Narayan was undoubtedly entitled to move the lower Court for a review of its order under S. 151, Civil P C Narayan was known to the appellant as a director of the company during its existence and subsequently as a purchaser of its assets after its extinction, and lastly as the person who had successfully opposed the winding-up proceedings started by the appellant and referred to in para. 3 of this judgment. With the object of avoiding all possible objections which he might have raised, the appellant deliberately omitted to make Narayan a party either to the first appeal or to the proceedings in Misc. Judicial Case No. 46 of 1927 and secured an order in the latter case behind his back highly prejudicial to his vested interests. I cannot, therefore, conceive of a more flagrant example of an abuse of the process of the Court than the one taken advantage of by the appellant in securing an order from the Court ex parte the very necessary opponent in the case This was, therefore, pre-eminently a case in which the inherent powers of the Court could be legitimately exercised by it in removing the apparent injustice done to Narayan in order to prevent an abuse of its own process The appellant's learned pleader contended that interference of the Court under S. 151, Civil P. C., was not possible in this case and cited *Sadasheo Rao*

v. *Umaji* (2) and *Nizamuddin* v. *Jumma* (3) in support of his contention. In my opinion each of the above cases, as indeed any other reported case under S. 151, Civil P. C., must be considered to have been decided on its own peculiar facts and therefore unless the facts of a particular case are on all fours with those found in the present case, it cannot be regarded as an authority for its decision. I, therefore, hold that, apart from the highly technical provisions of O. 47, R. 1, Civil P. C. the present case could very well be considered to have been decided under the salutory provisions of S 151, Civil P. C

The next contention advanced was that Narayan not having been made a party to the original proceedings which resulted in the passing of the order sought to be reviewed, had no right to present the application for review under O. 47, R 1, Civil P. C. It is admitted that the company must be deemed to have been a party to the previous proceedings, because the Registrar, Joint Stock Companies, represented it But under O. 29, Rr 1 and 2 read with S 141, Civil P. C, the company could not be said to have been properly represented through the Registrar, Joint Stock Companies, because under the said provisions the only person who could legally put in appearance on its behalf would either be its secretary or one of the directors. It is not denied that Narayan was a director of the company and I therefore hold that, under the circumstances, Narayan should be deemed to have been "a person considering himself aggrieved" within the meaning of O. 47, R. 1 so as to clothe him with a right to present an application for review. The learned District Judge has, in my opinion, stated the proposition too widely in para 3 of his order when he held that any person aggrieved, though not a party to the original proceedings, could apply for a review under O. 47, R. 1

The last point pressed for the appellant was that there was no "sufficient cause" within the meaning of these words in O. 47, R 1, Civil P. C., for granting the review. The present application of Narayan makes a distinct complaint that the learned Judge when granting the appellant's application did not at all consider the question that the said application was long barred by time. Under the mandatory provisions of S. 3, Limitation Act the Court was bound to notice this statutory bar of limitation and therefore, in my opinion, this was

"a mistake or error apparent on the face of the record"

within the meaning of these words in O. 47, R. 1 sufficient to justify the lower Court in granting the application for review and setting aside its prevlous wrong order. In view of the principle laid down in *Sheikh Kaudu* v. *Berar Ginning Co, Ltd* (1) it was clear that the original application of Sheikh Kawdu dated 16th November 1925 was long barred by time. In *British Equitable Assurance Co.* v. *Rayaram* (*A.I.R* 1928 *Nag.* 305) it was held by Findlay, J. C, that if the Court omits to apply apposite law to a case a review could be entertained to rectify the mistake. It may, in passing, be noticed that the operation of S 3, Limitation Act is specially saved by S. 29 (1) ibid, even in regard to cases where under special or local law a period of limitation different from that of Sch. 1 is prescribed for any suit, appeal or application. For the reasons given above I uphold the order appealed against and dismiss this appeal with costs. Pleader's fee Rs. 50.

Jackson, A J. C.—I agree.

K.N./R K *Appeal dismissed*

(2) A.I.R. 1927 Nag. 212=23 N.L.R. 79.
(3) A.I.R. 1926 Nag. 17=24 N.L.R. 48.

A. I. R. 1929 Nagpur 190

FINDLAY, J. C

Nago Wani—Accused—Applicant

v.

Emperor—Opposite Party.

Criminal Revn No 229 of 1928, Decided on 10th August 1928.

(a) Forest Act (1927), S. 26 (h) — Onus is on Government to show that the land is part of Government forest.

Where the charge against the accused is that he has made an encroachment on Government forest land, the onus is on the prosecution to establish that the land forms part of the Government forest. 19 *Mad* 165, *Ref.* [P 191 C 2]

(b) Forest Act, (1927), S. 26 (h) — Where accused and his predecessors have been cultivating forest land for many years past, conviction under S. (26) (h) cannot be maintained.

Where it is clear from evidence that the accused has been cultivating land alleged to be part of a Government forest for at least seven years and the probabilities are that his father had done the same before him he cannot be held to have cleared or broken up the land for cultivation or any

other purpose and his conviction under S. 26 (h) cannot be sustained. [P 191 C 1]

A. V. Wazalwar—for Applicant.

Order. — The applicant Nago was convicted by the 2nd Class Magistrate, Sausar, of an offence under S. 25 (H) of the Forest Act of 1927 and sentenced to a fine of Rs. 75. The applicant is a tenant of mouza Ghogri, District Chhindwara, the field of which village immediately adjoins the Government forest

The prosecution case was that the Forest Ranger found that the accused had cultivated a small strip of forest land amounting to 24 of an acre, that he went to the spot with Balaji Patwari (P. W. 1) and measured the alleged encroachment in his presence as well as that of Rati Mukaddam (P. W. 2) and Sito Kotwar (P. W 3). The applicant's hut was found to be standing on 4 of an acre and the crop on 20 of an acre. The applicant in the Magistrate's Court denied all knowledge of the encroachment and alleged that he had been in possession of the land for some 10 or 12 years. The Magistrate found the applicant guilty as stated above He applied to the Court of the District Magistrate, Chhindwara. The District Magistrate held that there was a discrepancy between the two maps filed by the prosecution and neither of these maps was properly proved. From the evidence of the Patwari and the Revenue Inspector, however, he was of opinion that there was no doubt that a part of the applicant's kotha and the field did lie within the Government forest He also held that on the evidence of Balaji (P. W. 1), Rati (P. W. 2) and Sito (P. W. 3), Nago was warned that he had encroached and was asked to give up the land.

It was highly unsatisfactory, in my opinion, that the Range Officer was not examined in the case. The District Magistrate, however, went on to hold that the encroachment had been in existence for years and had not been made intentionally. It is clear that applicant has been cultivating the land in question for some seven years at least and the probabilities are that his father had done the same before him I fail to understand how on these circumstances the applicant can be held to have cleared or broken up the land in question for cultivation or any other purpose. The indications are that his predecessors may have been guilty of this but the only presumption on the evidence on record is that he through his predecessors, is in possession of the land in question.

The onus of proof was on the prosecution in a case like the present and so far as the evidence on record goes the presumption must be that the applicant either himself or through his predecessors has been in possession of the land for many years past. There is nothing to show under what provision of law any formal action was taken by the forest authorities for the removal of the applicant from the land in question. The land in question must be held to have been occupied land and not to have been forest or waste land, until the latter point is properly established : cf *Secretary of State* v. *Bapanamma Garu* (1) Whether, however, the forest authorities have power from the executive point of view to remove the applicant from this land is a question which it is impossible for me to solve on the unsatisfactory and insufficient evidence on record. The action of the forest authorities in this case seems to have been informal to a degree. For the purposes of this criminal case it must suffice to say that I do not consider the case falls under S. 25 (1), Forest Act, because it is perfectly clear that if this land had been wrongly cleared or broken up in spite of its being reserved forest such clearing or breaking up took place at the hands of some of the predecessors of the applicant and not in his time For these reasons, however, I am of opinion that the conviction cannot stand

The conviction and sentence on the applicant are accordingly set aside and the fine, if paid, will be refunded.

K N./R.K *Conviction set aside.*

(1) [1896] 19 Mad. 165.

A. I. R. 1929 Nagpur 191

JACKSON, A. J. C.

Kongshi—Defendant—Appellant.

v.

Kandaji—Plaintiff—Respondent.

Second Appeal No. 409-B of 1927, Decided on 12th April 1929.

Hindu Law—Widow incurring debt in course of management of property on credit of estate—No charge created—Still estate in reversioner's hands is liable for such debt.

Property in the hands of a Hindu reversioner is liable to satisfy a debt, which a

widow, while enjoying a widow's estate has properly incurred in the course of management on the credit of the estate, though no specific charge is created : 3 *Bom.* 287 ; *A. I. R.* 1928 *Bom.* 310 ; 19 *All.* 300, *not Foll.* 33 *Mad.* 492 ; 26 *Bom*, 206, *Foll.* [P 192 C 1]

S. B. Gokhale—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—In this case a Hindu widow, Mt. Girji, in possession and management of her husband's estate, executed a bond for Rs. 400 on 25th May 1923. After Girji's death the creditor brought the suit out of which this appeal arises to recover the amount due on the bond from her daughter, Kongshi, who is the reversioner to whom the estate passed on Girji's death. The lower appellate Court, disagreeing with the trial Court, has found that the estate in Kongshi's hands is liable for the debt and has passed a decree acordingly.

Girji's husband, Vithoba, left some land, houses and a money-lending business The debt in question was incurred by Girji for cultivation and other expenses, the lower appellate Court's view being that the borrowing was rendered necessary by Girji's money being out on loan in connexion with the money-lending business and not by any careless or imprudent management on her part. But it is argued on behalf of the appellant that even so the debt cannot be recovered from the estate because no charge thereon was created. My view of the law applicable to the present case is that property in the hands of a Hindu reverioner is liable to satisfy a debt, not secured on such property, which a widow, while enjoying a widow's estate, has properly incurred in the course of management on the credit of the estate, though no specific charge is created *Gadgeppa Desai* v. *Apaji Jivanrao* (1) is against this view. In that case the money was advanced on the widow's personal credit; so also in *Bhagwantrao Abaji* v *Ramanath Kaniram* (2), in which reliance was placed upon *Gadgeppa Dasai* v. *Apaji Jivanrao* (1) the credit was given to the widow personally; but it was held that the property in the hands of the reversioner was not liable, not on the ground that the debt was incurred on the widow's personal credit, but because the debt, though properly incurred in the management of the estate, was not secured on the property. This view is also taken in *Dhiraj Singh* v. *Manga Ram* (3) But in *Regella Jogayya* v. *Venkataratnamma* (4), it was held that a debt contracted by a widow as representative of the estate, for the purposes of the estate, will be binding on it in the hands of the reversioners, though no formal charge on the estate is created when the creditor looks not to the porsonal creadit of the widow but to her as representative of the estate and relies on the credit of such estate. This decision was not dissented from in *Bhagwantrao Abaji* v. *Ramanath Kaniram* (2) in the head-note it is inaccurately referred to as having been followed ; and the latter decision and the other two decisions to the same effect mentioned above seem to me to go unnecessarily far in requiring a formal charge to be created before the estate in the hands of the reversioner will be liable.

In *Sakrabhai* v. *Maganlal* (5), it was held that trade debts properly incurred by a Hindu widow on the credit of the assets of the business are recoverable after her death out of the assets, even in the absence of a specific charge. This case is distinguished in *Bhagwantrao Abaji* v. *Ramanath Kaniram* (3), the distinction being drawn between trading debts and other debts incurred in the course of management. I am not impressed with the reasons given for making that distinction, but in any case it can hardly be drawn in the present case, as Vithoba's money-lending and cultivation were too closely connected with each other to be dealt with separately part of the land cultivated was that of Sitaram (P. W. 2), who in satisfaction of a debt due to Vithoba gave him a 26 years' lease of that land. I am of opinion that *Sakrabhai* v. *Maganlal* (5) as well as *Regella Jogayya* v. *Venkataratnamma* (4) affords support to the view I take. On that view the lower appellate Court's decree must stand, as the wording of the bond shows clearly that Girji borrowed the money on the credit of the estate. The appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1878] 3 Bom. 287.
(2) A. I. R. 1928 Bom. 310=52 Bom. 542.
(3) [1897] 19 All. 300=(1897) A. W. N. 69.
(4) [1910] 33 Mad. 492=20 M. L. J. 412.
(5) [1902] 26 Bom. 206.

A. I. R. 1929 Nagpur 193

SUBHEDAR, A. J. C.

Jankilal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 300-B of 1928, Decided on 17th April 1929, against judgment of First Addl. Sess. Judge, Akola, D/- 19th December 1928, in Criminal Appeal No. 365 of 1928.

Penal Code, S. 193 — Where accused's statement is proved to be false, it can be presumed that he "intentionally" gave false evidence—Accused in execution Court making statement that decree against him was adjusted on certain dates—Dates material factor for trial of case—In trial Court accused never suggesting that he gave those dates on mistaken belief—Statement was false and accused did not believe it to be true while making it.

Where a statement on the basis of which a person is accused of perjury is proved to be false, it can safely be presumed that in making that statement the accused "intentionally" gave false evidence. [P 194 C 1]

The accused who was charged of perjury, had stated in a varified application in the execution Court that the decree against him had been adjusted on certain dates and afterwards he confirmed the statement by his oral testimony. These dates of the alleged adjustment were an important factor in determining the question which the execution Court was called upon to decide. In the trial Court it was never suggested on his behalf that he was mistaken in giving the dates. It was in the High Court for the first time that this plea of false belief was raised.

Held: that the statement was absolutely false and the accusad did not believe it to be true while making the same. 22 *O. C.* 236, *Foll.*; 26 *All.* 503; 36 *All.* 362, *Rel. on*, *A. I. R.* 1927 *Nag.* 170, *Ref.* [P 194 C 1]

M. B. Niyogi—for Applicant.

G. P. Dick—for the Crown

Order.—The main facts of the case out of which this application for revision arises are these. In Civil Suit No. 26 of 1921 on the file of the Second Subordinate Judge, Akola, a decree for Rs. 456-8-0 for costs was passed against eight persons including the applicant. In execution of this decree the applicant put in a verified application on 10th January 1925 (Ex P-6) stating that there was an adjustment of the decree so far as he was concerned by the decree-helder Radhakisan having agreed to accept Rs. 75 as the applicant's share of liability. The decree-holder having denied this adjustment, an enquiry under O. 21, R. 2, Civil P. C., was made by the Subordinate Judge who held the adjustment not proved In this enquiry the applicant was examined as a witness on 27th August 1925 and had made the following statement in Ex. P-2 which has been the basis of the prosecution:

"About 12 months ago Seth Radhakisan came to my shop to settle the dispute. The next day I went to decree-holder's shop. It was on the 9th August. Radhakisan was then engaged in puja. Radhakisan came in the shop and told me that he would accept the amount of my share any day. Adjustment between me and Radhakisan was made in my shop on 8th or 9th August 1924."

After unsuccessfully moving the Subordinate Judge to start criminal proceedings against the applicant for an offence under S. 193, I P. C, the decree-holder filed an appeal to the District Judge who lodged a complaint against the applicant as desired by the decree-holder in respect of the false statements contained in Ex. P-6 and Ex. P-2. The case was tried by the Sub-Divisional Magistrate, Akola, who convicted the accused on both the counts and sentenced him to six months rigorous imprisonment and a fine of Rs. 250 on each count. Against this order the applicant appealed to the Additional Sessions Judge, Akola, who quashed the conviction with regard to Ex. P-6, but maintained the conviction and sentence in regard to Ex. P-2. The applicant, has, therefore, come up to this Court in revision.

Mr M. B. Niyogi, the learned advocate for the applicant, argued that the prosecution has failed to establish in this case that the accused intentionally gave false evidence. It was also contended that in the present case all that has been proved was that the alleged adjustment did not take place on the dates mentioned, but may possibly have taken place either in April or June and reliance was placed on the observations of this Court appearing in the case of *Sherkhan* v. *Anwarkhan* (1) to the effect that before a person could be convicted of perjury the evidence on record must be such as to exclude the possibility of any hypothesis other than that of the prisoner's guilt.

I will first dispose of the second contention In his defence at the trial the applicant never suggested that he had been mistaken in giving the 8th or 9th August 1924, as the dates on which the

(1) A. I. R. 1927 Nag. 170=23 N. L. R. 40.

alleged adjustment had taken place. As a matter of fact time was allowed to the applicant by the civil Court to make a definite statement, and on 10th January 1925, he filed a verified application (Ex. P-6) alleging that the adjustment had taken place on the aforesaid dates and later on he confirmed this statement by his sworn testimony which is the subject matter of the charge Even in the proceedings relating to his being prosecuted for perjury the applicant did not put forward the plea of the mistaken belief, that is now advanced on his behalf. It cannot be denied that the date of the alleged adjustment was a very material factor for the determination of the question which the civil Court was called upon to decide in the execution proceedings. In *Mohamad Ismail Khan* v *Emperor* (2), it was held that to justify a conviction for perjury it is not necessary to prove that the statement is impossible, it is sufficient to prove it is incredible In the present case, however, the evidence for the prosecution establishes beyond question that the statement of the accused which is the subject of the charge could not possibly be true. Having regard to all the circumstances of the case, I have not the slightest doubt in confirming the well-considered and concurrent finding of the two lower Courts that the statement made by the applicant and quoted above was absolutely false and that when making the same he did not believe it to be true.

With regard to the first point it is enough to say that if the statement is proved to be false, as is concurrently found by the two lower Courts to have been the case, it could safely be presumed that in making that statement the applicant "intentionally" gave false evidence. False evidence is intentionally given if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court and of leading it to be supposed that that which he states is true: *Babu Ram* v. *Emperor* (3). The Court may infer the corrupt intention from surrounding circumstances: *Muhammad Ishaq* v. *Emperor* (4).

(2) [1919] 22 O. C. 236=54 I. C. 60=21 Cr. L. J. 12.
(3) [1904] 26 All. 509=1 A. L. J. 236=(1904) A. W. N. 115.
(4) [1914] 36 All. 362=25 I. C. 331=12 A. L. J. 550.

On the question of sentence the learned advocate for the applicant prayed that as the accused was a respectable man and as this was his first offence he should be dealt with under S. 562, Criminal P. C. The learned Government Advocate, however, very properly opposed this prayer and stated that the punishment awarded was in fact very lenient. Taking into consideration the seriousness of the offence and having regard to the fact that such offences, though very common, are rarely brought to light, I consider the punishment awarded to be quite appropriate. For the foregoing reasons the application for revision is untenable and is dismissed The applicant, who is on bail, must surrender himself and undergo the unexpired portion of the sentence.

S.N./R.K. *Revision dismissed.*

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* A. I R. 1929 Nagpur 194

SUBHEDAR AND JACKSON, A. J Cs.

Indraraj Singh — Plaintiff — Appellant

v.

Chaitram and *another*—Defendants—Respondents.

First Appeal No. 138 of 1927, Decided on 28th March 1929, against decree of Dist. Judge, Bhandara, D/- 10th October 1927, in Civil Suit No 3 of 1926.

(a) Contract Act, S. 29—Agreement as to repayment of certain amount being indefinite—Uncertainty not pleaded as bar to its legality—Repayments made by one party and accepted by other towards agreement — Agreement is not void for uncertainty.

The terms of the agreement as to repayments of certain amount were indefinite, but the uncertainty was not pleaded as a bar to its legality and repayments were made by one party and accepted by the other towards the agreement without protest.

Held: that the agreement was not void for uncertainty: *A. I. R.* 1916 *P. C.* 9, *Rel. on.* [P 197 C 2]

(b) Specific Relief Act, S. 21 (c)—Terms of agreement indefinite but defendant performing his part of agreement—Plaintiff's possible inability to specifically enforce contract could not arise.

Where the terms of certain agreement being indefinite, the plaintiff could not be able to obtain specific performance of such an agreement in case of its breach by the defendant but the defendant had wholly performed his part of the agreement.

Held: that the plaintiff's possible inability to specifically enforce the contract could not arise in the case. [P 198 C 1]

(c) Mortgagor and mortgagee—Mortgagee obtaining absolute decree for foreclosure and formal possession of property—He getting his name mutated in respect of it and subsequently making oral agreement with mortgagor to reconvey property to him on payment of mortgage debt—Mortgagor remaining in actual possession of property for long time after decree considering himself as real proprietor to knowledge of mortgagee—Mortgagee himself regarding him as virtual proprietor of property—Such possession is in pursuance of oral agreement.

Mortgagee obtained an absolute decree for foreclosure for mortgage debt and formal possession of the mortgaged property and got his name mutated in respect of it. Mortgagee subsequently made an oral agreement with the mortgagor to reconvey the property to him on his payment of the debt. The mortgagor remained in actual possession of the property for a long time after passing of the decree absolute for foreclosure. The mortgagor regarded himself as the real proprietor of the property to the knowledge of the mortgagee and mortgagee himself regarded him as the virtual proprietor of the property.

Held: that although the legal title was with the mortgagee, such long and uninterrupted possession was in pursuance of the oral agreement between the mortgagor and the mortgagee. *A.I.R.* 1922 *Bom.* 9, *Rel. on.* [P 198 C 2]

***(d) Part performance—Vendees in possession under agreement for sale and performing his obligations can defeat vendor's suit for ejectment though right to specifically enforce contract is barred by time.**

The defendants vendees being in possession of the property in dispute by virtue of an agreement for sale and having fully performed their own obligation under it, can defeat the plaintiff vendor's suit for ejectment even though their right to have the contract specifically enforced against the plaintiff is barred by time at the date of the filing of the suit. *A. I. R.* 1914 *P. C.* 27; *A. I. R* 1916 *P. C.* 9; *A. I. R.* 1924 *Mad.* 271; 25 *C. W. N.* 905; 41 *Bom.* 438, *A.I R.* 1922 *Bom.* 9; *A. I. R.* 1923 *Bom.* 473, *A. I. R.* 1924 *Bom.* 150, *A. I. R.* 1928 *Bom.* 150, 40 *All.* 187; *A. I. R.* 1924 *All.* 826, *A. I. R* 1924 *Rang.* 214 (*F.B.*); *A. I. R.* 1923 *Nag.* 177; *Nag Second Appeal No.* 473 *of* 1923, *Rel. on.*, 40 *Mad.* 1134; 17 *C. P. L. R.* 19; 5 *N. L R* 70, *not Foll*, *A I R* 1927 *Nag* 353, *Expl. A. I. R.* 1922 *Cal.* 436, *Ref.* [P 201 C 2]

V. Bose, *P. A Pandit*, and *G. R. Bapat* and *P. N. Rudra*—for Appellant.

D N. Chaudhary, *Y V. Jakatdar* and *V. M. Jakatdar*—for Respondents.

Subhedar, A. J C.— The subject-matter of the suit out of which this appeal arises is the village of Kayadi in the Waraseoni Tahsil of the Balaghat District with *sir* fields, houses, trees and wells situate in the said village. The parties are closely related by marriage. The plaintiff is the zamindar of Fulchur, and his eldest son had, in 1901, married the daughter of defendant 1. In the year 1920 the plaintiff's daughter was married to defendant 2, who is the son of defendant 1. In 1909 in consideration of a loan of Rs. 12,000 defendant 1 and his two stepmothers had executed a mortgage of the property in dispute in plaintiff's favour with a condition of foreclosure. On the basis of this mortgage the plaintiff brought a suit (Civil Suit No. 15 of 1913 in the Court of the District Judge, Bhandara) and obtained an ex parte decree nisi for foreclosure for Rs. 16,455-11-3 on 18th August 1913, which was made absolute on 9th May 1914 and formal possession of the foreclosed property was obtained by the plaintiff on 9th August 1914 The plaintiff also got his name mutated in respect of this village on 24th March 1915.

The plaintiff brought the present suit for confirmation of his possession of the said village or in the alternative for actual possession thereof. The plaintiff's case was that after he had obtained possession of the property under his foreclosure decree, he had appointed defendant 1 as his manager to manage the same on his behalf, and that defendant 1 did so until the year 1923 when he asserted a hostile title by making an unsuccessful attempt in the revenue Courts for having the village mutated in his own name It was asserted in para. 4 of the plaint that there was some sort of agreement between the parties for reconveying the village to defendant 1 on his paying to the plaintiff the whole of the decretal amount within two months by the end of October 1914, and it was admitted that in pursuance of this agreement defendant 1 actually paid to the plaintiff's pleader Mr. Gokhale Rs. 4,500 on 29th September 1914, but since the balance was not paid as stipulated, it was asserted that the agreement fell through.

The main defence to the claim was made by defendant 1 (defendant 2 only adopted the pleas advanced by his father) who stated that prior to the institution of the mortgage suit there was an agreement between him and the plaintiff in January 1913, whereby it was settled that the plaintiff should file the suit on the mortgage against all the three mortgagors, obtain an ex parte decree absolute for foreclosure, take formal possession of the mortgage properties and reconvey the same to defendant 1 in consideration of

defendant 1 paying the decretal debt by easy instalments The defendants further pleaded that about September 1914, after the plaintiff had obtained formal possession of the mortgage property, it was finally settled that defendant 1 should pay to the plaintiff Rs 4,500 (representing the first five kists of the mortgage, viz , Rs. 3,750 and Rs 750 on account of the costs of the mortgage suit) within two months as an indication of his sincerity to abide by the terms of the agreement, that the balance due should be paid off by easy instalments, and that after the whole amount was thus paid off and the other creditors of the defendants were fully satisfied, the plaintiff would formally reconvey the village to the defendants. The defendants asserted that it was in pursuance of this agreement that the payment of Rs. 4,500 was made by them to the plaintiff's pleader, Mr. Gokhale, and not under the circumstances alleged by the plaintiff in para 4 of the plaint. The defendants also pleaded a number of further repayments amounting to Rs. 8,200 towards the fulfilment of their obligations under the agreement They also alleged that after the plaintiff's daughter was married to defendant 2, the plaintiff returned the amount of Rs 1,000 which defendant 1 had paid to the plaintiff's agent Bapuji on 18th May 1921, saying that on account of the new relationship he would not only not accept the same but would forego the rest of the claim for the balance due The defendants of course denied the plaintiff's allegation that defendant 1 was the agent of the plaintiff and managed the village in that capacity on his behalf On the contrary they asserted that their possession over the village was never disturbed and that their management of it was in their own right. It was finally contended by the defendants that since they were in possession of the property in dispute under an agreement which, so far as they were concerned, was fully performed, the plaintiff's suit to eject them was not maintainable.

The pleadings of the parties were very elaborate but a fair idea of them would be gathered from the following issues framed for trial :

"(1) Whether the plaintiff has been in possession of the property in suit and whether defendant 1 has been managing it on plaintiff's behalf, as alleged by the latter ?

(2) Whether the plaintiff got formal possession of the property in suit on 9th August 1914 through Court in execution of his foreclosure decree ? Is the plaintiff's claim for delivery of possession within time ?

(3) Whether the first oral agreement pleaded in sub-para. 4, para. 2 of the defendant 1's written statement was made between the plaintiff and defendant 1 about January, as alleged by the latter ?

(4) Whether the second oral agreement pleaded in sub-para. 5, para. 2 of the defendant 1's written statement was made between the plaintiff and defendant 1 about September 1914, as alleged by the latter ?

(5) Whether the defendants made the fourth, fifth, sixth, ninth and eleventh payments out of the eleven payments pleaded by the defendant's pleader in his statement recorded on 6th January 1927 ? Were all the eleven payments made in connexion with and on account of the second agreement said to have been made about September 1914 ?

(6) Whether the defendants' claim for specific performance of the second agreement is within time ? If not, can they resist plaintiff's claim for possession on the strength of that agreement ?

(7) If the plaintiff be found to be not in possession, whether the defendants are liable to deliver possession to him."

In a very careful and exhaustive judgment the learned District Judge dealt with all the contentions of the parties, and upon a consideration of the entire evidence, recorded the following findings in para 6 of his judgment :

"*On Issue* 1. — The plaintiff has not been in possession of the property in suit. The defendant 1 has been managing it on his own account and not on behalf on the plaintiff. He has been managing it with plaintiff's permission and defendant 1's possession has been of a permissive character.

On Issue 2. — The plaintiff got formal possession of the property in suit on 9th August 1914 through Court in execution of his foreclosure decree. The plaintiff's claim for delivery of possession is within time.

On Issue 3. — The first oral agreement pleaded in sub-para. 2 of the defendant 1's written statement is not proved.

On Issue 4.—The second oral agreement pleaded in sub-para. 5, para. 2 of the defendant 1's written statement is proved to have been made between the plaintiff and defendant 1 about September 1914. It was agreed that defendant 1 should pay the mortgage debt and costs of the suit in instalments, that defendant 1 should pay Rs. 4,500 as the first instalment and that after the whole account was paid the plaintiff should retransfer the village to defendant 1. The period within which the whole amount was to be paid and the number of the instalments and the amount of each of the instalments other than the first were not fixed.

On Issue 5. — The defendants made fourth, fifth, sixth, ninth and eleventh pay-

ments out of the 11 payments pleaded by the defendants' pleader in his statement recorded on 6th January 1927. All the 11 payments were made in connexion with and on account of the second agreement said to have been made about September 1914.

On Issue 6. — The defendants' claim for specific performance of the second agreement is not within time. The defendants can however resist plaintiff's claim for possession on the strength of the said agreement.

On Issue 7. — The defendants are not liable under the circumstances of the case to deliver possession of the property in suit to the plaintiff."

As a result of these findings the plaintiff's suit was dismissed and he has preferred this appeal which attacks almost all the findings of the lower Court which are adverse to him.

The learned advocate for the appellant commenced by arguing that the lower Court had misunderstood the doctrine of part performance and misapplied it to the facts, as found by it, in the present case It was stated that three things were essential to the application of this doctrine, viz.,

(1) a valid agreement ;

(2) delivery of possession in pursuance of the agreement ; and

(3) the existence of an agreement of such a nature of which specific performance could be granted,

and reliance was placed on certain quotations appearing at pp. 443, 468, 470 and 472 of White and Tudor's Leading Cases in Equity, 8th Edition.

It was urged that in the present case no second agreement was specifically pleaded and when the lower Court found that the first agreement was not proved the second one must fall to the ground, because it never existed independently of the first. There is very little force in this contention. The pleadings are very definite as to the second agreement and issue 4 framed for trial makes the position clearer still. As the parties went to trial upon a definite issue on this point, I hold that the second agreement was clearly pleaded.

While not seriously challenging the finding of the lower Court as to the existence of the second agreement, the learned advocate for the appellant contended that since the lower Court in para. 27 of its judgment found the terms of this agreement as to repayments indefinite, it could not but be regarded as an agreement void for uncertainty under S. 29, Contract Act, which says that

"Agreements the meaning of which is not certain or capable of being made certain are void."

It was, therefore, argued that such a void agreement could not be the basis of the applicability of the doctrine of part performance, because it could not have been enforced at all much less specifically.

In para 27 of his judgment the learned District Judge does not give his finding on issue 4 but merely makes certain observations while discussing the evidence and circumstances relating to the second agreement—a discussion which commenced in para. 18 and ended in para. 29 of the judgment. The definite finding on this point, however, appears in para. 30 in the following words :

"I therefore find issue 4 in the affirmative and hold that it was agreed between the parties about September 1914 that defendant 1 should pay to the plaintiff the mortgage-debt and the costs of the suit in instalments, that defendant 1 should pay Rs. 4,500 as the first instalment and that after the whole amount was paid off the plaintiff should retransfer the village to defendant 1. The period within which the whole amount was to be paid was not fixed. So also the number of the instalments and the amount of each of the instalments other than the first was not fixed."

With this finding and with the reasons in support of it as given in paras. 18 to 29 of his judgment I am in entire agreement with the learned Judge. The question then is, does such an agreement come within the purview of S. 29, Contract Act, and be void for uncertainty ? I have no hesitation in answering the question in the negative, because uncertainty in the terms was never pleaded as a bar to the legality of the agreement and for the additional reasons that the parties themselves did not regard the terms as to repayment vague or indefinite, because the defendants, as a matter of fact, did pay according to their convenience and the plaintiff accepted the several repayments towards the agreement in question without protest. In *Venkayyamma Rao* v. *Appa Rao* (1) (at p. 523 of 39 *Mad.*) it has been held by their Lordships of the Privy Council that a contract may be constituted by a promise followed by actings by the promisee on the faith thereof though not by

(1) A. I. R. 1916 P. C. 9=39 Mad. 509=43 I. A. 138 (P.C.).

an express acceptance, that the question in each case is one of fact and if the Court finds that the actings did take place on the footing of a proposal made by the promisor and that they were known by the latter to have taken place on that footing, the objection that the contract was inchoate or incomplete cannot be mentioned and specific performance of such a contract will not be refused in law I, therefore, hold that the agreement in question was not void in law as suggested and could, therefore, form the basis of the applicability of the doctrine of part performance.

It was also argued that because the terms of the agreement as to payments were indefinite, there was no mutuality and the plaintiff could not have been in a position to enforce such an agreement specifically. Reference was made to S 21 (c), Specific Relief Act, and also to *Mir Sarwarjan* v. *Fakhruddin Mahomed* (2) in this connexion. This argument seems to me to be of no avail to the appellant. Assuming that the plaintiff could not have been able to obtain specific performance of such an agreement, in case the defendants had committed a breach thereof, still now that the defendants have fully performed their own obligations under it by the payment of the entire consideration, no question of the plaintiff's possible inability to specifically enforce the contract can possibly arise in the present case

The next point argued was that possession of the village was never transferred to the defendants in pursuance of the second agreement, and that, therefore, the second element necessary for the applicability of the doctrine of part performance was wanting in this case It was pointed out that in para. 37 of the lower Court's judgment that Court held that the possession of the defendants was of a licensee, implying that it was not referable to the agreement. But para. 37 deals with the contention of the defendants that their possession was adverse to the plaintiff and the word licensee used therein by the learned Judge cannot possibly lead to the construction suggested by the learned advocate for the appellant. That the possession of the defendants was referable to the agreement is positively found by the learned District Judge in the following passage appearing in para. 26 of his judgment :

"Consequently defendant 1 would remain in possession of the village on his own account although in law the right to such possession was derived from a license given by the plaintiff—involved by implication in the agreement. Such possession would be of an anomalous nature inasmuch as although defendant 1 would be in possession on his own account as owner of the equity of redemption which was revived by the agreement in question, his possession would not be adverse to the plaintiff owing to the aforesaid license but would be of a permissive character."

The following facts are clearly established from the evidence on record and the conduct of the parties :

(a) that in spite of the passing of the decree absolute for foreclosure and delivery of symbolical possession of the property to the plaintiff and of the mutation of the plaintiff's name as a proprietor in the revenue papers, the defendants never lost khas possession of the village;

(b) that as is evidenced from their several acts, as enumerated in para 26 of the lower Court's judgment defendant 1 regarded himself as the real proprietor of the village apparently to the knowledge of the plaintiff,

and (c) that the plaintiff himself considered defendant 1 as the virtual proprietor of the village and addressed him accordingly as " Malguzar Kayadi " in his several letters which are filed as Exs D-1, D-2, D-3, D-4, D-9 and D-10

Agreeing with the lower Court, therefore, I hold that although the legal title was with the plaintiff the defendants' long and uninterrupted possession over the village Kayadi even after the passing of the decree absolute for foreclosure was in pursuance of the agreement between the plaintiff and defendant 1, as pleaded and successfully proved by them, and consequently there is no force in the contention that the defendants' possession was not referable to the agreement Moreover as laid down in *Venkatesh Damodar* v. *Mallappa Bhimappa* (3) possession need only be retained if it already exists.

On the question of the repayments involved in issue 5, the argument advanced was twofold :

(2) [1912] 39 Cal. 292=18 I. C. 331=39 I. A. 1 (P.C.).

(3) A. I. R. 1922 Bom. 9=16 Bom. 722.

(1) that the repayments were not proved;

and (2) that if proved they were not made towards the discharge of the obligation created by the agreement to reconvey the property.

Reference was made to Exs. D-1, D-2 and D-3 which relate to rice sent by defendant 1 to the plaintiff, and it was argued that these letters disclosed that rice was sent merely as present Reference was also made to Ex. D-10 to show that defendent 1 as manager of the plaintiff made the payments noted therein out of the profits of the village which he was then managing on the plaintiff's behalf. It is impossible to read in these documents the meaning sought to be assigned to them The entries in the account books of the defendant bearing on these repayments were also characterised as unreliable for no other good reason than that there were certain irregularities in the books pointed out by the lower Court in para. 33 of its judgment. But these irregularities point more to their genuineness than otherwise as rightly remarked by the lower Court.

The entire mass of oral and documentary evidence in connexion with these repayments has received such analytical and critical consideration at the hands of the learned Judge in paras. 31 to 35 of his judgment that it is unnecessary for this Court to analyse and criticise it over again in this judgment Suffice it to say that I am in entire agreement with the learned Judge in his appreciation of the evidence and the conclusions he drew therefrom. The whole of this evidence, moreover, stands unrebutted. The plaintiff had an opportunity to contradict it by going into the witness-box himself and by producing his own account books and other papers in his possession But he failed to take this obviously honest course, for reasons best known to him, and this unexplained conduct on his part gives, therefore, additional sanctity to the evidence adduced by the defendants. I, therefore, agree with the lower Court in holding that the several repayments pleaded by the defendants have been very satisfactorily proved and that the same were made towards the discharge of the defendants' obligations under the agreement.

I has been found by the learned District Judge in para. 38 of his judgment that after receiving about Rs. 12,000 under the agreement the plaintiff, on 18th May 1921, refused to accept Rs. 1,000 tendered by defendant 1 and promised to forego the balance due because of the new relationship that was formed between the parties recently by the marriage of the plaintiff's daughter to defendant 2. This was established by the evidence of the defendant himself as his own first witness and D. W 25 Diwakarrao and D. W. 28 Kunwarlal Singh, both of whom are plaintiff's sons and could not be expected to go against their own interest because admittedly there has yet been no partition between them and the plaintiff. It was argued for the appellant that because his sons are fighting with him that their testimony should be discounted on that account. It was, however, very easy for the plaintiff to disprove this version of the defendants by simply entering the witnes-box and denying on oath these simple facts or by examining the two pleaders, Mr Bapat and Pandit, whose names were disclosed by the defendants as having been present on the occasion. But as remarked by me already the plaintiff did not follow this honest and straightforward course He even failed to produce the counterfoil of the receipt of Rs. 1,000 though formal notice and an order by the Court to produce the same was served upon him. Under these circumstances it is not possible for this Court to disagree with the lower Court in its finding that so far as the defendants are concerned they have fully discharged their obligations under the agreement in question and that except the execution of a formal deed of conveyance by the plaintiff in defendant's favour nothing more remains to be done in respect of it.

There only remains the consideration of the most important argument advanced by the learned advocate for the appellant to the effect that even if the defendants performed their part of the obligations created by the agreement, they could not resist the plaintiff's claim for possession because there is yet no formal deed of conveyance executed in their favour so as to clothe them with a legal title in respect of the property in dispute. It was urged that the doctrine of part performance has no applicability to cases in which the title to immovable property

is by law required to be evidenced by a formal registered deed of conveyance and that even if the doctrine applied it could only be applicable to cases where the defendant's right to enforce specific performance of the contract of sale was not barred at the date of the plaintiff's suit for ejectment.

The Privy Council cases of *Mahomed Musa* v *Aghore Kumar Ganguli* (4) and *Venkayyamma Rao* v. *Appa Rao* (1) which lay down that the principle of the doctrine of part performance is applicable in India, were sought to be distinguished on the ground that in those cases admittedly no such formal deeds were necessary under the law for the time being in force. In other words it was contended that the doctrine of part performance cannot affect the statute law and reliance was placed upon the following cases in support of this proposition. *Sanjib Chandra* v. *Santosh Kumar* (5) and *Ramanathan* v. *Ranganathan* (6).

In the *Calcutta* case the suit was for specific performance of a contract of lease which was not registered, and therefore the Court dismissed the suit holding that no suit was maintainable on the basis of such an invalid document. In that case no question directly arose for the applicability of the doctrine of part performance. In the *Madras* case cited the plaintiff and the defendant had exchanged certain plots of land without the requisite formality of a registered instrument. The suit was for recovery of the plot originally belonging to the plaintiff and was dismissed by the trial Court. The matter came up in appeal before a Bench of Wallis, C J., and Seshagiri Ayyar, J., the former holding on the principle of the doctrine of part performance that the suit was rightly decided and dismissed the appeal, though the other learned Judge differed from the view taken by the learned Chief Justice. In the Letters Patent appeal that followed and which came before a Bench of three Judges of the same Court Sadasiva Ayyar and Napier, JJ, held that there was no estoppel against the plaintiff and decreed the plaintiff's claim, but Abdur Rahim, J., dissented and followed the view of the learned Chief Justice holding that the plaintiff was estopped by his conduct from recovering his plot, in spite of the want of a registered deed of exchange.

But this *Madras* case was over ruled by a Full Bench of the same High Court in a later case reported as *Vizagapatam Sugar Co.* v. *Muthuramareddi* (7) where in that Court followed the principle laid down in *Mahomed Musa* v. *Aghorg Kumar Ganguli* (4) and *Venkayyamma Rao* v *Appa Rao* (1) and held that the doctrine of part performance was applicable even in cases where the statute law required writing and registration to effect legal and valid transfers. The Divisional Bench of the same Court which ultimately disposed of the case further held that the plea of part performance is not limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit and in this view the learned Judges followed the law laid down in *Meher Ali* v. *Aratunnessa Bibi* (8).

Almost all the High Courts in India have now unanimously adopted and applied the principles of the doctrine of part performance as laid down in the two above mentioned Privy Council rulings not only to cases where the transactions were entered into after the passing of the Transfer of Property Act and were defective for want of writing and registration but also to cases where, at the date of the suit for ejectment by the dishonest vendor, the defendant's right to sue for specific performance of the contract of sale was barred by time : vide *Bapu Apaji* v. *Kashinath Sadoba* (9), *Venkatesh Damodar* v. *Mullappa Bhimappa* (3), *Sandu Walji* v. *Bhikchand Surajmal* (10), *Laxman* v. *Ravji* (11), *Ramappa* v. *Yellappa* (12). *Meher Ali* v. *Aratunnessa Bibi* (8), *Salamat-us-zamin Begam* v. *Masha Allah Khan* (13), *Kunti*

(4) A. I. R. 1914 P. C. 27 = 42 Cal. 801=42 I. A. 1 (P. C.).
(5) A. I. R. 1922 Cal. 436=49 Cal. 507.
(6) [1917] 40 Mad. 1134=33 M. L. J. 252=6 M. L. W. 300=43 I.C. 188=(1917) M. W. N. 757.
(7) A. I. R. 1924 Mad. 271=46 Mad. 919 (F.B.).
(8) [1920] 25 C. W. N. 905.
(9) [1917] 41 Bom. 488=39 I.C. 103=19 Bom. L.R. 100 (F.B.).
(10) A.I.R. 1923 Bom. 473=47 Bom. 621.
(11) A.I.R. 1924 Bom. 150.
(12) A.I.R. 1928 Bom. 150=52 Bom. 907.
(13) [1918] 40 All. 187=43 I.C. 645=16 A.L.J. 98.

v. *Gajraj Tiwari* (14) and *Maung Myat Tha Zan* v *Ma Dun* (15).

The earlier view held by this Court was that a defendant who is not in a position to maintain a suit for specific performance of the contract of sale cannot, in a suit for ejectment brought against him set up such a contract as a plea in bar : *Jeyram* v. *Ganpati* (16) and *Gangabisan* v. *Tukaram* (17). The last reported case was decided in 1908 long before *Mahomed Musa's* case was decided by the Privy Council. Reference was made by the appellant's counsel to the case of *Rao Saheb* v. *Umrao* (*A. I. R.* 1927 *Nag.* 353) to show that the limitation to the applicability of the doctrine as laid down in the aforesaid earlier cases was followed by Hallifax, A J. C, but on a perusal of the judgment in the case I find that the point was conceded and not decided. The question, however, arose in the case of *Sampat* v. *Motilal* (18), where Prideaux, A. J. C, dissented from the earlier view of this Court and following *Venkatesh Damodar* v *Mallappa Bhimappa* (3), expressed himself in these words:

"It is contended for the appellants-defendants that they can, even if their claim for specific performance is time barred, use that claim as shield against the present attack made on their title, while for the respondent-plaintiff *Jairam* v. *Balkrishnadas* (19), *Gangabisan* v. *Tukaram* (17) and *Jeyram* v. *Ganpati* (16) are relied on. In a recent case, *Venkatesh Damodar* v. *Mallappa Bhimappa* (3), it was held that where a person agrees to sell his property to another who is already in possession and who paid the purchase money but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property, although the time has passed within which the vendee could have sued to get a sale-deed. The principle enunciated in that case can be applied here. It seems to me that when the vendee is in possession and has paid the purchase money, in a case of this nature he can plead this. It is a valid defence that the plaintiff has agreed to sell the property whether the time for filing a suit for specific performance has expired or not. It would be, in a case like the present, manifestly unfair to allow a plaintiff to oust the buyer"

with these observations I entirely concur. In a very recent case (*Fagua* v *Chandulal, Second Appeal No.* 473 *of* 1923) the same point was referred for decision to a Full Bench of this Court as question No. 4, when Kinkhede, A. J. C., in an elaborate judgment answered it in these words :

"That though at the date of suit the defendants had acquired neither a title by purchase for which a registered conveyance was necessary or a prescriptive title by the operation of S. 28, Lim. Act, and the plaintiff's title to property was still subsisting, and even though their own remedy by suit to enforce the completion of their own title as purchasers as against the plaintiff was barred by limitation, the defence based on the doctrine of part performance is open to them as an answer to the plaintiff's right to sue."

Unfortunately in their separately recorded judgment Hallifax and Prideaux, A. J. Cs , while holding that this Court was bound to follow the decision of the Privy Council in *Mahomed Musa's* case omitted to give their opinion on this specific question but by implication they seem to have decided it in the way Kinkhede, A. J. C., did The case was finally disposed of by Hallifax, A, J. C., on the applicability of the doctrine of part performance by refusing the plaintiff the relief of possession, though the defendant's claim for specific performance of the contract of sale was barred at the date when the plaintiff's suit for ejectment was filed Following the law as laid down in the cases discussed in the foregoing three paras. I agree with the lower Court in holding that the defendants (being in possession of the property in dispute) by virtue of an agreement for sale and having fully performed their own obligations under it, can defeat the plaintiff's present suit for ejectment, even though their right to have the contract specifically enforced against the plaintiff was barred by time at the date of the filing of the present suit. The result is that the appeal fails and is dismissed with costs.

Jackson, J.—I agree.

P.N./R.K. *Appeal dismissed.*

(14) A.I.R. 1924 All. 826=46 All. 847.
(15) A.I.R. 1924 Rang. 214=2 Rang. 285 (F.B.).
(16) [1904] 17 C.P.L.R. 19.
(17) [1909] 5 N.L.R. 70=2 I.C. 244.
(18) A.I.R. 1923 Nag. 177.
(19) [1907] 3 N.L.R. 72.

A. I. R. 1929 Nagpur 201

STAPLES, A. J. C.

Kunwaria—Appellant.

v.

Pandi—Respondent.

Misc. Appeal No. 10 of 1928, Decided on 12th March 1929, against order of Dist. Judge, Bhandara, D/- 7th December 1927, in Civil Appeal No. 97 of 1927.

(a) C. P. Land Revenue Act (1917), S. 220—Order by revenue Court upon matter within jurisdiction is not ultra vires though based on mistake of fact—Application under S. 112 by person purporting to be member of family of protected thekedar—Deputy Commissioner upon enquiry holding appellant entitled to be maintained out of income of theka and transferring theka to him—His order not without jurisdiction though as matter of fact applicant not entitled to be maintained out of income of theka—S. 220 bars jurisdiction of civil Court to question such order—C. P. Land Revenue Act (1917), S. 112.

An order passed by a competent revenue Court upon a matter within its jurisdiction is not ultra vires or without jurisdiction even though it is based upon a mistake of fact. [P 204 C 1]

Where an application is made under S. 112 by a person purporting to be a member of the family of protected thekedar, who is entitled to share in the theka or to be maintained out of its income and the Deputy Commissioner upon enquiry holds that that member is entitled to be maintained out of the income and transfers the theka in his favour, his order cannot be without jurisdiction even though as a matter of fact the applicant is not entitled to be maintained out of the income; and S. 220 bars the jurisdiction of the civil Court to question such order as it is not without jurisdiction: 25 *Bom.* 337; *A. I. R.* 1926 *Nag.* 379; 5 *N. L. R.* 176, *Ref.*, 8 *N. L. R.* 107; 3 *N. L. R.* 169; *A. I. R.* 1922 *Nag.* 10; 25 *Cal.* 833, 37 *Cal.* 107; *A. I. R.* 1924 *Bom.* 1, *Dist.* [P 203 C 2, P 204 C 1]

(b) C. P. Land Revenue Act (1917), S. 109 (3)—Deputy Commissioner upon application under S. 112 transferring theka to applicant—Subsequent application under S. 109 (3) rejected by him—Such order rejecting transfer is not without jurisdiction though transfer was not made by thekedar but by Deputy Commissioner—C. P. Land Revenue Act (1917), S. 112.—(*Obiter*).

When the Deputy Commissioner upon application under S. 112 and upon proper enquiry and with the consent of the then thekedar transferred the theka to the applicant and where subsequently an application was made under S. 109 (3) to set aside transfer and it was rejected by him as there was nothing bad in the previous transfer such order rejecting an application is not without jurisdiction although the transfer was not made by the thekedar but by Deputy Commissioner upon application and will bar a suit in a civil Court to set aside the transfer. [P 205 C 1, 2]

(c) C.P. Land Revenue Act (1917), S. 109—Civil Court cannot entertain application under S. 109 (3)—C. P. Land Revenue Act 1917), S. 220.—(*Obiter*).

The fact that S. 109 is not expressly mentioned in S. 220 (1) does not in any way prejudice the general provisions of S. 220 and a civil Court has no authority to entertain an application under S. 109 (3). [P 206 C 1]

M. R. Bobde—for Appellant.

V. D. Kolte and *S. C. Dutt Chaudari*—for Respondent.

Judgment.—The respondent brought a suit for possession of a village with *sir* and khudkasht land, which had been held by Sunhar, the husband of appellant 1 Mt. Kunwaria, as a protected thekedar, and for a declaration that the order passed by the Deputy Commissioner transferring the theka to Tikaram appellant 2 did not affect the rights of the respondents and that the appellants had no interest in the village. The facts have been set out in the judgments of the lower Courts and need only be briefly stated. Sunhar died in 1898 and was succeeded in the theka by his two widows Mt. Baddo and Mt. Kunwaria. Mt. Baddo died about three or four years ago and then Mt. Kunwaria succeeded to the whole theka. An application was made by Tikaram to the Deputy Commissioner under S. 112, C. P. Land Revenue Act, stating that he was a grandson of Sunhar's sister and entitled to succeed to the theka as a reversioner upon the death of Kunwaria. Kunwaria appeared in the enquiry made upon the application and stated that she had no objection if the theka was recorded in the name of Tikaram. A report was then submitted by the Sub-Divisional Officer to the effect that Tikaram was the only heir of Kunwaria and was entitled to be maintained out of the income of the theka and was, in fact being so maintained, and that Kunwaria made no objection to the transfer ; a recommendation was therefore made that the theka should be transferred to Tikaram. Upon that report the Deputy Commissioner passed the following order :

"Approved as recommended by the S. D. O. under S. 112, Land Revenue Act."

Tikaram was then put in possession of the theka. On 26th May 1926, the respondents made an application under S. 109 (3) of the Act that they, as proprietors of the village, should be put in possession, as the transfer in favour of Tikaram was contrary to the provisions of S. 109 (1). Upon their application the Sub-Divisional Officer made a report stating the facts of the previous application under S. 112 and giving an opinion that the transfer in favour of Tikaram was according to S. 112, Land Revenue Act, and recommending that the application

of the respondents should be rejected ; upon which the Deputy Commissioner rejected the application on 7th October 1926. The respondents thereupon filed their suit on 21st December 1926.

The trial Court found that the order transferring the theka in favour of Tikaram was passed by the Deputy Commissioner under an erroneous impression that the applicant had a legal right to be maintained out of the income of the village, and that, as the order was passed after due and proper enquiry, the civil Court, in view of S. 220, Land Revenue Act, could not interfere with it. It further found that the civil Court had no jurisdiction to try the suit as the suit was to set aside an order with regard to a matter which was within the exclusive competence of the revenue Court. Some other findings were recorded but they are not of any importance with regard to this appeal, and the principal findings are these which have been detailed above. On those findings, the trial Court dismissed the suit. On appeal, however, the District Judge has found that the order of the Deputy Commissioner under S. 112 was without jurisdiction, ultra vires and consequently illegal, and that, as there was an entire lack of jurisdiction, it was illegal and inoperative, and the civil Court was in consequence not barred from entertaining and trying the suit with regard to the matter dealt with in the order. Another question had been raised in the appeal which does not appear to have been put in issue in the trial Court, viz. the effect of the dismissal of the respondents' application under S. 109 (3). On that point the District Judge held that, in the first place, the application, though it purported to be under Cl. 3, S. 109, could not, strictly speaking, fall under that clause, as no transfer of the theka by the thekedar had been made and that, therefore, the Deputy Commissioner could not proceed under S. 109 (3), as the transfer had been effected by the Deputy Commissioner himself and not by the thekedar; that he was therefore incompetent to pass an order under that clause, and that his order passed on the respondents' application was ultra vires and without jurisdiction. It was held therefore that rejection of the respondents' application also under S. 109 (3) could not bar a civil suit. The District Judge then also went on to point out that the jurisdiction under S. 109 (3) was not exclusive in the same way as the special jurisdiction conferred on Revenue Officers by Ss. 107, 108, 111, 112 and 114 was The District Judge therefore held that the findings of the trial Court with regard to the order under S. 112 and jurisdiction were incorrect and set aside the decree of the trial Court and remanded the case, as it had been decided upon preliminary points, for a fresh decision upon the merits. The defendants now appeal against that order of remand.

I am of opinion that the view taken by the trial Court was correct and that of the District Judge is wrong. Distinction must be drawn between an erroneous order and an order without jurisdiction, and the District Judge has, I think, failed to draw that distinction. There can be no doubt that the Deputy Commissioner has power to transfer a theka under S. 112, Land Revenue Act, on the application of any member of the family of a protected thekedar, who is entitled to share in the theka or to be maintained out of its income, in favour of such a member ; and, if an application is made purporting to be such member, and the Deputy Commissioner upon enquiry holds that that member is entitled to be maintained out of the income and transfers the theka in his favour, his order cannot be without jurisdiction even though, as a matter of fact, as in the present case, the applicant was not entitled to be maintained out of the income The application could only be made to the revenue Court, and the revenue Court was the only Court that could decide such a matter. The application purported to be by a member of the family entitled to be maintained out of the income of the theka, and had the applicant been entitled to be so maintained, the order of the Deputy Commissioner would have been correct and unassailable. The fact that the applicant was not strictly entitled to be maintained out of the income of the theka, though he appears to have been actually so maintained, cannot, in my opinion, divest the Deputy Commissioner of his jurisdiction, even though the Deputy Commissioner made a mistake in the matter. I would hold that an order passed by a competent revenue

Court upon a matter within its jurisdiction is not ultra vires or without jurisdiction even though it is based upon a mistake of fact. In such a case S. 220, Land revenue Act, will bar the jurisdiction of the civil Court to question the order of the revenue Court. The civil Court would only have jurisdiction if it be found that the revenue Court acted without jurisdiction, e. g., if a condition precedent for the exercise of jurisdiction was wanting, or the order of the Revenue Court was based upon a mistaken view of law. I have been referred in this connexion to *Malkarjun* v. *Narhari* (1), *Sadasheo* v *S. N. Fadnavis* (2) and *Jagannath* v. *Khuba* (3). I would quote the following passage which occurs at p. 347 of the Bombay ruling :

" The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true ; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact ; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do."

The learned counsel for the respondents have quoted the following cases in support of the contention that the order of the Deputy Commissioner was without jurisdiction : *G. I. P. Ry Co.* v. *Amraoti Municipality* (4), *Ganeshlal* v. *Dhondiba* (5). *Municipal Committee Malkapur* v. *A. W. Dalal* (6), *Balkishen Das* v. *Simpson* (7), *Janakdhari Lal* v. *Gossain Lal* (8) and *Bhagchand Dagadusa* v. *The Secy. of State* (9). I am of opinion that all the above cases may be distinguished. The cases in *G. I. P. Ry. Co.* v. *Amraoti Municipality* (4) and *Malkapur Municipality* v. *A. W. Dalal* (6) refer to a tax which was illegally imposed by the municipality, and it was held that the jurisdiction of the civil Court would not be ousted, as the municipality acted ultra vires. The case in *Ganeshlal* v. *Dhondiba* (5) refers to S. 26, Court of Wards Act, and has, I think, no application to the present case The cases in *Balkishendas* v. *Simpson* (7) *Janakdhari Lal* v. *Gossain Lal* (8) refer to sales which were held without jurisdiction, as no arrears existed at the time of the sales and the sales could not be legally held unless arrears actually existed at the time. In *Bhagchand Dagadusa* v. *Secy. of State* (9) a number of Acts and Notifications by the Government of Bombay were called into question, and the suit was brought for a declaration that the Government Notifications were illegal and unauthorized, and for a permanent injunction, and it was held in an exhaustive judgment that the suit was not barred either by S. 80 or 81, Bombay District Police Act or by S. 4 (f), Bombay Revenue Jurisdiction Act.

Many other matters were gone into in the case, which have no bearing on the present case, and there is nothing, I think, that will support the view taken by the District Judge, which the learned counsel for the respondents now tries to support, that the Deputy Commissioner in sanctioning the transfer in favour of the respondent, Tikaram acted without jurisdiction. Under S. 220 Cl. (1), Land Revenue Act, the jurisdiction of the civil Court is expressly barred with regard to any matter relating to thekedars under Ss. 107, 108, 111, 112 or 114 of the Act, and the order of the Deputy Commissioner being under

(1) [1901] 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=7 Sar. 739 (P.C.).
(2) A. I. R. 1926 Nag. 379=24 N. L. R. 5.
(3) [1909] 5 N. L. R. 176=4 I. C. 795.
(4) [1912] 8 N. L. R. 107=16 I. C. 449.
(5) [1912]] 8 N. L. R. 169=17 I. C. 621.
(6) A. I. R. 1922 Nag. 10=18 N. L. R. 121.
(7) [1898] 25 Cal. 883=25 I. A. 151=2 C. W. N. 513=7 Sar. 969 (P.C.).
(8) [1910] 37 Cal. 107=11 C. L. J. 254=1 I. C. 871=13 C. W. N. 710.
(9) A. I. R. 1924 Bom. 1=48 Bom. 87.

S. 112 and not being without jurisdiction cannot now be called into question in a civil Court and the jurisdiction of the civil Court is barred.

On this view the appeal must succeed and the suit of the plaintiff-respondents must be dismissed, as held by the trial Court. I would, however, also consider the other question which has arisen although it cannot affect the case, viz. whether the suit would also be barred by reason of the application made by the plaintiffs under S. 109 (3) having been rejected by the Deputy Commissioner. On this point also I am of opinion that the view taken by the District Judge is incorrect. The District Judge has held in para. 5 of his judgment that the application, although it purported to be made under S. 109, Cl 3 of the Act, could not strictly fall under that clause, because no transfer of the theka by a protected thekedar was involved, and therefore he held that the Deputy Commissioner had no jurisdiction under S. 109 (3), was incompetent to pass an order under that section and that his order rejecting the application was ultra vires and could not bar a suit. The District Judge went on in para. 6 of his judgment to hold that even a jurisdiction validly exercised under S. 109 (3) would not bar a subsequent civil suit because such jurisdiction was not exclusive in the sense in which the special jurisdiction conferred by Ss. 107, 108, 111, 112 and 114 was, the District Judge went an to reason that S. 109 does not find place in S. 220, Cl. (1), though the other sections referred to are expressly mentioned in that clause. From this the District Judge infers that the legislature did not intend to exempt matters falling within S. 109 of the Act from the jurisdiction of the civil Court, as otherwise that section would also have been expressly mentioned. I am not, however, pressed by any of the arguments put forward by the learned District Judge. As regards the application not being an application under S. 109, Cl. (3), I would point out that admittedly it purports to be under that section and was dealt with by the Deputy Commissioner as such. Further, the argument that there had been no transfer by a thekedar so as to make S. 109 (3) applicable appears to me to be somewhat specious. It is true that, in a sense, there had been no transfer in as much as, on the application of Tikaram, the Deputy Commissioner had transferred the theka in his favour under S. 112, but the thekedar Kunwaria had consented to the transfer and no other course for setting aside the transfer was open to the respondents than to make an application under S. 109 (3). Their application was rejected by the Deputy Commissioner on the report made by Mr. Bharucha, Sub-divisional Officer. In the report it was mentioned that Tikaram had been appointed under S. 112, Land Revenue Act, and that there was nothing which required the the consent of proprietors, nor was there anything wrong in the inquiry previously held. It is further mentioned that Tikaram was the only heir of Mt. Kunwaria and she had consented to the transfer. It was recommended there that application should be rejected. I can see no reason for holding that the order of the Deputy Commissioner rejecting the application was ultra vires or without jurisdiction. Another point, too, that had been brought to my notice is that the respondents by making their application submitted to the jurisdiction of the revenue Court and that by so doing, in effect, they admitted that there had been a transfer, and cannot now come to the civil Court and deny that there was a transfer to contend that the order of the revenue Court was without jurisdiction In this connexion I have been referred to *Pandurang* v. *Bala* (10).

Again, as regards S. 109, and S 220, Land Revenue Act, I would point out that S 220, in the first place, lays down that .

"except as otherwise provided in this Act, or in any other enactment for the time being in force, no civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the Governor General in Council, the Chief Commissioner, or any Revenue Officer is, by this Act, empowered to determine, decide or dispose of."

Now, an application under S 109, Cl. (3), is clearly one that can only be dealt with by the Deputy Commissioner and the Deputy Commissioner alone is empowered to decide such applications As regards the fact that S. 109, is not expressly mentioned in Cl. (I), S 220, I

(10) First Appeal No. 71 of 1926, decided on 23rd July 1927.

would draw attention to the last clause of para. 1, S. 220, which runs :

"and in particular and without prejudice to the generality of this provision, no civil Court shall exercise jurisdiction over any of the following matters."

The fact, then, that S. 109 does not appear in Cl. (1) will not in any way prejudice the general provisions of S. 220, which expressly bar the jurisdiction of the civil Court in such a matter. I hold therefore that a civil Court can have no authority to entertain an application under S. 109 (3), C. P. Land Revenue Act, nor will a suit lie to set aside a transfer by a protected thekedar and further that an order passed by the Deputy Commissioner under S. 109 (3) rejecting an application, will bar a suit to set aside the transfer.

I therefore set aside the decree of the lower appellate Court remanding the case for a decision upon merits, and instead restore the decree of the trial Court dismissing the suit of the plaintiff-respondents. Costs of the appeal in both Courts and of the original suit will be borne by the plaintiff-respondents. I fix pleader's fees at Rs. 50.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Nagpur 206

MOHIUDDIN, A. J. C.

Debinath—Defendant—Appellant.

v.

Bissesar Das and *another*—Plaintiffs—Respondents.

Second Appeal No. 419 of 1927, Decided on 28th February 1929, against the decree of Dist. Judge, Raipur, D/- 17th June 1927 in Civil Appeal No 66 of 1926.

Civil P. C., O 22, R. 4—Defendant dying after preliminary decree—R. 4 does not apply.

Where a defendant dies after the preliminary decree is passed and before the passing of the final decree, the provisions of O. 22, R 4 do not apply, because the right of action is determined in the preliminary decree and in the final decree proceedings, only the principles laid down and determined in the preliminary decree are worked out in detail. *A. I. R.* 1928 *Mad.* 914 (*F.B.*), *Foll.*; *A. I. R.* 1921 *Nag.* 82, *Rel. on.* [P 207 C 1]

D. N. Chowdhary—for Appellant.

K. P. Vaidya—for Respondents.

Judgment.—The appellant Debinath is a minor son of Harnath against whom and Mst. Gajma Bai a preliminary decree for foreclosure was passed on 15th September 1922. Applications were filed on 11th April 1923 to make the preliminary decree absolute and also to bring the names of the legal representatives of Harnath on record as it was stated in the application for substitution of name that Harnath died 3 months ago. The Court passed an order on 21st July 1923 that the name of Debinath be brought on record in place of Harnath and appointed Ganpatlal guardian ad litem of the minor Debinath. The preliminary decree was made absolute on 8th November 1924. An application was made on 14th August 1926 on behalf of the minor through his mother Yeshwanti Bai that the name of the minor should not be substituted in place of his deceased father Harnath because Harnath died on 9th November 1922 and the application for substitution of names was not made within the period of limitation prescribed for it, that is, within 90 days and therefore the suit had abated. This application was rejected on 11th December 1926 by Subordinate Judge, Second Class, Raipur. An appeal was filed against the order mentioned above, in the Court of the District Judge, Raipur, who dismissed the appeal on 17th June 1927.

The only point which was raised in this Court was that the suit having abated on 9th February 1923, all proceedings in the suit after that date were infructuous and were not binding on the minor. This argument is based on the fact that Harnath died on 9th November 1922 and the period of limitation for filing an application under Art. 177, Lim. Act was 90 days from the date of the death of the deceased defendant. In the proceedings which took place after the filing of the application dated 11th April 1923 the minor was properly represented by a guardian who was related to him and who was appointed by the Court. This point was not raised at that time and therefore cannot be raised by another guardian of the minor in a later stage of the same proceedings. The order was passed on 21st July 1923 that the name of the minor be brought on record in place of his deceased father and that order cannot now be challenged by means of an application which was filed after 3 years. Formerly the period of limitation for

bringing the legal representatives of a deceased defendant was six months and it was explicitly reduced to 90 days by the Amending and Repealing Act of 1923. In 1923 there was a conflict of opinion regarding the period of limitation prescribed under Art. 177 and this was set at rest by Act 11 of 1923. On the date the application was made the period of limitation under Art. 177, Lim. Act was considered to be 6 months and not 90 days. In any view of the case it cannot now be said that the application was barred by time when it was made and the suit had abated.

The learned counsel for the respondent urged that O. 22, R. 4, Civil P. C. does not apply where a defendant dies after the preliminary decree was passed and before the passing of the final decree. He cited in this Connexion *Talaram* v. *Tukaram* (1) and *Perumal Pillay* v. *Perumal Chetty* (2). In the latter case no application was made after the passing of the preliminary decree, within 3 months of plaintiff's death, to add his legal representatives to the record and it was held by a Full Bench of the Madras High Court, that O. 22, Rr. 3 and 4, Civil P. C. do not apply to cases of death of parties after the passing of a preliminary decree. The right of action was determined in the preliminary decree and in the final decree proceedings only the principles laid down and determined in the preliminary decree are worked out in detail. In this view of the case, the question of limitation raised in this case does not arise.

The appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

(1) A. I. R. 1921 Nag. 32=17 N. L. R. 81.
(2) A. I. R. 1928 Mad. 914 = 51 Mad. 701 (F.B.).

A. I. R. 1929 Nagpur 207

STAPLES, A. J. C.

Totaram Kasar—Appellant.

v.

Kutubuddin and *others*—Respondents.

Second Appeal No. 230-B of 1926, Decided on 27th October 1928, against decree of Special Addl. Dist. Judge, Akola, D/- 13th January 1926, in Civil Appeal No. 35 of 1925.

Berar Land Revenue Act, S. 79—One co-owner can sue to eject tenant so far as his share of property is concerned and can sue for his share of rent by making other co-owners parties to suit.

One co-owner can sue to eject a tenant as regards his share in the property and can sue for his share of the rent making the other co-owners parties to the suit. As he can sue for ejectment as regards his share, he can give valid notice to quit as regards his share ; but he, co-owner as such, cannot sue to eject a tenant as regards the whole of the property : 35 *Cal.* 331 (*P. C.*), *Ref.* , 2 *N. L. R.* 45, *Rel. on* ; 4 *N. L. R.* 45 , *A. I. R.* 1925 *Nag.* 140, *Dist.* [P 208 C 1, 2]

M. R. Bobde—for Appellant.

W. R. Puranik—for Respondents.

Judgment.—Respondent 1 Khwaja Kutub-ud-din, brought a suit against the appellant Totaram and respondent 2, Khwaja Hasan, for ejectment of Totaram from certain fields and for rent. The trial Court passed a decree for ejectment and for Rs. 106-14-0 as rent. On appeal however the Special Additional District Judge, Akola, modified the decree and granted the plaintiff a decree for joint possession on a half share in the fields only and for half the rent, that is, Rs. 53-7-0. Defendant 1, Totaram, has again appealed to this Court claiming that he was not liable to ejectment even as regards half of the fields. It is now admitted that the plaintiff and defendant 2 are certificated holders of the jagir village of Hingna Kazi It is also admitted that defendant 1, Totaram, is an annual tenant of the three fields, Nos 8, 52 and 57, in that village and as an annual tenant he is liable to be ejected upon a notice being duly served under S. 79, Cl. (2), Berar Land Revenue Act, It is, however, contested that the plaintiff cannot eject him alone without the consent of other certificated holders and that a notice given by the plaintiff alone was not a valid notice. The matter has

been considered by the lower appellate Court and I think the view taken by that Court is correct It is quite clear from the rulings quoted that one of two or more joint co-owners can sue for ejectment of a trespasser With regard to the ejectment of a tenant there may have been some difference of opinion but it seems settled law that one of two or more joint co-owners can sue for ejectment of a trespasser provided he makes the other co-owners parties to the suit. He can also sue for rent of the holding under the same conditions and in that case a decree should be passed in favour of the plaintiff and the defendant co-owners, who would be joined as defendants if they refuse to be joined as plaintiffs. This view has been taken in the previous suit between the parties as appears from the appellate judgments filed as Exs D-8 and D-9. I would also refer to the ruling in *Pramada Nath Roy* v. *Ramani Kanta Roy* (1). It seems clear that one or more joint co-owners can sue for ejectment of a tenant as regards his share in a holding and can sue for his share of the rent, if he makes the other co-owners parties to the suit. The learned advocate for the appellant relies upon the ruling in *Ramji Patel Kunbi* v. *Syed Nur* (2) where it has been said down that for avoiding a transfer made by an absolute occupancy tenant under the Central Province Tenancy Act all the landlords or co-owners must join. It seems to me, however, that there is a difference between avoiding a transfer, which is not in itself void, and which is valid unless it is avoided by a special procedure and ejectment of a tenant, which is the inherent right of every landlord, unless there are special conditions to the contrary. I am fortified in this view by the ruling in *Daryao Shah Gond* v. *Tiran Shah Gond* (3) and I would refer to pp 47 and 48 of that ruling. Unless this view is taken it is clear, as in the present case that one co owner by colluding with a tenant can entirely defeat the rights of the other co-owners. I would hold, then, that one co-owner can sue to eject a tenant as regards his share in the property and can sue for his share of the rent making the other co-owners parties to the suit.

Similarly it would follow that if one co-owner can sue for ejectment as regards his share, he can certainly give a valid notice to quit as regards his share. The appeal, therefore, fails and, in my opinion, the view taken by the lower appellate Court is correct and the decree should be for the plaintiff's share, i. e., half share in the fields. As regards the cross-objections there is little to be said. The view taken by the lower appellate Court is, as already stated, correct. The plaintiff can sue as regards his own share, but he cannot sue as regards the whole of the fields, as he has only a half share in the jagir. There is no evidence to show that the plaintiff is the superior holder or in any way the manager of the jagir. The case quoted, *Vithal* v. *Waman* (4) is beside the point, because now under S. 188, Central Prov. Land Revenue Act a lambardar is expressly recognized as the agent of the proprietary body and, therefore, he has certain definite powers. In the case of this jagir there is no analogy between the plaintiff and a lambardar under the Central Provinces Land Revenue Act and, as already stated, it has not been shown that the plaintiff has even been declared to be the superior holder or manager. On the contrary Ex. P-6, itself, on which the plaintiff relied, shows that the Deputy Commissioner had only proclaimed him as jagirdar and expressly stated that he had no power to proclaim him as the superior holder. There is no force in the cross-objections which are dismissed. The appeal and cross-objections are both dismissed. Costs of the appeal will be borne by the appellant. Costs of the cross-objections will be borne by respondent 1. Costs in the Courts below will be borne as ordered by the lower appellate Court.

P.N./R.K. *Appeal dismissed.*

(1) [1909] 35 Cal. 331=35 I. A. 73=12 C. W. N. 249 (P. C.).
(2) [1908] 4 N. L. R. 45.
(3) [1906] 2 N. L. R. 45.
(4) A. I. R. 1925 Nag. 140=21 N. L. R. 199.

* * A. I. R. 1929 Nagpur 209

JACKSON, A. J. C.

Chotelal—Appellant.

v.

G. I. P. Ry. Co.—Respondent.

First Appeal No. 42-B of 1927, Decided on 20th March 1929, against judgment of Addl. Dist. Judge, Khamgaon, D/- 29th April 1927, in Civil Suit No. 5 of 1925.

(a) Tort—Negligence— Door of compartment on moving train open is prima facie evidence—Railway Company must prove non-negligence.

The fact that a door is open on a moving train is evidence of negligence on the part of the company, but not conclusive proof. That a door was open is at any rate prima facie evidence against the company and it rests on the company to prove that the door was not open owing to negligence on the part of its servants. 34 *Bom* 427, 37 *Bom* 575, *Ref.*

[P 209 C 2]

*** * (b) Tort—Negligence — Contributory negligence—Test to determine liability enunciated.**

In order that a plea of contributory negligence may be successful, it must be shown either that there was negligence on the part of the plaintiff which contributed to the accident and that the defendant could not by using ordinary care have avoided the accident, or that notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary care, have avoided the accident. Where, therefore, the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was the real, direct and effective cause of the misfortune. When the acts of negligence alleged are not contemporaneous this test in general results in throwing the responsibility on that party who last had an opportunity of avoiding, by the exercise of ordinary care or skill, the effect of the negligence of the other, and who failed to do so. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best only a matter of doubt, the defendant is liable.

[P 210 C 2, P 211 C 1]

Where the plaintiff was travelling in a railway compartment with his elbow outside the window of the carriage and it was severely hurt by an open door of a compartment of another train which passed the train by which the plaintiff was travelling and the plaintiff sued the railway company for damages:

Held: that the plaintiff was guilty of contributory negligence as he had the last opportunity of avoiding the accident and that as he failed to do so he could not claim any damages from the company. [P 211 C 1]

M. R. Bobde and *M. K. Chande*—for Appellant.

W. R. Mudholkar and *M. V. Modak*—for Respondent.

Judgment.— The plaintiff-appellant Chotelal Varma is a Sub-Inspector of Police, who has sued the G. I. P. Ry. for damages amounting to Rs. 10,100 on account of injuries caused to him while he was travelling in a 2nd Class carriage from Jalamb to Malkapur. The lower Court has dismissed his suit, finding that there was contributory negligence on his part.

The facts as found by the lower Court are that the plaintiff was sitting with his elbow protruding from the carriage window when another train passed with a door swinging open, which struck the plaintiff's fore arm and caused the injuries for which damages are sought. As the lower Court has found that there was negligence on the part of the railway company, the company has raised the question again in answer to the appeal, and I propose to consider that point first. I have been referred to *Bromley* v *G. I. P. Ry. Co.* (1) for the proposition that leaving a railway carriage door open is negligence on the part of the company, but that does not mean that the fact of an open door concludes the matter. In *Dullabhji Sakhidas* v. *G. I P. Ry. Co.* (2), it has has been laid down that the fact that a door is open on a moving train is evidence of negligence on the part of the company, but not conclusive proof. That a door was open is at any rate prima facie evidence against the company, and it rests on the company to prove that the door was not open owing to negligence on the part of its servants In the present case the only evidence is that of the Guard, W. P. Perrin (D. W. 4), who says that after the train of which he was in charge left Biswa he exchanged signals on both sides with the driver and the brakesman and did not notice the door of any carriage on the offside open. He admits that it was dark at the time, and I cannot regard his evidence as sufficient proof that all due precaution was taken to see that the door was properly closed before the train left

(1) [1900] 24 Bom. 1=1 Bom. L. R. 254.
(2) [1910] 31 Bom. 427=5 I. C. 676=12 Bom. L. R. 73.

Biswa. I must hold that there was negligence on the part of the railway company when the train reached Nagpur. L. J., Rajput (D. W 5) the train examiner, found that the door which had caused the injury had come off the top hinge, the middle hinge was a bit loose, but was still holding, and the third hinge was firm Evidence has been given for the plaintiff to show that both the upper hinges had given way before the train left Malkapur. But I am unable to believe that evidence in view of what the train examiner has said It is shown by the inspection note recorded by the train Court and by the evidence of Mr. Horsfield, Divisional Transportation Superintendent (D. W. 6), that no greater danger arose from the fact that the open door was held by two hinges only out of three, and even if it be taken (a point by no means clear) that the hinges were damaged before the accident I do not think that the company is necessarily guilty of any greater negligence.

I now come to the question of contributory negligence on the part of the plaintiff. It is not now disputed that he did have his elbow outside the widow of the carriage. According to the evidence of two doctors, Dr John and Colonel Tarr, who judged from the nature of the injuries caused, his elbow must have been protruding about 4 inches. According to Mr. Horsfield it must have been at least 5 inches or else no injuries would have been caused. The exact distance to which the elbow protruded is, however, of little or no importance In *Dullabhji Sakhidas* v. *G I. P Ry. Co.* (2) it has been held that a railway company is not liable for the injuries caused to any part of a passenger which was outside the carriage in which he was travelling It is pointed out on behalf of the plaintiff that in *Jehangir Muncherji* v. *B. B & C. I. Ry. Co.* (3) the Court found itself unable to follow the rigid and inflexible rule of law laid down in the earlier case, but I do not find that, in effect, any other rule was followed the decision being given against the plaintiff on the ground that he was guilty of gross carelessness, because being engrossed in reading he failed to pull in his elbow when another train was passing. I am unable to appreciate this reasoning. It seems to me that the plaintiff in that case would have been equally, if not more, negligent if he failed to pull in his elbow when he did realize that another train was passing, and that in effect he was found guilty of contributory negligence, merely because he had his elbow outside the window. I have been referred to Pollock's Law of Torts, Edn. 11, p. 441 where the general rule as stated by Baron Alderson is quoted :

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do".

It is urged that in the present case the plaintiff was occupying a position such as is ordinarily occupied by passengers in Indian Railway trains, he was doing a common everyday act performed by many persons in perfect safety and not negligent This point of view has been considered in *Dullabhji Sakhidas* v. *G. I P Ry. Co* (2) and rejected for reasons which seem to me sound Apart from the fact that there was a notice warning all passengers not to lean out of the windows (and as has been said in *Dullabhji Sakhidas* v. *G. I P. Ry. Co* (2), no distinction can be fairly drawn to the company's disadvantage between leaning out and putting arms or heads out) there is an obvious duty on railway passengers to avoid running risk by protruding any part of their persons from the windows.

It is urged, however, that although the plaintiff may have been negligent, that fact alone does not disentitle him from recovering damages In this connexion reference has been made to Halsbury's Laws of England, Vol. 21, p. 446. It is there said in para 759 :

"In order that a plea of contributory negligence may be successful, it must be shown either that there was negligence on the part of the plaintiff which contributed to the accident and that the defendant could not by using ordinary care have avoided the accident, or that notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary care, have avoided the accident. Where, therefore, the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was the real direct and effective cause of the misfortune. When the acts of negligence alleged are not contemporaneous this test in general results in throwing the responsibility on that party who last had an opportunity of avoiding

(3) [1913] 37 Bom. 575=19 I. C. 485=15 Bom. L. R. 252.

by the exercise of ordinary care or skill, the effect of the negligence of the other, and who failed to do so. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best only a matter of doubt, the defendant is liable."

Here it is said that the plaintiff's contributory negligence is only a matter of doubt but there I cannot agree, because the accident could never have happened if his elbow had not been outside the carriage window That was the direct cause of the accident and applying the test stated in the above quotation for cases in which the acts of negligence are not contemporaneous, it is clear that it was the plaintiff who had the last opportunity of avoiding the accident and that he failed to do so. I agree with the lower Court's finding that the plaintiff has been guilty of contributory negligence and that his suit was rightly dismissed.

K N /R.K. *Appeal dismissed.*

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* A. I. R. 1929 Nagpur 211

MACNAIR, OFFG. J. C. AND STAPLES, A. J. C.

Yamuna Bai—Defendant—Appellant.

v

Jamuna Bai—Plaintiff—Respondent.

First Appeal No 117 of 1926, Decided on 18th April 1929, against decree of Addl. Dist Judge, Nagpur, D/- 7th August 1928, in Civil Suit No. 42 of 1923.

*** (a) Hindu Law—Adoption—Only one wife can receive child in adoption whether it is made during lifetime or after death of husband.**

Whether the adoption is made during the lifetime of the husband or after the death, only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. 37 *Mad.* 199 (*P.C.*), *Rel. on.* [P 212 C 1]

(b) Precedents—Subordinate Courts—Even principles laid down though not necessary by Privy Council are binding on Courts in India.

It is not open to the Courts in India to question any principle enunciated by the Privy Council even if it was unnecessary, for the decision of the suit before their Lordships to lay down those principles. *A. I R.* 1925 *P C.* 272, *Rel on* [P 212 C 2]

(c) Hindu Law—Succession to adopted son.

The adoptive mother inherits the property from the adopted son in preference to her co-widow: 23 *Mad.* 1 (*P.C.*), *Foll.* [P 212 C 2]

D. W. Kathalay—for Appellant

W. H. Dhabe and *K. A. Potey*—for Respondent.

Judgment—The defendant-appellant Yamuna Bai, as is admitted by the plaintiff-respondent in her deposition as P W. 17, was the senior wife of Maruti. The respondent, Jamuna Bai, was the junior wife. It will be convenient to refer to the wives as *Y* and *J*. Maruti adopted a son, Ramchandra, on 10th August 1916. Maruti, as the plaint states, died in 1921 and at his death Ramchandra became the sole owner of the property. Ramchandra died in 1923. The plaintiff's case is that she and the appellant were both mothers of Ramchandra and therefore succeeded to the estate. The suit is for partition of the estate. It is admitted that the respondent took part in the ceremony of adoption. The finding of the trial Court with which we are concerned is contained in para 16 of the judgment:

"The evidence on the record shows that the plaintiff as well as defendant 1 took part in the ceremony of adoption. Both of them are thus the adoptive mothers of Ramchandra Sao. The plaintiff is not a stepmother and she is entitled to a share."

It is necessary to refer to the pleadings and evidence in order to make clear the meaning of this finding. The defendant stated that the plaintiff who is the junior wife was excluded from the ceremony of adoption. The plaintiff rejoined that she took full part in that ceremony. The learned Judge has accepted the story told by the plaintiff's witnesses, they state that both wives were present but do not appear to state that they took an active part in the ceremony. Baliram (P.W. 4) states that Marutisao's two wives were sitting in his left side and *Y* was next Marutisao when the boy was placed on his lap. The deed of adoption prepared at the time (Ex. D. 1) states that Ramchandra's guardian was his adoptive mother *Y*. The Judge states that this fact does not indicate deliberate exclusion of the plaintiff and later on says that no reason is shown why Maruti Sao should have excluded the plaintiff. The finding, then, really is that while the defendant is admitted to have take part in the ceremony of adoption the plaintiff was not excluded from that ceremony.

The appellant's counsel considers that on the finding of fact the suit should have been dismissed and for this reason has not attacked the finding of fact. He relies on the very definite views expressed by their Lordships of the Privy Council in

Venkata Narasimha v. *Parthasarathy* (1) at p. 220. Their Lordships state:

"Before examining the validity of these contentions it will be well to clear up one or two points upon which their Lordships are of opinion that no reasonable doubt can exist. In the first place, there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his lifetime or by will. In the next place, only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance."

Their Lordships clearly state that in their opinion no reasonable doubt exists regarding this proposition:

"Only one wife can receive a child in adoption so as to step into the position of being its adoptive mother."

For the respondent it is urged that the opinion of their Lordships of the Privy Council was intended to apply only to the case of an adoption made by a widow after the death of her husband. The reason given by their Lordships conclusively shows that this is not the case. Whether the adoption is made during the lifetime of the husband or after the death to hold that more than one wife could receive a child in adoption would have an effect, which, their Lordships state, would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance. It is urged by the respondent's counsel that this is an obiter dictum which we are not bound to follow. Their Lordships considered it necessary to decide the point with which we are concerned in order to deal satisfactorily with the question whether a joint power of adoption given by a will to two wives was exercisable by the surviving widow alone after the death of the other. The point with which we are concerned must have been argued before their Lordships. We do not consider then that the finding of their Lordships can be termed an obiter dictum.

Again, their Lordships clearly laid down principles and it is not open to us to question any principle enunciated by the Board even if it was unnecessary for the decision of the suit before their Lordships to lay down those principles. It is sufficient to cite *Mata Prasad* v. *Nageshar Sahai* (2) at p. 900 (*of* 47 *All.*) where it is stated:

"Their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case."

We need not refer to cases cited by the appellant in which Judges have remarked that mere obiter dicta of the Privy Council were not binding on them as authority. It is next urged that the defence did not contain an argument that only one wife could step into the position of an adoptive mother of a child : had this argument been raised it might have been possible for the plaintiff to allege and prove a custom peculiar to the caste of Karars. But the plaintiff's case is simply that both wives were present at the adoption ceremony and consequently both were the adoptive mothers of Ramchandra Sao. Under the Hindu Law the presence of both widows has not this consequence. It was for the plaintiff to allege the existence of a custom among Karars by virtue of which this consequence followed.

We are bound to hold that only one wife could have received Ramchandra in adoption so as to step into the position of being his adoptive mother. It was admitted that the senior widow *Y* did become the adoptive mother of Ramchandra. There has been no formal application before us to amend the plaint by stating that as two wives could not become adoptive mothers, *Y* did not and *J* did become the adoptive mother. Full evidence regarding the facts of the adoption have been given and the evidence furnishes no support to such a proposition. The plaintiff-respondent, then, was not a second adoptive mother of Ramchandra. When Ramchandra died the defendant inherited the property from Ramchandra in preference to her co-widow. *Annapurni*

(1) [1914] 37 Mad. 199=23 I. C. 166=41 I.A. 51 (P.C.).

(2) A. I. R. 1925 P. C. 272=47 All. 883=28 C. C. 352=52 I.A. 398 (P.C.).

Nachiar v. *Forbes* (3). The appeal therefore succeeds. The suit for partition is dismissed. The plaintiff-respondent will bear costs in both Courts.

P N./R.K. *Appeal allowed.*

(3) [1900] 23 Mad. 1=26 I. A. 246=3 M.L.J. 209=7 Sar. 591 (P.C.).

A. I. R. 1929 Nagpur 213

SUBHEDAR, A. J. C.

Waman Balkrishna—Defendant—Applicant.

v.

Municipal Committee, Murtizapur—Plaintiff—Non-Applicant

Civil Revn. No. 239-B of 1928, Decided on 22nd April 1929, against judgment of Sm. C. C. Judge, Akola, D/- 31st July 1928, in Sm. C Suit No 5711 of 1927.

(a) C. P. Municipal Act, S. 25 (1) — Burden of obtaining sanction for payment of allowance is on Municipal Committee and unless it is refused, party receiving allowance, receives it legally.

In the *M* Municipal Committee, *A* was originally employed as a Sanitary Inspector. Three years later he was appointed Secretary on a monthly consolidated pay of Rs. 75. Later on he applied to the Committee to give him some allowance for doing the work of supervision of sanitation and the Chairman of the Public Health Committee proposed that *A* should get Rs. 12 as monthly allowance for doing additional work from the date on which he became Secretary. This proposal was ultimately confirmed by the Municipal Committee and *A* was accordingly paid this allowance with retrospective effect. The payment of this allowance was, however, objected to by the auditor on the ground that it required sanction of the Local Government under the proviso to S. 25. The Committee applied for sanction but the Commissioner returned the application without forwarding it to the Local Government. The Committee thereupon sued *A* for the recovery of the amount of allowance paid to him.

Held . that assuming that sanction of Local Government was necessary the burden of obtaining it was on the Committee and that unless the Local Government was approached and it refused to accord its sanction, the payment already made to *A* could not be said to have been illegally received by him so as to give the Committee a right to recover the amount from him. [P 214 C 2]

(b) C. P. Municipal Act, S. 176 (2) (iii)—Rules under S. 176 do not authorize Commissioner to withhold application to Local Government for sanction of allowance—Refusing to forward such application by Commissioner is ultra vires.

Rule 1 of the rules under S. 176 (2) (iii) not only does not delegate to the Commissioner the power of the Local Government of according sanction in a case covered by the proviso to S. 25, Municipalities Act, but does not even authorise the Commissioner to withhold forwarding such a proposal and the action of the Commissioner in refusing to forward to the Local Government the representation of the Municipal Committee for sanction of the amount is ultra vires. [P 214 C 2 ; P 215 C 1]

G. R. Deo—for Applicant.

P. K. Salve—for Non-Applicant.

Order.—The facts of the case out of which this application for revision arises are indisputably these : The defendant-applicant was originally employed by the plaintiff non-applicant (the Municipal Committee of Murtizapur) as a Sanitary Inspector on Rs. 60 plus Rs. 7-8-0 as cycle allowance per month About three years later on 6th July 1924 the applicant was appointed the Secretary of the Committee in addition on a consolidated monthly pay of Rs. 75, but on 8th December 1924 the applicant submitted an application to the plaintiff Committee to give him some allowance for "doing the work of supervision of sanitation" On the same day the Chairman Public Health Sub-Committee proposed that

"the Secretary should get an allowance of Rs. 12 per mensem with effect from 6th July 1924 for the additional work of supervision and sanitation,"

and on the next day the Public Health Sub-Committee confirmed the aforesaid proposal of its Chairman. At the ordinary general meeting of the plaintiff Committee held on 10th December 1924, the aforesaid resolution for the grant of the extra allowance was unanimously approved and confirmed, and accordingly the applicant was paid this allowance every month with effect from 6th July 1924 up to 28th February 1926 amounting in all to Rs. 238-1-0. The payment of this allowance having been objected to by the auditor, on the ground that the sanction of the Local Government was not obtained for it as required by the proviso to S. 25 (1), Central Provinces Municipalities Act 1922, the Deputy Commissioner, Akola, asked the plaintiff Committee to apply for the necessary sanction. Accordingly the plaintiff Committee applied for sanction of the Local Government and forwarded the application as required by the rules through the Deputy Commissioner ; who in his turn, after gathering some more information on the point, forwarded it to the Commissioner, Berar Division. The latter officer, however, refused to forward it to the

Local Government and sent it back on 16th September 1926 to the plaintiff Committee through the Deputy Commissioner, Akola. The plaintiff Committee thereupon resolved to recover the amount of the allowance paid to the applicant and after serving a notice upon him to refund the amount filed the suit in the Small Cause Court, Akola, for recovery of the same.

The applicant defendant admitted the receipt of the money but pleaded (1) that the grant of the allowance in question did not require the sanction of the Local Government ; and (2) that even if the sanction was required, the plaintiff Committee having failed to obtain the refusal of the Local Government for the same, their suit was premature.

A fair idea of the further pleadings of the parties would be gathered from the following points that were fixed for trial by the Court :

"1. Did the allowance in question require the sanction of the Local Government ?

2. Could plaintiff obtain the sanction directly from the Local Government as pleaded by defendant ?

3. Is the suit premature ?

4. Is plaintiff estopped from reducing the income ?

5. Has the plaintiff got no cause of action and is the suit not maintainable ?

6. To what relief is plaintiff entitled ?"

The lower Court held all the points in favour of the plaintiff Committee and decreed the claim with costs. The defendant has, therefore, come up to this Court in revision. Out of the five grounds the first three only were pressed in arguments. These are :

"1. That the learned Judge of the Small Cause Court erred in holding that the allowance granted to the applicant required the sanction of the Local Government under S. 25 (1), Municipalities Act.

2. That inasmuch as the Local Government has not disapproved of the grant of allowance to the applicant, the learned Judge of the Small Cause Court should have held that the suit, being premature, was not maintainable.

3. That the learned Judge of the Small Cause Court should have held that the non-applicant should have insisted on the forwarding by the Commissioner of the resolution of the non-applicant to the Local Government for its sanction and should have in that connexion supplied the necessary information in support thereof and a failure to do so disentitled the non-applicant to maintain the suit."

It is not necessary for the disposal of the case that a decision on the first ground should be given. I will assume that the sanction of the Local Government was necessary under the proviso to S. 25 (1), Municipalities Act, for the grant of the extra allowanee in question. It is admitted by the learned pleader for the non-applicant Committee that the burden of obtaining the necessary sanction was on the Committee, after it had resolved to grant the allowance. It is equally clear that the Local Government could be approached to accord the requisite sanction with retrospective effect for otherwise the Deputy Commissioner would not have asked the Committee and the latter would not have applied for it. It, therefore, follows that unless the Local Government was approached and refused to accord its sanction in the matter, the payment already made to the defendant could not be said to have been illegally received by him from the Committee so as to give them a right to recover the amount from him.

It was contended for the plaintiff Committee that the Commissioner's refusal to forward their application for sanction to the Local Government was in fact a refusal by the Government itself, and reliance was placed in support of this contention on R 1 of the rules under S. 176 (2) (iii), Municipal Act, and to be found printed at p. 288, Berar Municipal Manual (1928 Edition) :

"1. All correspondence between Municipal Committees and the Local Government and all representations to the Local Government shall pass through the Deputy Comissioner of the District and the Commissioner of the Division. The Deputy Commissioner shall forthwith forward the correspondence and the representations to the Local Government with such remarks as he may think fit to make.

The Deputy Commissioner may detain any correspondence or representation till he gets from the Committee such information as in his opinion may be considered useful or necessary by the Local Government for the proper disposal of the correspondence or representation."

It will, however, be clear that the aforesaid rule not only does not delegate to the Commissioner the power of the Local Government of according sanction in a case covered by the proviso to S 25 (1), Municipalities Act, but does not even authorize the Commissioner to withhold forwarding such a proposal of the Municipal Committee to the Local Government. As I read the rule it merely directs that all correspondence and representations to the Local Gov-

ernment from a Municipal Committee shall be forwarded through the Deputy Commissioner of the Division. The second part of the aforesaid rule makes the matter clearer still by stating under what circumstances the Deputy Commissioner may detain the correspondence for the time being until the necessary information asked for is supplied. I, therefore, hold that the Commissioner, Berar Division, acted ultra vires in refusing to forward to the Local Government the representation of the plaintiff Committee for sanction of the amount in question. It was the clear duty of the plaintiff Committee under the circumstances to have pressed upon the Commissioner the necessity of forwarding their representation to the Local Government and having failed to do so they cannot be heard to say that sanction of the Local Government was refused in the matter so as to give them a cause of action for the recovery of the amount in question from the applicant on the ground that the same was illegally received by him.

The present case appears to me to be analogous to the one in which the contract is not illegal ab initio but is likely to become void on account of the happening of a contingency and until that contingency happens the contract cannot be avoided. I, therefore, hold that until the Local Government has had an opportunity of refusing to accord sanction to the payment already made to the applicant, the plaintiff Committee has got no right to recover back the amount which they had by their own resolution agreed to and did pay to the defendant Their present suit is under the circumstances premature and ought to have been dismissed.

I allow the application for revision and setting aside the decree of the lower Court dismiss the plaintiff's suit on the ground that it is premature. As I consider that the plaintiff Committee were driven to file the suit on account of their being misled by the Commissioner's order in refusing to forward their representation to the Local Government, I order that the costs of this litigation here and in the lower Court be borne by the parties as incurred.

K.N./R.K. *Revision allowed.*

A. I. R 1929 Nagpur 215

KINKHEDE, A. J. C.

Muhammad Usuf Khan— Accused— Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 310 of 1928, Decided on 29th October 1928, against judgment of Sess. Judge, Chhindwara, D/- 4th July 1928, in Criminal Appeal No. 29 of 1928.

(a) Evidence Act, Ss. 133 and 114 Ill. (b)— All accomplices though not on same footing conviction principally upon evidence of accomplices in absence of corroboration in material particulars by independent evidence is unsafe.

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. In considering whether this maxim applies to a particular case it must be remembered that all persons coming technically within the category of accomplices cannot be treated on precisely the same footing. [P 217 C 2]

Accomplice evidence is untrustworthy for three reasons. (i). He is likely to swear falsely to shift the guilt from him, (ii). He being a participator in crime is likely to disregard the sanction of an oath, and (iii). He gives evidence under promise of or in expectation of a pardon. Therefore if the principal evidence is of accomplices, it is tainted evidence and hence there is need for corroboration. 26 *Bom.* 193, 14 *Bom.* 115, *Foll.* [P 217 C 2]

(b) Evidence Act, S. 133—Accomplice in case under S. 161, Penal Code—Person who has subscribed to, collected or paid the money over to the accused as also person who advances loan with the knowledge that it is to be paid as bribe to the accused is accomplice—Penal Code S. 161.

A person who offers a bribe to a public officer is an accomplice. Persons who actually pay the bribes or co-operate in such payments or are instrumental in the negotiations for the purpose are also accomplices of the person bribed, and a person who with knowledge that the bribe has to be paid advances money is clearly an abettor and as such an accomplice. 14 *Bom.* 331; 26 *Bom.* 193 and 27 *Cal.* 144, *Rel. on.* [P 217 C 1]

(c) Evidence Act, S. 133—Duty of prosecution to show that evidence is of accomplices and is corroborated—Defence can take advantage of omission.

It is mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record An accused is under no legal obligation to do so. He can keep quiet and take advantage of the flaw in the evidence brought by the prosecution against him, or in short, of the weakness of the prosecution case. [P 218 C 1]

(d) Evidence Act, S. 133—Withdrawal of prosecution against accomplice does not

make him independent witness as he still remains accomplice—Corroboration of one accomplice by another is not independent.

The withdrawal of prosecution against an accomplice relegates him from the position of a co-accused to his original position of an accomplice who had for all practical purposes earned complete immunity for his participation in the crime. His evidence under such circumstances could not be a piece of independent evidence. To regard the testimony of one accomplice as corroborated by the testimony of another accomplice is to hold that there is corroboration where under law or fact there is none at all. [P 218 C 2, P 219 C 1]

A. V. Wazalwar—for Applicant.

G P Dick—for the Crown.

Order.—This revision arises out of a criminal prosecution started against the applicant for an offence punishable under S. 161, I. P. C. The applicant is a Forester posted in Kedarpur getting Rs. 27-12-0 as his monthly pay. On the Holiday, which fell on 18th March 1927, he got information that a shooting party was coming for shooting into the Government forest in his charge Out of the party he could arrest only four persons and the rest escaped. A gun possessed by Charru without license was also seized. After the persons, namely, Charru (P. W. 15), Bhonga (P. W 18), Adku (P. W. 26), Harisingh (P W. 30) and one Gocha, who escaped, were arrested, one Bhangi (P. W. 36) came and offered to stand surety for them at the Forest Naka at Bakhari where they were taken in the meantime After his suretyship was accepted and they were released, it is said that the applicant threw out a hint for a bribe, if the persons arrested desired him to hush up the case of a forest offence A deputation of three persons, Amka (P W. 4), Gopalsingh (P W. 16) and the surety Bhangi (P. W. 36) came for negotiating and settling the bribe to be paid to him, but, as his demand which was for Rs 1,500 was considered to be exorbitant, nothing could be settled by them.

Thereafter, later, on the following day (19th March 1927) a second batch consisting of Charru, Janglih Harisingh, and Bhangi came and prevailed upon the accused to agree to a bribe of Rs 900 only. Then a sum of Rs. 730 was collected for the bribe and Rs. 710 out of it were paid to the accused on 20th March 1927, and the gun belonging to Charru was returned to the surety Bhangi with instructions to hand it back to Charru on payment by him of the balance of Rs. 190 on applicant's account to Bhangi (P. W. 36). Ex. 2 is the official report of the forest offence signed by the applicant. It bears date 18th-28th March 1927; whereas Ex. P-8 is his tour diary narrating incidents from 16th March 1927, to 23rd March 1927. Ex P-8 bears applicant's signature under dated 25th March 1927. It reached Mr. Cleophas (P. W. 1) on 27th March 1927, as his endorsement under entry of 18th March 1927, in the diary shows. It appears that the report (Ex. P-2) had not been received by Mr. Cleophas till 27th March 1927, and this necessitated the calling up of an explanation from the applicant who explained under date 29th March 1927, that his bundle was at Piparia and he himself was laid up with fever for three days at Kedarpur but had already made a report on plain paper, as his endorsement on Ex. P-2 shows.

Exhibit P-3 is the report on plain paper referred to above It reached Mr. Cleophas (P. W. 1) on 29th March 1927 It is thus clear that though the forest offence was committed on 18th March 1927, no intimation about it, in the shape either of an entry in the applicant's tour diary (Ex. P-8) or of an official report (Ex. P-2), or an informal report by him on plain paper Ex. P-3, dated 19th March 1927, reached P W. 1 till 27th March 1927, and 29th March 1927, respectively. After enquiry and trial the applicant was convicted and three concurrent sentences of eighteen months each, for three offences, with a fine of Rs. 200 were passed by the trying Magistrate, but the Sessions Judge convicted him for one offence and maintained only one sentence of eighteen months and fine of Rs. 200.

The applicant challenges the correctness of the conviction on various grounds. Several of them deal with the question of the right appreciation of the evidence on record and the probabilities of the case, and stress is laid on the non-production of some material evidence. An attempt was made to argue that some exceptional circumstances were brought out in the evidence which showed that the conclusions of the trying Magistrate as also of the Sessions Judge were perverse and that the evidence did not justify them. One serious objection raised against the legality of the conviction is

that it is based on evidence of persons who are mere accomplices. Reliance is placed on the decision in *Queen-Empress* v. *Maganlal* (1), *Queen-Empress* v. *Chagan Dayaram* (2), *King-Emperor* v. *Malhar* (3) and *In re*, *Vyasa Rao* (4) in support of the objection. The learned Standing Counsel for the Crown brings a case in *Emperor* v. *Shrinivas* (5) to my notice and asks me to hold on its authority that the witnesses were not accomplices, and even if they were so, he contends that they were reliable and relied upon, and that the finding as to the applicant's guilt was justifiable on other independent corroborative facts held proved in the case.

It is admitted on all hands that the conviction does "principally" rest on the evidence of persons who have either subscribed to the bribe or collected the money or paid it over to the accused. There is the evidence of persons who advanced loans in order that the money so lent may be paid to the applicant as a bribe. I have not the least doubt that the evidence of all these persons is evidence of accomplices. A person who offers a bribe to a public officer is an accomplice; *Queen-Empress* v. *Chagan Dayaram* (2) and *King-Emperor* v. *Malhar* (3). Persons who actually pay bribes or co-operate in such payments or are instrumental in the negotiations for the purpose, are also accomplices of the person bribed. This is clearly laid down in *Queen-Empress* v. *Maganlal* (1) and in *Queen-Empress* v *Deodar Singh* (6). A person who with knowledge that the bribe has to be paid advances money, is clearly an abettor and as such an accomplice. I am not prepared to agree with the Standing Counsel that they cannot be treated as accomplices. I need not discuss the statute law or the case law on this point at any length as the matter is very clearly discussed in a long series of cases.

I may, however, say that I agree with the observations of Fulton and Crowe, JJ, in *King-Emperor* v. *Malhar* (3) to the following effect:

It is generally unsafe to convict a person on the evidence of accomplices unless corroborated in material particulars. In considering whether this maxim does or does not apply to a particular case it must be remembered that all persons coming technically within the category of accomplices cannot be treated as on precisely the same footing; the nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. The legislature has not done so; and the Courts, whose function it is to interpret the law, cannot do so. The decisions, however, show the principles on which Judges have acted in particular cases and it is the duty of their successors to consider those principles and determine to what extent they are applicable to the circumstances of other cases.

What those principles are are set forth in *Queen Empress* v. *Maganlal* (1), by Scott, J., at p. 119:

"Accomplice evidence is held untrustworthy for three reasons: (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice, as a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath; and (3) because he gives his evidence under promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally; and this hope would lead him to favour the prosecution."

If then, the principal evidence is of accomplices, it is tainted evidence and hence there is need for corroboration.

In *Maganlal's* case (1) the main error relied on was that the Judge did not apparently in weighing the evidence bear in mind the fact that all the evidence came from accomplice witnesses. In cases where a Judge combines the functions of a Judge and jury, he is bound under law to scrutinize the accomplice's evidence with the same degree of care and caution which is required of him in a trial by jury and just as he is bound to give a warning to the jury, he must warn himself that it is evidence in the absence of substantial corroboration by independent evidence. What I have, therefore, to see is whether the the trying Magistrate, or the Judge who heard the appeal in this case

"weighed the evidence with a full knowledge and recognition of its accomplice character and the necessity for corroboration,"

(1) [1890] 14 Bom. 115.
(2) [1890] 14 Bom. 891.
(3) [1902] 26 Bom. 193=3 Bom. L. R. 694.
(4) [1911] 21 M. L. J. 293=9 I. C. 897=(1911) 1 M. W. N. 327.
(5) [1905] 7 Bom. L. R. 969.
(6) [1900] 27 Cal. 144.

or they wholly overlooked its accomplice character and whether, in the latter event, this is a fit case for interference. If, however, this Court on a scrutiny of the evidence, is itself satisfied that there is corroboration, there is an end of the case.

But it is argued by the Standing Counsel for the Crown that the question of witnesses being accomplices was never suggested in the course of the trial before the Magistrate or in appeal before the Sessions Judge, and that, though neither of them uses the word "corroboration" in his judgment, each of them must be deemed to be cognizant of the law that the giver and taker of the bribe are both accomplices; and if they still believed the evidence of the giver and his supporters, the conviction should not be interfered with in revision In my opinion, much depends upon the proper presentation of a case. It is, therefore, mainly the duty of the prosecution to bring the accomplice character of the evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. An accused is under no legal obligation to do so. He can keep quiet and take advantage of the flaw in the evidence brought by the prosecution against him, or in short of the weakness of the prosecution case. Apart from this it was of course the duty of the Magistrate as also of the Sessions Judge to have noticed the defect in the evidence being of accomplice character and looked for corroboration as regards material particulars The statute is clear and the responsibility of deciding the case according to the statute ought to rest on them. If the Magistrate and the Judges make it an invariable practice with them to look up the relevant sections of the statute every time a case comes up before them for decision, and not rely merely on their memory or on vague impressions, they would save themselves from much of the interference by this Court on the revisional side. Much depends upon the perspective from which a Court approaches the case and appreciates the evidence. If it is rightly formulated and the real points properly grasped by the Magistrate or the Judge, ordinarily, there is very little chance of the decision going wrong.

The District Magistrate in showing cause against the rule issued by this Court has forwarded the explanation of the trying Magistrate. A perusal thereof shows that the Magistrate regards

"the conviction as correct, though based principally on the evidence of those who had contributed towards the bribe-giving found."

His reasons are:

"Those concerned may be accomplices in a way but in cases under S. 161, I. P. C., there is no High Court ruling in existence instructing magistracy to distrust such a set of witnesses simply for their peculiar position as above."

Referring to the evidence of Bhangi Mahar (P. W. 36) he adds that

"Here fortunately we have also got a piece of independent evidence to strengthen the case for the prosecution."

This discloses complete misconception of what the requirements of the statute law or the case law on the point are. This necessarily suggests the inference that the Magistrate had "wholly overlooked the accomplice character" of the evidence he had to deal with. Moreover, if he relied upon the testimony of Bhangi (P. W. 36) as a piece of "independent evidence to strengthen the case for the prosecution." i e., as a corroborating piece of evidence, he was clearly wrong; and, had he based his decision solely on such evidence, I dare say I would surely have upset the same. Bhangi (P. W. 36) was initially an accomplice, whose degree of complicity was much greater than that of several other persons who helped the giving of the bribe. He was the principal intermediary through whom the bribing was negotiated and carried out, and, according to the prosecution story, had even received a portion of the bribe. He was, therefore, put on trial as a co-accused along with the applicant and remained so practically throughout the major period of the trial. The prosecution, however, was withdrawn as against him and he was examined as P. W. 36. So, if the withdrawal under such circumstances had any effect in the case, the least consequence it brought about was to relegate him from the position of a co-accused to his orginal position of an accomplice who had for all practical purposes earned complete immunity for his participation in the crime. His evidence under such circumstances could not be a piece of independent evidence as the Magistrate erroneously thinks.

To regard the testimony of one accomplice as corroborated by the testimony of

another accomplice is to hold that there is corroboration where under law or fact there is none at all. In any case it is no corroboration by independent evidence as required by law. Unfortunately the Sessions Judge does not purport to discuss this matter anywhere in his judgment. It will not, therefore, be improper to hold that even the learned Sessions Judge also wholly overlooked the accomplice character and the necessity for corroboration in material particulars to make the accomplices worthy of credit and to justify the legality of the conviction based thereon.

Even though the decisions of the Courts below are faulty in this respect, the applicant is not correct in saying that the conviction is based solely on the evidence of an accomplice character. Having been invited by the learned pleader for the applicant to scrutinize the evidence for myself with a view to find out whether there are any exceptional circumstances which showed that the conclusions of the Magistrate and the Judge were perverse and unjustified by the evidence on record I took the opportunity to look into it carefully and I have come to the conclusion that the evidence of the accomplices finds ample independent corroborative support from some other facts held proved by the trying Magistrate in paras. 16 to 19 and by the Sessions Judge in paras. 12 and 13 of their respective judgments. These facts relate to the conduct of the applicant after the occurrence of the incident. His withholding of the report about the forest offence committed on 18th March 1927, for practically 11 days, the suggestion that overtures were made to bribe him and the substitution of gun (Ex. A) for Charru's gun (Ex. B) are facts which clearly fix the applicant with guilty knowledge and point to a deliberate attempt on his part to twist facts and conceal evidence of his own complicity. This conduct renders the story of the accomplices highly probable, and tends to connect the accused with the crime for committing which he has been convicted.

On a careful consideration of the evidence adduced and the probabilities of the case, I see no reason to find fault with the rest of the manner of appreciation which is to be found in the judgments of the two Courts below. I see no necessity to discuss this matter of drawing conclusions from evidence any further. I am not also prepared to hold that from the mere omission of the prosecution to examine or adduce evidence about whose non-production of the applicant complains, an inference the applicant's innocence would have, at all, been deducible. Being satisfied that there is independent corroboration, I sustain the conviction and decline to interfere.

M.N./R K. *Application dismissed.*

A I. R 1929 Nagpur 219

SUBHEDAR, A. J. C.

Chintaman—Plaintiff—Appellant.

v.

Kisan and *another*—Defendants—Respondents.

Second Appeal No. 78-B of 1928, Decided on 11th March 1929, against the decree of First Addl. Dist. Judge, Akola, D/- 15th October 1927, in Civil Appeal No. 233 of 1927.

(a) Limitation Act, S. 14 — Suit returned for presentation to proper Court—Order returning plaint appealed against—Subsequent to filing appeal but before its decision suit presented to proper Court—Time required for prosecution of appeal subsequent to presentation of plaint to proper Court cannot be excluded.

Where a plaint is returned for presentation to proper Court, and the order returning the plaint is appealed against, but before the decision of the appeal the plaint is presented to the proper Court, the period required for the prosecution of the appeal subsequent to the presentation of the plaint to the proper Court cannot be excluded under S. 14, as the plaintiff cannot be said to have prosecuted his appeal in good faith. [P 221 C 1]

(b) Limitation Act, S. 14—Suit dismissed under O. 9, R. 2—Time covered by restoration proceedings cannot be excluded while computing limitation for suit under Civil P. C., O. 9, R. 4.

Where a suit is dismissed for want of prosecution under O. 9, R 2, the period covered by the restoration proceedings cannot be excluded under S. 14, Lim. Act, while computing limitation for a suit brought under O. 9, R. 4, for the cause of action in the restoration proceedings is not the same as that in the subsequent suit, nor can it be said that the restoration proceeding failed for want of jurisdiction. [P 221 C 1]

(c) Limitation Act, S. 14—Suit dismissed under O. 9, R. 2—If fresh suit under R. 4 is brought, S. 14, Limitation Act, would not be applicable—Civil P. C., Rr. 2 and 4.

Where a suit is dismissed for default of prosecution under O. 9, R. 2, and a fresh one is

brought under R. 4 of the same order, S. 14, Lim. Act, is not applicable as the prior suit failed for plaintiff's negligence in prosecuting it and not because of defect of jurisdiction or other cause of a like nature within the meaning of S. 14. 6 *W. R.* 184 (*F.B.*), *Foll.*

[P 221 C 2]

M. R. Bobde—for Appellant.

D. T. Mangalmurti—for Respondents.

Judgment.— The admitted facts of the case out of which this second appeal arises are these: On 9th August 1924 an order under O 21, R. 97, Civil P. C was passed against the plaintiff-appellant in certain execution proceedings He accordingly filed a suit under O 21, R. 103 ibid on 23rd October 1924 in the Court of the 1st Class Subordinate Judge No. 2, Akola, but that Court on 16th March 1925 returned the plaint for presentation to the proper Court holding that it had no jurisdiction in the matter. The plaintiff then on 28th April 1925, presented the returned plaint in the Court of the 2nd Class Subordinate Judge No. 3, Akola, but the suit was dismissed by that Court on 13th August 1925 under O. 9, R 2, Civil P. C. for plaintiff's failure to pay process fees

Before the presentation of the plaint in the Court of the 2nd Class Subordinate Judge, the plaintiff had, on 11th March 1926, filed an appeal in the Court of the District Judge against the order of the First Class Subordinate Judge returning the plaint, but the appeal was dismissed on merits on 29th July 1926. On 11th September 1925 the plaintiff started proceedings to have the dismissed suit restored to file, but they failed, the order of dismissal of the plaintiff's application for restoration being passed on 16th February 1926.

The plaintiff, therefore, filed a fresh suit in the Court of the 2nd Class Subordinate Judge No. 3, Akola, on 29th July 1926, the day on which his appeal against the order returning the plaint was rejected by the District Judge. The defence was that the suit was barred by limitation. Both the two lower Courts have held the suit to be barred by time and hence the plaintiff has come up to this Court in second appeal, and the only point urged in argument is that the suit should be held to be in time. I am, however, clearly of opinion that the Courts below have taken a correct view of the law of limitation applicable to the case and there is no force in this second appeal.

It would be convenient to reproduce S. 14 (1), Lim. Act, as the decision of the case depends upon a correct interpretation of its terms and their proper application to the facts of the present case:

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

This second suit is based on the same cause of action as the first one and it is admitted that both the suits fell within the purview of Art. 11A, Sch. 1, Lim. Act which prescribes a period of one year for the filing of such suit from the date of the order sought to be challenged. It is also admitted that this second suit was filed after a little less than 2 years from the date of the aforesaid order passed in execution proceedings, and the plaintiff, therefore, claims under the provisions of S. 14, Lim. Act, exclusion of the following periods so as to bring the suit within limitation .

(1) from 23rd October 1924 to 16th March 1925.	The time the first plaint remained in the Court of Sub-Judge, 1st Class.
(2) From 11th March 1926 to 29th July 1926.	The time required for the disposal of his appeal in the Court of the District Judge against the order of the Sub-Judge, 1st Class, returning the plaint.
(3) From 11th September 1925 to 16th February 1926.	The period taken up by the proceedings for restoration of the suit.

The lower appellate Court has allowed the plaintiff the period from 23rd October 1924 to 28th April 1925 and disallowed the rest, on the ground that after the plaint was again presented in the Court of the 2nd Class Subordinate Judge, the proceedings in connexion with the appeal before the District Judge, or those relating to restoration of the dismissed suit to file before the first Court, could not be considered to have been prosecuted bona fide and with due diligence and that they did not fail for want of jurisdiction in the Court which disposed of them.

It is contended here that the proceedings in appeal before the District Judge

that continued on after the presentation of the plaint in Court of the 2nd Class Subordinate Judge until disposal of the appeal (the period between 28th April 1925 to 29th July 1926) must be held to be "civil proceeding" whithin the meaning of S. 14 (1), Lim. Act, and because the plaintiff bona fide prosecuted his appeal, thinking that the order of the return of the plaint which was appealed against was wrong all this time should not run against him. It is not possible to accede to this contention It is clear that when he filed the plaint in the proper Court on 28th April 1925, the plaintiff must be deemed to have accepted the decision of the 1st Class Subordinate Judge as correct, and thereafter he could not be said to have prosecuted his appeal before the District Judge in good faith as required by the section

It was further argued that the restoration proceedings must also be taken to fall in the category of "civil proceeding" of S. 14, Lim Act, or at any rate that they were a continuation of the original suit and, therefore, the time occupied in their prosecution should also be excluded It is impossible to accede to this contention as well. In the first place the restoration proceedings were not founded upon the same cause of action as the subsequent suit—there cause of action admittedly was the dismissal of the previous suit under O 9, R. 2, Civil P. C, while that for the second suit was the alleged wrong order in the execution proceedings passed under O. 21, R 97, Civil P. C In the next place it could not be said that because an alleged wrong order was passed by the Court the restoration proceedings failed for want of jurisdiction or other cause of a like nature within the meaning of S. 14, Lim. Act.

The learned advocate for the appellant has brought to my notice certain observations of Mr Rustomji which appear at p. 138 of his Law of Limitation, 4th Edition, under the heading "Other cause of a like nature"—section applied," but I fail to see their applicability to the facts of the present case. The learned author himself doubts the correctness of the decision in the case of *Po Nyan* v *Muthu Karapan Chetty* (1).

On the contrary under the heading "'Other cause of a like nature'—section applied," the same learned author states that failure of a suit, on the ground that it is not maintainable or that it discloses no cause of action or is premature, would not come within the purview of S. 14, Lim Act, because in each of such cases the suit fails not for want of jurisdiction, but because it is misconceived. Where a suit is dismissed for default of prosecution under O. 9, R 2, Civil P. C., and a fresh one is brought under R. 4 of the same order, S. 14, Lim Act, is not applicable as the prior suit failed for plaintiff's negligence in prosecuting it, and not because of defect of jurisdiction or other cause of a like nature within the meaning of S. 14, ibid: vide *Chunder Madhab Chakerbutty* v. *Ramcoomar* (2) Even if the contention of the learned advocate for the appellant be accepted that the restoration proceedings were a continuation of the suit which was dismissed for default, the plaintiff is out of time according to the interpretation put upon the provisions of S 14, Lim. Act, by the Full Bench of the Calcutta High Court in the case just cited and with which I agree. For the reasons given above I hold that the question of limitation arising in this case was rightly decided by the Courts below and the plaintiff's suit was barred by time. The appeal fails and is dismissed with costs

S N /R K. *Appeal dismissed.*

(1) [1912] 6 L. B. R. 43=14 I. C. 497.

(2) 6 W. R. 184 (F.B.).

A I R. 1929 Nagpur 221

MACNAIR, A. J. C

Sitaram and *others*—Appellants.

v

Mulchand—Respondent

Second Appeal No. 345-B of 1927, Decided on 5th November 1928, against decree of Addl. Dist. Judge, Amraoti, D/- 31st October 1927, in Civil Appeal No 44 of 1927

Evidence Act, S. 115—Minor at the time of sale of property by his guardian signing letter stating that necessity for sale existed — Purchaser's object in taking letter being to prevent minor from bringing suit to set aside sale—Minor in suit for possession of property, is not estopped from denying that necessity for sale existed.

Where at the time of sale of property by a guardian of a minor, the latter signed a letter which stated in detail that necessity for sale existed and where the object of taking the letter from the minor was not to assure the vendee that necessity existed but was to prevent the minor from bringing a suit to set aside the sale, the minor in a suit for possession of property is not estopped from denying

the existence of legal necessity as he is not shown to have caused or permitted the vendee to believe that necessity existed.

[P 222 C 1]

M. B. Niyogi—for Appellants.

W. B. Pendharkar—for Respondent

Judgment. — The plaintiff-respondent in this Court sued for possession of a field which his guardian during his minority has sold to the appellants. At the time of the sale the respondent then a minor signed a letter which stated in detail that necessity for the sale existed. It is urged before me that the respondent was estopped from denying the existence of legal necessity and benefit. It seems sufficient to say that the minor respondent is not shown to have caused or permitted the vendee to believe that necessity existed. The apparent object of taking the letter from the boy was not to assure the vendee that necessity existed but was to prevent the boy from bringing a suit to set aside the sale S. 115, Evidence Act, then has no application This ground therefore, fails. It is next urged that necessity did exist. This is a question of fact and I see no reason to disagree with the finding of the lower appellate Court. The fact that the field sold brought in little income is not material. Had it not been sold it would have remained in the possession of the plaintiff. The cash consideration is not shown to have been expended for the benefit of the plaintiff or to have remained intact until he came of age The appeal, therefore, fails and is dismissed. Costs on appellants.

P.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 222

KINKHEDE, A J. C

Lodya Mahar—Accused—Appellant

v.

Emperor—Opposite Party.

Criminal Appeal No 52-B of 1928, Decided on 25th October 1928, against judgment of Second Addl. Sess. Judge, Akola, D/- 19th July 1928, in Sessions Trial No. 8 of 1928.

Evidence Act, S. 133 — Commission of dacoity—Evidence of approver against accused person—Corroborative evidence consisting of person saying he identified accused when they committed dacoity but omitting to mention dacoits by names in first information report—There is no corroborative evidence which connects or tends to connect accused persons with crime.

Where a dacoity was committed and the evidence against the accused persons was that of an approver and the corroborative evidence consisted of a witness who said he identified certain accused persons when they committed the dacoity but omitted to mention the dacoits by their names in the first information report, such omission is a disqualifying circumstance for accepting his evidence on the point of identification and there is absolutely no corroborative evidence which connects or tends to connect the accused persons with the crime 6 *Bom. L. R.* 443 ; 8 *All.* 306 ; *A. I. R.* 1921 *Nag.* 39 ; *A. I. R.* 1922 *Nag.* 172 ; *A. I. R.* 1925 *Nag.* 78, *Rel. on.*; *R. v. Baskervil*, (1916) 2 *K. B.* 658. *Ref.*

[P 223 C 2, P 224 C 1]

G. V. Deshmukh—for Appellant.

G. P. Dick—for the Crown.

Judgment.—The judgment in this appeal will also dispose of Criminal Appeals Nos. 53-B, 54-B, 55-B, 56-B, and 57-B of 1928. That on 21st February 1928, a dacoity was committed by a party of certain dacoits amongst whom were approver Banshya (P. W. 17), the confessing accused 5 Surya and the accused 7 Mahadya who has not appealed, is undisputable. The question, however, is whether the six appellants were also members of that gang of dacoits and whether any guilt has been legally brought home to them by any reliable evidence on record. This must depend mainly upon the evidence of identification Kaluram (P. W. 13) and Nandram (P. W. 14) are on the point of identification. Prosecution witness 13 said he identified accused Rupya 3, Tukia accused 4 and Lodya accused 2 at the time when they committed the dacoity. Prosecution witness 14's evidence is of no avail as he identifies only Banshya the approver and none else. Bhagirath's (P. W. 16) evidence, which is indirect, only shows that he struck one of the dacoits ; that dacoit can on the evidence of P. W. 1 be said to be the confessing accused Surya. So the evidence of P W. 14 and P. W. 16 does not advance the case against the appellants at all. However strong the corroboration which the evidence of P. W. 10 and P. W. 11 lends to the evidence of the approver Banshya may be, that is only as regards Mahadya accused 7 and Surya accused 5 and not about the present 6 appellants. The omission on the part of P. W. 13 to mention the dacoits by their names in the first information report (Ex. P. 6) and Ex. P. 7 has been rightly held

to be a disqualifying circumstance for rejecting his evidence on the point of identification. Otherwise why should there have been seven days' delay in arresting these appellants? Thus there is no reliable evidence against the 6 appellants except that of the approver. But it is urged on behalf of the appellants that the very circumstance which induced the learned Sessions Judge to disbelieve the approver Banshya so far as Tankia accused was concerned, ought to have weighed with him also for discarding his testimony even a against Tankia's relations. It is amply proved in the case by the evidence on record that Tankia is related to the rest of the accused except Surya. I think there is much force in this contention. Banshya had a motive in bringing Tankia into trouble naturally, he took this opportunity of impleading him as one of his own associates. But, the story would, on the face of it be unlikely, unless he introduced into it element of plausibility. This he did by placing Tankia in a group of his own relations and trying to make out that the whole gang consisted of Tankia and his relations besides, Surya, Mahadya and himself. But this, on the face of it, made the combination highly improbable as it was not expected that Tankia and his relations would take their enemy in their own camp and thus betray all their plans and accomplishments Viewed in the light of this improbability, it was unsafe to base the conviction of the appellants on the evidence of Banshya without any independent corroboration in material particulars in respect of each of them.

In deciding a criminal case with reference to the evidence of an accomplice the Court must take into consideration the maxim that it is unsafe to convict a person upon the evidence of an accomplice unless he is corroborated in material particulars both as to the circumstances of the offence and the identity of the persons, whom he implicates : per Aston, J , in *Emperor* v. *Hanmunt* (1). The corroboration ought to consist of some circumstance that affects the identity of the person accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is no corroboration at all : *Queen Empress* v. *Ram Sarup* (2). When several persons are indicated and the evidence of the accomplice is confirmed as to some only and not as to others, the Court ought, as a general rule, to acquit those against whom there is no corroboration : *cf.* : *Queen-Empress* v. *Ram Sarup* (2) where the Allahabad High Court set aside the conviction based on the uncorroborated evidence of an approver The following observations at p 119 of 17 *Nag. L. R.* in *Govinda* v. *Emperor* (3) clearly show that this Court also does not disagree with the Allahabad High Court in regard to this indispensable condition of a corroborating piece of evidence :

"We are in agreement with the view that so long as there is no corroboration by independent evidence *regarding a particular accused*, the evidence may be termed uncorroborated evidence of accomplices."

I have underlined (italicized) the words 'regarding a particular accused' as of the greatest importance in such cases.

Kisan Raghuji v. *Emperor* (4), which Kotval, A J. C., decided following the latest English ruling of of Lord Reading, C. J., *R.* v. *Baskerville* (5), quotes the following observation :

"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime , it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

Judging the evidence on record by the test laid down above, I find that there is absolutely no corroborative evidence which connects or tends to connect the appellants with the crime. The Sessions Judge simply looked to corroboration of the fact that that the crime was committed, but failed to appreciate the ne-

(1) [1904] 6 Bom. L.R. 449.

(2) [1885] 8 All. 303=(1885) A.W.N 911.
(3) A I.R. 1921 Nag. 39=17 N.L.R. 113.
(4) A.I.R. 1922 Nag. 172.
(5) [1916] 2 K.B. 658=86 L.J K.B. 28=60 S.J 696=25 Cox. C.C. 524=80 J.P. 446=115 L.T. 453.

cessity of finding out corroboration which connected or tended to connect each of the appellants with the crime. The evidence on record, therefore, falls short of the degree and nature of corroboration required under law for the conviction of the appellants. Moreover, the approver stands self-condemned in a major portion of his evidence as the lower Court's own conclusion as regards the innocence of Tankia shows. The foremost essential condition even according to *Govinda* v. *Emperor* (3), and other cases such as *Sheroo* v. *Emperor* (6) by a Bench of Kotval, A. J. C, and myself is that the approver's statement must be a trustworthy statement A mere reading of the deposition of Banshya (P. W. 17) clearly shows that he is a self condemned liar ; he is not at all worthy of credit. Under these circumstances I have no other alternative but to allow the appeals and acquit all the six appellants and set them at liberty.

P N./R.K *Appeals allowed.*

(6) A.I.R. 1925 Nag. 78.

A I R. 1929 Nagpur 224

KINKHEDE, A. J. C.

Lataji—Defendant—Appellant.

v.

Krishnaji—Plaintiff—Respondent.

Second Appeal No 152-B of 1927, Decided on 25th October 1928, against decree of First Addl. Dist Judge, Akola, D/- 28th February 1927, in Civil Appeal No. 204 of 1926.

(a) Pre-emption—Mere agreement to reconvey property creates no interest in property and does not by itself take away right of pre-emption.

A mere agreement to reconvey the property imports a personal contract and affects or creates no interest in property, nor does the agreement run with the land and it does not by itself defeat the right of pre-emption. 39 *Mad.* 462, *Rel. on.* [P 224 C 2]

(b) Berar Land Revenue Code, S. 205—Right of pre-emption is not lost on re-sale of property either to vendor or to stranger.

A person's right of pre-emption being presumably a right of substitution cannot be taken away by any transaction reconveying the property either to the vendor or to the stranger whether the reconveyance takes place before suit or after suit or decree. 2 *N. L. R.* 150; 5 *N. L. R.* 136, *Rel. on.* [P 224 C 2]

N. G. Bose—for Appellant.

M. R. Bobde—for Respondent.

Judgment. — This second appeal arises out of a suit for pre-emption. The plaintiff's case was decreed against the defendant in the lower appellate Court, though the same was dismissed in the first Court. Hence this second appeal by the defendant. The finding of the lower appellate Court to the effect that the defendant was not a co-occupant at the date of his purchase must stand in the absence of any evidence to the contrary. So the plaintiff's suit could not be thrown out on that ground alone The next point was whether the circumstance that the contract of sale to defendant was accompanied by a covenant for re-sale to the vendor makes the sale a mortgage The agreement, dated 7th July 1921, Ex. D-3. is absolute in its terms, so is the sale-deed. I, therefore, think that a mere agreement to reconvey the property imports a personal contract and affects or creates no interest in property, nor does the agreement or covenant run with the land: *Avula Charamudi* v. *Marriboyina Raghavulu* (1). The question, however, still remains what is the effect of a reconveyance before the suit for pre emption is filed. I think the case in *Ganpatsa* v. *Joomabai* (2) and *Raiyai* v. *Irbhan* (3) affirm the proposition that the plaintiff's right of pre-emption being presumably a right of substitution, cannot be taken away by any transaction reconveying the property either to the vendor or to the stranger, whether the reconveyance takes place before suit or after suit or decree. I thing the provisions of S. 205, Berar Land Revenue Code do not lay down that the right of pre-emption will be lost on resale of the property to the vendor himself A right of suit once acquired will not ordinarily be lost except by lapse of limitation or by abandonment express or implied, much less could the vendor and the vendee by a private treaty between themselves prejudice the pre-emptor's right by a transaction to which the pre-emptor is not a party.

No attempt is made before me to contest the decree on the ground of the price for pre-emption.

The appeal fails and is dismissed with costs

P.N./R.K. *Appeal dismissed.*

(1) [1915] 39 Mad. 462=28 M. L. J. 471=28 I. C. 871=(1915) M. W. N. 596.
(2) [1906] 2 N. L. R. 150.
(3) [1909] 5 N. L. R. 136=3 I. C. 923.

A. I. R. 1929 Nagpur 225

STAPLES, A. J. C.

Bhagwantrao and *others*—Plaintiffs—Appellants.

v.

Subhkaran—Defendant—Respondent.

Second Appeal No. 628 of 1927, Decided on 29th September 1928, from decree of Dist. Judge, Hoshangabad, D/- 29th August 1927.

Transfer of Property Act, S. 70—Sir land mortgaged to one mortgagee and then to another—Second mortgagee foreclosing it and mortgagor surrendering his occupancy rights which he retained under law—Second mortgagee stands as mortgagor to first mortgagee and as landlord to original mortgagor and so when occupancy rights are surrendered to him, it is ordinary surrender by tenant during continuance of first mortgage and so accretion to mortgage—Landlord and Tenant.

A subsequent mortgagee who has foreclosed, steps into the shoes of the mortgagor and stands in the same relation to the prior mortgagees as the original mortgagor.

Where *sir* land was mortgaged first to one mortgagee and then to another and where second mortgagee foreclosed the land, he is in the position of a mortgagor to the first mortgagee and is also in the position of a landlord to the original mortgagee inasmuch as the original mortgagor still retains under the law the right of an occupancy tenant in the land and so where the original mortgagor surrendered his occupancy rights in the land to the second mortgagee, it is an ordinary surrender by a tenant during the continuance of the mortgage of the first mortgagee and therefore an accretion to the mortgage, so if the first mortgagee obtains a final decree for foreclosure and sues for possession of the field, he is entitled to a decree. 14 *N. L. R.* 133, *Appl.*; 37 *All.* 390 and *A. I. R.* 1921 *Mad.* 627, *Dist.* [P 226 C 2]

A. V. Wazalwar—for Appellants.

V. Bose and *M. B. Niyogi*—for Respondent.

Judgment.—This appeal arises out of a suit for possession of a field in mouza Dhondwada in the Betul District. A decree for possession was granted in the trial Court, but on appeal by the second defendant the District Judge set aside the decree and dismissed the suit. The plaintiffs have, therefore, preferred a second appeal. The field in suit No. 131 in mouza Dhondwada, is now recorded as an occupancy field, but it was originally part of the *sir* land. The village belonged to Baliram and Krishnaji. They mortgaged it to the plaintiffs' predecessor in 1915 and in 1917 they again mortgaged it to Manakchand, father of defendant 1 Kasturchand. In 1923 the plaintiffs sued upon their mortgage, and impleaded Kasturchand as a puisne mortgagee. In the same year, Kasturchand also sued upon his mortgage, but did not make the plaintiffs parties to the suit. On 30th November 1923 the plaintiffs obtained a preliminary decree for foreclosure, and on 17th June 1924 they applied for a final decree. In the meantime, however, Kasturchand had obtained a final decree on 24th June and on 21st July 1924 Baliram and Krishnaji surrendered their occupancy rights in the *sir* land to Kasturchand in consideration of Rs 950 in cash and an old debt of Rs 750. On 25th July Kasturchand applied for time to pay off the plaintiff's decree and on 6th August the Court granted him time up to 26th August On 9th August Kasturchand granted a lease of the field to defendant 2 Subhkaran Kasturchand, however, failed to pay the amount of the plaintiffs' decree, and on 30th August the decree in favour of the plaintiffs was made absolute The plaintiffs filed their suit for possession of the field on 6th May 1925 claiming that the surrender of the fields by Baliram and Krishnaji during the pendency of the proceedings for making their decree absolute was an accretion to the mortgaged property, of which they were the prior mortgagees, and that, therefore, it passed to them along with the village under their foreclosure decree.

After defendant 2 Subhkaran had been impleaded, the plaintiffs contended that the lease of the field by Kasturchand in favour of Subhkaran was nominal and without consideration and was executed only to save the land from falling into their hands. The trial Court held that the field surrendered was an accretion to the mortgaged property and the plaintiffs were entitled to possession and further that the lease was nominal, bogus and fraudulent. The finding as regards the lease was upheld by the lower appellate Court, but it was held that the field in suit was not an accretion to the mortgaged property and therefore the plaintiffs were not entitled to it by virtue of their decree, or, if they were entitled they could only obtain possession on payment of the cost of the acquisition. The plaintiffs' claim was, therefore, dismissed.

The question about the field in suit being an accretion to the mortgaged property was considered somewhat briefly by the trial Court in para. 10 of the judgment on a finding on issue 4, but I am of opinion that the view taken by the Court is correct. The lower appellate Court has considered the matter at considerable length in paras. 2 and 3 of the judgment, but I am not impressed by the Judge's reasoning. The reasoning in para. 2 seems to me to be somewhat obscure and the last part of para. 3 seems to me to be totally wrong. The lower appellate Court too has, I think, misunderstood the ruling in *Shri Ganesh* v. *Pandurang* (1), and I would quote a passage out of that ruling which, I think, governs the present case:

"The learned pleader for the appellant argues that there was no accession, since at the date of the mortgage, and even at the date of the institution of the suit for foreclosure, the fields were occupancy fields, and at the date of the decree they were occupancy fields, if the lease of 1903 be upheld, so that the mortgagee in spite of the lease has got exactly what was mortgaged to him. This is not in my view the correct aspect in which the question should be regarded. If it had not been for the lease the mortgagee would undoubtedly by his decree have had the right to take the fields as khudkasht fields over which he as malguzar had the right of cultivation, and the sole question is whether the lease adversely affected the rights of the new malguzar. The lease, if upheld, would have the effect of his getting less by the decree than he otherwise would have got."

It is true that in the present case the field in suit was not an occupancy field at the date of their mortgage, but it became an occupancy field when Kasturchand foreclosed and claimed a final decree. Kasturchand was the malguzar of the village and the mortgagors Baliram and Krishnaji then became occupancy tenants of what was formerly *sir* land. They could then, as any other occupancy tenant, make a surrender in favour of the malguzar and that they actually did do on 21st July for a consideration of Rs. 950 in cash and an old debt of Rs. 750, as already stated. I cannot agree with the lower appellate Court in holding that where the cultivating right (that is, the occupancy right in what was formerly *sir* land) becomes a distinct entity as a creature of the foreclosure its acquisition by a surrender in favour of a puisne mortgagee who becomes a proprietor in the interval should be treated on a different footing. Nor am I pressed by the argument that S. 70, T. P. Act, does not apply as between a prior and subsequent mortgagees. A subsequent mortgagee who has foreclosed steps into the shoes of the mortgagor and stands in the same relation to the prior mortgagee as the original mortgagor did. The subsequent mortgagee Kasturchand then was in the position of the mortgagor as regards the plaintiffs. He was also in the position of a landlord with regard to his mortgagors after he foreclosed When, then, his tenants, that is, the original mortgagors, surrendered their occupancy holding to him, it must be taken as an ordinary surrender by a tenant during the continuance of the mortgage, and as such is, I think, clearly an accretion to the mortgage under S. 70, T. P. Act.

For the respondents reliance was placed upon the rulings in *Robert William Anderson* v. *Bank of Upper India Ltd.* (2) and *Sivananjiah* v. *Sithay Goudar* (3) but I think those rulings can be distinguished. In *Robert William Anderson* v. *Bank of Upper India, Ltd.* (2) the case referred to a purchase of a shop with the stock and goodwill and there is no analogy, strictly speaking, between such a purchase and a surrender or acquisition of immovable property. In the case in *Sivananjiah* v. *Sithay Goudar* (3), the mortgagor's share was sold in auction and, therefore, his interest had ceased to exist and the acquisition was made after his interest had ceased to exist. In the present case the property had been foreclosed and mortgagor had lost his proprietary rights in the *sir* land, but he still retained under the law the right of an occupancy tenant in the field in suit. That was a valid and subsisting right and he surrendered that right to Kasturchand. That surrender was an acquisition made by Kasturchand, whilst the plaintiffs' mortgage was still in existence and, therefore, the property acquired became an accretion to the mortgaged property. I am of opinion that the suit was rightly decided by the trial Court and that the decree of the lower appellate Court is wrong. The decree

(1) [1918] 14 N. L. R. 133 (135)=46 I. C. 762.

(2) [1915] 37 All. 330=29 I. C. 934=13 A. L. J. 489.

(3) A. I. R. 1921 Mad. 627.

of the lower appellate Court, therefore, is set aside, and instead the original decree of the trial Court granting the plaintiff's possession of the field in suit is restored All costs of the appeal in both Courts and in the original suit will be borne by the defendants-respondents.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Nagpur 227

STAPLES, A. J. C.

Oliver Ruby Brown and *others*—Appellants.

v.

G. I. P. Ry. Co.—Respondents.

First Appeal No. 16-B of 1928, Decided on 24th October 1928, against order of Addl. Dist. Judge, Amraoti, D/- 19th November 1927.

Civil P. C., O. 21, R. 1—Judgment-debtor depositing decretal amount into Court—He preventing that sum reaching decree-holder—Judgment-debtor is liable for interest until money is available to decree-holder.

Even though a deposit is made by the judgment-debtor into Court of the decretal amount if the judgment-debtor prevents that sum reaching the decree-holder, he is really applying for stay of or at any rate a partial stay of the execution and, therefore, he should be held liable for interest until the money is available to decree-holder : 42 *Mad* 576 ; 40 *All.* 125, *Dist.* [P 228 C 1]

C. B. Parakh—for Appellants.

S. R. Pandit—for Respondents.

Judgment—This is an appeal made by Mrs. Brown and her children against the order of the Additional District Judge, Amraoti, in execution of the decree passed in their favour against the G. I. P. Ry. Co. respondent. The only point at issue is whether the appellants should be allowed interest after the date the decretal amount was deposited by the respondent in Court. The facts of the case are as follows : The appellants sued the respondent for damages owing to the death of Mr. Brown in a railway accident and they obtained a decree for Rs. 60,000 and costs in the trial Court on 13th July 1925. The present respondent appealed to this Court and on 12th October, Kotwal, A. J. C., passed an order that unless the decree-holders give security the amount deposited in Court would not be paid to them. On 15th July 1926, the present appellants applied for execution. On 17th September 1926 security was given by Jahangir Sorabji on their behalf in the shape of land, two bungalows at Igatpuri and a fixed deposit of Rs. 30,000 but this security was not accepted by the Additional District Judge. On 21st September the Railway Company deposited a cheque for Rs. 64,255 being the full decretal amount in Court. On 27th September the decree-holder, that is the present appellants, suggested that the money should be deposited in a Bank at fixed deposit and should not be withdrawn. On 4th October the Additional District Judge sent the amount to the Co-operative Central Bank, Amraoti, as a fixed deposit for six months. On 9th and 10th February 1927, the appeal was heard in this Court and on 6th July 1927, a modified decree was passed for Rs. 35,866 in favour of the present appellants with Rs. 261 as costs and interest at 6 per cent per annum from 15th May 1923, till the date of payment. On 22nd September 1927, the decree-holders, i. e., the present appellants applied for the withdrawal claiming Rs. 3,58,66 plus Rs. 261 costs and Rs. 9,369-15-9 interest up to the date of application. The judgment-debtor, that is, the present respondent, denied that they were liable for interest from 21st September 1926, that is, the date on which they made the deposit in Court.

The lower Court in execution of the decree held in favour of the judgment-debtor respondent that interest should not be allowed after the date of the deposit in Court. The lower Court has held that the decree-holders were entirely to blame for the delay in furnishing security and again that they could have made a fixed deposit for one year and got interest in that way instead of making the deposit for six months only. I am not, however, pressed by that reasoning. In the first place, as already stated, the decree-holders did find security but that security was not accepted by the Court. Then it was not, I think in the power of the decree-holders to make a fixed deposit for one year or to renew the deposit already made. Surely the money was not in their power, but was under the orders of the Court, and the Court only could make a deposit. The most the decree-holders could do was to apply to the Court for the renewal of the deposit or to make a fixed deposit for one year. It may be noted that

the appeal was kept pending for a very long time in this Court before judgment was delivered. It having been heard in February it was reasonable to suppose that judgment would be delivered in a month or so, but as a matter of fact it was not delivered until July, i. e., after an interval of five months. The fixed deposit for six months would not expire until 4th April 1927, and it would be reasonable to imagine that the appellate judgment would be delivered before the date of the deposit expired. I do not think then that the decree-holders were in any way to blame for not applying for the renewal of the deposit.

The lower Court has followed the ruling in *Ramaiaya Shanbogue* v. *Venkataramanayya* (1) and *Amtul Habib* v *Mahammed Yusuf* (2) and has held that interest cannot run once the deposit has been made in Court I would point out that a deposit by the judgment-debtor in Court would mean a deposit of the money for payment to the decree-holder but when on an application of the judgment-debtor the money, although deposited in Court is not available to the decree-holders and it is to be kept in suspense under the orders of the Court, I do not see why interest should not run. It is true that the lower Court tried to evade the difficulty by sending the money to the Bank as a fixed deposit and allowing interest on that deposit to the decree-holders, but that, I think, was an evasion and was not really an answer to the question. I am of opinion that even though a deposit is made by the judgment-debtor into Court of the decretal amount, if the judgment-debtor prevents that sum reaching the decree-holder, he is really applying for stay or at any rate a partial stay of the execution and, therefore, he should be held liable for interest until the money is available to the decree-holders. Then I think, it was not for the decree-holders to apply to the Court to place the money in fixed deposit in a Bank to secure interest but it was rather for the judgment-debtor, who made the deposit to make such an application so that the money might not lie idle. Again it may be noted that the original decree was suspended by the appellate Court, and in the appellate decree it is clearly ordered that interest shall run from 15th May 1923, till the date of payment. Now the date of payment must, I think, mean payment to the decree-holder and not merely deposit in Court on a condition that the money would not be made over to the decree-holder that is, payment must mean effective payment.

Again it was urged that the decree-holders made an undue delay in making their application to withdraw the amount of the decree but as already noted, the appellate judgment was not delivered until 6th July 1927 and probably did not reach the lower Court for a week or later. The decree-holders were not living in Amraoti and it must have taken some time for them to be aware of the result and they actually applied within a little over two months. I do not think this can be considered an undue delay. I am of opinion that the order of the lower Court is incorrect and that the decree-holders, the present appellants, should be allowed interest as directed in the appellate judgment till the date of payment, that is, till the date they applied for the withdrawal of the decretal amount. The order of the lower Court is, therefore, set aside and instead the appellants are allowed the further sum of Rs. 2,152 claimed by them as interest, that is, the excess amount of interest claimed by them over the amount allowed by the lower Court. Costs of this appeal will be borne by the respondent. I fix pleader's fee at Rs. 50.

P.N./R K. *Appeal allowed.*

(1) [1919] 42 Mad. 576=50 I. C. 410=(1919) M. W. N. 458.

(2) [1918] 40 All. 125=43 I. C. 520=16 A. L. J. 15.

A. I. R. 1929 Nagpur 228

MACNAIR, OFFG. J. C.

Pandurang—Defendant—Applicant.

v.

Sitaram and *others*—Plaintiffs—Non-Applicants.

Civil Revn. No. 462 of 1928, Decided on 24th April 1929.

Civil P. C., S. 115—Contingent right to receive lease money attached and sold—Decree passed by Court in suit for recovery of lease money—Decision is so erroneous as to necessitate interference in revision.

Where the right to receive lease money was attached and sold before the period for which the lease money was payable had expired and a decree was passed in a suit for the recovery of the lease money, the decision of the Court is so obviously erroneous and directly opposed

to settled principles as to necessitate the High Court to interfere in revision, *A. I. R.* 1926, *Nag.* 396 ; *A. I. R.* 1925, *Pat.* 310, *Ref.*
[P 229 C 1, 2]

R. W. Fulay—for Applicant.

M. R. Bobde—for Non-Applicants.

Order.—Under the terms of a lease deed the consideration was payable each year in the month of Baisakh. In execution of a decree the non-applicants obtained a prohibitory order under O. 21, R. 43, Civil P. C., in respect of the right of the lessor to receive lease money for the Fasli year 1333 about eight months before this money was payable. This right was brought to sale and was sold before the payment became due. The suit out of which this application arises was for recovery of the lease money for the Fasli year 1333 and the plaintiffs obtained a decree against the lessee In revision it is first urged that the Small Cause Court had no jurisdiction to try this suit. It is sufficient to say that according to the plaint the lease money could be attached and sold After sale the right to receive lease money could not be immovable property. The plaint, therefore, virtually alleged that a debt of a small cause nature existed and the suit was properly tried in the Small Cause Court.

It is next urged that the right to receive lease money at a future date could not be attached or sold. This contention appears to me valid. The lessor and lessee of a moveable property possess as against each other rights detailed in S. 108, T P. Act. The right of the lessee to pay at the time of the attachment was contingent : for the money was not payable if the lessee subsequently lost possession in certain ways. The learned Judge has stated that nearly half the year has passed and the lessee was in possession : but he might not have continued in possession during the remainder of the year. I find no authority for the proposition that the right to receive lease money can be attached before the period for which the lease money is payable has expired. In *Lachhmi Narayan* v. *Dharamchand* (1) Hallifax, A. J. C., speaks of a right to recover a share of profits which have already been collected by the lambardar. He refers to *Sheogobind Singh* v. *Gouri Prasad* (2), where it was held that an arrear of rent is moveable property. I hold then that the right which is attached was not existing debt.

After holding that the decision of the Small Cause Court was erroneous I have to decide whether it is proper for this Court to interfere : for interference is not proper in every case where an error of law has led to an incorrect decision It appears to me that the error of the Small Cause Court is an obvious one and the decision is directly opposed to settled principles. In my opinion it is necessary to interfere in this case. I therefore set aside the decree of the Small Cause Court and dismiss the suit of the plaintiffs. Costs in the lower Court will be borne by the plaintiffs. Costs in this Court will be borne by the plaintiffs-non-applicants. Counsel's fee Rs. 40.

P.N./R.K. *Revision allowed.*

(1) A. I. R. 1926 Nag, 396=22 N. L. R. 108.
(2) A. I. R. 1925 Pat. 310=4 Pat. 43.

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* * A. I. R. 1929 Nagpur 229

Full Bench

MACNAIR, OFFG. J. C. AND MOHIUDDIN AND STAPLES, A. J. Cs.

Sheoram—Plaintiff—Appellant.

v

Hiraman and *others*—Defendants—Respondents.

Second Appeal No. 665 of 1927, Decided on 11th July 1929 against decree of Addl. Dist Judge, Nagpur, D/- 24th August 1927 in Civil Appeal No. 41 of 1927.

*** * (a) Civil P. C., O. 41, R. 1—Decree for plaintiff against three defendants—Both plaintiff and defendants preferring second appeals — Separate judgments delivered—Separate decrees drawn—Result being dismissal of suit—Plaintiff filing one second appeal against both decrees—Two separate second appeals held not necessary.**

The first Court passed a decree in favour of plaintiff *A* against defendants *B*, *C* and *D*. Plaintiff *A* filed an appeal therefrom and so the defendants *B*, *C* and *D*. The lower appellate Court delivered separate judgments in the two appeals and drew up two separate decrees, the net result being that the suit was dismissed. The plaintiff *A* came up to the High Court in second appeal desiring that both the decrees of the lower appellate Court should be set aside. The plaintiff filed only a single second appeal.

Held: that it was not necessary for the plaintiff to file two separate second appeals. (Cases Referred.) [P 231 C 2]

(b) Practice—Decree — Only one decree should be drawn up when appellate Court

has to deal with two appeals arising out of the same suit.

Per Findlay, J. C.—Apart from the question of preliminary and final decrees in suits the intention of the Civil Procedure Code is that there should be only one decree in any given suit and, therefore, when an appellate Court has to deal with two appeals arising out of the same suit it is desirable that it should draw up as a single decree, a comprehensive document which would give its adjudication in the whole matter of the litigation involved. [P 230 C 2]

R. N. Padhey—for Appellant.

M. R. Bobde—for Respondents.

Order of Reference.

Findlay, J. C—An interesting point of law arises in the present case, which in my opinion, should be referred to a Full Bench In the present suit (No 202 of 1926, in the Court of the Additional First Subordinate Judge, 2nd Class, Nagpur), the plaintiff Sheoram was granted a declaratory decree against four defendants to the effect that he was the owner of a part of an absolute occupancy field. Both the plaintiff and three of the defendants appealed. The Judge of the lower appellate Court delivered a full judgment in the defendants' appeal. In the plaintiff's appeal a formal separate judgment was also recorded and two separate decrees were drawn up. The defendants' appeal succeeded and the suit was dismissed, while the plaintiff's appeal was also dismissed.

The plaintiff has now come up to this Court on second appeal desiring that both the decrees of the lower appellate Court should be set aside A preliminary objection has been taken by the counsel for the respondents to the effect that, under O. 41, R 1, Civil P. C, a separate appeal should have been filed against the judgment and decree of the lower appellate Court. Reference has also been made to the fact that the Civil Procedure Code makes no provision for the consolidation of appeals and that, even if this be permissible, under the inherent powers of the Court under S. 151, Civil P. C, no consolidation, as a matter of fact, took place in the lower appellate Court, or was even asked for. Reliance has also been placed on two old decisions of the Allahabad High Court *Zaharia* v. *Debia* (1), and *Dakhni Din* v. *Syed Ali Asghar* (2), in which a view favourable to the respondents' contention was taken. Much water has, however, flown underneath the bridge since those two decisions were given. The earlier Allahabad decision was distinguished by the same Court in the Full Bench judgment contained in *Ghansham Singh* v *Bhola Singh* (3), which decision also overruled the judgment in *Dakhni Din* v. *Syed Ali Asghar* (2), quoted above.

I do not desire at present to go into the matter at any length, but it certainly seems to me, as at present advised, that the latter Full Bench decision is the more correct exposition of the law. In a very old decision of Phear, J., in *Raghubans Sahai* v *Mt Asloo* (4), the learned Judge remarks:

"It is, however, obvious that when two parties to a suit appeal so that the one appeal is but the cross-appeal of the other, there ought to be only one final decree made between two parties."

If the lower appellate Court in the present case had followed this course and made a joint decree dismissing the one appeal and allowing the other, the difficulty I am now confronted with would not have arisen. It is perfectly possible, of course, to argue so far correctly in terms that, under the provisions of O 41, R 1, two separate appeals should have been filed in the present case, but when one gets down to essentials, it seems to me that these two decrees should, for the purposes of second appeal in this Court, be regarded as one. The practice of the lower appellate Court drawing up separate decrees, as it has done in the present instance, seems to me an undesirable and possibly a wrong one. Apart from the question of preliminary and final decrees in suits, the intention of the Civil Procedure Code obviously is that there should only be one decree in any given suit and, therefore, in my opinion, when an appellate Court has to deal with two appeals arising out of the same suit, it is highly desirable that it should draw up, as its single decree, a comprehensive document which would give its adjudication on the whole matter of the litigation involved

I may add for the information of my brothers that the Lahore High Court in a recent Full Bench decision, *Mt.*

(1) [1911] 33 All. 51=7 I. C. 156=7 A. L. J. 861 (F.B.).

(2) [1911] 33 All. 151=7 I. C. 909=7 A. L. J. 995.

(3) A. I. R. 1923 All. 490=45 All. 506 (F.B.).

(4) [1873] 20 W. R. 294.

Lachhmi v. *Mt. Bhulli* (5), took a view similar to the decision in *Ghansham Singh* v. *Bhola Singh* (3), quoted above but it is only fair to add that one Judge (Dalip Singh) has written a dissenting judgment which also merits consideration.

I therefore refer the following question to a Full Bench:

"The first Court passes a decree in favour of plaintiff *A* against defendants *B*, *C* and *D*. Plaintiff *A* files an appeal therefrom and so do defendants *B*, *C* and *D*. The lower appellate Court delivers separate judgments in the two appeals and draws up two separate decrees, the net result being that the suit was dismissed. The plaintiff *A* comes up to this Court in second appeal desiring that both the decrees of the lower appellate Court should be set aside. The plaintiff files only a single second appeal in this Court. Can this Court entertain the said second appeal, or is it necessary for the plaintiff to file two separate second appeals?"

Opinion

Macnair, Offg. J. C—The question referred for decision by a Full Bench is as follows:

"The first Court passes a decree in favour of plaintiff *A* against defendants *B*, *C* and *D*. Plaintiff *A* files an appeal therefrom and so do defendants *B*, *C* and *D*. The lower appellate Court delivers separate judgments in the two appeals and draws up two separate decrees, the net result being that the suit was dismissed. The plaintiff *A* comes up to this Court in second appeal desiring that both the decrees of the lower appellate Court should be set aside. The plaintiff files only a single second appeal in this Court. Can this Court entertain the said second appeal, or is it necessary for the plaintiff to file two separate second appeals."

When the lower appellate Court delivers a judgment dismissing an appeal and passes a decree, the decree from which the appeal is preferred is confirmed. This is clear from the language of O 41, R. 32, Sch 1, to the Civil Procedure Code. I may, however, refer to the judgment of their Lordships of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (6). A decree had been passed by the Subordinate Judge, Allahabad, an appeal to the High Court was dismissed and the decree of the Subordinate Judge was confirmed. The defendant obtained leave to appeal to the Privy Council but did not prosecute the appeal which was dismissed for want of prosecution. The chief matter of argument before the Board was a contention that the decree of the High Court had been constructively turned into a decree of His Majesty in Council by virtue of the dismissal of the appeal for want of prosecution, and their Lordships remarked:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from."

They subsequently remarked:

"The only decree for sale that exists is the decree, dated 8th April 1893, and that is a decree of the High Court of Allahabad."

It is clear, then, that, in the opinion of their Lordships, when an appellate Court deals judicially with the matter of the suit, the decree of that Court based on a judgment is the only decree capable of execution An order dismissing an appeal for want of prosecution is not an order confirming the decision, not because it does not expressly state that the decree of the lower Court is confirmed, but because it does not deal judicially with the matter of the suit.

In the case I am considering the decree of the lower appellate Court, which dismissed the appeal of the plaintiff, merely states:

"It is ordered that the appeal be and it is hereby dismissed with costs."

But this decree read by itself is, none the less, a decree confirming the decree of the lower Court and capable of execution to the same extent as if it had contained the provisions of a decree of the lower Court.

The other decree passed by the lower appellate Court set aside the decree of the first Court and stated that the suit was dismissed It is clear that the lower appellate Court should not, on the same day, have passed two inconsistent decrees but the defect in the procedure was one of form; the intention of the Court was clear "The formal expression of an adjudication" by the lower appellate Court was, in form, two contradictory decrees, but was in substance and intention a single consistent decree, substituted in place of the decree of the first Court. In these circumstances, the plaintiff was, in my opinion, entirely justified in treating the two decrees of the lower appellate Court as a single decree dismissing his appeal, setting aside the decree of the first Court and dismissing the suit. The filing of a single second appeal was, therefore, proper. It would have been difficult to

(5) A.I.R. 1927 Lah. 289=3 Lah. 394 (F B.)
(6) A.I.R. 1914 P. C. 66=36 All. 350 (P.C.).

file two separate second appeals against the conflicting decrees of the lower appellate Court in a suitable form.

With his memorandum of appeal the appellant filed copies of both judgments and both decrees. The memorandum stated he was appealing from two decrees. It is unnecessary to consider what the result would have been had the appellant attacked one of the decrees (which must, in my opinion, be considered in substance a part of the real decree), and ignored the other It might then have been necessary to consider whether the decisions in the Allahabad Full Bench case *Ghansham Singh* v. *Bhola Singh* (3), and in the Lahore Full Bench case *Mt. Lachhmi* v. *Mt. Bhulli* (5), were correct. My answer to the question referred to the Bench is, therefore, that this Court can entertain the second appeal.

Mohiuddin, A. J. C.—I agree.

Staples, A. J. C.—I agree.

P.N./R.K. *Reference answered.*

A I. R. 1929 Nagpur 232

JACKSON AND MOHIUDDIN, A J. Cs.

Thakurdas—Appellant.

v.

Dhanrao—Respondent.

First Appeal No. 112 of 1928, Decided on 27th March 1929, against judgment of Sub-Judge, First Class, Khandwa, D/- 18th February 1926.

Civil P. C., S. 60—Service tenures are not attachable in execution.

Villages or lands given as jagirs for services cannot be attached and sold in execution of a decree as the sale of such property is opposed to the nature of the interest affected and is also contrary to public policy : *A. I. R.* 1922 *Mad.* 197, *Foll.* [P 232 C 2]

J. Sen—for Appellant.

W. R. Puranik—for Respondent.

Judgment—The share of Dhannoo in the village Daryapur and malik makbuza fields recorded in his name were attached by the decree-holders, who got a decree for Rs. 12,294-12-0 against Dhannoo in Suit No. 38 of 1925 on 18th February 1926. The respondent had filed an objection in the Court of Sub-Judge, First Class, Khandwa, and it was allowed on 21st August 1928, and the property attached was released, on the ground that

"the holders of the village and the fields in question were only trustees and had no disposing power over the corpus of the estate exercisable for their own benefit."

The decree-holders have filed this appeal against the order dated 21st August 1928.

The earliest document about the village Daryapur which has been filed in this case is a copy of the order (Ex. D-1) passed by Captain Forsythe on 9th November 1866, granting proprietary right to Mohan Gujar. The order begins with these words :

"It appears from the records that this mouzah was in A. D. 1797 khalsa. In A. D. 1846 it was given by H. H. Scindeah to Mohan Gujar in jagir on the tenure of affording drinking water to all travellers."

This shows that the village was given as a jagir for service. In the muafi register for the year 1868 (Ex. D-3) the following words appear :

"stated to be a grant from Scindeah's Government for charitable purposes."

This village was released in perpetuity as a muafi in pursuance of the treaty, which took place in 1860 between British Government and the Indore State. In the muafi register of 1899 in Col. 12 it was recorded that the village Daryapur was a grant for watering cattle of the village said to have been made on a date now unascertainable. All these documents clearly indicate that the village Daryapur was granted by the Scindeah Government as a service grant and the British Government on account of the treaty of 1860 confirmed the grant on the same condition. As pointed out by Schwabe, C. J. in *Anjaneyalu* v. *Venu-Gopal Rice Mill, Ltd.* (1) :

"the sale of such property is opposed to the nature of the interest affected and is also contrary to public policy."

Dhannoo cannot render the service attached to the grant, unless he enjoys the revenue of the property which was given to him. The village, therefore, cannot be attached and sold in execution of the decree obtained by the appellants against respondent. The malik makbuza fields were also granted for the same purpose. This is clear from Ex. 5 jamabandi of Daryapur for the year 1926/27 and Ex. O. 5 the jamabandi for the year 1890/91. The fields also are not liable to attachment and sale.

The appeal, therefore, fails and is dismissed with costs. We allow Rs. 50 as pleader's fee in this case.

V.B./R.K. *Appeal dismissed.*

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(1) A.I.R. 1922 Mad. 197=45 Mad. 620.

A. I. R. 1929 Nagpur 233

KINKHEDE AND MOHIUDDIN, A. J. Cs.

Musa—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 172 of 1928, Decided on 6th September 1928, against judgment of Sess. Judge, Saugor.

(a) Evidence Act, S. 133.—S. 133 is subject to S. 114 Ill. (b).

Absolute rule of law regarding the evidence of accomplices that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice is subject to a rule of guidance in illustration (b) to S. 114 and which says that an accomplice is unworthy of credit, unless he is corroborated in material particulars. [P 234 C 2]

(b) Criminal P. C., S. 288—Evidence in committing Court brought on record under S. 288 on day of examination—No notice given to prosecution or defence—Course irregular and illegal.

At the trial, on the date of the examination of the witness, the evidence of the witness recorded under Ch. 18, Criminal P. C., was brought on record and admitted in evidence under S. 288. The Court did not inform the accused or the prosecution that he was going to treat as evidence under S. 288 the evidence of the witness.

Held: that the course adopted was contrary to practice and inconsistent with all rules regulating the admissibility of evidence. [P 235 C 1]

(c) Criminal P. C. S. 288—Whole statement in committing Magistrate's Court must be treated as evidence.

Under S. 288 whole of the previous statement is to be treated as evidence and not only portions of it and therefore it is essential to put the whole of it to the witness and then after giving notice to the prosecution and the defence, it can be brought on record under S. 288, Criminal P. C. [P 235 C 2]

(d) Criminal P. C., S. 539-B—Inspection by a Sessions Judge—Non-compliance with the provisions of S. 539-B is an illegality vitiating conviction.

Omission to place on record the memorandum of a local inspection is an irregularity which may result in vitiating the conviction if there was any prejudice resulting from the default. *A. I. R.* 1924 *Cal.* 1035 and *A. I. R.* 1925 *Cal.* 1246, *Ref.* [P 236 C 1]

Harisingh Gour and *A. Razak*—for Appellant.

G. P. Dick——for the Crown.

Judgment.—The appellant Mohammad Musa, who is 16 years of age, has been convicted by the Sessions Judge, Saugor, under S. 302, I. P. C., for the murder of Mohammad Ishaq, aged 25 years, which took place on the night of 17th March 1928, and has been sentenced to death.

The corpse of Mohammad Ishaq who was Pesh-Imam of Kasai Mandi Mosque and who was present at the taravi prayer on the night of 17th March, was seen lying near the railway line by many persons on the morning of 18th March, and one of them P. W. 6 Hussaini went to the Police Station House, and made a report, which is Ex. P. 1. After inquest, the corpse was sent to the mortuary and Assistant Medical Officer Deo Rao held the post-mortem examination. He found a number of injuries, which have been mentioned in para. 9 of the Sessions Judge's judgment and expressed the opinion that death was due to fracture of the skull, that the injuries found on the body could have been caused by the knife Art. A, that the deceased was not of a weak constitution and was much older than Musa, that it was improbable that accused Musa would have singly inflicted the wounds on the deceased and that blood must have passed profusely from the body. It is thus clear that Ishaq was murdered by some person or persons, between 9 p. m. and 6 a. m.

The exact time when Mohammad Ishaq was murdered is very important in this case, but the evidence on this point is far from satisfactory. According to P. W 1 Siddiq, Ishaq was murdered before 11 p. m., and he definitely stated that he reached home, after the murder, just as the 11 p. m. train went out. Ismail, P. W. 3, who was staying in the mosque that night stated that after the Bina Katni train had passed at about 11-30 p. m., Siddiq alone came to the mosque for the third time, inquired from Ishaq if he was going to wake up people for saheri, that after this Ishaq went to sleep again, and that about 2 a. m., on being called by some one, Ishaq went out. If Ismail is to be believed on this point, Ishaq was alright and alive at the time, when Saddiq says he was murdered. This is the first important particular, about which there is not only no corroboration, but a direct contradiction. Both the witnesses are definite about the time and their statements are irreconcilable. It is, therefore, not possible to find out.

the exact time, when Ishaq was murdered.

The next important point which is established will be of great help in deciding this case, is the question of motive, the feeling or reason which actuated the appellant to commit this brutal murder. Ths learned Sessions Judge in paras 2 and 3 of his judgment, has stated the prosecution case, regarding motive, in these words :

"The accused Musa and he (Ishaq) had been friends for some time and addicted to sodomy. The accused, however, a few months before the murder became friendly with Mohammad Siddiq P. W. 1, who is about 14 years of age and between them also sodomy took place. Ishaq, aggrieved by the cessation of Musa's friendship, sent him numerous letters expressing his sorrow and hope for a resumption of their former relations . . . . . Musa who had lost interest in Ishaq was irritated by these letters and by the taunt of "Ishaq ka gandu" and eventually decided to kill him."

The evidence on this point has been discussed in paras. 22 to 28 of the lower Court's judgment, and, the conclusion reached has been stated as follows .

"From the tone of the letters and the circumstances in which they were written, it is undisputably clear that both had been on terms of an unnatural intimacy and that Musa had refused to continue this connexion with Ishaq."

Regarding the alleged sodomy between Musa and Siddiq, the learned Sessions Judge expressed his opinion in para. 29 in the following words :

"The friendship between Musa and Siddiq was extraordinary and could only be explained by the fact that they also practised sodomy . . . . . although I consider it must have taken place, I cannot hold that it has been proved. At any rate, there can be no doubt of the existence of a strong friendship between these two."

In arriving at the conclusions mentioned above, the learned Sessions Judge has mainly relied on the following facts :

1. Taunt "Ishaq ka gandu" uttered by Wali Mohd. ; 2. Letters P-21 to 51 written by Ishaq, and P. 52 to 62 in Musa's handwriting, and, 3. Siddiq's statement.

(The learned Judges discussed the evidence and proceeded.) We do not find any reliable material on record from which we could infer that Ishaq and Musa were addicted to sodomy, and, find it difficult to believe that a passive agent would resent the overtures of the active agent, to such an extent, that he will try to get rid of him by murdering him.

The evidence of Siddiq, P. W. 1, the approver who is 14 years of age, has to be considered next He says that he was present at the murder and saw Musa killing Ishaq. He is a competent witness against Musa, and a conviction will not be illegal if it proceeds upon the uncorroborated testimony of Siddiq, according to S. 133, Evidence Act, but this absolute rule of law, as regards the evidence of accomplices, is subject to a rule of guidance which we should also regard and it is contained in illustration (b) to S 114 and runs as follows .

"That an accomplice is unworthy of credit unless he is corroborated in material particulars."

We will first examine the evidence of Siddiq to find out if he is a reliable witness and later on, see if he is corroborated in material particulars

* * * *

It seems to us that Musa had gone late to the Mosque for the taravi prayers, and after the prayers Musa and Ishaq had gone towards the bridge, and Siddiq went away towards his house, and Ishaq went back to the mosque This is the story which Siddiq had given out first and is corroborated by P. W. 3, Ismail, who was in the mosque that night. Ismail stated before the Sessions Judge that he saw Musa at lamplight, that night, but not again that night, that Ishaq went out to take his food after taravi prayers and returned to the mosque at 10-30 p. m. that Siddiq had come twice to the mosque during the absence of Ishaq and had enquired about him, that Siddiq came again at 11-30 p. m., and asked Ishaq if he was going out to wake up people for sehri, that Ishaq went to sleep after that, and that at about 2 a. m. he heard some one shout for Ishaq and he went out. This witness when reminded of his statement made before the committing Magistrate, admitted that he had stated that he had seen Musa coming at midnight, and explained later on in cross-examination that as Siddiq had told him that the man who had taken out Ishaq was Musa and, therefore, he had mentioned Musa's name. To the questions put by Court, this witness replied that it was a dark night, and the man who came for Ishaq first called from outside the gate and then

came inside and entered the hujra and was 40 paces from him. This witness according to his own statement was under police surveillance for a week after the occurrence and was staying in the Police Chauki. He has made different statements about the person who came to call Ishaq and finally stated that he did not recognize the man who had come to the mosque to call Ishaq at 2 a. m. If his statement about the departure of Ishaq from the mosque at about 2 a. m. is correct, in that case, the statement of Siddiq cannot be true, and if Siddiq's statement is true, the statement of Ismail must be false. The witness has made different statements about the persons who had come to call Ishaq and, therefore, reliance cannot be placed on his statement.

The learned Sessions Judge has made the following endorsement on the back of Ex. P-2, Ismail's statement, made before the committing Magistrate :

" Relevant portions read in Court and admitted under S. 288, Criminal P. C "

Ismail was examined on 9th July 1928, in the Sessions Court and the order-sheet of that date does not contain any entry about treating as evidence in the case under S 288, Criminal P C , the evidence of Ismail recorded under Chap. 18. There is no doubt that the evidence of Ismail as contained in Ex P-72 was brought on the Sessions record on 9th July 1928, but this ought to have been done, with full notice to the conductors of the prosecution and defence. The following additional ground was filed in this Court :

" 1. That the lower Court was wrong in transferring the statement of P. W. 2, Ismail made to the committing Magistrate after close of the case under S. 288, Criminal P C , without intimating even his intention to the accused so as to enable him to cross-examine the witness thereon, and this illegality has materially prejudiced your appellant (S. 32). "

There is nothing on record to show that the Court informed the accused, that he was going to treat as evidence under S. 288, Criminal P. C., the evidence of Ismail. The course adopted is contrary to practice and inconsistent with all rules regulating the admissibility of evidence The endorsement mentioned that

" relevant portions read in Court and admitted under S. 288, Criminal P. C. "

We find it impossible, to find out either from the deposition of P. W. 3, Ismail recorded on 9th July 1928, or from Ex. P-72 the relevant portions which were read out in Court, because the relevant portions have neither been mentioned nor marked. Under S. 288, Criminal P. C., the whole of the previous statement is to be treated as evidence and not only portions of it, and therefore, it was essential to put the whole of it to the witness and then after giving notice to the prosecution and the defence, it could be brought on record under S 288, Criminal P. C. It seems to us that the portions which were put to the witnesses were put for the purpose of contradicting him, rather than anything else. The evidence of such witnesses who have resiled from their former statements cannot be relied upon for supporting a case of this sort. The evidence of Ismail was wrongly taken on the record under S. 288, Criminal P. C., and we have no alternative but to reject it.

Wazir D W. 4, is another witness who speaks about seeing Musa at the door of the mosque and Ishaq and Musa entering the hujra. He must have gone to the mosque, if he did at all, at about 10 p. m and seen Ismail sleeping there. Ismail knew Wazir and stated definitely that Wazir did not come to the mosque that night Each and every important prosecution witness in this case has either made different, irreconcilable, contradictory statements or is contradicted by another prosecution witness. We find it unsafe to rely on such witnesses

The learned Sessions Judge inspected the spot on 11th July 1928, but failed to record a memorandum of the relevant facts observed at the inspection, as he was bound to do under S. 539-B, Criminal P. C , and wrote the following in para. 39 of his judgment :

" Having inspected the place mentioned in the evidence, I am satisfied that the uncorroborated portions of Siddiq's testimony are true. "

The learned Judge ought to have stated definitely, what uncorroborated portions of Siddiq's testimony were found by him to be true, on spot inspection. As nothing has been mentioned in the judgment, we have no means of knowing what the learned Judge had in his mind when he wrote what he has written about the corroboration of uncorroborated portions of Siddiq's evidence, and therefore, we have no alternative but to exclude that portion of the judgment, while consider-

ing this case. In *Hriday Govinda Sur* v. *Emperor* (1); Newbould and Mukerjee, JJ., held that

"The omission to place on the record the memorandum of a local inspection is an illegality vitiating the conviction, and not an irregularity curable by the absence of any prejudice resulting from the default,"

and in a later case reported as *Forbes* v. *Muhammad Ali Haidar Khan* (2); Walmsley and B. B. Ghose, JJ., held that

"The omission to record a memorandum under S. 539-B, Criminal P. C. in an inquiry under S. 145 is not an illegality vitiating the proceeding, but an irregularity which does not affect it in the absence of prejudice to the parties."

The accused is certainly prejudiced because the learned Sessions Judge relied on his own impression, received at the spot inspection, in coming to the conclusion that the uncorroborated portions of Siddiq's testimony are true, but in this case, as we have decided, for reasons already given, to exclude that portion of the judgment, we do not consider it necessary to order a retrial.

The following articles which were seized either from the person of the appellant or from his house, have been found to be stained with human blood:

Article *S* Pyjama; Art. *V* Tape; Art. *P* Shirt; Art. *Q* Pyjama, Art. *O* Battua or purse.

S and *V* were seized on 19th March 1928, *P* and *Q* were seized on 20th March 1928 and *O* on 21st March 1928. Siddiq definitely stated that Musa was wearing that night shirt, pyjama *S* and coat *R*. Coat article *R* was found to be blood-stained but as the stains were disintegrated, their origin could not be determined. The only article which, therefore, remains is article *S*, the pyjama. The appellant has offered an explanation as to how the pyjama came to be stained with blood and has examined a witness in support of his statement. The explanation seems to be a plausible one and may be quite true. Anyhow we cannot infer from these human blood-stains on the pyjama, that Siddiq is speaking the truth or that Musa got these stains when he murdered Ishaq. The presence of other clothes stained with human blood, about which the prosecution has nothing to say, beyond producing them in Court, and which were certainly not worn by Musa when he committed the murder, takes away the significance if any, of finding blood-stained clothes with the appellant. No importance can be attached to the blood-stained clothes in this case.

Article *O* was seized on 21st March 1928, from Musa's house but he did not admit that it belonged to him. The prosecution tried to prove by examining P. W. 24, Alidad Khan that the purse belonged to Ishaq but Alidad Khan expressed his inability to identify it. There is no reliable evidence to show that Art. O belonged to Ishaq and the learned Sessions Judge seems to be wrong in writing in para. 41 of the judgment that the battua Ex. O is admittedly his (i. e. Musa's) property. The finding of a blood-stained purse in the house of Musa, which has not been proved to be that of Ishaq, cannot be said to be a particular which corroborates the statement of Siddiq.

The appellant Musa was sent to Assistant Surgeon Ghulam Ali for examination on 19th March 1928, as some bruises and scratches were seen on his person. The marks were very faint and were observed through a magnifying glass Mr. Ghulam Ali opined that the scratches were very superficial and could be caused by the nails of the accused or by the nails of another person during a struggle or by thorns, if a man falls on a bush of thorns. The medical evidence is consistent with the prosecution theory, as well as with the case put forward by the appellant. There were scratches on the left side of the chest and an abrasion on the right shoulder, which could not be caused by the deceased during the struggle, as the appellant was wearing a shirt and a coat. The scratches and an abrasion, therefore, by themselves do not prove anything.

There are certain other matters, e. g., discovery of blood-stains on the rail at point 1, discovery of blood-stains on the iron fencing at point 12, presence of rose petals near the corpse. Rs. 12-9-0 seized from Ajmeri on 21st March 1928, mentioned in paras. 40 and 41 of the lower Court's judgment, which have been perhaps considered by the learned Sessions Judge, as "the leading circumstances" of Siddiq's story, which may be regarded as corroborating the statement of the approver Siddiq. These are not material particulars and do not afford such corroboration of the approver's statement, as to make his statement reliable.

(1) A. I. R. 1924 Cal. 1305=52 Cal. 148.
(2) A. I. R. 1925 Cal. 1246=53 Cal. 46.

After a careful consideration of the entire evidence in the case, we are of opinion, that the charge under S. 302, I. P. C., has not been established against Musa, and, therefore, he is acquitted.

V.B /R.K. *Appeal allowed.*

A. I. R. 1929 Nagpur 237

MOHIUDDIN, A. J. C.

Manbodh Singh—Applicant.

v

Jhaboolal and *others* — Non-applicants.

Criminal Revn No 389 of 1928, Decided on 20th December 1928, against order of Sess. Judge, Hoshangabad, D/- 30th June 1928, in Criminal Revn. No. 2 of 1928.

Criminal P. C., S. 233—No question of illegal joint trial arises when accused persons are discharged under S. 253—Criminal P. C., S. 253.

There is no provision in the Criminal Procedure Code requiring a separate inquiry in respect of each accused person. The provision contained in S. 233 relates to separate trials only. Hence no question of an illegal joint trial arises when the accused persons are discharged under S. 253: 9 *N. L. R.* 42, *Rel. on.*; 4 *N.L.R.* 71 and 13 *N. L. R.* 35, *Dist.* [P 237 C 2]

Abdul Razak—for Applicant.

Fida Hussain—for Non-applicants.

Order.—Sub-Judge Sohagpur, filed a complaint against Jhaboolal, Debisa and Premchand in the Court of Sub-Divisional Magistrate, Sohagpur. from whose file the case was transferred to the file of Mr. Steinhoff, Magistrate, First Class, Hoshangabad, who, on 18th February, 1928, discharged the accused. Manbodh Singh filed a revision application in the Court of Sessions Judge, Hoshangabad, which was rejected on 30th June 1928. He has now moved this Court by means of a revision application and prays that the District Magistrate be directed to hold a further inquiry into the case. The first point which was urged was that the joint trial of the three accused was contrary to law and illegal, and a separate trial of each accused should be ordered. In this connexion the rulings of this Court reported as *Emperor* v. *Balwant Singh* (1) and *Gunwant* v. *Emperor* (2) were cited. In *Emperor* v. *Balwant Singh* (1) there was a joint trial of six persons, based on a medley of unconnected transactions some joint and others several, and in *Gunwant* v. *Emperor* (2) the scribe and the attesting witnesses of an alleged forged document were tried together. In both the cases it was held that the joint trial was illegal. But these cases have no bearing on the present case, in which there has been no trial at all but only an inquiry. As pointed out by Drake Brockman, J. C. in *Manna* v. *Emperor* (3).:

"In a warrant case the trial proper does not begin until the accused is charged and called upon to answer."

A Court seized of a case can at almost any point upto actual judgment separate the trials of persons or offences and in this case, if the learned Magistrate had come to the conclusion that a prima facie case had been made out against the non-applicants, he could have, if necessary, held a separate trial, for each accused As the case never reached that stage, no question of an illegal joint trial arises in this case. There is no provision in in the Criminal Procedure Code requiring a separate inquiry in respect of each accused person, the provision contained in S 233 of the Code relates to separate trials only. The procedure adopted in the case is correct and the point urged does not affect the inquiry which was held It was next urged that the circumstantial evidence of the following fact which proves the offence, was not properly considered:

(1) Omission to mention the chitti in the sale-deed.

(2) Omission to mention the payment of Rs. 400 and,

(3) The existence of Ex. P. 5 which is partly in the handwriting of the non-applicant Jhabboolal.

The above facts, if correct, may raise a suspicion against the correctness of the date mentioned in the receipt but do not prove conclusively that the chitti was really antedated. There is no reference in the sale-deed about the chitti but there is a reference about a previous agreement which perhaps, was meant for the chitti, Ex. P-5 which is a list of the tenants who were in arrears does not

(1) [1908] 4 N. L. R. 71.

(2) [1917] 18 N. L. R. 35=38 I. C. 723=18 Cr. L. J. 839.

(3) [1918] 9 N. L. R. 42=19 I. C.926=14 Cr. L. J. 230.

really prove anything. Jhaboolal denied the fact that the Ex. P-5 was in his handwriting and there is no independent evidence on the point except the statement of Kamod Singh who stated that a portion of Ex. P-5 was written by Jhaboolal. Under the circumstances of this case no reliance could be placed on the statement of Kamod Singh on that point, when no other evidence was adduced on the point The evidence adduced on behalf of the prosecution was carefully considered and the non-applicants were discharged, because a prima facie case was not made out against them. The order of discharge is neither perverse nor incorrect and, therefore, no interference is necessary.

The application is dismissed.

P.N./R K. *Revision dismissed*

A. I. R. 1929 Nagpur 238

FINDLAY, J. C.

Gopaldeo—Applicant.

v.

Ratni—Non-Applicant.

Criminal Revn. No. 271 of 1928, Decided on 23rd August 1928, against order of Sub-Divisional Mag., Nagpur, D/- 22nd May 1928.

Criminal P. C., S. 488 (5)—Order of maintenance allowance passed in wife's favour—Single act of adultery on her part does not entitle husband to discontinue allowance.

Where an order of maintenance allowance is passed under S. 488 in favour of a wife, High Court will not disturb it in revision unless the applicant satisfies the Court that his wife has, under S. 488 (5), become disentitled to the continuance of the allowance and a single solitary act of adultery on her part does not give the husband the right to discontinue it: 31 *Mad.* 185, *Dist.* [P 238 C 2]

M. K. Padhey and *Y. V. Jakatdar*—for Applicant.

W. R. Puranik—for Non-Applicant.

Order. — The applicant Gopaldeo Raghvi applies for revision of an order of the Sub-Divisional Magistrate, Saoner, dated 22nd May of this year, ordering him to pay certain arrears of maintenance allowance to the non-applicant, his wife Mt. Ratni. The latter woman obtained an order in her favour on 10th October 1923, and she had, in due course, applied for payment of the allowance for three months from 10th December 1927. The applicant, as on previous occasions, once more raised the contention, hitherto unsuccessful, that the non-applicant was living in adultery and it is undoubtedly true that, about 8th March she had advanced some seven months in pregnancy but says that she had meanwhile had intercourse with her husband. The lower Court, after a careful survey of the evidence, has disbelieved the contention of the applicant that she was living in adultery with one Pandya Mahar, and his review of that evidence is, in my opinion, unexceptionable. I agree with the Magistrate that, if there were truth in this allegation Pandya would undoubtedly, when accused, have attempted to save himself at the expense of the non-applicant Even, however, if I assume that the non-applicant's present pregnancy was the result of a single act of adultery, which is the utmost extent I can go to in favour of the present applicant on the evidence on record, I cannot see that the applicant's case at present is much advanced.

I have been referred to a decision of the Madras High Court in *Ponnayee* v. *Periya Mooppan* (1) in which Benson and Miller, JJ , were not prepared to interfere with the discretion exercised by a Magistrate in refusing to grant the maintenance allowance because the applicant there had been guilty of adultery with a low caste man and had been outcasted in consequence. That decision appears to me quite inapposite in the present case. I am not concerned with the order of maintenance which has been passed long ago. Before that order can be disturbed, the applicant has to satisfy the Court that his wife has, under sub-S. (5), S. 488, Criminal P. C., become disentitled to the continuance of the allowance, and this he has most certainly not done in the present case. His attempt to dispute the payment of the arrears seems only one more vexatious effort to avoid a responsibility which has already been imposed upon him in the previous proceedings.

I see no reason, therefore, to interfere with the order of the Magistrate for the payment of the arrears in question, and the present application is dismissed. In the circumstances of the case, I order the applicant to pay to the non-appli-

(1) [1908] 31 Mad. 185=18 M. L. J. 150.

cant Rs. 10 in respect of costs to cover Pleader's fees and the like, which she must have incurred in this Court.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Nagpur 239

SUBHEDAR, A. J. C.

Bakhatlal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 423 of 1928, Decided on 5th March 1929, against judgment of Dist. Magistrate, Raipur, D/- 4th October 1928, in Criminal Appeal No. 134 of 1928

Penal Code, S. 265—Principal ingredient of offence under S. 265 is the use of false measure with intent to defraud.

Where the accused was getting his grain measured with two kathas, which he borrowed for the purpose from another person, who told him that the kathas were passed by the Notified Area Committee and which were seized by the police, who found them to measure five tolas more than the standard katha and prosecuted the accused who was convicted under S. 265.

Held, that the accused could not be convicted unless it was proved that he knew that the kathas were incorrect or that before he used them, he tampered with them. Unless this was established, fraudulent intention on the part of the accused so as to convict him under S. 265 could not be presumed, one of the principal ingredients of the offence being the use of false measure with intent to defraud.

[P 240 C 1]

D N. Chowdhry—for Applicant

Order—The facts of the case are that on 4th April 1928 in the grain market of the Notified Area Committee of Bhatapara the applicant had purchased some cart loads of wheat and while the same were being measured by two kathas bearing Nos 274 and 275, they were seized by the police who found each of them to measure five tolas more of grain than the standard katha prescribed by the Notified Area Committee. The applicant was accordingly challaned under S. 265, I. P. C, for having fraudulently used a false katha measure and was convicted by Mr. B. L. Verma, Magistrate 2nd, Class, Baloda Bazar, and sentenced to three months rigorous imprisonment and a fine of Rs 100. In appeal the District Magistrate, Raipur, maintained the conviction but increased the fine to Rs. 300 and remitted the sentence of imprisonment.

The applicant has, therefore, come up in revision to this Court and his learned advocate urged that in the absence of any evidence or circumstances showing that the accused knew of the incorrectness of the katha measure in question when he used them, he could not be said to have used them fraudulently within the meaning of S. 265, I. P .C. It is no doubt established by the evidence on record in the case that the applicant did not himself possess any kathas, that those that were seized by police belonged to one Jeetmal from whom the accused had borrowed them on the day in question, and that these kathas were, as a matter of fact, verified by the Officers of the Notified Area Committee, on 21st March 1928, with the result that one of them was found to be correct and the other short by only two tolas. It is also proved by actual test at the trial that these two kathas, on a comparison with the standard one, measured five tolas more and therefore they were false measures within the meaning of S. 265, I. P. C.

In para. 5 of his judgment in spite of the finding that Jeetmal had told the accused, at the time when he lent the kathas, that they had been passed by the Notified Area Committee, the learned Magistrate presumes fraudulent intention on the part of the accused because, according to him, it was possible that the accused could tamper with the kathas on the way. He further states that the accused:

" could very well do it when he was going to make a large profit by its use and at the same time be not responsible for it as the kathas belonged to another man."

It is unfortunate that the learned District Magistrate has fallen into the same error in making a similar presumption for, after concurring with the finding of the first Court that the kathas in question were incorrect, the learned District Magistrate in para. 2 of his judgment states that:

" For the second question therefore whether the false kathas were used fraudulently I must find that they were so fraudulently used on the principle that a man must be presumed to know the natural result of his actions."

The learned District Magistrate even goes further than the trying Magistrate in presuming that the kathas in question

were incorrect even when the Notified Area Committee certified them as correct and he could not understand

"the Notified Area Committee certifying as correct katha with a wobbling "sigcutter."

It was the duty of the prosecution to lead some evidence to prove that before he brought the kathas from Jeetmal the accused knew them to be incorrect or that before he used them he tampered with them and there being no evidence on these points the lower Courts could not, in my opinion, presume fraudulent intention on the part of the accused so as to convict him under S 265, I. P. C., one of the principal ingredients of the offence being the use of false measure with intent to defraud.

For the reasons set forth above I allow the application for revision and set aside the conviction of the applicant. The fine, if paid, will be refunded.

K.N /R.K. *Revision allowed.*

A. I. R. 1929 Nagpur 240

SUBHEDAR, A. J. C.

Raghya—Accused—Applicant.

v.

Emperor

Criminal Revn No. 79-B of 1929, Decided on 21st June 1929 against judgment of Sub-Divisional Mag., Basim, D/- 17th March 1929.

Criminal P. C. (5 of 1898), S. 162—During trial after charge was framed accused desiring to cross-examine prosecution witnesses further and applying for copies of statements made by witnesses to police—Accused should be allowed such copies and judgment should not be passed without disposing of such application.

If during the course of the trial after the charge is framed the accused desires to cross-examine prosecution witnesses further and applies to the trying Magistrate to grant him copies of the statements made by the witnesses to the police during the investigation, the Magistrate should allow him such copies and should not pass judgment without disposing of such application, and if the appellate Court finds that the statements of witness were recorded in the diary he should remand the case and allow the copies to the accused. *A. I. R.* 1929 *Rang.* 87, *Rel. on.*

[P 240 C 2]

D. T. Mangalmurti—for Applicant.

Order.—On 12th February 1929 the applicant was convicted by the Tahsildar and Magistrate, Second Class, Basim, of an offence under S. 354, I. P. C., and sentenced to four months rigorous imprisonment. His appeal to the Sub-Divisional Magistrate has been rejected and he comes up on revision to this Court The applicant has already undergone the sentence and therefore the decision of this application is only of an academical interest.

During the course of the trial after the charge was framed the accused desired to cross-examine the prosecution witnesses further and with that object on 22nd November 1928 he presented an application to the trying Magistrate to grant him copies of the statements made by the witnesses to the police during the investigation On 24th November 1928 the Magistrate recorded the following curious order on the face of the application :

"Ask S. I. if the statements are on separate papers or in the general diary. If latter copies cannot be given."

In the order sheet of the same date the Magistrate also noted the following order .

"Read application for copies of statements of P. Ws. made to police. Request S. I. through A. S. P. to send all papers in this connexion for my perusal and reference."

It does not appear from the record whether the police papers were sent to the trying Magistrate or not and judgment was apparently pronounced without disposing of the aforesaid application for copies. The learned Sub-Divisional Magistrate in disposing of the appeal found fault with the trying Magistrate in not passing any final order on the application for copies, but when he found that the statements of witnesses were recorded in the diary, he should have remanded the case and allowed the accused copies thereof as was done in the case of *Sulaiman Mohamed Bholai* v. *Emperor* (1). But this apparent illegality cannot now be cured because the accused has already undergone the sentence and his learned pleader very properly objects to a retrial being ordered. With these remarks the application is dismissed.

P.N./R.K. *Order accordingly.*

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(1) A. I. R. 1929 Rang. 87=6 Rang. 672.

A. I. R. 1929 Nagpur 241

SUBHEDAR, A. J C.

Sadia and *another* — Plaintiffs— Appellants.

v.

Ambhiria—Defendant—Respondent.

Second Appeal No. 359 of 1927, Decided on 11th March 1929, against decree of Dist. Judge, Bhandara, D/- 22nd March 1927, in Civil Appeal No. 112 of 1926

Contract Act, S. 65—Usufructuary mortgage executed by occupancy tenant in consideration of loan in contravention of Central Province Tenancy Act — Suit to eject mortgagee is governed by S. 65 and decree should be passed conditional on payment of loan.

Where an occupancy tenant of certain fields executed an unregistered usufructuary mortgage in consideration of a loan and the mortgagee got possession under it, a suit brought to eject the mortgagee from the fields will be governed by S. 65 and a decree will be passed conditional on mortgagor paying to the mortgagee the above loan, although the mortgage was in contravention of the provisions of Central Province Tenancy Act : 33 *All.* 779, *Foll.*; *A. I. R.* 1924 *Nag.* 132 , 15 *C.P.L.R.* 33, *Appl.*; *A. I. R.* 1922 *P. C.* 403, *Cons.* , 54 *I. C.* 794 ; *not Foll.* [P 243 C 1]

M. B. Niyogi—for Appellants.

W. R. Puranik—for Respondent.

Judgment.—The plaintiffs came to the first Court alleging that they were the occupancy tenants of fields 397 and 403 of mouza Mohagaon, Tahsil Gondia that their father sublet the said fields to the defendant for the year 1923-1924, and that after this period was over the defendant was wrongfully withholding possession though asked to give it up. The claim was to eject the defendant from the fields. The defendant pleaded that he was lawfully in possession of the fields by virtue of an unregistered usufructuary mortgage-deed which the father of the plaintiffs had executed in his favour, on 15th February 1923, in consideration of having taken a loan of Rs 300. It was, therefore, contended that so long as the debt was not paid off the defendant could not be ejected. In the alternative the defendant prayed that the plaintiffs should be put upon terms : if they repudiated the mortgage, they should get a decree for possession conditional upon their refunding the mortgage debt. The Second Class Subordinate Judge, Gondia, who tried the suit passed an unconditional decree in plaintiffs' favour for possession of the fields, but on appeal by the defendant, the learned District Judge, Bhandara, modified it by making it conditional upon the plaintiffs paying to the defendant Rs 300 which he found to have been received by the plaintiffs' father under the mortgage-deed (Ex. D-1). The plaintiffs have, therefore, come up in second appeal to this Court.

The only point argued by the learned advocate for the appellants was that the order for the refund of consideration of the mortgage debt passed by the lower appellate Court was wrong because once it was held that the transaction was void, being in contravention of the provisions of the Central Province Tenancy Act, the consideration for the contract was unlawful and the maxim *in pari delicto potior est conditio defendatis* applied, and therefore the money paid under such an illegal contract could not be recovered by the defendant. Reliance is placed on the case of *Bhure* v. *Sheogopal* (1), in support of this contention. That was a case in which the plaintiff sued to recover certain *sir* fields of which the defendants, soon after selling the village share to the plaintiff, had become occupancy tenants but had surrendered the same to the plaintiff. In the alternative a claim for refund of consideration was also made. The learned Judicial Commissioner found that the sale and the surrender being practically one transaction, the latter was void and confirmed the dismissal of the plaintiff's suit. In disposing of the claim for refund of consideration the learned Judge made the following observations :

"The actual position obtaining is that the defendants are in possession while the plaintiff seeks to enforce against them an agreement which is void. Both parties knew that when the sale and surrender were executed they were contravening the provisions of the Tenancy Act. The plaintiff as the defendants' creditor was certainly not less to blame than the defendants, and the maxim *in pari delicto, potior est conditio defendatis* would seem to apply. S. 65, Contract Act, has no application where the contract embodies a purpose known to be illegal to which both sides are parties. For similar cases I may refer to *Muridhar* v. *Pem Raj* (2) and *Dipan Rai* v. *Ram Khelawan Rao* (3). The position in *Bahoran Upadhya* v

(1) [1920] 54 I.C. 794.
(2) [1900] 22 All. 205=(1900) A.W.N. 10.
(3) [1910] 32 All. 389=5 I.C. 557=7 A.L.J. 390.

Uttamgir (4), was practically the reverse of what obtains here . in that case the plaintiff sued the mortgagee of an occupancy holding to recover possession upon the ground that the mortgage was void under the Tenancy Act without repaying the mortgagee the money he had received, and it was held on the principle that he who seeks equity must do equity that the mortgagor could not retain the mortgage money in addition to regaining the property."

It will, therefore, appear clear that on the facts found in the case that possession was not transferred the learned Judicial Commissioner disallowed the claim for refund following the two Allahabad cases in which the facts were similar to those in the case before him. The case of *Bohoran Upadhya* v. *Uttamgir* (4), the facts of which are identical with those of the present case, was only distinguished. The case cited can, therefore, afford no precedent for the decision of the present case. On the facts the present case is similar to the case of *Bohoran Upadhya* v *Uttamgir* (4) and the law propounded therein must, in my opinion, be followed for the decision of the present case. In a later case decided by Prideaux, A. J. C., and reported as *Narayan* v. *Motisa* (5) the dictum laid down is that :

"before an illegal purpose is carried out, wholly or in part, and when the parties are in pari delicto, the general rule is that no suit will lie to recover money paid under the unlawful agreement. But when the parties have done nothing illegal with their eyes open but have been caught by the fiction that they should have known the law, a suit for refund of the consideration is maintainable."

Applying this principle to the present case, it is evident that the plaintiffs' father as well as the defendant being mere agricultural rustics could not be expected to know the intricacies of the tenancy law as to transfer of holdings, and have been caught by the fiction that they should have known the law. It would be manifestly unjust that the defendant should be made to lose both money and the fields, and equity demands that in such a case as the present restitution must be made An earlier case of this Court reported as *Durgai* v. *Ajab Singh* (6), was also decided on the same equitable principles and the plaintiffs there were given a decree for possession conditional upon their refunding a proportionate part of premium received by them under an illegal lease which they wanted to avoid.

There only remains the consideration of two other cases cited by the learned advocate for the respondents which also support his case. They are *Vijendra Mohan* v. *Monorama Dasi* (7) and *Harnath Kuar* v *Indar Bahadur Singh* (8). In the first of these cases the dispute was between the two rival purchasers of certain properties belonging to a minor and conveyed to them separately by the certificated guardian at different times. The plaintiff was the subsequent purchaser and sought to oust the defendant, who was the prior purchaser, from possession of the properties on the ground that his purchase was not legal because of certain irregularities committed by the guardian in effecting the sale. In confirming the dismissal of the plaintiff's claim the learned Judges made the following observations :

"Nothing can be more unjust than to permit a person to sell a tract of land and take the purchase money, and then, because the sale happens to be informal and void, to allow him or, which is the same thing, the person on whose behalf he acts, to recover back the land and keep the money , any Code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect or a very inequitable one."

In the second case the plaintiff had filed the suit to recover possession of certain properties conveyed to him in consideration of the advances received by the defendant as loan, and in the alternative for recovery of the money. It was found that the sale was void at its inception because the defendant had, at the date of transfer, no interest capable of transfer but merely an expectancy. The claim for possession was, therefore, disallowed, but that for the recovery of money decreed on the ground that S 65, Contract Act, governed the case. The controversy that so long raged as to the correct interpretation of the provisions of S. 65, Contract Act, was thus set at rest by the following pronouncement to be found in the judgment of their Lordships of the Privy Council :

"The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from S. 2. By Cl. (e) every promise and every set of promise forming the consideration for each other is an agreement, and by Cl. (h) an agreement, enforceable by law

(4) [1911] 33 All. 779=12 I.C. 112=9 A.L.J. 981.
(5) A.I.R. 1924 Nag. 132=20 N.L.R. 87.
(6) [1902] 15 C. P. L. R. 33.
(7) A. I. R. 1922 Cal. 150=49 Cal. 911.
(8) A. I. R. 1922 P. C. 403=45 All. 179=26 C. C. 223=50 I. A. 69 (P.C.).

is a contract. S. 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By Cl. (g) an agreement not enforceable by law is said to be void. An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated."

In the light of these observations of the Privy Council the view of the learned Judicial Commissioner expressed in the case of *Bhure* v. *Sheogopal* (1) that S. 65, Contract Act, has no application to the case of contracts which are void ab initio must, therefore, be held to be no longer good law. The present case must also be governed therefore by S. 65, Contract Act. Upon a review, therefore, of the authorities considered above, I hold that the plaintiffs were rightly directed to pay, before receiving possession of the holding, the amount of Rs 300 to the defendant which their father had received as consideration for the transfer The appeal fails and is dismissed with all costs,

P.N./R.K. *Appeal dismissed.*

A I. R. 1929 Nagpur 243

HALLIFAX AND KINKHEDE, A. J. Cs.

Commissioner of Income-tax—Applicant.

v.

Jainarain Motiram—Non-Applicant.

Misc. Ref. No. 20-B of 1927, Decided on 18th July 1928, made by applicant on 14th December 1927.

(a) Income-tax Act, S. 62 (2)—Question of law not raised before Commissioner—High Court can direct to refer if it arises out of his order.

An assessee is entitled to move the High Court for a direction to the Commissioner to refer questions of law raised by him in his petition to the High Court even though they may not have been raised before him in the course of the proceedings under S. 62 (2) provided they are questions of law arising out of the Commissioner's order passed in appeal. [P 244 C 2]

(b) Income-tax Act, S. 23 (4)—If assessee disputes authority of the Income-tax Department to adopt flat rate, then question of law may arise for consideration whether in absence of reliable data of income from certain source, Income-tax Officer can make assessment based on formula by taking certain percentage of gross turnover as representing fair margin of profit.

If an assessee disputes in his statement the authority of the Income-tax Department to adopt a flat rate, then a question of law may arise for consideration of High Court as to whether in the absence of other reliable data as to income of an assessee from a certain source an Income-tax Officer is justified in making an assessment based on a formula deduced by taking a certain percentage of the gross turnover as representing a fair margin of profit. But if assessee admits that he has nothing to say if some percentage is adopted to find out income from a particular source, it is not open to him to urge merely the question of the reasonableness of the extent of the percentage adopted. [P 245 C 1]

(c) Income-tax Act, S. 10 (2)—Assessee can claim deduction of expenditure only if expenditure is actually incurred or liability incurred is satisfied before close of year—Income-tax Act, S. 11 (2).

An assessee is not entitled to deduct an expenditure (adat, interest etc.,) not actually incurred by him before the close of the account year and a deduction can be claimed only if the expenditure is actually incurred or the liability incurred is satisfied before the close of the year. [P 245 C 2]

D. N. Choudhary—for Applicant.

A V. Khare—for Non-Applicant.

Kinkhede, A. J C—This is a case referred for decision to this Court by the Commissioner of Income-tax under S. 66 (3), Income-tax Act (11 of 1922), upon a requisition made by this Court as per its order dated 16th February 1927. The facts are stated in sufficient detail by the Commissioner of Income-tax in his reference and I need not repeat them here The assessee had filed a return showing Rs. 20,374-9-6 as his approximate (Ajmasa) income for the year ending Divali 1922. He could not vouchsafe for the correctness of his figures as required by law, as is clear from the word "Ajmasa" (approximately) used by him. This was not accepted, as the Assistant Commissioner himself puts it, "as he was said to have a large trade in cotton." The Assistant Commissioner asked him to produce his account books which being produced were inspected and found to be "unclosed." He was asked to close them, but he pleaded his inability to close them for want of accounts from other firms with which he had dealings.

After some investigation the Assistant Commissioner assessed him on a total income of Rs. 1,79,905 and by an order dated 20th February 1924 directed him

to pay Rs. 17,453-10-0 on account of income-tax and super-tax. The assessee appealed to the Commissioner who ordered reduction of tax by Rs. 2,884-5-0. Not being satisfied he applied to the Commissioner of Income-tax to state his case on points formulated by him but the Commissioner thinking that they did not constitute points of law, asked him to submit a revised petition But even then the Commissioner was not satisfied, and the assessee then put in a third application through a pleader. Still it was not clear

"as to what point of law arose out of this case and on what point of law the reference to the High Court was sought."

The application was therefore refused.

The assessee then presented a petition to this Court setting forth the points of law arising out of the Commissioner's order. Both parties were heard, and this Court passed the order dated 16th February 1927 compelling the Commissioner to make the reference. The Commissioner in submitting the case as ordered has raised a preliminary question and requested this Court to decide it before giving its opinion on the points raised. That question is whether or not an assessee is entitled to move the High Court for a direction to the Commissioner to refer questions of law which have not been raised before him in the course of the proceedings under S. 66 (2) of the Income-tax Act ?

Before dealing with the question referred it is necessary to dispose of this preliminary objection. In my opinion, the wording of S 66 (2) does not bear the construction put by the Commissioner. It does not lay on the assessee the duty of formulating any question of law, although it is open to him to do so for the benefit of the Commissioner. It ought to be sufficient for him to indicate that the order of the Commissioner upholding the assessment gives rise to questions of law and that he wants him to state his case for the decision of this Court. The law casts on the Commissioner the duty of drawing up a statement of the case. Had the wording of the section been that the petition for reference shall be drawn up in the form laid down for a memo of appeal under S. 30 (3) or 32 (2), Income-tax Act, and shall also specify the questions of law, then there was some force in the contention raised by the Commissioner. No rules or departmental instructions have been brought to my notice by the learned counsel who appeared for the Commissioner, making it obligatory on the assessee to specify or even to formulate the questions of law arising out of the Commissioner's order at the time when he moves the Commissioner to state his case under S 66 of the Act. It thus follows that the duty of stating the case for the decision of the High Court in such a clear manner as "to enable it to determine the question raised thereby" rests on the Commissioner and not on the assessee. After the Commissioner refused to state his case, the law vests in the assessee the right to move this Court for compelling the Commissioner to make a reference on the ground that his case involves questions of law, and this Court on being satisfied that the Commissioner's view that no questions of law are involved is not correct, can issue directions to him to state the case. It is sufficient for the purposes of the reference if the questions set forth in the petition to this Court arise out of the Commissioner's order passed under S. 31 or S 32 of the Act. I therefore hold that an assessee is entitled to move the High Court for a direction to the Commissioner to refer questions of law raised by him in his petition to this Court even though they may not have been raised before him in the course of the proceedings under S. 66 (2), Income-tax Act, provided that they are questions of law arising out of the Commissioner's order passed in appeal. For these reasons I overrule the preliminary objection and proceed to deal with the questions involved in the reference.

The Assistant Commissioner stated in his order of assessment that the accounts of the Shegaon business which were examined and scrutinized by the Income-tax Officer as also by himself disclosed that they were "unclosed accounts" and that the total turnover was of Rs 16,48,928. The Income-tax Officer therefore applied 2½ per cent rate, whereas the Assistant Commissioner reduced it to 2 per cent. The Commissioner has upheld this rate. He says it is not an unreasonable or arbitrary rate.

The scheme of the Income-tax Act shows that under S. 22 and S. 23 (4) it

is the duty of the assessee to supply the materials of his assessment. If he fails to supply or having supplied fails to substantiate the same under S. 23 (3) the Income-tax Officer has still "to assess the total income of the assessee " to the best of his judgment " as contemplated by S. 23 (4). The assessee's accounts being unclosed he was unable to supply the full material, much less to substantiate the same. Realizing this difficulty the assessee's agent in his oral statement dated 11th January 1924 before the Income-tax Officer expressly admitted that he had nothing to say if some fair percentage is adopted to find out his income from the cotton business of Shegaon. The owner of the shop also did not object to the adoption of a percentage. He simply objected to the rate of 2½ per cent as being high. On the facts ascertained by the Assistant Commissioner in his enquiry he had no reason to think that the rate of 2 per cent was unreasonable and the Commissioner also has confirmed the same. The reasonableness or otherwise of the rate applied cannot be a question of law which he can agitate before us. Had the assessee disputed in his statement, the authority of the Income-tax Department to adopt a flat rate, then I think a question of law might have arisen for consideration "as " to whether in the absence of other reliable data as to income of an assessee from a certain source an Income tax Officer is justified in making an assesment based on a formula deduced by taking a certain percentage of the gross turnover as representing a fair margin of profit."

But on the admission made by the assessee in this behalf that question does not arise. Therefore it follows that it is not open to him to argue merely the question of the unreasonableness of the extent of the percentage adopted.

I am satisfied that the opinion given by the Commissioner on the second point leaves no ground for complaint. I therefore hold that it does not raise any question of law.

I now come to the third point. It raises a question of law whether the assessee is not entitled in law to deduct the adat charges Rs. 4,692-6-0 payable but not paid to the adatya from the amount of the gross income derived from the business of purchases and sales of the Telahara branch carried on by him in the adat of another firm, irrespective of the fact that the actual payment of the adat charges came to be made to the adatya when the whole account was settled later on. It is an admitted fact that even though the liability for adat charges was incurred during the sambat year 1978-79, the same had not been paid to the adatya before the close of the year. The Commissioner was, therefore, right in disallowing this item as it was not " expenditure incurred " for earning the profits of the account year within the meaning of S. 10 (9) or S. 11 (2) of the said Act. No doubt it could be termed a liability incurred so long it is not satisfied. But it appears the Income-tax Act for obvious reasons does not take into account mere monetary obligations or liabilities incurred The Income-tax Commissioner was, therefore, right in refusing to allow this deduction

The sum of Rs 4,468-13-0 paid on account of interest to others for the business would certainly be debitable against the gross income of the business under S. 11 (2), Income-tax Act. The Commissioner's opinion shows that he might have allowed these deductions had the assessee furnished the necessary details and shown that the payment made was before the end of the account year. A part of this amount was paid after the assessment order was made, i. e., after the accounts were examined. Thus the Commissioner entertained doubts about the correctness of the debit and thought fit to disallow it. My answer to this question is that an assessee is not entitled to deduct any expenditure not actually incurred by him before the close of the account year and that a deduction can be claimed only if the expenditure is actually incurred or the liability incurred is satisfied before the close of the year.

Hallifax, A. J. C.—I agree with my learned brother in the general conclusion of his judgment delivered two days before my return from three months' leave. The petitioner has put in from time to time four lists of verbose and involved arguments or contentions. To understand them involves considerable labour, but they all seem to cover the same ground. My learned brother was " of opinion that the Commissioner's decision that no questions of law are involved is not correct " and required the Commissioner " to state the case and

refer it to this Court." The point of law which he was to refer, with his statement of the case on it, was not mentioned

It may be correct to say that the petitioner may raise questions in this Court which he never raised before the Commissioner, though it would certainly be difficult to do so, but that hardly needs consideration as no question, whether of law or of fact, was raised in this Court that had not already been raised three times before the Commissioner. But I am at a loss to see how the Commissioner can refer a question of law to the Court, with a statement of the case on it, unless it is formulated for him. The Commissioner was apparently aware of this, but he has courteously done his best by stating the case on all the points raised in the petition presented to this Court, whether of fact or law

But after a laborious examination of all the petitions I am still unable to discover a single question of law in any one of them. The only questions that emerge from them are these;

1. Was the income derived from the Shegaon business less than 2 per cent of the total " turnover " ?

2. Is money that a person owes, but has not paid and may never pay, money that he has expended ?.

3 Can a sum of Rs. 4,692-8-0 admittedly not expended during the year in question be called money expended in that year ?

4. Was a sum of Rs. 4,468-13-0 spent at all " for purposes of profession or vocation " or as interest ?

The Commissioner's answer in the negative to each of these questions of pure fact is undoubtedly correct, as my learned brother holds, and indeed it would be hard to answer any one of them incorrectly. But we are not concerned with questions of fact. I am of opinion further that the assessee should be ordered to pay the whole of the costs of these proceedings including a pleader's fee of Rs. 50.

P.N./R.K. *Reference answered.*

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* A. I. R. 1929 Nagpur 246

KINKHEDE, A. J. C.

Ramnath—Appellant.

v

Hazarilal—Respondent.

Misc. Appeal No. 23 of 1928, Decided on 19th October 1928, from decree of Addl. Dist. Judge, Narsinghpur, D/- 29th February 1928

(a) Interpretation of Statutes—General statute cannot be impliedly repealed by local or special statute.

A general statute cannot be treated as impliedly repealed by a local or special statute because ordinarily the general law of the country is not altered by special legislation made without particular reference to it. A statute must necessarily be repealed by express legislation. Repeal by implication, which whenever it occurs is the consequence of inconsistent legislation, should never be favoured and judicial interpretation should be directed to avoiding consequences which are inconvenient and unjust if this can be done without violence to the spirit or language of a statute. [P 249 C 1]

(b) Interpretation of Statutes — General words and phrases.

General words and phrases, however wide and comprehensive they may be in their literal sense must usually be construed as being limited to the actual objects of the Act and as not altering the law beyond. [P 249 C 1, 2]

(c) C. P. Tenancy Act (2 of 1920), S. 104 and C. P. Land Revenue Code (2 of 1917), S. 80—Mortgagee foreclosing mortgage without impleading owners of equity of redemption—Entry in settlement records on basis of that decree—Mortgagee cannot set up S. 80 and S. 104 to defeat right to redemption of owner of equity of redemption —Transfer of Property Act, S. 91.

On the principle that a man cannot take advantage of his own wrong, he may not plead in his own interest a self-created necessity, a mortgagee who forecloses a mortgagor, omitting to implead the owner of the equity of redemption as a party to the suit and at a time when he had left in him no interest to foreclose, cannot plead that the settlement entry based on a foreclosure, which brought him no part of the equity of redemption that had already vested in another person and gave him nothing beyond his own right as prior mortgagee, secured to him the status of an absolute occupancy tenant under the provisions of S. 80, Tenancy Act and S. 104, Land Revenue Code, and deprive the owner of the right of redemption which the Transfer of Property Act secures to him. [P 249 C 2]

*** (d) Civil P. C., O. 1, R. 9—Omission to join owners of equity of redemption in mortgage suit keeps intact rights of such persons and their title can only be impugned by separate suit.**

A mortgagee who forecloses his mortgagor or a person who purchases at a mortgage sale, behind the back of the owner of the equity of

redemption or of other persons interested in the said equity does not by foreclosure or purchase get the right to sue for khas possession of the property as against the transferee of the equity of redemption who were not parties to the suit on the mortgage, but his only remedy is to bring a suit against such transferee to have his right declared to sell or foreclose the property to satisfy his mortgage-debt. The principle is that omission to join keeps intact rights of persons not joined : 6 *Cal.* 317 , 11 *C. W. N.* 314 , *A. I. R.* 1923 *Cal.* 274 ; 19 *All.* 541 (*F.B.*) ; 21 *All.* 235 (*F.B.*) , 11 *A. L. J.* 362 ; *A. I. R.* 1921 *All.* 301 ; *A. I. R.* 1921 *All.* 339 (*F.B.*), 30 *Mad.* 500 ; and *A. I. R.* 1923 *Nag* 279, *Ref.* [P 250 C 1, 2]

J Sen—for Appellant.

N. G. Bose—for Respondent 1.

Judgment.—This is an appeal against an order of remand passed by the lower appellate Court. One Damodar was formerly an absolute occupancy tenant of fields old Nos. 150, 151, 152, 162, 163/1, 163/2, 164/1, 164/2, 165, 195 and 197, total area 29 83 of mouza Tinsara. Their new numbers are 109, 132, 133, 134, 160, 204, 205 and 206, area 29.83, rent Rs. 70. He mortgaged them all to plaintiff under a registered mortgage-deed, dated 10th August 1911. Subsequently he leased field No. 195=109 to one Godhan under a deed of lease, dated 25th January 1913 (Ex. P-14), for the period Samat 1970 to Samat 1984 and mortgaged the rest to him by a deed, dated 17th September 1915 (Ex. P-15). Thereafter he mortgaged on 17th February 1917 to Patiram and Barelal fields Nos. 150, 151, 152, 195 and 197 without possession and fields Nos. 162, 163/1, 163/2, 164/1, 164/2 and 165 with possession for Rs. 400. In execution of his own money decree against Damodar, defendant 1 Hazarilal purchased at auction all the aforesaid fields of the aggregate area of 29 83 acres rental Rs 70 on 27th June 1918, the auction sale being confirmed in his favour on 30th July 1918, and a sale certificate (Ex. 1-D-1) was issued to him on 14th August 1918.

In this way after the equity of redemption had become vested in virtue of the subsequent lease, mortgages and auction sale in different persons, the mortgagee plaintiff instituted his suit No. 227 of 1918 for foreclosure of the mortgaged property on 10th September 1918 only against his mortgagor and obtained a preliminary decree for foreclosure on 7th January 1919 (Ex. D-3) and made it absolute on 16th December 1919. In pursuance of this foreclosure decree the plaintiff alleges he got possession of the property foreclosed on 30th July 1921. He admits that the delivery of possession to him was formal, so far as the fields in the possession of Godhan and Patiram were concerned, and asserts that it was actual as regards the rest. He contends that having thus obtained actual physical possession of the fields bearing old Nos. 150-152, and 197, he was illegally dispossessed by Godhan and Hazarilal from old No 150=new No. 206, old No. 152= new No 205, area 1.11 and 7.10 acres on 24th June 1926, and from old No 197= new No. 160 area 2 39 in Jeth Samat 1983 He, therefore, instituted the present suit for ejecting the defendants as trespassers from the aforesaid three fields on 24th February 1927

Defendant Hazarilal alone contested the suit ; the representatives of Godhan did not. The defence was that plaintiff having failed to implead him as a party to the mortgage suit, his foreclosure decree, dated 16th December 1919, gave him no right to eject him and that his proper remedy was to let him redeem the mortgage and not to treat it as foreclosed even as against him. The plaintiff's allegation that he got into possession of the land in suit and was subsequently dispossessed by the defendants was of course denied by defendant Hazarilal, who asserted that, in pursuance of the right which he acquired by the purchase at auction, he got into possession of the fields on 13th July 1919 which was at any rate before the date of the foreclosure decree. He also raised the defence that plaintiff, not having taken possession of the land within two years of the date of his decree, had lost his right to the tenancy, and that he never was in possession, and was, therefore, never dispossessed by himself. He admitted the plaintiff's allegation that at the recent settlement there was a dispute between him and the plaintiff as regards the right to obtain the settlement parcha and that the same was granted to plaintiff. He, however, disputed the right of the plaintiff to eject him from the land merely on that ground, in the absence of a foreclosure decree against himself.

The first Court recorded oral pleadings and framed a few issues of a preliminary character and fixed the case for the evidence of parties. After some evidence

was gone into, the parties came to an understanding that, in case the Court held that defendant 1's right to redeem plaintiff was subsisting, he may be allowed to redeem the mortgage, in this suit, on certain terms. Issue 4 was accordingly amended and parties closed the case on the preliminary issues. As the Judge thought that the decision on the preliminary issues was sufficient for the decision of the case he proceeded to record the judgment in the case and decreed the plaintiff's suit against defendant 1 for possession and discharged the heirs of Godhan.

The defendant Hazarilal, therefore, appealed to the Court of the Additional District Judge, Narsinghpur, contending that the said decision was incorrect on several grounds, and chiefly on the ground that, in view of the agreement between the parties, they had altogether dispensed with the necessity of the Court's giving any findings on the questions of fact involved in issues 1 to 3 and simply invited it (the Court) to decide the legal question whether defendant 1 had a subsisting right of redemption in view of the fact that he was not joined as a party to the mortgage suit irrespective of the question whether the tenancy right of the respective parties had or had not become barred by limitation. It was also urged that defendant 1 had not produced his evidence, in view of the agreement arrived at, in support of his contentions

It will not be out of place to note here that the Court of first instance really went off the rail when it considered that the decision on the preliminary issues was sufficient to dispose of the case. It is undisputed that the case was brought to an abrupt close by virtue of the agreement of the parties; but the scope of the agreement was really misunderstood by the Judge of the first Court. It was not proper for that Court to take into consideration the one-sided evidence of possession and to base its findings on it, and then deduce the conclusion that defendant 1's equity of redemption was extinguished by the adverse possession of Damodar, and that he, therefore, had no subsisting right to redeem the plaintiff, and that the plaintiff's final decree for foreclosure furnished a starting point for his adverse possession, and perfected his title by prescription as against defendant 1. The Court also held that defendant 1, not having sued within one year for setting aside the settlement entry recording plaintiff as a tenant of the land, could not contest the latter's status as a tenant In this view of the case the plaintiff's suit was decreed. The defendant, therefore, appealed.

The learned Additional District Judge, however, upset the first Court's decision on the ground that the relation of mortgagor and mortgagee not having come to an end as between the plaintiff and defendant 1, plaintiff's possession could not be adverse to defendant 1 and that defendant 1's right to redeem could not be lost by reason of plaintiff's possession (even if the same were held to have been actually taken), and further that defendant 1's right of redemption could not be lost or affected by his failure to set aside the settlement entry, as the foreclosure decree made plaintiff the owner of the land subject to the rights of defendant 1. Thus the findings of the first Court on issues 1 to 4 were set aside as being wrong and that Court was ordered to decide the case after framing the necessary issues The effect of this decision was to hold that the mortgage though foreclosed as against the mortgagor was subsisting as against defendant 1 under the Transfer of Property Act.

The plaintiff contests the correctness of the remand order on the ground that the entry recording him as a tenant of the land in suit having become conclusive as against defendant 1 by reason of his omission to sue to set it aside, the latter was not entitled to contest his right to be restored to possession as a tenant. In other words, the appellant's contention amounts to a plea that, with the loss of his right to contest the correctness of the entry describing the plaintiff as the tenant of the land, defendant 1 must be deemed to have also lost the right of redemption which the Transfer of Property Act preserves for him It is also contended that, though the auction sale, dated 27th June 1918, clothed defendant 1 with a right to possession as against the judgment-debtor Damodhar, the latter continued in forcible possession of the land down to the time when the appellant entered into possession under his foreclosure decree, and that whatever right defendant 1 had was extinguished under S. 104, C. P. Ten. Act, on 1st

May 1921, i. e., one year after the new Tenancy Act of 1920 came into force.

In my opinion this contention is fallacious and cannot prevail. The Transfer of Property Act enacts the general law of transfer for British India, whereas the Central Provinces Tenancy Act is nothing more than a subsequent local legislation made for a particular purpose and with reference to a particular locality. A general statute cannot be treated as impliedly repealed by a local or special statute, because ordinarily the general law of the country is not altered by special legislation made without particular reference to it. A statute must ordinarily be repealed by express legislation. No doubt a statute is repealed by implication also, if its provisions are wholly incompatible with a subsequent statute or if the two standing together would lead to wholly absurd consequences, or if the entire subject-matter of the first is taken away by the second Repeal by implication, which, whenever it occurs, is the consequence of inconsistent legislation, is never to be favoured, and should not be imputed to Parliament. Lord Halsbury's Laws of England Vol. 27, p 197. But judicial interpretation should be directed to avoiding consequences which are inconvenient and unjust if this can be done without violence to the spirit or the language of a statute.

There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act, and as not altering the law beyond : Maxwell on the Interpretation of Statutes, 6th Edn., pp. 148 to 150.

Similarly, where Courts avoid a construction that leads to obvious injustice or to absurd results, they act upon the view that such a result could not have been intended unless the intention has been expressly manifested in the express words. On the general principle of avoiding injustice and absurdity, any construction would, if possible, be rejected (unless the policy and object of the Act required it) which enabled a person to defeat or impair the obligation of his contract by his own act, or otherwise to profit by his own wrong .

"a man may not take advantage of his own wrong; he may not plead, in his own interest, a self-created necessity : Maxwell on the Interpretation of Statutes pp. 369-370."

Bearing these rules of interpretation in mind while dealing with the contentions raised by the appellant, I say that, having omitted to implead the respondent as a party to his mortgage suit, and having, behind his back, sued and foreclosed the mortgagor at a time when he had left in him no interest to foreclose, he cannot under law be allowed to profit by his own wrong In other words, on the principle that

"a man may not take advantage of his own wrong, he may not plead, in his own interest, a self-created necessity,"

the plaintiff-appellant cannot plead that the settlement entry, based on a foreclosure which brought him no part of equity of redemption that had already vested in other persons including the respondent and which gave him nothing beyond his own rights as a prior mortgagee, secured to him the status of an absolute occupancy tenant. To interpret the provisions of S. 80, C. P. Land Revenue Act, 1917, and also those of S. 104, C. P. Ten. Act, 1920, in a manner which will give to the appellant the status of an absolute occupancy tenant and also the right to eject the respondent without obtaining a foreclosure decree against him, and thus to deprive the latter of the right of redemption which the Transfer of Property Act secured to him, would be to permit plaintiff to "plead, in his own interest, a self-created necessity." Such a construction would lead not only

to inconvenience and injustice but to absurd results, and if I may be permitted to say, would render the legislature open to the charge that its local legislation tends

"to overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

The general words used in S. 80, C. P. Land Revenue Act, 1917, that "the entry shall . . be conclusive" however wide and comprehensive they may be in their literal sense, must be construed as being limited to the actual objects of the Act, and not altering the law beyond, namely, the law of transfer as enacted in the Transfer of Property Act

This brings me to the consideration of the question whether, under the general law of transfer, the plaintiff-appellant, by obtaining a foreclosure decree against the mortgagor at a time when he had ceased to be the owner of the equity of redemption, could have acquired such ownership of the mortgaged property as entitled him to say that his own right is not qualified by the respondent's right of redemption, and that he can eject the latter as a trespasser. It must be clearly understood that the foreclosure vested the estate in plaintiff subject to redemption by the person interested in it who was not made party to the proceedings. In other words, "omission to join keeps intact rights of persons not joined" The plaintiff thus did not get clear title to the property, but got all the title which the mortgagor would give and that was a title subject to the equity which the present respondent had of redeeming plaintiff's mortgage and preserving the property for himself. The plaintiff's title, if any, was thus subject to the infirmity that the present respondent had not been impleaded and consequently he must suffer by his neglect to implead him. It is on this principle that in a long series of cases it has been laid down that, a mortgagee who forecloses his mortgagor, or a person who purchases at a mortgage sale, behind the back of the owner of the equity of redemption or of other persons interested in the said equity, does not, by the foreclosure or purchase, get the right to sue for the khas possession of the property as against the transferees of the equity of redemption who were not parties to the suit on the mortgage, but his only remedy is to bring a suit against such transferees to have his right declared to sell or foreclose the property to satisfy his mortgage debt: *Radha Pershad Misser* v. *Monohar Das* (1), *Aghore Nath Banerjee* v. *Deb Narain Guin* (2), *Krishtopada Roy* v. *Chaitanya Charan Mandal* (3), *Hargu Lal Singh* v. *Gobind Rai* (4), *Madan Lal* v. *Bhagwan Das* (5), *Hajra Bibi* v. *Shiam Narain* (6), *Mahadeo Rai* v. *Baldeo Rai* (7), *Hukum Singh* v. *Lallanji* (8) and *Entholi Kizhakkikandy Kanaran* v. *V. K Unnooli* (9). The case of *Sheoram* v *Jamnabai* (10), also contains very valuable observations in the same connexion.

Moreover, the principle that a right to redeem is co-extensive with the right to foreclose cannot be lost sight of. If the provisions of S 104, C. P. Ten. Act, read with Art. 1, Sch. 2, were interpreted so as to destroy the tenancy right itself after two years' non-possession by or on behalf of the tenant mortgagor, then many a mortgagee would find himself stranded into difficulties by his mortgage becoming unenforceable even before the expiry of the period of twelve years limitation prescribed for a mortgage suit, for no fault of his, on the ground that the tenant right on which the mortgage was engrafted has ceased to exist This would throw on the mortgagee an additional duty or obligation which the law never intended to impose on him to see that none but the mortgagor or person having title from him keeps any touch with the mortgaged land down to the date when he (mortgagee) himself effects his own entry into possession as owner after foreclosure, or the auction purchaser makes a like entry into possession on the basis of his purchase at auction. If, as a result of want of possession by mortgagor for two years even the right to redeem is to be treated as lost by the operation of Art. 1, Sch. 2 and S. 104, C. P. Ten. Act, then it would follow as a natural

(1) [1880] 6 Cal. 317=7 C. L. R. 293.
(2) [1906] 11 C. W. N. 314.
(3) A. I. R. 1923 Cal. 274=49 Cal. 1018.
(4) [1897] 19 All. 541=(1897) A. W. N. 154 (F.B.).
(5) [1899] 21 All. 235 (F.B.).
(6) [1913] 11 A. L. J. 362=20 I. C. 134.
(7) A. I. R. 1921 All. 301=43 All. 533.
(8) A. I. R. 1921 All. 333=43 All. 204 (F.B.).
(9) [1907] 30 Mad. 500=17 M. L. J. 431.
(10) A. I. R. 1923 Nag. 273=19 N. L. R. 18.

consequence thereof that with the extinction of the mortgagor's right of redemption the mortgagee's right to foreclose may have to be treated as extinguished for no fault of his own. These and several other anomalous results may ensue if the construction sought to be put by the appellant were to be accepted.

The present suit as laid asked for an absolute decree, and not a conditional one, for ejectment of the respondent, and as such, it was liable to be dismissed in view of the aforesaid decisions. But in view of the agreement arrived at in the lower Court, I take it that plaintiff is prepared to abandon his prayer for an absolute decree, if his contention based on the effect of S. 80, C. P. Land Revenue Act, and of S. 104, C P. Ten. Act, were overruled. He has thus very narrowly escaped from a summary dismissal of his suit as being not maintainable under the general law of transfer. The remand order virtually gives effect to the agreement between the parties and gives them an opportunity of having the question of the price of redemption determined in the trial Court I must, therefore, decline to interfere with the remand order; I cannot of course vary it in favour of the respondent by dismissing the suit upon an appeal by the plaintiff-appellant. To say the least the appeal was ill-conceived and plaintiff should have thought twice before he lodged it. The appeal is dismisssd with costs. Pleader's fee Rs 25.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Nagpur 251
Full Bench

MACNAIR, OFFG. J. C., STAPLES AND SUBHEDAR, A. J. Cs.

Sitaram—Petitioner.

v.

Kaniram and *another* — Opposite Parties.

Misc. Judicial Case No. 55 of 1928, Decided on 15th August 1929, for review of order, D/- 28th April 1925, reported in *A. I. R.* 1926 *Nag.* 193.

(a) C. P. Courts Act, S. 9—Question of law referred to Bench—Judge disposing of the case need not be on the Bench.

Section 9 does not make it necessary that the Judge who is disposing of the case should be a member of the Bench for the decision of which a question of law is referred.

[P 253 C 1]

*** (b) Civil P. C., O. 47, R. 1—Decision proceeding upon incorrect exposition of law—Subsequent exposition by superior Court—Review cannot be allowed — Hardship to applicant is immaterial.**

Review is not permitted where new material comes in existence subsequently. A review cannot therefore be granted on the ground that the previous decision of the case had proceeded upon an incorrect exposition of the law. The question of hardship to the applicant does not arise in such a case *A. I. R.* 1922 *P. C.* 112 and *A. I. R.* 1925 *Nag.* 266, *Rel. on.* [P 253 C 1, 2]

*** (c) Civil P. C , S. 151—Order based on erroneous view that incorrect procedure was followed—It cannot be varied for ends of justice.**

It is not necessary for the ends of justice, or to prevent abuse of the process of the Court that orders based on an erroneous view that an incorrect procedure has been taken should be varied. There is no greater injustice or abuse when a claim is wrongly dismissed on the ground that the wrong procedure has been followed than where it is wrongly dismissed on the ground that the claim is invalid.

[P 254 C 1]

B. K. Bose, *V. Bose*, *P. A. Pandit* and *P. N. Rudra*—for Petitioner.

D. N. Choudhri, *V. D. Kolte* and *S A. Ghadgay*—for Opposite Parties.

Order of Reference.

Findlay, J. C.—This is an application for review of the order of this Court, dated 28th April 1925, in Civil Revision No. 295 of 1924 The circumstances of the case are rather peculiar In *Sitaram* v *Kaniram* (1), I have held that recourse could not be had to S. 151, Land Revenue Act, for the purpose of enforcing a right to pre-empt in execution proceedings. In confirming the order of the lower Court to the same effect, I pointed out that the then applicant Sitaram had his remedy by way of suit open to him. In pursuance of the said order, the present applicant instituted a civil suit (No 138 of 1925) in the Court of the Subordinate Judge, 2nd Class, Sakoli, to enforce his right of pre-emption. That Court decreed the suit, and the said decree was upheld on appeal by the District Judge, Bhandara. The defendants-purchasers, Kaniram and Hiralal, instituted second appeals Nos. 343 and 344 of 1927. Both these appeals were disposed of by one judgment, dated 30th August 1928, on the ground that in the meantime a Full Bench of this Court had, in *Govinda* v. *Murlidhar* (2), overruled my decision in *Sitaram* v.

(1) A. I. R. 1926 Nag. 193=21 N. L. R. 157.
(2) A. I. R. 1928 Nag. 48=23 N. L. R. 141 (F.B.).

Kaniram (1) quoted above. The Full Bench finding was that a claim to pre-empt under S 151, C. P. Land Revenue Act, is enforceable in execution proceedings. The result of this curious combination of circumstances undoubtedly constitutes a grave hardship on the present applicant who had, in the first instance, adopted the right procedure as laid down by the Full Bench in the case quoted ; yet the result for him has been that he failed on the view of the law taken by me, which has, in the meantime, been overruled by a Full Bench In these circumstances, the applicant has applied for review of the order of this Court, dated 28th April 1925, and claims that the said order should be set aside

The application has been attempted to be supported on the ground that, in view of the decisions in *Sharup Chand Mala* v. *Pat Dassee* (3) (at p. 630) and *Brindaban Chandra* v. *Damodar Prosad* (4) (at p. 150 *of* 29 *C W N.*), the language of R. 1, O. 47, Civil P. C. is sufficiently wide to embrace a case like the present. In *Sudananda Moral* v. *Rakhal Sana* (5) Mitter, J., however held that the words "sufficient reason" must be some reason analogous to the previous one included in the rule and, in so doing, he followed the Privy Council decision in *Chhajju Ram* v *Neki* (6) cf also *Ramchandra* v. *Govindrao* (7).

As at present advised, I am still inclined to the view that the words "sufficient reason" cannot be so interpreted as to bring a case like the present within the terms of R. 1, O 47, Civil P. C. The mistake or erroneous view of this Court cannot be said to have been "apparent on the face of the record" at the time the Court passed the order which is now sought to be reviewed. On the contrary, the difficulty and complexity of the matter was such that a Full Bench was constituted to deal with it. I do not think therefore that the present case comes within the terms of the rule in question, but, in view of the widely discrepant case-law on the point, I am of opinion that it is highly desirable that a Full Bench should deal with this question, as also with the further one as to whether, even assuming that a case like the present does not come within the terms of the rule quoted, it is open to this Court, in the exercise of its inherent powers, to remedy what has caused an obvious injustice to the present applicant.

I am of course aware of my decision in *Nizamuddin* v. *Jumma* (8), but I am not at present prepared to admit that that decision is an erroneous one. I am nevertheless, of opinion that it is desirable that a fundamental important question like the present should be considered by a Full Bench : cf. *Munna Lal* v. *Radha Kishan* (9) and *Chhayemannessa Bibi* v. *Basirar Rahman* (10) (at p. 404). I am therefore of opinion that it is desirable that the following questions should be referred to a Bench :

(i) Whether, on the facts stated in the first part of this order, a case like that of the present applicant can be brought within the letter of R. 1, O. 47, Civil P. C. ; and

(ii) Whether, even if the first point be held against the applicant, the circumstances of such a case would permit of this Court reviewing its order in the applicant's favour in the exercise of the inherent powers of the Court under S. 151, Civil P. C.

A Full Bench consisting of the J. C. and the 1st and 3rd A. J Cs. will be constituted accordingly.

Opinion.

Macnair, Offg. J. C. — The facts which led to this reference are stated in the order of reference, dated 5th February 1929. In execution of a money decree certain village shares were sold. The applicant Sitaram preferred a claim to pre-empt these shares to the executing Court ; that Court held that S. 151, C. P Land Revenue Act did not authorise investigation of such claims by the executing Court. Sitaram applied in revision to Findlay, J. C., who refused to interfere and in the order dismissing the application remarked that the applicant was not prejudiced by the refusal of the executing Court to consider his claim to pre-emption, but still had a remedy by suit open to him. The applicant then filed a suit to enforce his right of pre-emption. The trial Court decreed the suit and an appeal was dis-

(3) [1887] 14 Cal. 627.
(4) A. I. R. 1925 Cal. 804.
(5) A. I. R. 1927 Cal. 920.
(6) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).
(7) A. I. R. 1925 Nag. 266=23 N. L. R. 53.
(8) A. I. R. 1926 Nag. 17=24 N. L. R. 48.
(9) [1915] 37 All. 591=30 I. C. 186=13 A. L. J. 899.
(10) [1909] 37 Cal. 399=5 I. C. 532=11 C. L. J. 285.

missed. In second appeal, however, the suit was dismissed as a Full Bench—*Govinda* v. *Murlidhar* (2)—had ruled that a claim to pre-empt under S. 151, C. P. Land Revenue Act, was enforceable in execution proceedings and could not be enforced in a separate suit. The present application was then filed; the applicant asked for review of the order of Findlay, J. C. Findlay, J. C., considered it highly desirable that a Full Bench should deal with two questions :

"(a) Whether, on the facts stated in the first part of this order, a case like that of the present applicant can be brought within the letter of R. 1, O. 47, Civil P. C.,

"(ii) Whether, even if the first point be held against the applicant, the circumstances of such a case would permit of this Court reviewing its order in the applicant's favour in the exercise of the inherent powers of the Court under S. 151, Civil P. C."

The non-applicant urges a preliminary objection. His first argument was that Findlay, J C., had in reality held that the application for review should be dismissed. I am unable to follow this argument. It is quite clear that Findlay, J C., considered that the opinion of a Bench on certain questions should be obtained before he disposed of the application.

The next point urged is that the provisions of O. 47, R. 5, Sch. 1, Civil P. C., make it necessary that Sir Charles Findlay himself should be a member of the Bench. It seems sufficient to say that S. 9, C P. Courts Act, does not make it necessary that the Judge who is disposing of the case should be a member of the Bench for the decision of which a question of law is referred. I add that Sir Charles Findlay would probably have been a member of the Bench had he not taken nine months leave directly after making the order of reference.

The applicant urges that review can be granted in accordance with the provisions of O. 47, R 1, Sch. 1, Civil P. C., both on the ground that new and important matter has been discovered and on the ground that there is something analogous to an error apparent on the face of the record. Now, for the purpose of deciding whether the applicant is entitled to apply for a review under O. 47, R. 1, I have to consider only whether the conditions mentioned in the rule are satisfied. The question of hardship to the applicant does not arise. The facts material for decision of this point then are simply these : A Judge took a certain view of the law and dismissed an application : subsequently a tribunal whose decision that Judge was bound to follow took a contrary view of the law The applicant's counsel admitted that an application did not lie in the numerous cases were these facts exist. These were the facts which were considered by a Bench of this Court in *Ramchandra* v. *Govindrao* (7) and in that case for reasons with which I am in entire agreement it was held that there was not ground for granting a review. I add that in a Full Bench ruling of their Lordships of the Privy Council *Chhajju Ram* v. *Neki* (6) (at p. 133 *of* 3 *Lah.*), their Lordships state that :

"the three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or 'any other sufficient reason'."

Review then is not permitted where new material comes in existence subsequently. In the same judgment their Lordships have clearly held that review cannot be granted on the ground that the previous decision of the case had proceeded upon an incorrect exposition of the law.

In the second question of the reference the referring Judge appears to have used the word "reviewing" in a very general sense. Clearly S. 151, Civil P. C., does not enable a Court to follow the procedure laid down in O. 47, where the conditions under which review can be granted are not satisfied. In my opinion the point raised in the question is the power of the Court to vary the previous order. For consideration of this point the only material facts are in my opinion these : Findlay, J. C, erroneously held that the applicant adopted a wrong procedure and for this reason refused the relief . it appears to be a fact that the applicant was entitled to the relief claimed by him. The fact that the applicant subsequently adopted the procedure suggested by Findlay, J. C, does not appear to me to have any bearing on the decision of the question I remark that, as the applicant has not challenged the judgment in which it was held that the procedure first adopted by him was correct, it must be assumed for the purposes of this opinion that the decision of Findlay, J. C., was erroneous.

It is not urged that that Court has inherent power to vary at any time a final order merely because that order was incorrect. In my opinion it is not necessary for the ends of justice or to prevent abuse to the process of the Court that orders based on an erroneous view that an incorrect procedure has been taken should be varied There is no greater injustice or abuse when a claim is wrongly dismissed on the ground that the wrong procedure has been followed than where it is wrongly dismissed on the ground that the claim is invalid

The applicant has cited *Pandu* v. *Rajeshwar* (11) and other cases in which effect has been given to the principle that the act of the Court should prejudice no one, but the Judge decided the case with due care and did not act wrongly even if his decision was incorrect. These cases then have no application.

The applicant has also cited cases such as *Sarat Chandra Bose* v. *Bisweswar Mitra* (12), in which it has been held that where there is no provision in the Civil Procedure Code expressly providing for a remedy and none which prohibits a remedy being obtained, the provision of S 151 may in a suitable case apply. But these rulings do not justify the application of S 151 where such application would contravene the fundamental principle that there must be finality to litigation. A final order passed after proper consideration must not be set aside if it cannot be challenged by methods expressly provided by the Code.

I add that I am not considering the power of the Court. If I had to decide whether that power should be exercised in this particular case, I should have to consider the question whether or not it would involve hardship to the non-applicant to allow pre-emption to the applicant so long after the sale to him had been confirmed.

In my opinion then both the questions must be answered in the negative.

Staples, A. J. C.—I agree.

Subhedar, A. J. C.—I also agree

R.K. *Reference answered.*

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(11) A. I. R. 1924 Nag. 271=20 N. L. R. 131.
(12) A. I. R. 1927 Cal. 534=54 Cal. 405.

* * A. I. R. 1929 Nagpur 254

Full Bench

MACNAIR, OFFG. J. C., JACKSON AND SUBEDHAR, A. J. CS.

(Haji) Mahomed Haji Wali Mahomed —Plaintiffs—Appellants.

v.

Ramappa—Defendant—Respondent.

Second Appeal No 298-B of 1927, Decided on 12th August 1929, against decision of Special Addl. Dist. Judge, Akola, D/- 25th June 1927 in Civil Appeal No 13 of 1927.

*** * (a) Transfer of Property Act, S. 58 (c)—Lahan Gahan mortgage.**

In a Lahan Gahan mortgage it is necessarily implied that there is no covenant or personal liability if no such covenant is included in the terms of the deed : *A. I. R.* 1916 *P. C.* 119 *Expl.* and *Rel. on* , 12 *N. L. R.* 19; *A.I.R.* 1922 *Pat.* 167, 34 *Bom.* 462, 10 *Cal.* 740; *(P.C.)*, 22 *Cal.* 434; *A. I. R.* 1916 *P. C.* 147; *Rel. on.*, *A. I. R.* 1924 *Nag.* 97, *Expl. A. I. R.* 1922 *Nag.* 98, *not Foll.* [P 256 C 2]

*** (b) Transfer of Property Act, S. 58 (c)—Effect of Lahan Gahan mortgage is same as that of conditional mortgage.**

The effect of a Lahan Gahan mortgage is the same as that of one by conditional mortgage and mortgages in forms similar to that of Lahan Gahan stand on the same footing as the mortgages by conditional sale 22 *All.* 149 *(P.C.)*, *Rel on.* [P 255 C 1]

(c) Contract Act, S. 19—S. 19 does not entitle party to insist on entirely new contract.

Per Jackson, A. J. C.—Under S. 19 the right is given to a party, who has entered into a contract under fraud or misrepresentation, to avoid the contract or to insist on the contract being performed. S. 19 does not entitle a party to insist on an entirely different contract being performed. [P 257 C 1]

M. R. Bobde, G. R. Deo and *P. B. Gole*—for Appellants.

M. B Niyogi—for Respondent.

Opinion

Jackson, A. J. C.—The question we have to decide is whether, in a Lahan Gahan mortgage, that is, a mortgage in which the remedy provided is foreclosure in default of payment by given date and in which the only remedy expressly given is that of foreclosure, there is by implication no covenant of personal liability. The reference has been made necessary by the decision in *Gopikisan* v. *Mt. Mankuarbai* (1) which applied *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2) as interpreted in *Jiwandas*

(1) A. I. R. 1924 Nag. 97=20 N. L. R. 46.
(2) A. I. R. 1916 P. C. 119=44 Cal. 388=44 I. A. 87 (P.C.).

v. *Mt. Janki* (3). According to *Seth Gopikisan* v *Mt. Mankuarbai* (1) the Privy Council decision in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2) must be considered to have overruled *Govind* v *Jagannath* (4), in which it was laid down that

"where in a mortgage-deed the remedy of the mortgagee is expressed to be foreclosure the mere fixation of a date by which the mortgagor undertakes to pay the mortgage-money does not amount to a stipulation binding him to repay the same within the meaning of clause (a), S. 68, T. P. Act."

As has been held in *Jag Sahu* v. *Mt. Ram Sakhi Kuer* (5) and *Dattambhat Rambhat* v. *Krishnabhat* (6), the insertion in a usufructuary mortgage of a covenant by the mortgagor to repay the consideration money on a particular date may entitle the mortgagee to a personal decree against the mortgagor, but it does not follow that that would be the effect of inserting such a covenant in a mortgage by conditional sale or in a mortgage of a similar nature to one by conditional sale. It has been pointed out in *Govind* v. *Jagannath* (4) that a Lahan Gahan mortgage does not come within the definition of a mortgage by conditional sale in S. 58 (c), T. P. Act. Nevertheless, the effect of a Lahan Gahan mortgage is the same as that of one by conditional sale and mortgages in forms similar to that of Lahan Gahan, such as "kutkubala" or "bai-bil-wafa," were recognized by their Lordships of the Privy Council in *Balkishen Das* v. *W. F Legge* (7), in a passage that occurs at p. 159, as standing on the same footing as mortgages by conditional sale. In that case their Lordships said that it is not necessary in such mortgages that the mortgagor should make himself personally liable for the repayment of the loan. Again, in *Kalka Singh* v. *Paras Ram* (8), another Privy Council decision, the following occurs:

"In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner."

(3) A. I. R. 1922 Nag. 98=18 N. L. R. 145.
(4) [1916] 12 N. L. R. 19=33 I. C. 753.
(5) A. I. R. 1922 Pat. 167=1 Pat. 350.
(6) [1910] 34 Bom. 462=7 I. C. 446=12 Bom. L. R. 491.
(7) [1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P.C.).
(8) [1895] 22 Cal. 431=22 I. A. 68=6 Sar. 545 (P.C.).

These decisions are authority for the view that a personal covenant is not necessarily implied in every mortgage. In *Narotam Das* v. *Sheo Pragash Singh* (9) their Lordships have held that there was no personal covenant to pay in an instrument which contained a promise to repay the loan within a fixed period and then provided, in default of payment, for satisfaction of the debt out of the property hypothecated. This is exactly the same view as has been taken in *Govind* v. *Jaggannath* (4). It goes further than the two Privy Council decisions already cited and makes it clear that in some mortgages the nature of the mortgage gives rise to the implication that there is no personal covenant.

It has now to be considered whether the Privy Council have taken a different view in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2). At p. 400 (*of* 44 *Cal.*) the following passage occurs:

"In considering this question it must be borne in mind (i) that a loan prima facie involves such a personal liability; (ii) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (iii) that the nature and terms of such security may negative any personal liability on the part of the borrower."

The interpretation of this passage in *Jiwandas* v. *Mt. Janki* (3), as applied in *Gopikisan* v *Mt. Mankuarbai* (1), is that a personal covenant to repay the money lent exists in every mortgage transaction unless it is negatived expressly or by necessary implication by the terms of the bond or the circumstances of the case. It is argued before us that the mortgage-deed is an acknowledgment of the debt, that such acknowledgment implies a personal promise to pay the debt and that, therefore, the law is correctly laid down in *Gopikisan* v. *Mt. Mankuarbai* (1). It is difficult, however, to hold that their Lordships of the Privy Council have, in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2), taken a different view to those expressed in the earlier decisions already referred to. Another judgment of their Lordships delivered in the same year as *Ram Narayan Singh* v. *Adhihdra Nath Mukherji* (2) is that in *Jatindra Nath Basu* v. *Peyer Deye Debi* (10). At p 255 (*of* 31 *M. L. J.*) they seem to repel the argument now

(9) [1884] 10 Cal. 740=11 I. A. 83 (P.C.).
(10) A. I. R. 1916 P. C. 147=43 Cal. 990=43 I. A. 108 (P.C.).

sought to be based on *Ram Narayan Singh* v *Adhindra Nath Mukherji* (2) by the following words :

"The Subordinate Judge and the High Court have assumed from the mention in that document that the Rs. 1,90,000 had been advanced that it might be inferred that it was the intention of the parties that the Maharaja Ram Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Ram Narayan Singh did not intend that he should be personally liable."

From the words used in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2) I do not think that their Lordships' pronouncement in that case supports the argument taken before us. In my order of reference I have pointed out that the learned Judge, who interpreted their Lordships' pronouncement in *Jiwandas* v. *Mt. Janki* (3), interpreted it, in my opinion, somewhat inaccurately, because he referred only to the terms of the deed and not to the nature thereof. It is argued before us that the nature and the terms of a mortgage-deed are the same thing, but I cannot agree. It is true that the nature of the deed must be set forth in the terms and it is set forth, in my opinion, in the terms which state how the property is to be used in satisfaction of the debt It is also argued before us that the nature of a mortgage deed has nothing to do with the remedy but it seems to me clear that it is the remedy which decides whether a mortgage is by nature a simple mortgage, or a mortgage by conditional sale or a usufructuary mortgage and so on. This is indeed clear from the words used by their Lordships of the Privy Council in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2) at p. 401 (*of* 44 *Cal.*) :

" having regard to the nature of the deed of 14th April 1896, which was a usufructuary mortgage only."

It seems to me that the nature of the deed, that is, the terms relating to the remedy, has been given special importance by their Lordships and that the nature of the deed may by itself negative a personal covenant. That is also I think in accordance with S. 68, T. P. Act. That section gives the mortgagee a right to sue the mortgagor for the mortgage money in three cases only the first of which is where the mortgagor binds himself to repay the mortgage money. Reference to S. 58 will show that it is in only two of the four mortgages there defined that the mortgagor binds himself to pay the mortgage money ; he does not do so in a mortgage by conditional sale or in a usufructuary mortgage and as I have said, a mortgage such as that we are considering, stands on the same footing as a mortgage by conditional sale.

Although I have expressed the opinion that the learned Judge who interpreted *Ram Narayan Singh* v *Adhindra Nath Mukherji* (2) in *Jiwandas* v. *Mt Janki* (3) has restated their Lordships' pronouncement somewhat inaccurately, it is clear from what he goes on to say that he was in no danger in that case of applying that pronouncement wrongly. After his statement :

" In every mortgage bond there is a personal covenant to pay the mortgage debt unless the contrary is expressly stated or appears by necessary implication from the terms of the bond, "

the following sentence occurs : " Where there is no express covenant, that necessary implication " that is, that there is no personal covenant :

" arises out of the terms of most foreclosure and many usufructary mortgages, but not out of those of a simple mortgage for sale. "

By these words he gives the requisite value to the nature of the mortgage. In *Gopikisan* v. *Mt. Mankuarbai* (1) he seems to have misapplied his own judgment and to have omitted to consider that the provision of foreclosure and no other remedy in a deed might imply the absence of a personal covenant.

I am of opinion that *Seth Gopikisan* v. *Mt Mankuar bai* (1) has been inaccurately decided and that *Govind* v. *Jaagnnath* (4) has not been overruled by *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (2) I consider that in a Lahan Gahan mortgage it is necessarily implied that there is no covenant of personal liability if no such covenant is included in the terms of the deed ; and that the question referred to us should be answered in the affirmative.

Macnair, Offg. C. J.—I agree.

Subhedar, A. C. J.—I also agree.

After receiving the opinion of the Full Bench, Jackson, A. J. C. delivered the following :

Judgment.—In accordance with the opinion given by the Full Bench I hold that there is no personal covenant in

the mortgage-deed on which the suit out of which this appeal arises is based. There is one other point to be considered and that is the claim of the plaintiffs to a decree for sale with a personal decree against the defendant, in the event of the sale proceeds being insufficient to satisfy the mortgage debt, on the ground that the defendant misrepresented to the plaintiffs the value of the property mortgaged at the time the mortgage deed was executed. Both the lower Courts have recorded that the defendant has admitted that he told the plaintiffs that the value of the property was about Rs. 9,000. I do not so read the defendant's deposition but assuming that he did make a statement as to the value of the property and that his deposition shows that that statement was to the effect that the value was Rs. 9,000 and assuming further that that was a false statement of the value of the property mortgaged, I am of opinion that the plaintiffs are still not entitled to the decree that they claim.

Under S 19, Contract Act, the rights given to a party, who has entered into a contract under fraud or misrepresentation, are to avoid the contract or to insist on the contract being performed. The section does not entitle the party to insist on an entirely different contract being performed. Moreover, the rights given by S. 19 are given only to a party whose consent to the contract was, in fact, caused by the fraud or misrepresentation. I agree with the trial Court that it is impossible to believe that the plaintiffs relied solely on the statement of the defendant as to the value of the property. They had materials or could have obtained them without much trouble on which to form an independent opinion of the value and I am convinced that it was not the statement of the defendant that induced the plaintiffs to enter into a contract and that any statement of the value made by the defendant does not entitle them to the decree that they claim. I dismiss the appeal with costs. I fix pleader's fee at Rs. 150.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Nagpur 257

JACKSON, A. J. C.

Rajeshwar—Defendant—Appellant.

v.

Ajabsingh—Plaintiff—Respondent

Second Appeal No. 170 of 1927, Decided on 13th July 1929, against decree of Dist. Judge, Bhandara, D/- 21st December 1926, in Civil Appeal No. 62 of 1923.

(a) C. P. Tenancy Act, S. 49—Surrender of *sir* land is void if it forms part of the transaction of sale.

If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then only the agreement to surrender will be void and unenforceable,

Where there was a difference of more than three months between the dates of the two transactions, sale of one anna share of a particular village and surrender of occupancy rights in *sir* land, and where no evidence was led to show that the two transactions were really one, the surrender was held to be not invalid. *Nag. Second Appeal No.* 530 *of* 1918, *Appr.* [P 258 C 1]

*** (b) Evidence Act, S. 114—Two documents executed on same day—Purpose of the documents will determine priority.**

Where more documents than one bear date on the same day they are presumed to have been executed in the order necessary to effect the purpose for which they were executed. That is, it might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity was, in fact, done first. [P 258 C 2]

But where a sale deed in respect of property under the management of the Collector in execution of a decree, has been executed and deposit in Collector's Court, sufficient to satisfy the decree is made on the same day, but it is found that the sum out of which the deposit was made was obtained at the time of the registration of the sale-deed, it cannot be presumed, in the absence of any reliable evidence to the contrary, that the deposit was made before the sale. [P 258 C 1]

*** (c) Contract Act, S. 65—Sale-deed found invalid under para. 11, Sch. 3, Civil P. C—Purchaser suing for refund of consideration—Purchaser is entitled to a refund.**

Where a vendor sues his vendee for possession of the property on the ground that the sale is invalid under para. 11, Sch. 3, Civil P. C., the decree for possession of the property in his favour should be made subject to the payment of the consideration of sale received by him: *A. I. R.* 1922 *P. C.* 403, *Appl.*, 30 *Cal.* 539 (*P. C.*), *Dist.*; 19 *N L.R* 190, *Cons.* [P 259 C 2]

B. K. Bose and *V. Bose*—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—Bhagwat, the father of the plaintiff-respondent, on 22nd March

1919 sold a one-anna share of mouza Sulsuli to the defendant-appellant for Rs. 400. On 1st July 1919 he surrendered to the appellant his occupancy rights in what had been his *sir* land. The respondent and his brother, who is now dead, sued for a declaration that the sale and surrender were not binding on them and for possession. Their claim has been decreed by the trial Court, whose decree has been upheld by the lower appellate Court, though that Court has held that the sale was invalid and not merely as the trial Court did, that it does not bind the respondent.

I propose to refer first to a new plea raised here on behalf of the respondent. The fact that there was both a sale and a surrender of occupancy rights in what had been *sir* land is made a ground for attacking both. This is based on the pronouncement by Drake-Brockman, J. C., in *Second Appeal No* 530 *of* 1918 that :

"if a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it."

The decision of the learned Judicial Commissioner would render invalid only the surrender and not both transactions; but I consider that I must reject the plea even as regards the surrender. It does not involve only a question of law; there was a difference of more than three months between the dates of the two transactions and obviously evidence would be required to show that the two transactions were really one. There is no such evidence and the plea must fail.

The sale has been held invalid on the sole ground that it was effected while the property sold was under the management of the Collector in execution of a decree against Bhagwat. It is alleged that on 22nd March 1919, the date on which the sale-deed was executed and registered, Bhagwat made a deposit in the Collector's Court of a sum sufficient to satisfy the decree that the Collector was executing ; but it has been held by the lower Courts that the deposit was not made before the sale and consequently that the property was still under the management of the Collector when the sale took place. That is a finding of fact but it is challenged on the ground that the burden of proof has been wrongly laid. It seems to me clear that the lower Courts have considered that the burden of proof lay upon the defendant He examined two witnesses to prove that the deposit was made before the sale-deed was executed, but they have not been believed. It is argued that the burden of proof really lay upon the plaintiffs, that although the witnesses called by the defendant have been disbelieved there is no evidence that the sale deed was executed before the deposit was made and that the result is the same as if no evidence had been given on either side and the suit, as the burden of proof lay on the plaintiffs, must fail.

It might be possible to apply in principle the presumption mentioned in Woodroffe and Ameer Ali's Law of Evidence, Edn. 8, p. 803, that, where more documents than one bear date on the same day they are presumed to have been executed in the order necessary to effect the purpose for which they were executed. That is, it might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity was, in fact, done first There are, however, circumstances which seem to me to justify the Court in refusing to draw this presumption in the present case. The plaintiffs' plea regarding their father's incompetence to sell owing to the Collector's proceedings was not replied to by the defendant in the trial Court. In first appeal, he put in, by order of the Court, a written statement dated 8th April 1924 in which he did not assert that the deposit was made before the sale-deed was executed. He first made the assertion, through his pleader, on 26th August 1926 when he admitted that he could not say how many days or hours before execution of the deed the deposit was made. Moreover, I find that, when the defendant was examined as a witness on 28th March 1923, he made a statement which I read as meaning that the sum out of which the deposit was made was paid to Bhagwat at the time of registration of the sale-deed. I cannot then draw the presumption that the learned counsel for the defendant-appellant suggests, and the appea

must fail in so far as it is based on the validity of the sale.

The defendant is on firmer ground when he claims refund of the consideration under S. 65, Contract Act. It has been found that the sale was effected to satisfy debts of Bhagwat which would have been binding on his sons, who have therefore been benefited by the sale. For the defendant the Privy Council decision in *Harnath Kunwar* v *Inder Bahadur Singh* (1) has been cited, in which the following remarks occur :

"Before this Board, the claim has been based on S. 65, Contract Act. It is there provided that "when an agreement is discovered to be void, or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it." So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section and it has to be seen whether the facts of this case come within its scope. The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from S. 2. By Cl. (e) every promise and every set of promises forming the consideration for each other is an agreement, and by Cl. (h) an agreement enforceable by law is a contract. S. 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By Cl. (g) an agreement not-enforceable by law is said to be void.

An agreement therefore discovered to be void is one discovered to be not enforceable by law and, on the language of the section would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated."

As against this the plaintiff-respondent relies on the following passage from the Privy Council judgment in *Mohori Bibee* v. *Dharmodas Ghose* (2) (at p 548) as showing that S 65, Contract Act does not apply :

"A new point was raised here by the appellant's counsel founded on S. 65, Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this S. 65 starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been any contract."

It is the former ruling that seems to me to be applicable. In the latter, their Lordships of the Privy Council were dealing with a case in which a contract was entered into by a person who was totally incompetent to contract, a minor. In the former the contract was entered into by a person who was not incompetent to contract but was incompetent to transfer the property that he purported to transfer and the position is the same in the case with which I am now dealing It is true that in *Mt. Salu Bai* v. *Bajat Khan* (3) Drake Brockman, J. C., has said that in S. 325-A, Civil P. C. of 1882 and its counter-part in the current Code there is a legal disqualification to alienate at all which mutatis mutandis puts the judgment-debtor affected on a par with a minor ; but para. 11, Sch 3, Civil P. C. of 1908, which corresponds to S 325-A of the Civil P. C of 1882, only makes the judgment-debtor incompetent to alienate his immovable property which is under the Collector's management. He is otherwise competent to contract and can only be considered on a par with a minor in respect of that property. That being so, I hold, on the authority of *Harnath Kunwar* v. *Indar Bahadur Singh* (1) that S. 65, Contract Act, applies and that the appellant is entitled to recover the consideration that he paid to Bhagwat.

The trial Court has decreed possession of the malguzari share and the *sir* fields to the plaintiffs ; but as its finding was that the sale was not binding on them because it was not effected to pay off antecedent debts of Bhagwat, a declaration was added that the appellant had acquired interest to the extent of a one-third joint share in the malguzari share. Though the lower appellate Court has found the sale null and void, it has not ordered deletion of that declaration but has simply confirmed the trial Court's decree. That declaration must now be deleted ; and in view of my decision in the last preceding paragraph, the decree must be further modified by making the respondent's right to possession subject to the payment to the appellant of the consideration that the latter paid to Bhagwat. In view of the result I consider that each party should bear his own costs throughout.

K N./R K *Order accordingly.*

(1) A. I. R. 1922 P. C. 403=45 All. 179=50 I. A. 69 (P. C.).

(2) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 874 (P. C.).

(3) [1913] 13 N.L.R. 180=42 I.C. 200(F.B).

*A. I R. 1929 Nagpur 260

JACKSON, A. J C.

Khaje Hussenuddin — Plaintiff — Appellant

v.

Kisan and *another*—Defendants—Respondents.

First Appeal No 65-B of 1928, Decided on 22nd July 1929 against the decree of 1st Sub-Judge, 1st Class, Khamgaon, D/- 16th April 1928.

(a) Tort—Malicious proceedings—It cannot be said that because accused is acquitted complainant must have deliberately made false complaint.

Although it is true that if a deliberately false complaint is proved to have been made, no further proof of malice and want of reasonable and probable cause would be required, but it cannot be said that because the accused in the criminal case is acquitted and because the complainant must, if the complaint was false, know that it was false, he must be held to have deliberately made a false complaint. [P 260 C 2]

***(b) Tort—Malicious proceedings—It is not sufficient in suit for malicious prosecution to prove mere fact of acquittal.**

It is not sufficient, in a suit for damages for malicious prosecution to prove the mere fact of acquittal. The plaintiff can establish the other facts necessary to entitle him to damages without proving his innocence, but if he relies on the falsity of the complaint to establish those other facts he must prove his innocence by proving the complaint to be false; and he cannot do this by simply putting in the judgment of the criminal Court which acquitted him *A. I. R* 1922 *All.* 209, *Rel. on*; *A I. R.* 1926 *P. C.* 46, *Ref.*

[P 260 C 2, P 261 C 1]

M. R. Bobde—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—This appeal arises from a suit for damages for malicious prosecution which the lower Court has dismissed The prosecution arose out of a dispute regarding the succession to the property of one Maroti. Maroti had two brothers, Janji, the father of the defendant 1, Kisan, and Sakharam, the husband of defendant 2, Bindi. Both these brothers predeceased him, and after he too died, Kisan claimed his property on the strength of a will made by Maroti in favour of Kisan and Sakharam. Maroti's widow, Lakshmi alias Gangu Bai, resisted Kisan's claim, and a contest took place for possession of the cotton crop obtained from Maroti's fields after his death. Kisan and Bindi made reports to the patel and to the police, that one Khair Muhammad, Lakshmi's agent, and certain other Mahomedans, had broken the lock put upon Marot Dhaba by Kisan, had taken out the cotton there from and carried it away and had assaulted Kisan and Bindi in doing so. No action was taken by the police, and on 11th January 1924 Kisan lodged a complaint in the Court of the Sub-Divisional Magistrate, Jalgaon. Five of those against whom Kisan complained, including the plaintiff appellant, were eventually charged with an offence punishable under S 147, but in the end they were acquitted on 23rd December 1924 On 1st December 1925 the plaintiff-appellant Hussenuddin instituted his suit for damages.

The lower Court has found that Kisan alone was responsible for instituting the criminal proceedings against Hussenuddin but that though Hussenuddin was acquitted in those proceedings, he has failed to prove that Kisan acted maliciously or without reasonable and probable cause. It is argued on behalf of the appellant that the complaint was false to the knowledge of the defendants and that is sufficient to show both malice and want of reasonable and probable cause. I agree that if a deliberately false complaint is proved to have been made, no further proof of malice and want of reasonable and probable cause would be required. No authority, I think, is necessary for that proposition, but it does not follow that because the accused in the criminal case were acquitted and because the complainant must, if the complaint was false, know that it was false, he must be held to have deliberately made a false complaint It is true, as has been contended on behalf of the appellant on the authority of the Privy Council decision in *Balbhaddar Singh* v. *Budri Sah* (1), that the plaintiff in a suit for damages for malicious prosecution need not prove that he was innocent of the charge made against him, but their Lordships do not indicate that it can ever be sufficient, in a suit for damages for malicious prosecution, to prove the mere fact of acquittal. The plaintiff can establish the other facts necessary to entitle him to damages without proving his innocence; but if he relies on the falsity of the complaint to establish those other facts he must, in fact, prove his innocence

(1) A. I. R. 1926 P. C. 46=1 Luck. 215=29 C. C. 163 (P.C.).

by proving the complaint to be false; and he cannot do this, as has been held in *Gobardhan Singh* v. *Ram Badan Singh* (2) by simply putting in the judgment of the criminal Court which acquitted him.

For purposes of the suit that judgment proves nothing but the acquittal, but I should like to point out that the criminal Court did not find the complaint to be false as regards Hussenuddin. He pleaded an alibi and it is asserted that that alibi was accepted; but I do not find this to be the case. There is no definite finding as to the alibi and the general remark:

"The prosecution story is rebutted by the oral and documentary evidence adduced by the defence and as such the charge is not substantiated against any of the accused,"

cannot be interpreted to mean acceptance of the alibi. What the criminal Court found was that Khair Muhammad and his companions did use force to break open the lock of the Dhaba and removed the cotton, but that they were justified in doing this and in using force. In the suit the only evidence to show that Hussenuddin was not present when Khair Muhammad and others removed the cotton is that of Luxmi (P W. 7), whom the lower Court has, I think, rightly disbelieved. Hussenuddin (P. W. 1) himself has not in his deposition asserted his innocence and the other oral evidence adduced by him relates merely to the part taken by Bindi in the institution of criminal proceedings and to the fees paid to pleaders by Hussenuddin in connexion with them.

I agree with the lower Court that Hussenuddin has failed to establish that Kisan brought his complaint maliciously and without reasonable and probable cause, and that his suit therefore had to be dismissed. In view of this finding I need not consider the question whether Bindi, who was not a party to the complaint, could be held to have joined with Kisan in instituting the criminal proceedings. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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(2) A. I. R. 1922 All. 209=44 All. 485.

A. I. R. 1929 Nagpur 261

PRIDEAUX, A. J. C.

Surajmal and *another* — Plaintiffs—Appellants.

v

Raghunath and *others*—Defendants—Respondents.

Second Appeal No 620 of 1926, Decided on 16th April 1928, from a decree of 2nd Addl. Dist. Judge, Wardha, D/- 11th October 1926, in Civil Appeal No. 88 of 1926.

Civil P. C., O 6, R. 17—Appeal in name of dead plaintiff—No application to rectify error for about three months—Case is not one of misdescription of plaintiff and Court is justified in dismissing appeal.

Where an appeal is filed in the name of the dead plaintiff when it should have been filed in the name of his legal representative and no application was made for about three months to get the error rectified, the case cannot be called one of a misdescription of the plaintiff and the Court is justified in dismissing the appeal 10 *N. L. R.* 144, *A. I. R.* 1923 *Nag.* 96, *A I. R.* 1923 *Bom.* 452, *A. I. R.* 1925 *Lah.* 441, *not Appl*, *A.I R.* 1924 *Cal.* 74, *Dist.*; 31 *Mad.* 86, *Ref.* [P 262 C 1]

M. R Bobde—for Appellants.

D N Khare—for Respondents

Judgment.—The plaintiff Chandanbai sued the defendants for possession of a one-anna malguzari share of mauza Panjra Gondi. That suit was dismissed on 10th April 1926. An appeal was filed on 16th June 1926, in the name of the plaintiff Chandanbai who had, however, died on 22nd May 1926 On 24th September 1926, the pleader for the respondents brought this fact to the notice of the lower appellate Court, the fact being admitted by the pleader for the appellant who stated that the name of Chandanbai had been inserted in the memorandum of appeal through an accidental mistake, the appeal really having been filed by Chandanbai's two sons. It was argued for the respondents that the appeal being filed in the name of a dead person, abated. The lower appellate Court, following the case of *Veerappan Chetty* v *Tindal Ponnam* (1) which deals with a suit against a deceased person dismissed the appeal with costs.

It is here contended that the intention was to bring the appeal in the name of Chandanbai's heirs who gave a power-of-attorney to the pleader who filed the appeal, but that by a clerical error the

(1) [1908] 31 Mad. 86=17 M. L. J 551.

name of the original plaintiff was entered as the appellants and the present appellants ask for permission to correct the misdescription. Reliance is placed on *Manjula* v *Shankar* (2) a case which, in my opinion, does not apply. Another case quoted is *Bakaram* v. *Hiralal* (3) a case of a misdescription of a plaintiff. In that case the managers of a temple filed a suit when the temple itself was the real plaintiff. It was held that the omission to mention the temple in the heading was merely a mistake in the description of the plaintiff and that no question of limitation arose when that description was corrected. It is difficult to see how the decision in that case applies to the facts of the present case, the appeal here having been brought in the name of a plaintiff who is dead. Other cases quoted are *Saraspur Manufacturing Co. Ltd.*, v *B. B & C. I. Ry Co.* (4) and *Nanak Chand Mukandi Lal* v. *East-Indian Ry.* (5). These are two cases where the agent of a railway was sued as such, while the case was against the railway itself. They again do not apply to the circumstances of the present case.

Another case referred to by the pleader for the appellants is *Seodoyal Khemka* v. *Joharmull Manmull* (6). But the circumstances there are not on all fours with those of the present case. It is noteworthy that the power signed by the sons of Chandabai to the pleader does not state under what authority they wished to file the appeal. There is nothing to show that they did so as the legal representatives of the deceased ; and as the facts stand, the appeal was filed in the name of a dead person, and further until September 1926, no application was made to get the error rectified. I do not think that the present case can be properly called one of a misdescription of the plaintiff: there is no misdescription at all. The appeal was filed in the name of a dead woman when it should have been filed in the name of her representatives, and it is difficult to see what the lower appellate Court could have done under these circumstances except to dismiss the appeal with costs. I am told that the sons have now filed an appeal in their own name, asking for time under S. 5 Lim. Act, but that is a separate case and will be dealt with by the original Court. The result is that this appeal fails and is dismissed with costs. The appellants will pay the respondent's costs.

P.N./R K. *Appeal dismissed.*

(2) [1915] 10 N. L. R. 144=26 I. C. 830.
(3) A. I. R. 1923 Nag. 90.
(4) A. I. R. 1923 Bom. 452=47 Bom. 785.
(5) A. I. R. 1925 Lah. 441=6 Lah. 252.
(6) A. I. R. 1924 Cal. 74=50 Cal. 549.

A. I. R. 1929 Nagpur 262

SUBHEDAR, A. J. C.

Abdul Rahiman—Defendant — Appellant.

v.

Mt. Shah Bibi—Plaintiff — Respondent.

Second Appeal No 12-B of 1929, Decided on 5th July 1929, from decree of Spl. Addl Dist. Judge, Akola, D/- 17th October 1928, in Civil Appeal No. 47 of 1928.

Mahomedan Law—Divorce— False tcharge of adultery against wife—Conditional retraction is not retraction in law and wife is entitled to decree.

A person preferred a false charge of adultery against his wife. He made a conditional retraction in the course of the pleadings in the suit brought by the wife for dissolution of marriage.

Held . that such conditional retraction was no retraction in law and wife was entitled to a decree for dissolution of marriage. 41 *All.* 278, *Relied on.* [P 263 C 1]

M. R. Pathak—for Appellant.

Fida Hussain—for Respondent.

Judgment — This second appeal is directed against the decree for dissolution of plaintiff's marriage with the defendant passed by the Subordinate Judge Second Class No. 3, Akola, in Civil Suit No. 301 of 1927 and confirmed by the Special Additional District Judge in Civil Appeal No 47 of 1928. Both the lower Courts have concurrently held that the defendant did prefer a false charge of adultery on oath against the plaintiff, his wife, that he did not make retraction of the same as required by law and that therefore the plaintiff was entitled to have a decree for dissolution of marriage passed against the defendant

There is no force in either of the grounds of appeal. It is abundantly proved by documentary evidence on record that the appellant on two occasions before the District Magistrate and the Sub-Divisional Magistrate had stated on oath

that "her uncle Abdul Rahim is having immoral relation with her," the plaintiff. The defendant was also subsequently convicted under S. 500, I. P. C, with respect to this defamatory statement. The conditional retraction made by him in the course of the pleadings in the suit is no retraction in law. The plaintiff was, therefore, rightly given a decree for dissolution of marriage: *Zafar Husan* v. *Ummatur-Rahman* (1). The second appeal fails and is dismissed with costs. Pleader's fee Rs. 50.

P.N/.R.K. *Appeal dismissed.*

(1) [1919] 41 All. 278=49 I. C. 256=17 A. L. J. 78.

A I. R. 1929 Nagpur 263

MACNAIR, A. J. C.

Ramnarayan Marwadi — Plaintiff—Appellant

v.

Ukanda and *others*—Defendants—Respondents.

First Appeal No 30-B of 1928, Decided on 3rd December 1928, from decree of First Class Sub-Judge, Morsi, D/- 10th December 1927.

(a) Civil P. C., O. 34, R. 3 .(2) Proviso—Judgment-debtor not paying decretal amount in March 1927 on date fixed for its payment but submitting statement in July 1927 to extend time on ground of bad harvest— Statement held to be attempt to show good cause for non-payment and Court should consider its truth and sufficiency.

A judgment-debtor did not pay the decretal amount on 10th March 1927, the date fixed for its payment in a preliminary decree for foreclosure but submitted a statement in July 1927 for extension of time referring to bad harvest in the previous years,

Held: that though the statement was a belated one and referred primarily to the difficulty in raising money in July 1927 it could be considered an attempt to show that good cause existed for non-payment prior to 10th March and the Court should consider the truth and the sufficiency of such statement: *A. I. R* 1929 *P. C.* 137, *Dist.* [P 264 C 1]

(b) Civil P. C., O. 34, R. 3 (2) Proviso—Fact that decretal amount is large and payment is made within few months from date fixed for payment is not good cause.

Extension cannot be granted unless good cause is shown and the facts that the decretal amount is large and that payment is made within a few months from the time fixed for payment do not by themselves constitute good cause: *A. I. R.* 1928 *P.C.* 137, *Rel. on.* 2 *C. P. L. R.* 29, *not Foll.*; 10 *N. L. R.* 150, *Ref.* [P 264 C 1]

W. B. Pendharkar—for Appellant.

G. L Subhedar—for Respondents.

Judgment.—The facts which I have to consider are these: A preliminary decree for foreclosure was passed by which the defendants were directed to pay over Rs. 7,000 to the plaintiff on or before 13th February 1927. An appeal was decided on 5th February 1927, and the decretal amount was reduced considerably. Mr. Subhedar for defendant 3 asked that the date for payment should be extended and on 10th February 1927, the date fixed for payment was changed from 13th February 1926 to 10th March 1927. It may be conceded that as the fixation of the date for payment was not discussed when defendant 3 was present in person, Mr. Subhedar was unable to press for a longer date, but the fixation of a date one month ahead should have impressed upon defendant 3 the necessity for prompt payment. The payment was not made before the due date and an application for final decree was made on 22nd March 1927. The case was adjourned for hearing twice for want of time. Then on 25th June 1927, defendant 3 tendered Rs. 2,500 in part payment and prayed for time till the next harvest to pay the balance. The plaintiff refused to accept part payment and defendant 3 was directed to deposit the amount in Court and submit in writing his grounds for extension of time. The case was adjourned till 16th July 1927. Defendant 3 submitted his statement and on 16th July 1927, he was ready to pay the decretal amount. He had, however, not brought any amount as interest by way of compensation or as costs to be paid to the plaintiff. The plaintiff again refused to receive the amount. Statements were taken and on 19th November 1927, the Judge held that an extension of time should be granted on condition that some interest was paid. Interest was paid and the Judge passed a final decree to the effect that the mortgage-debt had been satisfied.

In appeal it is urged that as the judgment-debtors did not show sufficient cause for their failure to pay the amount within the time fixed, the lower Court could not legally extend the time. Now, the reasons given by the lower Court are: (1) that it was not a small amount that the defendant had to pay and (2) that payment had been made after a small

delay of four months, It appears to have followed the dictum in *Govinda* v. *Gangaram* (1) that

"where a few days after the fixed time the mortgagor pays down the whole of the mortgage-money he should not forfeit his estate."

This dictum is quoted with apparent approval in *Balkishan* v. *Atmaram* (2) but this judgment contains a statement on p. 157 that the Court has to be satisfied that there is good cause for extending time and that this good cause is not to be assumed either from non-payment or delayed payment. The judgment of the Privy Council in *Motilal* v. *Ujjar Singh* (3) makes it clear that an extension cannot be granted unless good cause is shown The facts that the amount is large and that payment has been made within a few months do not, by themselves, constitute good cause The first Court, then had no material before it to use the discretion to enlarge the time fixed. The decree passed must, therefore, be set aside

But the facts of this case differ from those considered in *Motilal* v. *Ujjar Singh* (3) In that case their Lordships of the Privy Council had before them a definite finding that there was no good cause for extension In the present case defendant 3 asked for extension by a statement referring to the bad harvest during the previous year and other matters This statement is belated and appears to refer primarily to a difficulty in raising the money in July 1927, but it can be considered an attempt to show that good cause existed for non-payment prior to 10th March 1927 The truth of the statement and its sufficiency, if true, has not been considered by the first Court. I, therefore, direct the first Court to consider the reasons given by defendant 3 and to come to the conclusion whether he had good cause for the delay in making the payment. Costs of this appeal will be costs in the suit.

P.N /R K *Case remanded.*

(1) [1889] 2 C. P. L. R. 29.
(2) [1914] 10 N. L. R. 150=26 I. C. 701.
(3) A. I. R. 1928 P. C. 137=55 Cal. 821=55 I. A. 207 (P.C).

A. I. R. 1929 Nagpur 264

SUBHEDAR, A. J. C.

Sampat—Appellant.

v.

Kisan—Respondent.

Second Appeal No. 346-B of 1927, Decided on 20th March 1929, from judgment of Addl. Dist Judge, Akola, D/- 27th October 1926, in Civil Appeal No. 32 of 1927.

(a) Civil P. C., S. 96—Objection against award decided—No appeal lies against decree in accord with terms of award.

No appeal lies against the decree which is in accord with the terms of the award and particularly when the trial Court entertained and decided all the objections preferred against the validity of the award . 18 *All.* 422 (*F B.*) ; *A. I. R.* 1921 *Bom.* 32 and 29 *Cal.* 167 (*P. C.*), *Rel. on.* [P 265 C 1]

(b) Civil P. C., Sch. 2, Para. 10—Para. 10 contemplates writing of evidence—But it is not obligatory.

Paragraph 10 undoubtedly contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators but does not oblige them to keep such a record. [P 265 C 2]

W. B. Pendharkar—for Appellant.

Judgment —The plaintiff's suit was for recovery of Rs 40 as damages for the breach of contract of marriage. Defendant 1 was to have been married to the plaintiff. Defendant 2 is her brother and defendant 3 a mere stranger but is alleged to have contributed to the breach Defendants 1 and 3 denied knowledge of the contract but defendant 2 admitted its existence but pleaded breach on the part of the plaintiff.

The pleadings led to the framing of the following issues for trial :

1. Had the plaintiff agreed to give a field to defendant 1 before the performance of marriage ?
2. Who is responsible for the breach of the contract of marriage ?
3. Whether plaintiff incurred actual damages on account of the breach of contract, if so, to what extent ?
4. What amount of damages, if any, is plaintiff entitled to recover from the defendants ?

Before, however, the evidence was recorded the matter in dispute was referred by the parties to the arbitration of certain panchas who submitted their award on 7th December 1926. But as award gave no findings on issues 2, 3 and 4, it was remitted to the panchas for proper disposal with directions that, if they thought it necessary parties or witnesses

may be further examined. The award was duly completed and again filed in Court on 20th December 1926 and defendant 2 filed certain objections to the same. His principal ground of attack against the validity of the award was that he or his witnesses were not further examined by the arbitrators after the award was returned to them. It was, however, admitted that he and his witnesses were already examined before the award was first drawn up.

The trial Court found no substance in this objection and passed a decree in terms of the award directing defendant 2 to pay to the plaintiff Rs 141 as damages The Court further ordered defendant 2 to pay the costs of the plaintiff. Against this decree all three defendants appealed though no decree was passed against defendants 1 and 3 The lower appellate Court held that no appeal lay against the decree and assuming that it did lie, it held that no irregularity of procedure adopted by the arbitrators was pointed out to justify the upsetting of the award. The first appeal was accordingly dismissed and again all the defendants have preferred this second appeal.

It was urged by the appellant's learned pleader that the lower appellate Court was wrong in holding that no first appeal lay to that Court. But in view of the principle laid down in *Ibrahim Ali* v. *Mohsin Ali* (1), *Ravjibhai* v. *Dahyabhai* (2) and *Gulam Khan* v *Muhammad Husain* (3), it is clear that no appeal lay against the first Court's decree which was in accord with the terms of the award and particularly when the trial Court did entertain and decide all the objections preferred by the appellants against the validity of the award.

It was also contended that because the arbitrators did not make any notes of the statements of the parties or take down the depositions of the witnesses examined by them their proceedings were void but no authority has been shown to me in support of this contention. Para. 10, Sch 2, Civil P. C, only says that the award is to be filed in Court :

"together with any depositions and documents which have been taken and proved"

before the arbitrators and it was suggested that this paragraph postulates that depositions of witnesses must be reduced to writing. I do not think this suggession is sound. The paragraph in question undoubtedly contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators but does not oblige them to keep such a record. The appeal fails and is dismissed with all costs

P.N./R.K. *Appeal dismissed.*

(1) [1896] 18 All. 422=(1896) A. W. N. 137 (F.B.).
(2) A. I. R. 1921 Bom. 32=45 Bom. 832.
(3) [1902] 29 Cal. 167=29 I. A. 51=8 Sar. 154 (P.C.).

A. I. R. 1929 Nagpur 265

MACNAIR, OFFG. J. C. AND JACKSON, A. J. C.

Commr. of Income-tax, Nagpur—Applicant.

v.

S. M. Chitnavis—Non-Applicant

Misc Petn. No 15 of 1929, Decided on 1st August 1929, for leave to appeal to Privy Council from the decision of this Court reported in *A I. R.* 1929 *Nag.* 50

(a) Income-tax Act, S 66-A (2)—When the matter referred to comes before civil Court, Commissioner is a party.

The Act in providing that the Commissioner in proper cases should make references to the civil Court, merely provides a convenient procedure for obtaining the decision of the Court with regard to the matter in dispute and so when the matter comes before the civil Court the Commissioner is a party *A. I. R.* 1928 *P. C.* 1, *Rel. on.* [P 266 C 1]

(b) Civil P. C., S. 110—Question to decide when debt becomes bad—Case is "otherwise" fit.

The question whether an assessee has an absolute option to decide in what year a debt due to him or any of that debt is to be treated as irrecoverable and therefore to affect an amount of profits received in that year is of great public importance and the case is "otherwise" fit for appeal to the Privy Council *A. I. R.* 1927 *P. C.* 242 and 23 *All.* 227 (*P.C.*), *Ref.* [P 266 C 1, 2]

D N. Choudhri—for Applicant.

M. R. Bobde—for Non-Applicant.

Order.— The Commissioner of Income-tax asks for leave to appeal to His Majesty in Council under the provisions of S. 66-A (2), Income-tax Act, 11 of 1922, against the final order of this Court passed on a reference under S. 66 (2) of the Act. The respondent raises a preliminary objection that S. 66-A does not authorize an appeal by the Commissioner of Income-tax to the Privy Council. His ground is that the Commissioner of Income-tax cannot be considered a

party as he exercises the functions of a Court in making a reference to the civil Court. We hold that the Income-tax Act, in providing that the Commissioner in proper cases should make reference to the Court, merely provides a convenient procedure for obtaining the decision of a Court with regard to the matter in dispute. When the matter comes before the civil Court the Commissioner of Income-tax is a party A Collector also can make a reference under the Land Acquisition Act, and it has never been doubted that the Collector is a party in the proceedings of a civil Court. The practice of the Privy Council is sufficient to remove any doubt on this point. In appeals by the assessee the Commissioner of Income-tax is treated as respondent and in *Commissioner of Income-tax* v. *Western Indian Turf Club, Ltd.* (1) the Commissioner of Income-tax was considered to be the appellant.

In *Delhi Cloth and General Mills Co. Ltd* v. *Income-tax Commissioner, Delhi* (2), it was held that the provisions of S. 66 A, Income-tax Act, exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. We have, therefore, to decide whether this case is "otherwise" fit for appeal to His Majesty in Council. Their Lordships of the Privy Council in *Banarsi Prasad* v. *Kashi Krishna Narain* (3), have stated that the provision authorizing a High Court to certify that the case is fit for appeal "otherwise" is clearly intended to meet special cases: such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. The applicant urges that the point in dispute is of great public importance.

The point which is in dispute is briefly this. Has an assessee an absolute option to decide in what year a debt due to him or any part of that debt is to be treated as irrecoverable and therefore to affect the amount of profits received in that year? It cannot, we think, be denied that this point is of great public importance. Every trader or money lender contracts bad debts. If he is aware that he has an absolute option to abstain from writing off these debts in a year when such abstention will not greatly increase his tax, he will frequently or even generally utilize that option in order to save income-tax. A petty trader, whose income but for this device would in many years exceed the taxable minimum, can write off in a considerable proportion of these years just enough of a bad debt to bring his income below the minimum. As assessee with a considerably larger income can write off just sufficient to reduce the rate of assessment in years in which, if he has not full option to choose the time of writing off, his income would be slightly above the maximum for which a certain rate is taken. A still wealthier trader or money lender can utilize the option in order to escape super-tax, refraining from writing off bad debts in years when his income is below the super-tax limit. The existence of this option then whon it becomes known will have a very considerable effect on the receipts of Government from income-tax.

The sum in dispute in this case is stated to be about Rs. 1,000, but the sums affected in individual cases by exercise of the option, will in most cases be even smaller. In the present case the point in dispute was referred to a Full Bench. We do not consider it likely that a case more suitable for certification will come before this Court in the near future. The counsel for the non-applicant did not urge that the grant of the certificate when the sum in dispute was so small would involve great hardship on his client, and we do not think that the grant does involve undue hardship The amount placed in jeopardy by the grant is a small fraction of the income of the non-applicant for a single year, and the non applicant will not be saddled with the costs of the applicant in appeal unless their Lordships of the Privy Council consider that this is just. We therefore certify that the case is fit for appeal on the ground that the point in dispute is of great public importance. Costs incurred in this Court will be borne as incurred.

P.N./R K. *Application granted.*

(1) A. I. R. 1928 P. C. 1=52 Bom. 123=55 I. A. 14 (P.C.).
(2) A. I. R. 1927 P. C. 242=3 Lah. 284=54 I. A. 421 (P.C.).
(3) [1901] 23 All. 227=28 I.A. 11=7 Sar. 825 (P.C.).

* A. I. R. 1929 Nagpur 267

JACKSON, A. J. C.

Daulat—Plaintiff—Appellant.

v.

Baliram and *others* — Defendants—Respondents.

Second Appeal No. 419-B of 1927, Decided on 29th July 1929, from decree of Addl. Dist. Judge, Khamgaon, D/- 30th September 1927, in Civil Appeal No. 96 of 1925.

(a) Evidence Act, S. 95 — Transfer by mortgagee of mortgaged property—No mention in deed that only mortgage rights were intended to be sold—Presumption is that whole property is sold—If absence of assertion of absolute ownership in the deed makes it possible to hold that only mortgagee's rights were sold, there is latent ambiguity and evidence can be given to remove it—Limitation Act, Art. 134.

Where a mortgagee transferred the mortgaged property and there was no mention in the deed that only mortgage rights were intended, to be transferred the mere fact that it is mentioned in the deed that the property stood in the khata of the mortgagor and that there is an indemnity clause cannot justify the contention that only mortgage rights were intended, and if the absence of any assertion in the deed of absolute ownership on the part of the vendor mortgagee makes it possible to hold that mortgagee's rights were sold, there is a latent ambiguity to remove which evidence can be given. 14 *M. I. A.* 1 (*P.C.*), *Rel. on.* [P 267 C 2]

*** (b) Limitation Act, Art. 134—Scope.**

Good faith is immaterial and Art 134 applies even if the transferee knows that the transferor was only a mortgagee. *A. I. R.* 1922 *Bom.* 234; 40 *Mad.* 745 and *A. I. R.* 1926 *Mad.* 81, *Foll.* [P 268 C 1]

(c) Limitation Act, Art. 134—Scope.

Article 134 applies even to transfers by trustees and mortgagees and there is no distinction between transfers by these two classes: *A. I. R.* 1926 *Mad.* 81, *Rel. on.* [P 268 C 1]

G.S. Brahmarakshas and *M.R. Pathak* —for Appellant.

M V Abhyankar and *S A. Ghadgay* —for Respondents

Judgment.—This appeal arises from a suit for redemption of a usufructuary mortgage. After the death of the mortgagee his son sold the property mortgaged in 1907 The suit for redemption having been brought more than 12 years after the transfer has been held to be time-barred under Art 134, Sch. 1, to the Limitation Act It is urged, in the first place, that the sale was merely of the mortgagee's rights and not an absolute sale of the property and that the finding of both the lower Courts that it was an absolute sale is based on an inadmissible oral evidence as to the intention of the parties There is no mention of mortgage rights in the deed and prima facie it purports to be a sale of the property and not of those rights. The fact that it is mentioned in the deed that the fields comprised in the property stood in the khata of Baliram Kunbi, the original mortgagor, and the fact that there is an indemnity clause cannot prove that mortgage rights only were transferred. If it can be held that the absence of any assertion in the deed of absolute ownership on the part of the vendor makes it possible to hold that only the mortgagees's rights were sold, a view which appears to have been taken by the Privy Council in *Radanath Doss* v *Gisborne & Co.* (1), then, there is a latent ambiguity to remove which evidence can be given.

For the appellant it is argued that the fact that no enquiry into the title of the vendor was made by the purchasers is evidence that only the mortgage rights were transferred This argument is based on *Muthaya Chetti* v. *Kandhappa Chetti* (2) in which at p 438 it is said :

"If, for instance, it should appear that the purchaser refrained from calling for and examining the title-deeds and from examining the register of assurances, or from enquiry as to who was in possession of the property, or otherwise abstained from means available to him of ascertaining the title or that he in fact inspected the mortgage document under which the vendor claimed the property, there would be evidence upon which the Court might hold that the parties did not intend to transfer an absolute property but such interest only as was vested in the transferrer, or possibly that the mortgagee intended to commit a fraud upon the mortgagor and that the transferee was accessory thereto or did not act in good faith."

It will be seen that this decision does not lay it down as a necessary deduction from the fact that no enquiry was made, that only mortgage rights were intended to be transferred ; and the oral evidence makes it clear that in the present case that was not the intention, a point on which there are concurrent findings by both the lower Courts.

As to the other possible inference suggested in the Madras decision, it appears to me immaterial whether the purchasers acted in good faith or not. The words "in good faith" occurred in the provisions of the Limitation Acts of 1859

(1) [1870] 14 M. I. A. 1=15 W. R. 24=2 Suther 397=2 Sar. 636 (P.C.).

(2) [1918] 34 M. L. J. 431=7 M. L. W. 482=45 I. C. 975=(1918) M. W. N. 384.

and 1871, which correspond to Art. 134 of the present Act. They have, however, been omitted in the Acts of 1877 and 1908, and their omission cannot be without significance. It has been held in *Keshav Raghunath* v. *Gafurkhan* (3), *Baluswamy Ayyar* v. *Venkataswamy Naicken* (4), and *Rukku Shetti* v. *Ramachandraya* (5), that good faith is immaterial and that Art. 134, applies, even if the transferee knew that the transferrer was only a mortgagee. Art. 134 applies to transfers by trustees and mortgagees, and in Rustomji's Law of Limitation a distinction is suggested between transfers by these two classes. That distinction has been rejected in *Rukku Shetti* v. *Ramchandraya* (5), and it is difficult to see how it can be drawn, in face of the clear wording of the Article, which leaves no room for any such distinction.

Prima facie then the suit was time-barred, but the plaintiff-appellant relies on the fact, that he has brought his suit within three years of his attaining majority, in order to save limitation. The lower Courts have, however, held that S. 7, Lim. Act, applies ; firstly because time began to run in the lifetime of the plaintiff's father, who was the manager of the joint family, and, secondly, because the plaintiff's elder brother did not sue for redemption within three years of attaining majority : he also is held to have been the manager of the family It has been argued that the inaction of the elder brother does not affect the plaintiff's right to sue. Reliance is placed in the decision in *Shampuri* v. *Ramchandra* (*A. I. R.* 1925 *Nagpur* 385) and the Privy Council decision in *Jawahir Singh* v. *Udai Parkash* (6) In the first of these cases the decision appears to me to have turned on the fact that the elder brother was not necessarily and had not been proved to be the manager of the family ; and in the second also the elder brother does not appear to have been the manager In cases in which the elder brother was the manager of the family *Rati Ram* v. *Niadar* (7), and *Bupu Tatya* v. *Bala Ravji* (8), a suit barred as against him has been held barred as against the younger brother. Moreover, no argument has been addressed to me to show that the inaction of the plaintiff's father does not lead to the plaintiff's suit being barred He clearly was in a position to bind the plaintiff, and time began to run against him from the date of the transfer I agree with the finding of the lower Courts that the suit is barred The appeal is dismissed with costs

P.N /R K *Appeal dismissed.*

(3) A. I. R. 1922 Bom. 234=46 Bom. 903.
(4) [1917] 40 Mad. 745=40 I. C. 531=32 M. L. T. 24.
(5) A. I. R. 1926 Mad. 81=49 Mad. 29.
(6) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P.C.).
(7) [1919] 41 All. 435=49 I. C. 990=17 A. L. J. 649.
(8) A. I. R. 1921 Bom. 289=45 Bom. 446.

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* A I. R 1929 Nagpur 268

FINDLAY, J C.

Jagannathpuri—Appellant

v.

Nathoo and *others*—Respondents

First Appeal No. 28 of 1927, Decided on 16th March 1928, against decree of 1st Sub-Judge, 1st Class, Nagpur, D/- 2nd February 1927 in Civil Suit No. 29 of 1925

*** (a) Civil P. C., S. 149 — Only application under O. 33 filed—S. 149 has no application.**

Where no suit is instituted but only an application under O 33 for leave to sue as a pauper is made, S. 149 has no application to validate subsequent payment of court-fees. 38 *Bom* 41, *Ref*, [P 269 C 1]

(b) Limitation Act, S. 14 — Application for leave to sue as a pauper dismissed—Application made in bad faith—Payment of court-fees after dismissal cannot operate retrospectively for purposes of limitation.

Where an application for leave to sue as a pauper has been disposed of and dismissed and where, moreover, it has been found that the application was made in bad faith, any payment of court-fees made thereafter cannot operate retrospectively for the purposes of calculation of limitation 2 *All.* 241 (*P.C.*), *Dist.*, 20 *Bom* 509, 24 *Cal* 889, *Rel. on.* [P 269 C 2]

D W. Kathaley and *T. Hiralal*—for Appellant.

W. R. Puranik and *M. R. Bobde*—for Respondents.

Judgment.—The facts of this case are sufficiently clear from the judgment of the lower Court. The only question with which I am concerned is whether the payment of court-fees by the present plaintiff-appellant on 1st October 1924 has retrospective effect, or whether the suit should be deemed to have been instituted

on the actual date of payment of court-fees. The plaintiff-appellant's contention is that he is entitled to exclusion of time from 18th June 1923 to 1st October 1924, which time is said to have been spent in proceedings in the Court of the Second Subordinate Judge first class, taken with a view to being allowed to sue as a pauper The said application for leave to sue as a pauper was dismissed by the Court in question on 22nd February 1924, but thereafter the applicant asked the Court to keep the case pending as he intended applying for revision to this Court against the dismissal of the application. Meanwhile, the application was dismissed and the Court gave time until 1st October 1924 for payment of court-fees There can be no question in the present case but that the applicant was able to pay court-fees and that his application to sue as a pauper was one made in bad faith

An argument has been addressed to me in this Court to the effect that the provisions of S. 149, Civil P C., apply to the case It is urged that the payment of court-fees made on 1st October 1924, in effect, validated the original application for leave to sue as a pauper and the decision in *Achut Ramachandra* v. *Nagappa Bab Balgaya* (1) has been referred to in this connexion I am wholly unable to accept the view that S. 149, Civil P. C, has any application to the facts of the present case No suit had been instituted when the application for leave to sue as a pauper was filed, that was a preliminary proceedings as laid down in O. 33, Civil P. C.

The only question, therefore with which I am concerned, is whether if there has been fraud on the part of the plaintiff in applying to sue as a pauper by setting up a false case of pauperism he is entitled, nevertheless, to claim the benefit of S 14, Lim. Act, if his application to sue as a pauper has been dismissed and he pays court-fees on a date when the limitation for suit has expired. I have not the slightest hesitation in holding that the position urged on behalf of the plaintiff in this connexion cannot for a moment be supported. The decision of their Lordships of the Privy Council in *Stuart Skinner* v. *William Orde* (2) clearly cannot govern the present case because, in it, there was no question of malafides or fraud on the part of the plaintiff. That their Lordships might have come to a different decision had such mala fides or fraud been proved, is clear from the remarks at p. 248 of the judgment. The view I take in this connexion finds support in the decision of Sargent C. J., and Parsons, J., in *Keshao Ramchandra* v. *Krishna Rao Venkatesh* (3) and in *Aubhoya Churn Dey* v. *Bissesuari* (4). I am of opinion that where an application for leave to sue as a pauper has been disposed of and dismissed and where, moreover, it has been found that the application was made in bad faith, any payment of court-fees made thereafter cannot operate retrospectively for the purpose of calculation of limitation. The suit has, therefore, been properly dismissed as time barred and I dismiss the present appeal. The appellant must bear the respondent's costs. Costs in lower Court as already ordered Only pleaders fees will be allowed.

P N./R.K. *Appeal dismissed.*

(1) [1914] 38 Bom. 41=21 I. C. 837=15 Bom. L. R. 902.

(2) [1878] 2 All. 241=6 I. A. 126=3 Suther. 627=4 Sar. 31 (P. C).
(3) [1896] 20 Bom. 508.
(4) [1897] 24 Cal. 889.

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* A. I R. 1929 Nagpur 269

SUBHEDAR, A. J. C.

Mt. Manbi—Plaintiff—Appellant.

v.

Kodu—Defendant—Respondent.

Second Appeal No. 215 of 1928, Decided on 25th July 1929, from decree of Dist. Judge, Jubbulpore, D/- 26th January 1928, in Civil Appeal No. 126 of 1927

*** Easements Act, S. 60 (6)—Licensee constructing permanent building on licensor's site under implied license— License is irrevocable as to building and licensee cannot be ejected—Irrevocability is restricted to portion covered by building.**

If a person constructs a permanent building on a portion of the site belonging to another under an implied license from him, the license cannot be revoked and the licensee cannot be ejected from the building. The irrevocability of the license in such a case applies to that portion of the site which is covered by the building and not to any other open portion of the site: 8 *All.* 69, *Rel. on.* [P 270 C 2]

Abdul Razak—for Appellant.

Fida Husain—for Respondent.

Judgment.—The facts leading to this second appeal are briefly these: About 30 years ago the plaintiff's husband died leaving three kachcha houses in the town of Mandla. The defendant is the plaintiff's brother's son and lived at Jubbulpore with his mother. In 1901 he was invited by the plaintiff to come and stay with her in one of these houses and since then the parties are admittedly occupying the house which is the subject matter of the present suit All the three houses were dismantled and new ones put up in their places at different periods of time from 1908 onwards. The plaintiff's story is that the cost of construction of all the three was borne by her though the money was actually disbursed through the hands of the defendant, while the defendant's version is that after he came over to the plaintiff she gifted the whole of her property including the old houses to him on condition of his maintaining her all her life, and that he rebuilt all the three houses at his cost and had otherwise acquired a title thereto by adverse possession.

The plaintiff had brought the present suit to eject the defendant from the occupation of the parties, though each of them occupy separate portions. The trial Court held that the alleged gift was not proved, that the houses were not constructed at the defendant's expense, and that the defendant did not become the owner of the house in dispute by adverse possession. The claim was accordingly decreed

On defendant's appeal, the District Judge, Jubbulpore, concurred with the trial Court in holding that the alleged gift was not proved and that no question of adverse possession arose in the case, but he dismissed the plaintiff's suit holding that because the defendant had spent his own money in rebuilding the house with plaintiff's acquiescence he could not be turned out of it by the plaintiff.

The plaintiff has come up in second appeal and it is contended on her behalf that the lower appellate Court erred in holding that because the defendant paid for the construction of the house he had become the owner of it. Mr. Fida Husain, who appeared for the defendant respondent, stated that the lower appellate Court has not decided that the defendant had become the owner of the house. All that is decided by the District Judge is that the defendant was a licensee of the land, and since the superstructure was constructed by the defendant at some cost and was of a permanent character the license could not be revoked under S 60 (6), Easement Act. But in view of the principle enunciated in the *Land Mortgage Bank of India* v. *Moti* (1) the irrevocability would only apply in the present case to that portion of the site which is covered by the building and not to any other open portion of the site. The result indeed is very unsatisfactory to both sides, but as the law stands there is no escape from it I would, therefore, uphold the decision of the lower appellate Court and declare that because the defendant has constructed permanent building on a portion of the site belonging to the plaintiff under an implied license from the plaintiff the license cannot be revoked and defendant cannot be ejected from the building; but that so far as the unbuilt portion of the site is concerned there is no license in favour of the defendant and the plaintiff is the owner thereof along with the building in dispute itself stands

After the conclusion of the arguments Mr Abdul Razak for the plaintiff presented an application for permission to withdraw from the suit with liberty to bring a fresh suit on the allegation that the pleadings were defective and the whole trial consequently unsatisfactory. As the application is opposed by the respondent I see no reason to grant it. The second appeal fails and is dismissed. But as the operative finding of the lower appellate Court was not very clear I direct that the costs of the second appeal be borne by the parties as incurred.

P N./R.K *Appeal dismissed.*

(1) [1886] 8 All. 69=(1886) A. W. N. 9.

A I. R. 1929 Nagpur 270

MACNAIR, OFFG. J. C.

Sitaram—Plaintiff—Appellant.

v

Doma and *others*—Defendants—Respondents.

Second Appeal No. 553 of 1927, Decided on 27th June 1929, from decree of Dist, Judge, Chhindwara, D/- 9th August 1927, in Civil Appeal No. 45 of 1927.

(a) Civil P. C., S. 100—Soundness of conclusions drawn from facts is matter of law.

Where the soundness of the conclusions drawn from the facts is in question, it is a matter of law and can be questioned in appeal: 20 *Cal.* 93 (*P.C.*), *Rel. on.*[P 271 C 1, 2]

(b) Civil P. C., S. 100—Undue weight on certain facts—Finding of fact cannot be questioned.

The finding of the lower appellate Court cannot be set aside merely on the ground that undue weight was laid on certain facts which it was proper to consider. [P 271 C 2]

(c) Hindu Law—Debt—Manager — Bonds executed by adult members—Subsequent borrowing on bond executed by only one such member and executant not described as manager—Creditor must prove that money was borrowed on subsequent bond by him in capacity of manager and that there was necessity.

Where a joint Hindu family was in difficulties and borrowed money on bonds executed by certain adult members of the family and subsequently money was borrowed on a bond executed by only one of such members but he was not described in the bond as manager, the creditor must prove that money was borrowed in his capacity of manager and that either there was necessity for the loan or the creditor after due enquiry had reason to believe that there was such necessity. [P 271 C 2]

D. W. Kathalay—for Appellant

M. R Bobde—for Respondents.

Judgment—The suit out of which this appeal arises was based on bonds executed by Manaji. It is admitted before me that Manaji, in the bonds, is not described as manager of the joint Hindu family. The lower appellate Court has held that Manaji was the manager of the joint family but has disbelieved the evidence of the plaintiffs that the money borrowed was taken for family purposes and that the bond executed in 1924 acknowledged the debts due in the previous bonds on behalf of the family Manaji is dead and the suit against the surviving members of the joint family has accordingly been dismissed

The argument in appeal is as follows: The District Judge has based his judgment, to a very large extent, on an inference drawn from the fact that the plaintiffs obtained the signatures of other adult members of the family on previous bonds. This inference, which is not justified, caused him to reject the evidence of respectable witnesses which had been accepted by the first Court. Therefore, although the first Court's decision regarding the effect of the evidence must stand final as to the facts, it is the soundness of the conclusions drawn from the facts that is in question, and this is a matter of law: *Ramgopal* v. *Shamskhaton* (1). The conclusions of the District Judge can, therefore, be challenged in appeal.

Now, in 1916 the bonds were executed in favour of the plaintiffs by three adult members of the family. In 1920 plaintiff 1 Balwant Rao (P. W. 1) wrote to Nago Rao about one or both of these bonds and, in consequence, in July 1920, a fresh bond was written. It is admitted before me that this fresh bond was executed by the three adult members. Part of the debt, on account of which the present suit is instituted, was lent in August 1920; the bond was signed by Manaji alone. Plaintiff 1, as P W. 1, states that Manaji said it was unnecessary for the others to come and execute the bond, as he had authority to borrow on behalf of the family. It must be admitted that the lower appellate Court was correct in laying some weight on the fact that, whereas the signatures of three members had been taken on the former bond, the signature of Manaji alone was taken on this bond.

The family has been in money difficulties for many years and it is not improbable that the money was borrowed by Manaji for purposes of cultivation, but it was for the plaintiffs to prove that the money was borrowed by Manaji in his capacity of manager and that either there was necessity for the loan, or the plaintiffs, after due enquiry, had reason to believe that there was such necessity The plaintiffs' evidence on these points has been disbelieved I might have come to a different conclusion with regard to this evidence, but I am unable to set aside the finding of the final tribunal merely on the ground that undue weight was laid on certain facts which it was proper to consider. The evidence of the plaintiffs has been rejected and, without that evidence, it is not possible to hold that the money must have been borrowed by Manaji in his capacity of manager for the purpose of carrying on the agriculture of the family since it is not impossible that the plaintiffs were content to lend money to Manaji in his personal capacity. The same considerations apply to both bonds on which money was advanced and to the bond which was the renewal of one

(1) [1893] 20 Cal. 93=19 I. A. 228 (P.C.).

of the former bonds. The appeal therefore, fails and is dismissed. Costs on appellant.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 272

STAPLES, A. J. C.

Ajodhya Prasad—Applicant.

v.

Parashram—Non-Applicant.

Civil Revn. Appln. No. 426 of 1928, Decided on 10th July 1929, from order of Addl. Dist. Judge, Damoh, D/- 8th October 1928 in Civil Suit No. 16 of 1928.

(a) Stamp Act, S. 57—Scope.

If a deed does not mention the value of the property it does not require a stamp 44 *All.* 339, *Foll.* [P 272 C 2]

(b) Stamp Act, S. 42—Document stamped as authority to adopt though in reality it is deed of gift validated by Collector under S. 42—His decision cannot be set aside.

Where a document purports to be a deed of adoption but is in reality a deed of gift and is stamped as an authority to adopt, if the Collector validates and certifies it under S. 42, his decision is final and binding and cannot be set aside by a civil Court 7 *N. L. R.* 26, *Rel on.* [P 272 C 2]

J. Sen—for Applicant.

N. G. Bose—for Non-Applicant.

Order.—This is an application for revision against the finding of the Additional District Judge, Damoh, on an issue framed in the suit with regard to a document tendered in evidence, its admissibility and the value of the stamp payable upon it The document in question purports to be a deed of adoption executed by Motiram in favour of the applicant Ajodhya Prasad. It was written upon a stamp of Re. 1, but was produced before the Collector under S. 41, Stamp Act, and has been certified and endorsed by the Collector under S. 42 of the Act upon payment of R. 20 as duty.

The lower Court has held that the document, although purporting to be a deed of adoption is really a deed of gift as it transfers the whole of the executant's property in favour of the applicant Adjodhya Prasad, and has relied upon *Bhagwan Prasad* v. *Hari Singh* (1). The lower Court has then proceeded to hold that the document is inadmissible in evidence without a proper stamp and has declared the stamp duty to be Rs. 1,500 and the penalty Rs. 15,000 and has recorded a finding that the document is not admissible as a deed of gift until the applicant, defendant 1 pays Rs 16,500 as duty and penalty The application for revision is against this finding.

Two points appear to have been overlooked by the Judge of the lower Court. The first is that the deed does not mention the value of the property and therefore according to *In the matter of Muhammad Muzaffar Ali* (2) which was a decision upon a reference made by the Chief Controlling Revenue Authority under S. 57, Stamp Act, the deed does not require a stamp under the Act; the second point is that, as mentioned above the deed has been validated and certified by the Collector under S. 42 of the Act and is therefore admissible in evidence. The lower Court has brushed this fact aside by simply stating that the document has been stamped as an authority to adopt and not as a deed of gift. But whether the Collector made a mistake or not in the matter, I am of opinion that this decision is now binding and final and that it cannot be disturbed or set aside by the civil Court. In this connexion I have been referred by the learned counsel for the applicant to *Tukaram* v. *Somaji* (3). I am of opinion, then, that the finding of the lower Court is bad on both grounds and cannot be upheld. I therefore set aside the finding of the lower Court as regards the stamp duty leviable upon the document and its admissibility in evidence, and instead record a finding that the deed must now be held to be sufficiently stamped and that it is admissible in evidence. Costs of this application will be payable by the non-applicant. I fix pleader's fees at Rs. 10 as the application was not opposed and was heard ex parte.

P.N./R.K. *Revision allowed.*

(1) A. I. R. 1925 Nag. 199=22 N. L. R. 124.
(2) A. I. R. 1922 All. 82=44 All. 389 (F.B.).
(3) [1911] 7 N. L. R. 26=10 I. C. 702.

* A. I. R. 1929 Nagpur 273

JACKSON, A J. C.

Muhammad Wazir Agha—Appellant.

v.

Muhammad Abdul Gafoor—Respondent.

Misc. Appeal No. 10-B of 1929, Decided on 3rd July 1929, against the order of Sub-Judge, 1st Class, Amraoti, D/- 17th April 1929.

*** (a) Civil P. C., O. 39, R. 2—Right of appeal under O. 39, R. 2 exists although Court acts under O. 39, R. 2, by virtue of S. 141.**

When the Code specifically gives a right of appeal against order passed under O. 39, R. 2, a person cannot be deprived of his right of appeal merely because the lower Court acts under O. 39, O. 2 by virtue of S. 141. 9 *N. L. R.* 33, *Expl.*; *A. I. R.* 1922 *Nag.* 62, *Rel. on.* [P 273 C 2]

(b) Civil P. C., O. 39, R. 2—Temporary injunction against person not to get girl married—He not responsible for promoting marriage but not doing all to prevent it—He does not actually disobey order as passed and order for his detention in prison cannot stand.

Where a temporary injunction was obtained against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention in prison is incompetent. [P 274 C 1]

W. A. Forbes—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—In this case the appellant, Mohammed Wazir Agha, has been directed to be detained in the civil prison for a term of one month under O. 39, R. 2, in Sch. 1, Civil P. C. The proceedings arose out of a case under the Guardians and Wards Act. A girl, Rahimatbi, who had been living with the respondent Abdul Gafoor, left his house and came to that of the appellant. Abdul Gafoor applied to be appointed guardian of the girl and obtained a temporary injunction against Mohammad Wazir Agha directing him not to get the girl married pending disposal of the application. The girl, nevertheless, was married on 1st August 1927. Action was then taken under O 39, R. 2, against Mohammad Wazir Agha for his disobedience of the Court's injunction after an application for the prosecution of Mohammad Wazir Agha under S. 188, I. P. C., had failed.

It has been argued on behalf of the respondent that no appeal lies in this case and reference has been made to *Faridbi* v. *Mohammad Amin* (1). The argument is that the Court in a case under the Guardian and Wards Act could only act under O. 39, R. 2, by virtue of S. 141 and that S. 141 relates to procedure only and does not confer a right of appeal. *Gabba* v. *Kanchhedilal* (2), which was decided by the same Judge as *Faridbi* v. *Mohammad Amin* (1), shows that the latter ruling was not intended to have a very wide effect that the respondent would give it and when the Civil P. C. specifically gives a right of appeal against orders passed under O. 39, R. 2, I am unable to hold that the appellant is deprived of his right of appeal merely because the lower Court has acted under O. 39, R. 2, by virtue of S. 141.

The question then is whether the appellant has disobeyed the injunction of the Court His plea is that it was the girl herself who, with the connivance of some of the inmates of the house, left his house and went and got married without his knowledge. It is clear that the appellant himself was not present at the marriage but the lower Court has found that he arranged it. If the evidence of the Kazi, Nur Mohammad and of a tongawala, Sheikh Hussain, is believed, then the case against the appellant is clear. Nur Mohammad says that a week or ten days before the marriage actually took place Mohammad Wazir Agha asked him to perform it and that he promised to do so if someone was responsible for the girl. Sheikh Hussain, who carried the girl and two others from the appellant's house, says that his hire was paid by the appellant I cannot, however, believe these two witnesses. Even if the appellant was responsible for the marriage, it is clear that he was keeping himself carefully from taking any ostensible part in it and I do not think that he would himself have approached the Kazi or would himself have paid the tongawala, thereby clearly implicating himself It is noteworthy that the Kazi knew of the Court's injunction but said nothing to the appellant about it and made no objection to performing the marriage on

(1) [1913] 9 N. L. R. 33=19 I. C 97.
(2) A. I. R. 1922 Nag. 62=18 N. L. R. 15.

that account. This seems to me to throw additional suspicion upon his evidence.

Ignoring the evidence of Nur Mohammad and the tongawala all we have proved is that Rahimatbi got married with the assistance of Mohammad Yusuf, who lives in the appellant's house but is not related to him. I do not for a moment believe the evidence of the girl Rahimatbi that she fled alone from the appellant's house, that she met by chance the brother of the man to whom she is now married and told him that she wanted to get married, although she did not know him previously, and that he then arranged for her marriage to his brother; but I do not think that it necessarily follows that the appellant was responsible for the marriage. It is not clear what his interest in the girl was or why he should want to get her married, while it is clear that the girl did not want to go back to Abdul Gafoor's house. It seems to me quite possible and, in view of the Court's injunction, very probable that the appellant did not take any part in promoting the marriage. He may not have done all that he could do to prevent it; but then he was not ordered to prevent the marriage but merely not to arrange for it himself and I am unable to find that he has disobeyed the order as it was passed.

He has put in an affidavit to show that he reported to the police the girl's disappearance from his house and the likelihood that she would get married. I think that he might reasonably have been expected to do more and might have told the Court what the position was and that he was not in a position to prevent the marriage although he could undertake not to promote it. He appears to have done the minimum to comply with the Court's order but as he has not been proved actually to have disobeyed it, I do not think that the lower Court's order for his detention in prison can stand. It is accordingly set aside. As I cannot approve of the appellant's conduct, I do not propose to give him costs. Each party will bear his own costs.

P.N /R.K. *Order set aside.*

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* A. I. R. 1929 Nagpur 274

JACKSON, A. J. C.

Bankidas—Appellant.

v.

Tanabai—Respondent.

Second Appeal No. 103-B of 1928, Decided on 3rd April 1929, against decree of Dist. Judge, Akola, D/- 15th November 1927.

(a) Negotiable Instruments Act, S. 4—Document containing promise to pay on demand certain sum to specified person is promissory note.

It is not because a document is not payable to order or bearer that it is excluded from the definition of promissory note, and even a document which contains simply promise to pay on demand a certain sum to a specified person is a promissory note: 29 *Bom.* 82, *Expl.* [P 275 C 1]

*** (b) Negotiable Instruments Act, S. 27—Undisclosed principal cannot be sued on negotiable instrument.**

The effect of S. 27 is that the principal can only be made liable through his agent on a negotiable instrument when the agent acts in his principal's name, that is, when he signs as agent and that an undisclosed principal cannot be sued on a negotiable instrument. 30 *Mad.* 88 (*F.B.*), *A. I. R.* 1918 *P. C.* 146, *Rel. on.*; *A. I. R.* 1925 *Cal.* 1062; *A. I. R.* 1928 *Bom.* 516, *Dist.* [P 275 C 1]

(c) Practice—New plea.

A new cause of action cannot be taken in second appeal. [P 275 C 2]

M. B. Niyogi—for Appellant.

N. G. Bose—for Respondent.

Judgment.—This appeal arises from a suit on a promissory note executed by Kesheo, defendant 2, in favour of the plaintiff, Bankidas. Tanabai has been impleaded on allegations that Kesheo, who is her son-in-law, had been managing her estate and had authority from her to pass document as her agent, and that the promissory note in suit was passed by him in that capacity. The lower appellate Court relying on the decision in *Sadasuk Janki Das* v. *Kisan Pershad* (1) has found that Kesho alone is liable on the promissory note.

It is first contended in second appeal on behalf of the plaintiff that the document in question is not a promissory note and is not governed by the Negotiable Instruments Act. Reference has been made to *Venku* v. *Sitaram* (2) in which it was held that a document, not dissimilar in terms from the one that I am con-

(1) A. I. R. 1918 P. C. 146=46 Cal. 663=46 I. A. 93 (P.C.).

(2) [1905] 29 Bom. 82=6 Bom. L. R. 841.

sidering, was a bond and not a promissory note, because it was attested and was not payable to order or bearer and because the executant obliged himself to pay the amount to another. This decision merely reproduced the terms of Cl. (b) of the definition "bond" in S. 2 (5), Stamp Act 1899, and it was not because the document was not payable to order or bearer that it was excluded from the definition of "promissory note" in S. 4, Negotiable Instruments Act. Under that section a document like the present one, which contains simply a promise to pay on demand a certain sum to a specified person, is a promissory note: see Ill. (b). To be a negotiable instrument a promissory note, under S. 13 (1), must be payable either to order or to bearer, but explanation (i) to S. 13 (1) shows that a promissory note, which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable, is payable to order.

Under this explanation the promissory note that I am considering is a negotiable instrument, and will be governed by Ss. 27 and 28 of the Act. With regard to S. 27, it has been remarked in *Subba Narayan Vathiyar* v. *Ramaswami Aiyar* (3), that the effect of this section is that the principal can only be made liable through his agent on a negotiable instrument when the agent acts, as here prescribed in his principal's name, that is, when he signs as agent, and that an undisclosed principal cannot be sued on a negotiable instrument. In the case of *Sadasuk Janki Das* v. *Kisan Pershad* (1), relied on by the lower appellate Court it was decided by the Privy Council that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, and that it is not sufficient that the name of the principal should be "in some way" disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the bill. The principle on which this case was decided was applied in *Sreelal Mangtulal* v. *Lister Antiseptic Dressing Co. Ltd.* (4) and *Sitaram Krishna* v. *Chimandas Fatechand* (5). In those two cases the question was whether the name of the principal had been sufficiently disclosed on the document. In the present case no such question arises, as according to the promissory note only Kesheo is liable.

It is urged, however, that the suit has not been brought on the promissory note alone but also on the debt for the satisfaction of which the promissory note was executed That, however, does not appear to me to be the case. There are pleadings as regards the debts to satisfy which the note was executed and as to Tanabai's liability for those debts, in support of the plea that Kesheo acted as her agent in executing the note But the suit was, in fact, on the note and has been dealt with by the lower Courts on that basis. The plea that Tanabai is liable on another cause of action cannot be taken in this Court for the first time for one reason, the question of limitation would at once arise and would, as far as I can see, defeat the plea, but that is a question that I need not go into I hold that the suit is on the promissory note and that Tanabai whose liability is in no way shown upon the document cannot be made liable to the plaintiff The appeal fails and is dismissed with costs.

P N./R.K *Appeal dismissed.*

(5) A. I. R. 1928 Bom. 516=52 Bom. 640.

(3) [1907] 30 Mad. 88=16 M.L.J. 503 (F.B.).

(4) A. I. R. 1925 Cal. 1032=52 Cal. 802.

A. I. R. 1929 Nagpur 275

SUBHEDAR, A. J. C.

Ramdutt Keshandayal and *others* — Defendants—Applicants.

v.

Mt Basantibai — Plaintiff—Non-Applicant.

Civil Revn. No. 81-B of 1929, Decided on 29th July 1929, from decision of 1st Addl. Dist. Judge, Akola, D/- 19th January 1929, in Misc. Appeal No. 21 of 1928.

Civil P. C., O. 23, R. 3—Order refusing to record compromise under O. 23, R. 3, is appealable whatever reasons of refusal may be—Civil P. C., O. 43, R. 1 (m).

If an appeal is permissible to a party who is aggrieved by an order recording a compromise, whatever the reasons behind the order may be, it is but just that similar remedy should be available to a party aggrieved by the order refusing to record a compromise : *A. I. R.* 1928 *Lah.* 33, *Rel. on.*; *A. I. R.* 1924 *Lah.* 248, *not Foll.* [P 276 C 1]

S. B Gokhale—for Applicants.

M. B. Niyogi—for Non-Applicant.

Order.—On the basis of a promissory note the applicant defendant was sued by the non-applicant plaintiff in the Court of Second Class Subordinate Judge No. 4, Akola. During the pendency of the suit it was alleged that the matter was compromised and a decree in terms of O. 23, R. 3, Civil P. C. was asked for. After investigation the trial Court, however, held that no compromise was made and proceeded with the trial of the case in the ordinary way. The defendant preferred an appeal against the finding that no compromise was proved but the First Additional District Judge, Akola, rejected the appeal holding that no appeal lay from such an order under O. 43, R. 1 (m), Civil P. C. It is against this order that the present application for revision has been filed.

It is contended that the wording of O. 43, R. 1 (m) is clear and that a finding that no compromise is effected would fall within its purview. The view expressed in the case of *Shanti Sarup* v. *Jahangir*, *A. I. R.* 1924 *Lah.* 248 on which the lower appellate Court relied appears not to have been followed by the same Court in a later case of *Kishore Chand* v. *Hans Raj*, *A. I. R.* 1928 *Lah.* 39 wherein it was held that all orders refusing to record a compromise under O. 23, R. 3, would be appealable whatever the reasons for refusal may be. This view appears to be in consonance with common sense and can also come within the purview of the wording of O. 43, R. 1 (m), Civil P C. If an appeal is permissible to a party who is aggrieved by an order recording a compromise, whatever the reasons behind the order may be, it is but just that similar remedy should be available to a party aggrieved by the order refusing to record a compromise. I, therefore, allow this application for revision, set aside the order of the lower appellate Court and remand the appeal to that Court for disposal on merits. Pleader's fee in this Court Rs. 25. Costs in this Court shall abide the result

P.N./R.K. *Case remanded.*

A. I. R. 1929 Nagpur 276

SUBHEDAR, A. J. C.

Babuappa—Applicant.

v.

Ramchandra—Non-Applicant.

Civil Revn. No. 270-B of 1928, Decided on 19th April 1929, from judgment of 2nd Class Sub-Judge, No. 2, Akola, D/- 14th September 1928, in Civil Suit No. 10 of 1928.

Court-fees Act, S. 7 (5)—Suit not for declaration but merely for possession—Court-fee on actual relief only need be paid.

If the plaintiff does not claim a declaration in his plaint that a decree under which the defendant holds possession is not binding upon him but sues for possession simpliciter, he need pay court-fee only on the actual relief claimed: 50 *All.* 610, *Rel. on*; 38 *Mad.* 1184, *Ref.* [P 276 C 2]

W. B. Pendharkar—for Applicant.

Order.—The only question for decision in this application for revision is if the plaint is properly stamped. The plaintiff claimed two reliefs : (1) for possession of a field and (2) for an injunction restraining the defendants from interfering with plaintiff's possession of two fields, and has valued the claim for the first relief for purposes of court-fees under S. 7, Cl. 5 by paying court-fees on five times the revenue payable in respect of the said field. The lower Court following the principle laid down in *Rajagopala Naidu* v *Vijayaraghavalu* (1) held that the court-fee was correctly paid.

In support of the revision it is contended that since the grant of the relief for possession involves the setting aside of a decree under which the contending defendant holds possession, the relief claimed should be for declaration that the decree is not binding on the plaintiff and therefore the court-fee should be paid upon Rs. 1,179-12-0 which is the amount of the decree which has to be rendered ineffectual by the declaration. Reliance is placed upon the case of *Tula Ram* v. *Dwarka Das* (2) for the contention advanced. But that case clearly decides that if the plaintiff does not claim declaration in the plaint and sues for possession simpliciter he need pay court-fee only on the actual relief claimed. I think the lower Court has decided the point of court-fee correctly

(1) [1915] 38 Mad. 1184=25 I. C. 683=1 M. L. W. 824.

(2) A. I. R. 1928 All. 248=50 All. 610.

and I dismiss this application for revision.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Nagpur 277

SUBHEDAR, A. J. C.

Kishan—Appellant.

v.

Namdeo—Respondent.

Second Appeal No 67-B of 1928, Decided on 17th April 1929, from decree of 1st Addl. Dist Judge, Akola, D/- 10th October 1927, in Civil Appeal No. 223 of 1927.

Hindu Law—Alienation—Widow—Next reversioner female entitled to absolute estate—Consent of immediate male reversioner is necessary.

Even under the Bombay school where the next reversioner is a female entitled to an absolute estate upon succession the consent of the immediate male reversioner is necessary in order to estop him from challenging the alienation. Mere consent of female reversioner is not sufficient 5 *Bom.* 563; 25 *Bom* 129; 34 *Bom.* 165, *Rel. on.*, 38 *Bom.* 224, *Dist.* [P 277 C 2]

M. B. Niyogi and *W. B. Pendharkar*—for Appellant.

A. S. Athale and *G. A. Pande*—for Respondent.

Judgment.—The facts necessary for the disposal of this second appeal are shortly these: One Laxman had two daughters Mt Bajai and Mt Sonai and the plaintiff is the son of the latter. After Laxman's death his widow Mt Uma succeeded to the property in dispute and alienated the same to defendant 2 in 1926 for a consideration of Rs. 1,200 said to have been required to meet certain objects of legal necessity. Mt. Uma died about four years ago and the plaintiff brought the present suit as a reversioner of his maternal grandfather for possession of the property in dispute on the allegation that it was illegally alienated by his grandmother.

The suit was resisted on various grounds the principal one being that since the plaintiff's mother, who was the immediate reversioner, had joined her mother in the alienation the same was binding upon the plaintiff. It was also denied that the plaintiff was a reversioner. Both the Courts below have decreed the plaintiff's claim on the finding that the plaintiff was a reversioner and that the sale was not proved to have been for legal necessity. Defendant 2 has, therefore, come up to this Court in second appeal. It is contended for the appellant that the consent of the plaintiff's mother, who was the next reversioner, should be held sufficient to validate the transfer as against the plaintiff. No question of the validity of the alienation does, however, arise in the present case. Mere consent of the next reversioner does not validate an alienation, it is only of evidential value though not conclusive proof of the existence of legal necessity. It merely raises a presumption of the existence of legal necessity and throws the burden of proving the contrary on the actual reversioner, who questions the alienation after the death of the transferring widow. If the consenting reversioner himself is the actual reversioner claiming the alienated estate he will be precluded by his consent from questioning the alienation.

In the present case it is concurrently found by the two lower Courts that the plaintiff was a reversioner of Laxman though not the next reversioner. Therefore, under the Bombay school of Hindu law, when the next reversioner in the present case was a female though entitled to an absolute estate upon succession, the consent of the immediate male reversioner, i. e, the plaintiff, was necessary in order to estop him from challenging the alienation: *Varjivan Rangji* v. *Chelji Gokaldas* (1), *Vinayak* v. *Govind* (2) and *Pilu* v. *Babaji* (3). The case of *Mallik Saheb* v. *Mallik Arjunappa* (4) cited by the learned advocate for the appellant was decided on different facts and is no authority for saying that the earlier view of that Court as propounded above was departed from in that case. The case has been correctly decided by the Courts below and this appeal, therefore, fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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(1) [1880] 5 Bom. 563.
(2) [1901] 25 Bom. 129=2 Bom. L. R. 820.
(3) [1910] 34 Bom. 165=4 I. C. 581=11 Bom. L. R. 1291.
(4) [1914] 38 Bom. 224=22 I. C. 292=15 Bom. L. R. 1142.

A. I. R. 1929 Nagpur 278

SUBHEDAR, A. J. C.

Emperor

v.

Bhaiyalal—Accused—Non-Applicant.

Criminal Revn. No. 169 of 1929, Decided on 8th June 1929, reported by Dist. Magistrate, Nagpur.

(a) Hindu Law—Marriage—Discarded wife of Kori cannot remarry in absence of legal divorce.

In the absence of a legal divorce even the discarded wife of a Kori will not be able to remarry. [P 278 C 2]

(b) Criminal P. C., S. 439—Scope.

High Court has got power under S. 439 to grant the permission necessary for compounding offences under S. 345 (2). [P 279 C 1]

(c) Criminal P C., S. 438—Kori convicted for branding his wife and only fined — Recommendation that sentence be enhanced—Compromise between parties and application to High Court for permission to compound offence—In view of nearness of relationship between and interest of parties case was allowed to be compounded.

A Kori branded his wife with hot iron tongs in three places. He was convicted and fined. The District Magistrate reported the case to the High Court for enhancement of sentence. But the parties had compromised their differences and an application was made to High Court signed by the husband and the father of the wife, a minor girl, for permission to compound the offence under S. 345 (2). Compromise was effected in mutual interest of husband and wife.

Held: that the case was a fit case to be compounded in view of the nearness of relationship between parties. *A. I. R.* 1922 *Cal.* 191, *Rel. on.* [P 279 C 1]

Razak—for Non-Applicant

Order.—The non-applicant Bhaiyalal alias Chhotelal Kori who is young lad of 20 years of age was convicted, practically on his own admission, by the Tahsildar & Magistrate, Second Class, Nagpur, under S. 324, I. P. C, and sentenced to pay a fine of Rs 50 only. The case against the accused was that he had branded his wife Mt Gulabboo with hot iron tongs in three places on account of a petty domestic quarrel.

The District Magistrate, Nagpur, has, under S 438, Criminal P C. reported the case to this Court with the following recommendation:

"The brutality of the act of the accused calls, in my opinion, for a sentence of imprisonment of at least six months. In awarding the sentence of fine, the Magistrate has been influenced by the consideration that the accused was the husband of the girl, who was branded. But I do not consider this a sufficient reason for taking a lenient view of the case. I may note that the accused and his wife are Koris by caste, and remarriage amongst them is permissible."

Mr. Razak who appeared for the non-applicant in showing cause against the recommendation of the District Magistrate presented an application to this Court signed by his client and Hiralal, the father of the minor girl, stating that since the parties have compromised their differences permission of the Court be granted to compound offence under S. 345 (2), Criminal P. C.

The principal grounds for the necessity for compounding the offence are given in paras 3 and 4 of the application in these words:

The applicant is a young girl of 16 years and if her husband, the non-applicant, were to be sentenced to imprisonment, the whole family would suffer disgrace, and in that eventuality there is every apprehension of the non-applicant marrying another woman and deserting the applicant. The applicant will not, according to the law governing the parties, be able to marry another person and her whole life will be ruined and blasted.

"It is therefore in the mutual interest of the applicant as well as the non-applicant that the differences between them be removed and the compromise effected and the parties have therefore compounded the offence and seek permission of this Hon'ble Court to file this compromise in Court. As the applicant is a minor her father who is her present guardian is acting on her behalf in this compromise."

It was this consideration of the close relationship between the accused and the assaulted girl wife that led the learned trying Magistrate to deal with him leniently, apparently not to embitter their relationship any further The learned District Magistrate in his recommendation for enhancement of sentence seems to suggest that even if a sentence of imprisonment is inflicted upon the accused with a possible eventuality of his discarding his wife it would not matter at all because the parties "are Koris by caste and remarriage amongst them is permissible" He fails to take account of the fact that in the absence of a legal divorce even the discarded wife of a Kori would not be able to remarry, and that a revengeful husband is not likely to grant the divorce though he may himself marry a second wife.

Hiralal, the father of the minor girl to whom the hurt was caused was examined by me and he admitted having come to terms with his son-in-law, the non-applicant. He also stated that the girl was only 16 years of age and had been staying

with him since she was assaulted and that it was at his suggestion that the girl had made a report to the police who after investigation put up the case against the accused before the Court. Under the peculiar circumstances of the case Hiralal must therefore be considered to be competent to compound the case on behalf of his minor daughter under S. 345 (4), Criminal P. C.

There is no doubt that this Court has got the power under S. 439, Criminal P. C., to grant the permission necessary for compounding offences under S 345 (2) *ibid*. Having regard to the nearness of the relationship between the parties to this case and for the reasons enumerated in grounds 3 and 4 of the petition of compromise, I consider this case to be a fit one to be compounded and therefore accord the necessary permission. In *Aminulla* v. *Emperor* (1) it was very pertinently remarked by a Bench of the Calcutta High Court that :

"it is a great pity when parties who are apparently nearly related to one another succeed in patching up their quarrels, that the Magistrate should not do what he can to restore peace and goodwill."

As the matter has now been compounded sub-S 6, S. 345, Criminal P. C., comes into play and I must record an order of acquittal against the accused. The fine paid by him will be refunded.

P N /R.K. *Accused acquitted.*

(1) A. I. R. 1922 Cal. 191.

A. I. R. 1929 Nagpur 279

FINDLAY, J. C.

Tarachand Marwadi — Accused—Appellant.

v.

Emperor—Opposite Party.

Misc. Appeal No. 43 of 1928, Decided on 29th September 1928, from an order of Dist Judge, Chhindwara, D/- 11th July 1928

(a) Penal Code, S. 193—For offence of perjury to be complete deponent must leave Court under lie with which he begins by deceiving it.

The gist of an offence of perjury is the fact that it amounts to an attempt to mislead and deceive the Court. For the offence to be complete the deponent must leave the Court under the lie with which he began by deceiving it.

[P 280 C 2]

Where a witness makes a statement in his examination-in-chief contradictory to his previous deposition but in his cross-examination goes back to his previous position, the whole evidence must be read together and no offence of perjury is committed : *A.I.R.* 1927 *Nag.* 189, *Affirmed.* [P 280 C 1]

(b) Precedents—If head-note is not consistent with judgment, it is latter that is to be looked upon as authoritative.

If a head-note to a reported case is, in any way, inconsistent or not wholly reconcilable with the body of the judgment, it is the latter that must undoubtedly be looked upon as authoritative. [P 280 C 1]

P S. Kotual, M. B. Niyogi and *W. R. Puranik*—for Appellant.

G. P. Dick—for the Crown.

Judgment.—The prosecution of the appellant Tarachand for an offence under S. 193, I. P C, has been ordered by the District Judge, Chhindwara, on 11th July 1928. Neither in the order in question, nor in the complaint sent to the Magistrate of the First Class, Chhindwara, was the particular section of the Indian Penal Code concerned mentioned, but the offence for which the appellant was ordered to be prosecuted, was apparently one under S. 193, or that section read with S 511, I. P. C.

It is unnecessary here to repeat in any detail the facts of the case. It will suffice to say that, in the year 1916, the question of the validity of the adoption of one Uderam was concerned, and the present appellant, who is an influential and old member of the community concerned, gave evidence testifying to the existence and validity of an orphan-adoption in the caste. Curiously enough, in the suit, out of which the present proceedings arose, the validity of the adoption of the same Uderam was again in question and, in his examination-in-chief in the Court of the District Judge, the appellant's evidence was of a kind which was to some extent prima facie contradictory of his earlier statement in 1916. When, in cross-examination, however, that statement was brought to his notice, the appellant then more or less resiled from the position he had taken up in his examination in-chief and admitted the existence of the custom of orphan-adoption as well as its validity ; he, in fact, went back, to all intents and purposes, to the position he had taken in 1916. The learned District Judge was of opinion that a prosecutions for perjury prima facie lay, for alleged contradictions between the appellant's deposition of 1916 and his examination-in-chief in the present case, and for contradictions existing in his

later deposition between the examination-in-chief and the cross-examination.

The attention of the District Judge had been called to the decision of Hallifax, A. J. C., in *Local Government* v. *Gambhir Bhujua* (1), a decision which, as at present advised, I may say, I see no reason to differ from. In considering this decision, the District Judge has allowed himself to be influenced by the terms of the head-note thereto. I may at once say that if a head-note to a reported case is, in any way, inconsistent or not wholly reconcilable with the body of the judgment, it is the latter that must undoubtedly be looked upon as authoritative The head-note is little more than an index summary, or memoriser, abstracted from the judgment for purposes of quick reference by those having occasion to refer to the reported decision in question. It is in no way authoritative and in practice, it is often not even prepared by the Judge, who has delivered the judgment, for the simple reason that when the case comes to be reported, that Judge may not be available. In practice, therefore, such head-notes are not infrequently prepared, not only by Judges of this Court other than the one who delivered the judgment but, in certain instances, by other officials of this Court. The head-note, therefore, cannot, in any way, be looked upon as authoritative.

It will be convenient, first of all, to deal with the deposition of the appellant, as given in the District Judge's Court, There can be little doubt indeed but that, in the initial part of that deposition, the appellant was anxious to suggest, as regards the custom of orphan adoption in the caste concerned, that the practice in question did not exist, or at least that he was unaware of it. That his action in this connexion was dishonourable and possibly perverse cannot be doubted for a moment. At the same time, even in the examination-in-chief, it was obvious that the witness was only prepared to make a half-hearted attempt in support of the plea he was called on to support, because, even in that examination-in-chief, he explicitly stated that he was not prepared to say that an orphan-adoption was invalid; all the length he would go, was to say that the caste opinion was in favour of its invalidity. However this may be, I fully agree with the remarks of Hallifax, A. J. C., in para. 6 of his judgment in *Local Government* v. *Gambhir Bhujua* (1), quoted above, and I am of opinion that the deposition must be taken as a whole and, in the cross-examination, it is obvious that the appellant fully retracted the statement in the examination-in-chief and went back to the position he had taken in 1916. It not infrequently occurs in criminal and civil Courts that a witness, who begins by making, or attempting to make a false statement, is cautioned by the Magistrate or Judge concerned and is informed of circumstances which seem to him to establish the falsehood of that statement; it frequently ensues that the witness, after such caution, corrects his earlier statement and proceeds, to put it bluntly, to tell the truth. I have never known of any case, where in such circumstances, a Judge or Magistrate has thought it desirable to prosecute such a witness either for perjury or for an attempt to commit that offence. This is precisely what we have occurring in the present case, the only difference being that the witness proceeded to tell the truth, not as the result of a caution from the Judge but on his being confronted with his earlier statement of 1916. I myself am of opinion that, in such circumstances, if it be true that a very technical offence, attempt to commit perjury, has been committed by such a witness, it is inadvisable and perhaps unreasonable to order his prosecution. The very gist of an offence of perjury is the fact that it amounts to an attempt to mislead and deceive the Court. For the offences to be complete, the deponent must, in my opinion, leave the Court under the lie with which he began by deceiving it.

In the present instance, the result has been precisely the reverse When the appellant left the Court, the latter was doubtless by that time imbued with the truth of the later statement of the witness as given in his cross-examination. It might be advanced in this connexion that the motive, which led the deponent eventually to tell the truth, was an unworthy one, viz., the mere fear that he might otherwise incur a penalty under the Criminal Law. I fully concur that this was probably so in the present case, but, nevertheless, I do not think that, in such circumstances it is advisable to

(1) A. I. R. 1927 Nag. 189=23 N. L. R. 35.

order a prosecution for perjury, or for an attempt to commit perjury of a most technical nature, a prosecution in which, moreover, there is not, in my opinion, any large degree of certitude of conviction.

Taking the view I do, it pari passu follows that, if the whole of the evidence of the appellant in the lower Court is read together, there is no essential contradiction between it and his deposition of 1916. I do not, therefore, think that, in the present case, a prosecution lay at all for a contradiction between the earlier deposition and the examination-in-chief in the later deposition. Similarly, I have already given my reasons for holding that it is inadvisable to prosecute the appellant for an attempt to commit perjury in respect of the discrepancies and contradictions between his oxamination-in-chief and his cross-examination in the later deposition.

Rife though the offence of perjury may be and although it may be most desirable to bring offenders in the matter to justice, I do not think that, for other reasons, a prosecution was advisable in this case. The question of whether an orphan-adoption is valid or invalid in the case concerned is obviously a vexed one, on which opinions differ, even among the caste people. It is difficult, therefore, to arrive at any degree of certitude as to the existence of the validity or invalidity of any such custom, at any rate, as regards the degree of certitude required in a criminal trial, in which the onus of proof would lie on the prosecution.

Secondly, I am of opinion that, in view of the long lapse of time since the earlier deposition, the appellant was worthy of some consideration in this connexion. Finally, it is impossible to overlook the extreme old age of the appellant who is a man of 74. If his respectable position in the past is taken into account, he has certainly disgraced himself in the present proceedings and, in the circumstances, I should be inclined to hold that his punishment will be sufficient. Moreover, there occur many worse and much more manifest cases of perjury than the present one which is, as I have shown, from the legal point of view, of an extremely doubtful nature as to whether even a technical offence was committed; and which has, moreover, in it incidents I have referred to above, which make the case one of a very marginal nature. I do not think, therefore, that, in the circumstances, the learned District Judge exercised a sound discretion in ordering the prosecution of the appellant and I do not think that that prosecution would be likely in any way to further the ends of justice The order appealed against is accordingly reversed and the prosecution of the appellant for the offence in question in the Court of the First Class Magistrate, Chhindwara, is quashed.

P.N./R.K. *Prosecution quashed.*

A. I. R. 1929 Nagpur 281

MOHIUDDIN, A. J. C.

Chinai—Appellant.

v

Mukundram—Respondent.

Criminal Appeal No. 74 of 1929, Decided on 12th August 1929, from decision of Sess. Judge, Saugor, D/- 4th March 1929, in Criminal Appeal No. 10 of 1929.

(a) Criminal P. C., S. 476 (B)—Meaning of words "and if it makes such complaint, the provisions of that section shall apply accordingly," explained.

The words "and if it makes such complaint, the provisions of that section shall apply accordingly" refer to the procedure laid down in S. 476 about the filing of such complaints and not to the act of making the complaint. [P 282 C 1]

(b) Criminal P. C, S. 476 (B)— No appeal lies against order by appellate Court under S. 476 (B).

The policy of the Code is not to allow two appeals in criminal matters and no appeal lies under the provisions of the Code against an order made by an appellate Court under S. 476 (B). *A. I. R.* 1925 *Lah.* 322, *Rel. on.*; *A. I. R.* 1926 *Pat.* 81, *not Foll.*; *A. I. R.* 1924 *Bom.* 347; *A. I. R.* 1927 *Rang.* 313, *Ref.* [P 282 C 1]

J. Sen—for Appellant.

Judgment.—Mukundram moved the Sub-Divisional Magistrate, Rehli, by an application to file a complaint against Chinai and this application was rejected on 5th January 1929 and the Sub-Divisional Magistrate, Mr G P Saraiya, declined to lodge a complaint. This was done under S. 476, Criminal P.C. Mukundram filed an appeal under S. 476-B, Criminal P. C., in the Court of Sessions Judge, Saugor, who allowed the appeal, and filed a complaint which the Subordi- Court might have made under S. 476, Criminal P. C. Chinai has filed this appeal under S. 476 B, Criminal P. C., and the learned Government Advocate has

taken an objection to the effect that no appeal lies against the order of the Ses-Sessions Judge passed under S. 476-B, Criminal P. C. Chinai's learned pleader relies on a judgment of the Patna High Court in *Ranjit Narain Singh* v. *Rambahadur Singh* (1), and the learned Government Advocate cites the following cases in support of his contention : *Somabhai Vallavbhai* v *Aditbhai Parshottam* (2), *Muhammad Idris* v. *Emperor* (3) and *Ma On Khin* v. *N. K. M. Firm* (4).

I have read carefully the reported cases on the subject and am of opinion that no appeal lies against the order passed by the appellate Court under S. 476-B, Criminal P. C Great stress was laid on the following words in S. 476-B:

"and if it makes such complaint, the provisions of that section shall apply accordingly," and it was argued that if the appellate Court files a complaint, it is a complaint under S. 476, Criminal P. C., and an appeal lies. The words :

"and if it makes such complaint, the provisions of that section shall apply accordingly," refer to the procedure laid down in S. 476, Criminal P. C., about the filing of such complaints and not to the act of making the complaint. The policy of the Criminal Procedure Code is not to allow two appeals in criminal matters, and, if the construction put by the Patna High Court is accepted, there would be two appeals under S. 476-B, Criminal P. C. S. 476 B, Criminal P. C., does not seem to provide for a second appeal As pointed out by Martineau, J., in *Muhammad Idris* v *Emperor* (3)·

"Section 476-B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under S. 476 or S. 476-A, and neither of those sections relates to a complaint made by a Court on appeal from an order of a subordinate Court refusing to make a complaint."

I therefore hold that no appeal lies under the provisions of the Criminal Procedure Code against an order made by an appellate Court under S. 476-B, Criminal P. C.

This Court will exercise its revisional powers in suitable cases where justice demands it, but no good case is made out for interference in revision in this case. The learned Sessions Judge has given good reasons in his order dated 4th March 1929 why a complaint should be filed and in my opinion the order is correct. The appeal is dismissed.

P.N /R.K. *Appeal dismissed.*

(1) A. I. R. 1926 Pat. 81=5 Pat. 262.
(2) A. I. R. 1924 Bom. 347=48 Bom. 401.
(3) A. I. R. 1925 Lah. 322=6 Lah. 53.
(4) A. I. R. 1927 Rang. 313=5 Rang. 523.

A. I. R. 1929 Nagpur 282

JACKSON, A. J. C.

Gokal Prasad—Defendant—Applicant

v.

Govindrao Subhedar—Plaintiff—Non-Applicant.

Civil Revn. No. 58 of 1929, Decided on 18th July 1929, against the order of Sub-Judge, 1st Class, Betul, D/- 22nd December 1928.

(a) Civil P. C., S. 115—Election—Order thereon is revisable.

High Court has jurisdiction to revise an order passed in connexion with an election petition under the Municipal Election Rules : *A. I. R.* 1927 *Mad.* 935, *Rel. on.* [P 282 C 2]

(b) C. P. General Clauses Act, S. 5 (c)—Scope.

It cannot be said that S. 5 (c) requires the proceedings to continue before the original Court and not before the Court to which jurisdiction may have been transferred by the repealing Act. [P 283 C 1]

(c) Interpretation of Statutes — Amendment of law.

An amendment of the law which changes the forum and does not take away the right to institute proceedings, relates to procedure only and has retrospective effect : *A. I. R.* 1924 *Cal.* 983, *Appr.*; *A. I. R.* 1927 *P. C.* 97, *Dist.*; *A I. R.* 1927, *Mad.* 977, *Ref.* [P 283 C 2]

G. R. Pradhan—for Applicant.

A. V. Vazalwar—for Non-Applicant.

Order.—This is an application for revision of an order passed by the Subordinate Judge, First Class, Betul, in connexion with an election petition under the Municipal Election Rules. The jurisdiction of this Court to interfere in revision has been questioned ; but it is a fact that such applications have been hitherto entertained and I find that in *Chellaswami Konar* v. *Sangama Nayakar* (*A. I. R.* 1927 *Mad* 935) the jurisdiction of the High Court has been efinitely asserted. That is a view from which I am not prepared to dissent, particularly as the wording of the rules appears to give the civil Court as such the jurisdiction to deal with election petitions.

The election petition was originally presented, as the rules then in force required, to the Deputy Commissioner. While

it was pending, the rules were amended and the jurisdiction was given to the civil Court. The petition was accordingly transferred, but the applicant objected to the civil Court's jurisdiction on the ground that the amendment of the rules had not a retrospective effect. The learned Subordinate Judge has held against the applicant and revision of his order is now sought. Reliance is placed on S. 5, Cl. (c), C P. General Clauses Act, which deals with the continuance of proceedings after the enactment, under which they were instituted, has been repealed ; but it does not seem to me that that section requires the proceedings to continue before the original Court and not before the Court to which jurisdiction may have been transferred by the repealing Act. Moreover, legislation is regarded as having retrospective effect in so far as it relates to procedure.

It is argued, however, that this is not a mere matter of procedure and that the right to present a petition to a particular authority is a substantive right which cannot be taken away with retrospective effect. Various decisions have been cited before me dealing the effect of legislation which takes away a right of appeal, but I cannot find in any of them any decision that the right to appeal to a particular Court cannot be taken away, what is decided in those cases is that the right of appeal is not affected by subsequent legislation. One of the decisions *Daivanayaga Reddiar* v *Renukambal Ammal*, *A I.R.* 1927 *Mad* 977 (*F.B.*) seems to me to have no bearing at all on the present case; it decides that a question of valuation of an appeal, namely, that an amendment of the Court-fees Act, does not alter the money value of the original suit, calculated under the law in force when it was instituted, by which jurisdiction throughout the subsequent litigation in its several stages is fixed. The Privy Council decision in *Keshoram Poddar* v. *Nundo Lal Mallick* *A. I. R.* 1927 *P. C.* 97, upon which great reliance was placed, does not help the applicant. It dealt with a right of appeal to the President Improvement Committee, Calcutta, under the Calcutta Rent Act. An appeal had been preferred, but before it could be decided the Act had ceased to be in force as regards premises, the rent of which exceeded Rs. 3,000 a year The rent of the premises occupied by the appellant did exceed this amount and the President of the Improvement Committee decided that he had no jurisdiction to decide the appeal. It was held by their Lordships of the Privy Council that the President had jurisdiction ; but the position there, was that no appellate Court had been appointed to succeed the President with jurisdiction in respect of premises such as those occupied by the appellant ; and I cannot infer from the decision of their Lordships that, if jurisdiction had been transferred from the President to another authority, the appellant would have had the right to continue his appeal before the President.

On behalf of the non-applicant I have been referred to the decision in *Rajib Lochan Dhar* v. *Jogesh Chandra Das* (*A. I. R.* 1924 *Cal.* 983). It dealt with an amendment of the Criminal Procedure Code, which made an offence previously triable only by the Court of Session triable by a Magistrate of the First Class. It was held that the amendment related to procedure and had retrospective effect and that a case, commenced before the amending Act came into force, could be disposed of by a Magistrate. That is a view with which I respectfully concur. I am of opinion then that an amendment of the law, which changes the forum and does not take away the right to institute proceedings, relates to procedure only and has retrospective effect. That being so, I must hold that the Subordinate Judge, in the present case, has jurisdiction to deal with the election petition presented to the Deputy Commissioner. The application for revision is dismissed with costs. I fix pleader's fee at Rs. 20.

P N /R.K. *Revision dismissed.*

A. I. R. 1929 Nagpur 283

JACKSON, A. J. C.

Babarao and *another*—Plaintiffs—Appellants.

v.

Narayanrao and *others*—Defendants—Respondents.

Misc. Appeal No. 6-B of 1929, Decided on 26th August 1929, from order of Addl. Dist. Judge, Amraoti, D/- 12th March 1929, in Civil Suit No. 33 of 1928.

(a) Civil P. C., O. 40, R. 1 (2)—O. 40 R. 1 (2) deals with cases in which property,

is in possession of person who is not party to suit.

Order 40, R 1 (2), deals with cases in which the property is in possession of a person who is not a party to the suit. [P 284 C 2]

Where a creditor, who had purchased the rights of a person in execution of a decree, is made a party to a suit brought by the person's wife and son for partition and declaration that certain decrees, mortgages and attachments were not binding on them, a Court can on creditor's application appoint a receiver although such creditor has no present right to possession of the property 18 *Mad.* 23, *A. I. R.* 1925 *Pat.* 293, *Rel. on*,, 9 *N. L. R.* 18, 15 *C P. L. R.* 156; 9 *N L. R.* 145 and 39 *Mad.* 265, *Ref.* [P 284 C 2]

(b) Hindu Law—Debts—Debts incurred by father are binding on son unless it is proved that they are incurred for immoral and illegal purposes.

In a suit brought by a minor son and a wife of a person against him and his creditors for a partition and declaration that certain decrees, attachments and mortgages were not binding on them on the ground that the debts were incurred by the person for immoral and illegal purposes, the whole estate is prima facie liable for the debts unless it is proved that the debts were so incurred. [P 285 C 1]

T. L. Sheode—for Appellants.

M. B. Niyogi—for Respondents.

Order.—This is an appeal against an order appointing a receiver. The plaintiffs are the minor son and the wife of defendant 1 and they have sued for a partition and a declaration that certain decrees, attachments, mortgages and simple money debts are not binding upon them on the ground that the debts incurred by defendant 1 were for illegal and immoral purposes. Defendant 1's creditors have been joined as defendants and they made an application for a receiver which was rejected on 13th August 1928. They were, however, permitted to apply again if they failed to realize the sums due to them by sale of the right, title and interest of defendant 1. A part of the property has been sold, but there still remained debts of Rs 18,000 outstanding. A second application for a receiver has now been granted on the ground that if no receiver is appointed, defendant 1 in collusion with the plaintiffs will do away with as much of the produce as they can.

The first point taken in appeal is that the creditors, who have purchased the rights of defendant 1, have no present right to possession of the property. It has been laid down in *Abdul Aziz* v. *Ajudhia* (1) and *Mohanlal* v. *Tekchand* (2), that a purchaser of an undivided share can only obtain separate possession by enforcing partition of the whole estate. On this it is urged that no receiver can be appointed because of O. 40, R. 1, sub-R. (2) which runs as follows:

"Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

But that subrule seems to me clearly to deal with cases in which the property is in possession of a person who is not a party to the suit. If applied, as the appellants desire, it would mean that a receiver could not be appointed in suits for partition and that a receiver can be appointed in such suits as has been recognized in *Hanumayya* v. *Venkatasubbayya* (3) and *Bhagwan Das* v. *Sheonandan Prasad* (4). It has been sought to distinguish those cases on the ground that no strangers were parties to the suits; but that would not take them out of the operation of O. 40, R 1, sub-R. (2) if the appellants' interpretation of that subrule is correct.

It is next contended that, as the only ground for appointing a receiver is a fear that defendant 1 and the plaintiffs will do away with the produce and as the creditors are not entitled to mesne profits before partition, they are not entitled to obtain the appointment of a receiver. Reference has been made in this connexion to *Amritrao* v. *Govind* (5) and *Maharaja of Bobbili* v. *Venkataramarajulu Naidu* (6). In *Maharaja of Bobbili* v. *Venkataramarajulu Naidu* (6), it is laid down that a purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant-in-common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition. It may be pointed out that here the suit for partition has been instituted though not by the purchasers, but the real answer to the appellants' contention is that the creditors are not claiming mesne profits; what they claim is that the whole property and the produce

(1) [1902] 15 C. P. L. R. 156.

(2) [1918] 9 N. L. R. 18=18 I. C. 926.

(3) [1895] 18 Mad. 23.

(4) A I. R. 1925 Pat. 293=3 Pat. 964.

(5) [1913] 9 N. L. R. 145=21 I. C 590.

(6) [1916] 39 Mad. 265=25 I. C. 585=27 M. L. J. 409.

thereof are liable for the debts due to them. The plaintiffs have to prove that the debts were incurred for illegal or immoral purposes and until they do so, the whole property is prima facie liable for the debts. In these circumstances, I consider that the receiver was rightly ordered to be appointed. I dismiss the appeal with costs. I fix pleader's fee at Rs. 50.

P.N./R.K *Appeal dismissed.*

A. I. R. 1929 Nagpur 285

STAPLES, A. J. C.

Gangadhar—Applicant.

v.

Balkrishna and *others*—Non-Applicants.

Criminal Revn. No 107 of 1929, Decided on 19th August 1929, from decision of Sess. Judge, Wardha, D/- 22nd January 1929, in Criminal Revn. No. 33 of 1928.

(a) Criminal P. C., S. 145—Order regarding future possession is wrong.

Section 145 relates simply to the fact of actual possession at the date of the preliminary order. No question of title can be taken into consideration, nor can any order be passed as regards future possession with reference to the actual possession at the date of the preliminary order. [P 286 C 2]

Where a Magistrate, in proceedings under S. 145 passed an order according to an agreement between the parties, for future possession :

Held : that the order regarding future possession on the strength of the agreement was wrong. [P 286 C 2]

(b) Criminal P. C., S. 145 — Proceedings under S. 145 cannot be compromised nor can they be referred to arbitration.

Proceedings under S. 145 cannot be compromised, nor can they be submitted to arbitration : all that can be done is that there may be an agreement as to the mode of taking evidence as regards actual possession on the date of the preliminary order either by a commissioner or by arbitrators. Such a commissioner or arbitrators have no power to decide the case, but can only submit a report, and the Magistrate would then be bound to take that report into consideration before passing an order. It has, however, always to be borne in mind that if the parties come to any agreement with regard to a dispute even an agreement as regards the mode of ascertaining actual possession it at once becomes doubtful whether there is any likehood of a breach of the peace, and if the Magistrate is satisfied that no likelihood of a breach of the peace exists he should cancel his preliminary order under S. 145 (5). *A. I. R.* 1924 *Pat.* 589, 32 *Cal.* 552, 2 *Pat. L. J.* 86 ; 15 *C. W. N.* 568 and *A. I. R.* 1921 *Cal.* 687, *Ref.* ; *A. I. R.* 1923 *All.* 77 and 7 *C. W. N.* 461 *Dist.*

[P 287 C 2, P 288 C 1]

T. J. Kedar—for Applicant.

R. M Bhagade—for Non-Applicants.

G. P. Dick—for the Crown.

Order.—The applicant applies for revision of the order of the Sessions Judge, Wardha, which confirmed an order of the Sub-Divisional Magistrate, Wardha, passed under S. 145, Criminal P. C. The applicant had made an application to the Sub-Divisional Magistrate under S. 145, alleging that the non-applicants had changed the boundary between their fields and had taken possession of about a quarter of an acre of his field, No. 35, by force. A preliminary order was passed, and after a short written reply by the non-applicants the applicant's pleader Mr. Kale stated that the boundary line between the two fields was unchanged, that he was prepared to have the boundary measured by the Court with the help of any revenue officer according to the settlement record and that he would abide by the decision of the Superintendent of Land Records about the exact boundary. Mr. Ghate pleader for the non-applicants stated that he had no objection if a revenue officer was directed by the Court to fix the boundary lines between the fields according to the settlement record and that any encroachment would be condoned and that the non-applicants would abide by the decision of the revenue officer. On these statements the Magistrate directed that the Superintendent of Land Records should be asked to measure the boundary line between the fields Nos. 35 and 40 according to the settlement record and put the parties in possession accordingly. The Superintendent of Land Records submitted a report by 18th September 1928 but the applicant's pleader stated that he wished to examine him. He was so examined on 21st September and then the Court examined the patwari, who actually did the measurements, on 2nd October arguments were heard on the 6th October and on 11th October further statements of the parties were recorded. At that time Mr. Manohar Deshpande for the applicant stated that his client was not satisfied with the measurements taken by the Superintendendent of Land Records and the Revenue Inspector and

wanted to revoke his previous statement. Mr. Ghate for the non-applicants stated that the settlement map could not now be challenged and that it was binding, that no flaw had been shown in the measurements taken by the Revenue Inspector and permission could not be granted to the applicant to revoke his former statement and agreement to submit to the measurements. The Magistrate then passed an order and held that the arbitration was not on the point of determining the fact of possession, but was to determine the boundary line according to the settlement record, according to which the parties undertook to maintain future possession. He held, then, that the parties, when they agreed to abide by the settlement dhura and to maintain future possession in accordance therewith, gave up their right to determine actual past possession. He further held that according to the spirit of S. 145, if the parties agreed to maintain future possession in accordance with a certain order, the findings on their statement would be legal. The Magistrate refused therefore to allow the applicant to revoke his statement and passed an order that the parties should maintain possession of their respective fields in accordance with the boundary as pointed out by the Superintendent of Land Records until the matter was finally decided by the civil Court. On an application for revision the Sessions Judge held that the rulings cited by the applicant as regards arbitration in such proceedings did not apply and that the method of survey was agreed upon by the parties to decide the dispute as to the extent of possession of each of the parties He further held that the primary object of proceedings under S. 145 was as stated by the Magistrate to prevent a breach of the peace and that it was not for the Court in these proceedings to adjudicate upon the title or right of possession. He added :

"The parties in this case had agreed to have the question of their possession decided by the result of the survey, and the lower Court did not act illegally in accepting it."

I am of opinion that the view taken by the Sessions Judge is incorrect. The agreement between the parties was not to have the question of past possession decided by the result of the survey as is quite clear from the settlements and from the order of the Magistrate ; the agreement was that measurements should be taken and that the boundary should be fixed according to the settlement map. The Magistrate has made it clear that he has made no order as regards past possession but has ordered that future possession should be maintained according to the boundary fixed by the Superintendent of Land Records after measurements. I am very clearly of opinion that such an order under S. 145, Criminal P. C., is wrong. That section relates, as has been held in numerous cases simply to the fact of actual possession at the date of the preliminary order. No question of title can be taken into consideration, nor, in my opinion, can any order be passed as regards future possession without reference to the actual possession at the date of the preliminary order. The order of the Magistrate, therefore, is on the face of it, incorrect and cannot be upheld.

I am further of opinion that, strictly speaking, proceedings under S. 145, Criminal P. C , cannot be compromised or settled by agreement, though possibly, there may be an agreement as to the mode of ascertaining the possession of each party, e. g by appointing a commissioner or commissioners to enquire into the fact of actual possession. In this connexion I have been referred to *Uttim Singh* v. *Jodhan Bai* (1) and *Banwari Lal Mukerjee* v. *Hriday Chakravarti* (2). In the latter case it has been held that even the question as to who is in actual possession should not be delegated even by consent of parties, to arbitrators, whilst in the former case it has been held, firstly, that an order could not be passed upon a reference to arbitration, and then it was held that a local enquiry might be directed and the enquiry report might be brought on record as evidence. I would quote the following passage from that case :

"There are decided cases in which the delegation of the jurisdiction of the Court, under S. 145, to arbitrators has been condemned. In the case of *Banwari Lal Mukerjee* v. *Hriday Chakravarti* (2) this procedure was condemned on the ground that the law does not allow delegation. The utmost that the Code allows in a proceeding under S. 145 is that the Court may direct a local enquiry and bring the enquiry report on the record as evidence. In the case *Hamidul Haque* v.

(1) A. I. R. 1924 Pat. 589=3 Pat. 286.
(2) [1905] 32 Cal. 552=1 C. L. J 432.

Alait Hussain (3) the procedure was also condemned on the ground that it was not in accordance with the specific directions given S. 145. An analogous case to this, bearing out the same principle, is to be found in case of *Sadhu Biswas* v. *Mahammad Ali Biswas* (4) where a compromise was filed in a proceeding under S. 145."

It seems clear, then, that proceedings under S. 145 cannot be submitted to arbitration and that all that can be done is that, in certain cases, the Court may appoint a commissioner or commissioners to conduct a local enquiry and to report as regards actual possession.

Another point which must be made clear is that, when once the parties have agreed to arbitration or to a compromise there can be no question really of a breach of the peace and that the preliminary order should therefore be cancelled under S. 145 (5), Criminal P. C. For this I would again rely upon *Uttam Singh* v. *Jodhan Rai* (1) at p. 294 *of* 3 *Pat.* and upon the case there quoted, viz., *Sadhu Biswa* sv. *Mahammad Ali Biswas* (4).

The learned Standing Counsel who appeared for the Crown argued that a case under S. 145 might be submitted to arbitration and cited *Gopi Das* v. *Madho Lal* (5), *Taramoni Chaudhurani* v. *Gyanendra Mohan Chaudhuri* (6), *Kalananda Singh* v. *Rameshwar Singh* (7) and *Jamunadas Kyriwala* v. *Hanuman Baksh* (8). As regards these cases, I would point out that in *Gopi Das* v. *Madho Lal* (5), it has not been laid down that proceedings under S. 145, Criminal P. C. can be compromised. That case was a second appeal from a decree passed in a civil appeal. The civil appeal related to a suit which was brought after proceedings under S. 145. All that has been stated in the judgment is that the case under S. 145 was compromised, but nothing has been said as regards the legality or otherwise of the compromise. What has been held is that the compromise could, at the outset, amount to an admission of title, but that it could not be deemed to have the effect of estoppel and that therefore the compromise or agreement in the proceedings under S. 145, Criminal P. C., would not preclude either party from having recourse to the civil Court. In *Taramoni Chaudhurani* v. *Gyanendra Mohan Chaudhari* (6), it is true, it has been held that when the question of possession in proceedings under S. 145 has been referred to arbitrators and the arbitrators have submitted an award as regards the question of actual possession, the Magistrate was bound to take the finding of fact by the arbitrators into consideration. This view, perhaps, may be accepted, though it directly conflicts with the view expressed in *Banwari Lal Mukerjee* v. *Hriday Chakravarti* (2); but, at any rate, all that it amounts to is that there may be an agreement, as already held above, as regards the mode of ascertaining actual possession; it cannot mean that the question of possession can be compromised nor does it even say that the Magistrate is bound by the award or report submitted by arbitrators. All that has been held is that the Magistrate is bound to take the finding of fact by the arbitrators into consideration, which of course, would apply to any evidence or report submitted by a commissioner. *Kalananda Singh* v. *Rameshwar Singh* (7), is somewhat similar to *Sadhu Biswas* v. *Mahammad Ali Biswas* (4) already referred to above, and the chief point there laid down is that, when once a dispute has been referred to arbitration in proceedings under S. 145 and the Magistrate has stayed further proceedings as unnecessary, the order really amounts to an order under S. 145 (5) and that the preliminary order should be cancelled. In *Jamunadas Kyrawala* v. *Hanuman Baksh Marwari* (8) it has been clearly held that a reference to arbitration is not contemplated under S. 145, but that if the parties privately referred the dispute to arbitration and the award has been accepted, the Magistrate would have grounds to proceed under S. 145 (5).

On a review of the authorities, then, I am of opinion that proceedings under S. 145 cannot be compromised, nor can they be submitted to arbitration: all that can be done is that there may be an agreement as to the mode of taking evidence as regards actual possession on the date of the preliminary order either by a commissioner or by arbitrators. Such a commissioner or arbitrators have no power

(3) [1917 2 Pat. L. J. 83=37 I. C. 513=1 Pat. L. W. 81.
(4) [1911] 15 C.W. N. 568=9 I. C. 167=12 Cr. L. J. 92.
(5) A. I. R. 1923 All. 77=45 All. 162.
(6) [1903] 7 C. W. N. 461.
(7) [1911] 15 C. W. N. 271=8 I. C. 892=11 Cr. L. J. 729.
(8) A. I. R. 1921 Cal. 637.

to decide the case, but can only submit a report, and the Magistrate would then be bound to take that report into consideration before passing an order. It has, however, always to be borne in mind that if the parties come to any agreement with regard to a dispute, even an agreement as regards the mode of ascertaining actual possession, it at once becomes doubtful whether there is any likehood of a breach of the peace, and if the Magistrate is satisfied that no likehood of a breach of peace exists he should cancel his preliminary order under S. 145 (5).

For these reasons I am of opinion that the order of the Magistrate in the present case is wrong, in the first place, as it relates to future possession and not to actual past possession, and, secondly, it is wrong because, when once the parties had agreed to maintain possession according to the measurements made by a revenue officer, there was no likelihood of a breach of the peace existing, and the preliminary order should be cancelled under S 145 (3). I therefore now set aside the order of the Magistrate and under S 145 (5) cancel the preliminary order which was passed on 20th July 1928.

K.N./R.K. *Order accordingly.*

A I. R. 1929 Nagpur 288

JACKSON, A. J C.

Pandu—Applicant.

v.

Bapudas and *others*—Non-Applicants.

Civil Revn No 136 of 1929, Decided on 7th August 1929, from order of 2nd Class Sub-Judge, Chanda, D/- 8th February 1929, in Misc. Judicial Case No. 84 of 1928.

Evidence Act, S. 65 –Trial Court is to decide whether or not sufficient proof of search for or loss of, original documents for admission of secondary evidence is given—Loss of original held to be not proved—Secondary evidence refused—Order of refusal is not revisable.

Whether or not sufficient proof of search for or loss, of an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance and depends very much on his discretion. Thus if such Court finds the loss of a document not proved and refuses to admit secondary evidence it cannot be said that it has refused to exercise jurisdiction or has exercised jurisdiction with material irregularity, nor is there any gross or palpable error to justify interference in revision : *A. I. R.* 1926 *Nag.* 290 and 19, *Cal.* 438 (*P.C.*), *Rel. on* ; *A. I. R.* 1926 *Nag.* 257 ; *A. I. R.* 1927 *Nag.* 286, *Expl.* and *Dist* : *A. I. R.* 1924 *Cal.* 693, *Dist.*

[P 288 C 2, P 289 C 1]

V N. Herlekar—for Applicant.

V. V. Kelkar—for Non-Applicants.

Order.—This is an application for revision of an order dismissing an objection under O. 21, R. 58, Civil P. C. The non-applicant has argued that there can be no revision under S. 115, Civil P. C., and he has relied upon the ruling in *Samsherkhan* v. *Abdul Sattarkhan* (1), in which it has been held that this Court will not interfere in revision when another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from its refusal to act In any case, it is urged that there has been no material irregularity in the exercise of the lower Court's jurisdiction. This appears to me to be correct What is objected to in the lower Court's decision is that it has found the loss of a document not proved and has therefore refused to admit secondary evidence. As their Lordships of the Privy Council have laid down in *Harripria Debi* v *Rukmini Debi* (2), whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. In coming to a conclusion of fact that the loss of the document was not proved, it is impossible to say that the lower Court has refused to exercise jurisdiction or has exercised its jurisdiction with material irregularity.

I have been referred to the decision in *Joqunnessa Bibi* v. *Satish Chandra* (3) which lays it down that the expression "acted illegally" in S. 115, Civil P. C., is an indefinite expression which empowers the High Courts to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. I am not prepared to say that there is any gross

(1) A. I. R. 1926 Nag. 290=22 N. L. R. 90.
(2) [1892] 19 Cal. 438=19 I. A. 79=6 Sar. 177 (P.C.).
(3) A. I. R. 1924 Cal. 693=51 Cal. 690.

or palpable error in this case which would justify interference in revision. Moreover, as I have already pointed out, the applicant has another remedy and so there is no grave injustice to be redressed.

I have been referred to the decision of this Court in *Pandurang Govind* v. *Maifuzbai* (4), but that decision gives no assistance in the present case, as it dealt with a case in which an erroneous view of the scope of a section of the Civil Procedure Code had been taken by the lower Court. Again in *Sujat Ali* v *Bhao Singh* (5), it was held that the word "conclusive" in R. 63, O. 21, does not preclude revision and the order of the lower Court was reversed but on the ground that it had wrongly gone into the question of title, that is, it had exercised a jurisdiction not vested in it. This decision also is no authority for interference in the present case. I dismiss the application with costs I fix pleader's fee at Rs. 25

P.N./R.K *Revision dismissed.*

(4) A. I. R. 1926 Nag. 257.
(5) A. I. R 1927 Nag. 286.

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* A. I. R. 1929 Nagpur 289

JACKSON, A. J. C.

Tani and *another*—Defendants—Appellants.

v.

Krishnappa and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 2-B of 1927, Decided on 24th July 1929, from decree of 1st Class Sub-Judge, Yeotmal, D/- 15th September 1926, in Civil Suit No. 6 of 1924

(a) Hindu Law—Partition—Evidence of—Entering widow's name in place of that of husband is not sufficient—Application by mother to enter share in minor son's name is also not sufficient.

The fact that a Hindu widow's name has been entered in the revenue records in place of her husband does not prove partition. Nor is an application by the mother of a Hindu, asking for a specific share of the property, which belonged entirely to the family, to be entered in the name of her son, then a minor, an unequivocal declaration of an intention to separate from the rest of the family. [P 290 C 1]

*** (b) Hindu Law — Adoption — Bombay School—Husband dying joint—Property not vested in widow—Widow cannot adopt.**

A Hindu widow in the Maratha country of the Presidency of Bombay, who has not her husband's estate vested in her and whose husband was not separate at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of her father-in-law of her husband's undivided coparceners ;6 *Bom.* 498 (*F.B*), *held not overruled by A.I.R.* 1922 *P C.* 216, *A I.R.* 1926 *Bom.* 435 (*F.B.*); *Appr.* [P 290 C 1, P 291 C 2]

M. B Niyogi and *W. B. Pendharkar*—for Appellants.

K V. Deoskar—for Respondents 3 to 6.

Judgment—This appeal arises from a suit for partition of the Nim Jagir village of mouza Pardi, Tahsil Kelapur The family to which the appellants belong owns a half share in this village, and the question I have to decide is whether the appellants are entitled to half of that share.

The first appellant Tani is the widow of Kesho, who, with his brother Raghunath and Raghunath's sons, formed a joint family owning the whole half share. Kesho died, according to the finding of the lower Court, in a state of jointness, without issue, but after the institution of the suit out of which this appeal arises, Tani adopted to him the second appellant, Wasanta The lower Court has held that this adoption is invalid.

As regards the finding that there was no partition between Kesho and the rest of the family, I agree with the lower Court Tani's pleading is that in 1917, her husband Kesho declared to his brother Raghunath, his intention to separate, and that the home-farm was then divided, the division of the rest of the property being postponed. The evidence adduced does not support this pleading. Tani herself (6 D. W. 1) gives very confused evidence, and obviously she has no personal knowledge of the facts to which she deposes, because on her own showing she can only have been nine or ten years old at the time of the alleged partition, and she had not then been married to Kesho. The other oral evidence is mainly to the effect that Kesho had for some years before his death lived separately from Raghunath and had separate cultivation. Kesho died in 1918 and it is clear that his living and cultivating separately from Raghunath did not indicate partition, because it began before the partition is alleged to have taken place There is some evidence to prove that the partition went further than the division of the home-farm, but that is

not in the pleadings, and in any case I agree with the lower Court that the evidence is unreliable

It was decided in a case before the Munsif, Kelapur, that Kesho did separate from the rest of the family, but the judgment in that case, Ex 6 D 3, does not operate as res judicata. The fact that Tani's name has been entered in the revenue records in place of Kesho's does not prove partition, and I agree with the lower Court's view of the statement made by Shivappa then a youth of 18, in the proceedings relating to mutation of names after Kesho's death. Great reliance is, however, placed on the application, of which 6 D 3 is a copy, made by Kesho's mother on 9th April 1918, in which she asks to have a 4-anna share of mouza Pardi and an 8-anna share of mouza Palsi, which belonged entirely to the family, entered in the name of her son Kesho, who was then a minor. This application is not an unequivocal declaration of an intention to separate from the rest of the family. It makes no mention of the alleged separation in 1917, and its object is clearly to have it recorded that Kesho is entitled to a 4-anna share and not to an equal share with each of his nephews, Raghunath's sons It does not prove that partition had already taken place, nor does it operate to effect partition

The question then arises whether no partition having taken place in the family, Tani had authority to adopt a son to her deceased husband. In *Ramji* v *Ghamau* (1), it was held by a Full Bench that a Hindu widow in the Maratha country of the Presidency of Bombay, who has not her husband's estate vested in her and whose husband was not separate at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of her father-in-law or her husband's undivided coparceners. That decision has been considered by the Privy Council in *Yadao* v *Namdeo* (2), and there are passages in their Lordship's judgment from which it may be inferred that they have overruled *Ramji* v *Ghamau* (1), but I do not think that they have gone so far as that.

In *Yadao* v. *Namdeo* (2) the facts were as follows: One Pundalik died while still joint with his cousin Namdeo and the latter's two sons, Pandurang and Rambhau. His senior widow, Mt. Champa Bai, with Pundalik's authority and Namdeo's consent adopted the latter's son, Pandurang. Pandurang died and thereafter Mt. Champa Bai adopted one Yadao and it was the validity of Yadao's adoption that the Privy Council had to consider. At the time of the adoption of Pandurang a deed of adoption was executed by Namdeo, which their Lordships held to have the effect of separating Pandurang from his natural father and brother, Namdeo and Rambhau. On Pandurang's death the property which had gone to him as the adopted son of Pundlik vested in Pundlik's widows, and the adoption of Yadao had thus not the effect of divesting Namdeo and Rambhau of property already vested in them Nevertheless, the law as laid down in *Ramji* v. *Ghamau* (1) would have applied to the facts found in *Yadao* v. *Namdeo* (2) as the following passage from the judgment of the Privy Council will show:

"In the present case Pundlik had not separated, he had died a member of a joint Hindu family, and the estate which was vested in Mt. Champa Bai at the time when she adopted the plaintiff as a son to her husband was not the interest which Pundlik had in the joint family property, but was the estate which had vested in Pandurang on the separation of the joint family."

Their Lordships, however, refused to apply the law so stated, and thus gave their reasons.

"There does not appear to their Lordships to be any sound reason why in the Mahratha country of the Presidency of Bombay the Hindu Law as to the power of a Hindu widow who has not the authority of her deceased husband to adopt a son to him should depend on the question as to whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question as to whether the property which was vested in her when she made the adoption was or was not vested in her as his heir. If it was her religious duty to adopt to her husband, that duty would be same in either case, although possibly the right of the adopted son to the property vested in the widow might be different."

It is this passage and one to similar effect, in which their Lordships commented on a quotation they had made from *Rakhma Bai* v. *Radha Bai* (3), that may be taken to indicate that the decision in *Ramji* v. *Ghamao* (1) was overruled. It has, however, been decided

(1) [1881] 6 Bom. 498 (F.B.).
(2) A. I. R. 1922 P. C. 216=49 Cal. 1=48 I.A. 513=17 N. L. R. 145 (P.C.).
(3) 5 B. H. C. 181.

by a Bench of five Judges of the Bombay High Court, with one dissentient, in *Ishwar Dadu* v. *Gajabai* (4) that *Ramji* v. *Ghamau* (1) has not been overruled by *Yadao* v. *Namdeo* (2) and I have come to the same conclusion.

The observation of their Lordships of the Privy Council must be read with reference to the facts to which they were applied. These were essentially different from the facts in *Ramji* v *Ghamau* (1) and in the present case, in which the person to whom adoption was made had not separated in his lifetime and his widow could not separate after his death, and in which the adoption had the effect of introducing a new member into the coparcenary. I do not read the decision in *Yadao* v *Namdeo* (2) as meaning that such an adoption would be valid. In that case their Lordships based their decision on two propositions Firstly, they say that the power of a Hindu widow to adopt does not depend on the question whether her husband died as a separated Hindu or an unseparated Hindu, by which they mean, in my opinion, that it is the position at the time of adoption that has to be considered and not the position at the time of the adoptive father's death, secondly, they say that that power to adopt does not depend on the question whether the property which was vested in her when she made the adoption was or was not vested in her as his heir; and by this, I take them to mean that it is immaterial whether the property came to her as the immediate successor of her husband or in some such way as that in which it came to the widow in the case with which they were dealing. They clearly, however, contemplated that the husband's property or property in which he had an interest must have come to be vested in her directly or indirectly. The effect of their decision is not, I consider, to overrule *Ramji* v. *Ghamau* (1) At the most the decision is that the law has been too widely stated in that case; it needs the qualification that it is applicable only to cases in which the effect of the adoption would be to introduce a new member into a coparcenary.

My view is, I think, strengthened by the quotation made in the judgment of their Lordships from from *Raghunadha* v. *Brozo Kishoro* (5):

"It may be the duty of a Court of Justice administering the Hindu Law to consider the religious duty of adopting a son as the essential foundation of law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

The comment of their Lordships on this passage is also instructive. It ends with the sentence.

"In the present case, owing to the family having separated the rights of Namdeo and his son Pandurang were merely rights of collaterals in unpartitioned property."

That comment indicates the distinguishing feature in *Yadao* v. *Namdeo* namely, the fact that although Pundlik died in a state of jointness, the son first adopted to him afterwards separated. It is that fact and that fact alone which seems to me to have led their Lordships of the Privy Council not to apply the law as laid down in *Ramji* v. *Ghamau* (1). It is nowhere stated in *Yadao* v. *Namdeo* (2) that *Ramji* v. *Ghamau* (1) was an incorrect decision as far as the facts to which it applied were concerned. I am satisfied that it is correct as to such facts and that it applies in the present case.

It follows that the adoption of defendant 2 Wasanta is invalid and that he is not entitled to a share in the village of Pardi which is now to be partitioned.

The appeal is dismissed with costs.

K.N./R.K. *Appeal dismissed.*

(4) A. I. R. 1926 Bom. 495=50 Bom. 468. (F.B.).

(5) [1876] 1 Mad 69=3 I. A. 151=25 W. R. 291=3 Sar. 589 (P.C.).

A. I. R. 1929 Nagpur 291

MOHIUDDIN AND STAPLES, A. J. Cs.

Amrutrao Vinayakrao Deshmukh — Defendant—Appellant.

v.

Trimbakrao and *others*— Plaintiffs— Respondents

First Appeal No. 49-B of 1927, Decided on 9th July 1929, against decree of Addl. Dist. Judge, Buldana, D/- 16th June 1927.

(a) Civil P. C., O. 20, R. 12—Partition decree silent about mesne profits — Party can assert right to them by separate suit.

Where a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. 19 *Bom.* 532, *Foll*, *A. I. R.* 1927 *Mad.* 801, *A. I. R.* 1922 *Bom.* 119, *Dist.*. 39 *Mad.* 159, 5 *Mad* 236 (*P. C.*), *Ref.* [P 293 C 2]

(b) Civil P. C, O. 20, R 12—Cosharer kept out of possession, is entitled to claim from his co-tenant interest on mesne profits.

The relations between lambardar and a co-sharer are not analogous to those which exist between two co-tenants, one of whom is kept out of possession. In a suit brought by the latter for mesne profits in respect of his share against his co-tenant, who has excluded him from possession he is entitled to claim interest on mesne profits. 15 *N. L. R.* 85, *Dist.* [P 294 C 1]

W. B. Pendharkar and *G. K. Dixit*—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—This appeal relates to a claim for profits for the years 1920-21, 1921-22, and 1922-23 which the respondents Trimbak Rao and Daulat Rao had filed in the Court of Subordinate Judge, First Class, Buldana, on 3rd December 1924, against the appellant Amritrao It is an admitted fact that the respondents had filed a suit for partition in 1917 in the Court of third Additional District Judge, Buldana, against the appellant, and that the partition suit was continued in the Akola Court, and ended in a compromise between the parties in 1920. The details of the compromise have been stated in para. 3 of the plaint and are contained in Ex. P-133 The parties according to the terms settled between them, referred the question of actual partition to arbitrators, who gave their award in 1923. The respondents in this suit claimed their share of the profits for the period during which the appellant was in possession, after the parties had determined finally the definite shares to which they were entitled. The profits claimed are from the following four sources :

(1) Lands other than home-farm.
(2) Home-farm lands.
(3) Mango trees.
(4) Guava trees.

The appellant denied the respondents' claim, contested the various items for which the claim was made and expressed his willingness to pay such an amount to the respondents as might be decreed by the Court. Para. 14 of the written statement ran as follows :

"After taking the accounts as per schedule, if anything is found due to plaintiffs, it may be decreed."

The trial Court held that the appellant had realized the letting values of 12 fields in mouza Chondal, of three fields in mouza Perikhed, and of seven fields in mouza Takli, during the years in suit, that the income per year from the mango grove in the appellant's possession was Rs. 1,000 to Rs. 1,200, that similarly the income from the guava was Rs. 25 per year, that the appellant had incurred an expenditure of Rs. 32 per year in maintaining the mango grove, that the net profits from the excess home-farm land was Rs 42-8-0, that the respondents were entitled to get interest, that the respondents were entitled to receive profits for the years in suit, that the profits from the fields mentioned in Sch A were Rs. 22,606 for the years in suit and Rs 42-8-0 for those mentioned in Sch. B, that the rental value of the fields was six times the revenue and passed a decree for Rs. 12,049-12-6.

Ground 1 in the memorandum of appeal ran as follows :

"The lower Court should have held that the suit as filed for claiming mesne profits was not maintainable and was liable to be dismissed."

The learned pleader for the appellant contended that the question of profits for the years in suit, that is, 1920-21, 1921-22, and 1922-23, ought to have been raised and agitated in the partition suit, and could not be claimed in a subsequent suit, as the matter in dispute was one, which in the ordinary course was a relevant question in the partition suit. He cited *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar* (1) at p. 874 *of* 50 *Mad.* and *Gulabchand Chhotiram* v. *Ramnath Chhotiram* (2) at pp. 332 and 333 *of* 46 *Bom.* in support of the point raised by him. It is clear from the written statement filed by the appellant and his pleadings recorded in the trial Court, that this point was not raised by him at all in the Court below. The only objection which the appellant put forward is contained in para. 12 of the written statement, which runs as follows :

(1) A. I. R. 1927 Mad. 801=50 Mad. 866.
(2) A. I. R. 1922 Bom. 119=46 Bom. 327.

"Plaintiffs are claiming as per award of the Panches but as the Panches have given their award on 13th November 1923, plaintiffs are not entitled to claim mesne profits for the years 1920-21 and 1921-22. This defendant therefore denies the plaintiff's claim in toto."

No reason was assigned, why the appellant was not liable for the claim for the year 1922-23, and it was never alleged that the suit was not maintainable. The rulings cited do not support the contention raised In *Gulabchand Chhotiram* v *Ramnath Chhotiram* (2) the plaintiffs brought another suit against the defendants to recover from them by way of damages rent of certain lands, and the amount due in respect of certain bonds, both of which were referred to, by the trial Judge in the partition suit. The plaintiffs had not followed the instructions, contained in the judgment, and the real ground for the dismissal of the suit was stated by Shah, J., in the following words :

"The present suit in respect of the rents for the years 1905 to 1910 is nothing but a claim for mesne profits partly prior to the date of the partition suit, and partly after the date of the suit. It is clear that it was really a point arising in the partition suit, and having regard to the result of the appeal to this Court there could be no doubt that that claim would have been disallowed, even if it had been allowed by the lower Court. It follows that the plaintiffs cannot now maintain a suit in respect of the mesne profits which would have been disallowed if they had been claimed then as mesne profits."

The facts of that case were quite different, and the remarks contained on pp. 332 and 333 do not apply to the facts of this case. Reliance was placed on the following remarks contained in *Sri Ranga Thathacharıar* v. *Srinivasa Thathacharıar* (1) 874 *of* 50 *Mad.* :

"But subsequent to the date of the suit, the plaintiff and the first defendant were only tenants-in-common or cosharers and therefore the first defendant is strictly bound to account for all receipts and expenses and as observed by the lower Court can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff."

The point now urged was not raised in that case. After the compromise of 1920, the appellant and the respondents were tenants-in-common and as the appellant was in possession, .he had to make over to the respondents their share of the profits. This was filed as a suit for partition, but after the compromise, the arbitrators were asked to divide certain specific property and this they did. The suit for partition was first filed in 1917, and as held in *Soundararajan* v *Arunachalam Chetty* (3), the filing of a plaint claiming partition amounts to an unambiguous manifestation of intention on the part of the plaintiff to separate. The severance of joint status took place in 1917, if not earlier, and from that year, the parties became tenants-in-common. The respondents, as stated in para. 3 of the plaint, gave up specificially, their claim on account of profits, from the year 1910-11 to the date of compromise. The claim for the years for which the suit was filed in 1924 was not made then and could not have been made. The suit after the compromise of 1920, did not continue as a partition suit, and the arbitrators did not take into consideration the question of mesne profits, because it was not referred to them There is no doubt that the claim as laid is maintainable. *Bhivrav* v. *Sitaram* (4) is clear authority on the point and the facts of that case were similar to the facts of this case In that case, it was held that where a decree for partition is silent about mesne profits subsequent to to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. The claim for profits made by a member of a Hindu joint family in a suit for partition, though, is not technically one for "mesne profits" as used in the Civil Procedure Code, must be calculated on the same basis.

The respondents were excluded from their share of the property by the appellant in this case. This is clear from the perusal of the judgment, Ex P-1, and the award, Ex. P-134. Their Lordships of the Privy Council allowed mesne profits from date of exclusion of cosharers in *Appa Rao* v. *Court of Wards* (5) and, in our opinion, the lower Court was right in calculating profits on the basis which it adopted. We therefore hold that the suit as framed was maintainable (The judgment discussed evidence as to amount of mesne profits and concluding that the calculation by the lower Court was correct, proceeded.)

(3) [1916] 39 Mad. 159=29 M. L. J. 816=33 I. C. 858=(1916) 1 M. W. N. 31.
(4) [1915] 19 Bom. 532.
(5) [1882] 5 Mad. 236=9 I. A. 125=4 Sar. 345 (P.C.).

Lastly, it was urged that Rs. 1,151-8-6 ought not to have been awarded as interest, on the amount of the profits calculated by the Court, and *Gopala* v. *Ramkrishnapuri* (6) was cited in this connexion. It was argued that the appellant ought not to have been treated as a trespasser and on the analogy of a lambardar in Central Provinces he could not be made to pay interest on profits realized by him. Batten, A. J. C., had made the following observation in *Gopala* v. *Ramkrishnapuri* (6, (at p. 87) .

"As a matter of fact there is no uniform practice of the Courts to grant interest irrespective of the circumstance and I myself have never allowed interest in such suits unless the plaintiff proves special circumstances entitling him to claim interest."

The relations between a lambardar and a cosharer are not analogous to those which exist between two co-tenants, one of whom is kept out of possession. The appellant must pay interest in this case, because he unnecessarily detained money in his hand, which he ought to have handed over immediately to the respondents who were entitled to it.

The appeal therefore fails and is dismissed with costs.

K N./R K *Appeal dismissed.*

(6) [1919] 15 N. L. R. 85=50 I. C. 930.

A I. R. 1929 Nagpur 294

MOHIUDDIN, A. J C.

Patil Shyamlal—Applicant

v

Gaurishankar—Non-Applicant.

Misc. Judicial Case No. 53 of 1929, Decided on 10th August 1929, from decision of Addl Judge, to 1st Class Sub-Judge, Hoshangabad, in Civil Suit No 10 of 1929

(a) Court fees Act S. 4—Scope.

Filing of an appeal on insufficient court-fee stamp with the knowledge that it is insufficient, with a view to save limitation, cannot be allowed. [P 295 C 1]

(b) Civil P. C , S. 149—Appellant not caring to find out proper court fee payable on memorandum of appeal—Discretion under S 149 to allow party to make up deficiency of court fees, even after expiration of period of limitation for filing of appeal cannot be exercised.

Discretion given to the Court by S. 149 to allow a party to make up the deficiency of court-fees payable on a memorandum of appeal even after the expiration of the period of limitation, prescribed for filing of the appeal, can be exercised in cases where the insufficiency of the stamp was caused by a bona fide mistake or a bona fide misunderstanding of the law as to valuation but not where the appellant never cared to find out the proper court-fee which he had to pay on the memorandum of appeal. [P 295 C 1, 2]

(c) Court-fees Act, S. 4—S. 4 is imperative

Section 4 is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which the proper amount of court-fee has not been paid. [P 295 C 2]

Fida Hussain—for Applicant.

Judgment.—This is an appeal, which was filed in this Court on 19th July 1929, on a court-fee of Rs 10, against the judgment and decree dated 12th April 1929, passed by Mr S D. Phatak, Additional Sub-Judge, 1st Class, Hoshangabad, decreeing plaintiff's claim against defendants 1 and 2 for Rs 4649-12 7 with proportionate costs and future interes The proper court-fee payable in this case is Rs. 260, but the appeal has been filed on a court-fee of Rs. 10 only, and a month's time is asked for, to make up the deficiency in court fees. The application filed with the appeal mentions the following facts :

"That a preliminary issue was framed about the admissibility or otherwise of oral evidence and was decided against the appellant That the appellant came to Nagpur with the intention of filing an appeal against that order and was told that an appeal could be filed on a court fee of Rs 2 but did not file the appeal, as he was advised to wait till the final decision of the suit. That after the suit was finally decided, he sent his man to get the appeal filed, but being under the impression, that the appeal could be filed on a Court-fee stamp of Rs 2, he did not provide his man with the necessary funds That the man came to know at Nagpur that full court-fee will have to be paid and as the last date for filing the appeal was 20th July 1929 and as there was not enough time for the man to go back and to arrange and send Rs 355, the appeal was filed on a stamp of Rs. 10"

Relying on these facts the appellants want a month's time to make good the deficiency in court-fee.

Section 4, Court-fees Act, runs as follows :

" No document of any of the kinds specified in Sch. 1 or 2 to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction ,
or in the exercise of its extraordinary original criminal jurisdiction ,
or in the exercise of its jurisdiction as re-

gards appeals from the judgment of two or more Judges of the said Court, or of a Division Court,
or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence,
or in the exercise of its jurisdiction as a Court of reference or revision,
unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

3. In this case, the decree was passed on 12th April 1929, and the appellants must have come to know on that date that it was for a sum of Rs 4,649-12-7. Any one at Hoshangabad would have told them, that they will have to pay full court-fee on the amount decreed, if they wanted to file an appeal. Apparently they made no enquiry and sent a man to Nagpur to file the appeal, when only two days were left for the period of limitation to expire. The advice which was given before was about the court-fee to be paid in a miscellaneous appeal or a revision application, against an interlocutory order, but no advice was sought or was given about the court-fee to be paid, on a memorandum of appeal against the decree which might be eventually passed in the case. It is not alleged that the appellants made any enquiry about the amount of court-fee which it would be necessary for them to pay on their memorandum of appeal. They applied for copies of judgment and decree on 3rd July 1929 and got these copies on 12th July 1929. They could have got the requisite information at Hoshangabad, about the court-fee payable on the memorandum of appeal, after they had obtained the copies of judgment and decree. The appellants never cared to find out after the decree was passed, as to what court fees would be required for filing an appeal against the decree passed against them. The reasons stated in the application are not sufficient to extend time and therefore I refuse to do so.

This is a case in which an appeal was filed, on insufficient court-fee stamp, with the knowledge that it is insufficient, with a view to save limitation. This cannot be permitted. Section 4, Court-fees Act, expressly provides that no document shall be filed, unless in respect of such document there be paid a fee of an amount indicated in the schedules as a proper fee. In this case the proper fee has not been paid. Section 149, Civil P. C. gives a discretion to the Court to allow a party to make up the deficiency of court-fees payable on a memorandum of appeal, even after the expiration of the period of limitation prescribed for filing of the appeal. This discretion can be exercised in suitable cases, where the insufficiency of the stamp was caused by a bona fide mistake or a bona fide misunderstanding of the law as to valuation but not in a case of this nature, where the appellants never cared to find out the proper court-fee which they had to pay on their memorandum of appeal. Section 4, Court fees Act, is imperative in its terms and makes it impossible for the Court to entertain a memorandum of appeal upon which the proper amount of court-fee has not been paid. The amount of court fee payable was not open to doubt, and therefore the appellants cannot be allowed to pay the balance of the court fee within a month from 19th July 1929. The appeal is insufficiently stamped and therefore I refuse to accept it.

P.N./R.K. *Appeal dismissed*

A. I. R. 1929 Nagpur 295

FINDLAY, J. C.

Narayan Singh Chhatri—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No 189 of 1928, Decided on 25th September 1928, from decision of Addl Sess Judge, Nagpur, D/- 14th June 1928.

(a) Criminal P. C., Ss 238 and 537—Trial by jury — Accused charged with major offence—Jury returning verdict of guilty in respect of minor offence—Verdict of jury is right and is covered by S 537 (a)

An accused was convicted by a jury of an offence under S. 325, I. P. C., and the verdict of the jury was accepted by the Sessions Judge. It was contended that the Judge used the jury as assessors in accepting the verdict for an offence with which th accused was not specifically charged and that therefore the High Court could go into the facts as if the verdict amounted to an opinion of the assessors:

Held that the effect of S. 238, Criminal P. C., was to invest a jury trying an offence under S. 307, I. P. C., with authority to find that the facts proved only constitute a minor offence and to return a verdict of guilty of such offence. It cannot be disputed that, in view of the charge under S 307, I. P. C., the fact that no charge under S 325 was framed is not even a defect or irregularity and, as

such, curable under S. 537 (a), Criminal P. C., for the simple reason that, under S. 238 (1), Criminal P. C., the accused was liable, without separate charge, to be convicted incidentally of the minor offence under S. 325, I. P. C. The High Court could not interfere and go into the question of facts on which the jury delivered the verdict they did . 26 *Mad.* 243, Ayyangar, J., *Foll.* [P 296 C 2]

(b) Criminal P. C., S. 298—Duty of Judge, while charging Jury.

It is not the duty of the Judge to discuss in detail each and every item of the evidence and any such discussion of the evidence by the Judge in the charge leads to a great risk of the Judge pressing his own view of the facts too positively. [P 297 C 2]

B. R. Mandlekar—for Appellant

G. P. Dick—for the Crown.

Judgment.—The appellant Narayan Singh and his co-accused Raghunath (Criminal Appeal 191 of 1928), who has also appealed to this Court, have been convicted by the Additional Sessions Judge at a jury trial of offences under Ss 147 and 325 read with S. 145, I. P. C., in the case of Narayan Singh, and as regards Raghunath of an offence under S 147, I. P. C., simpliciter. The appellant Narayan Singh has been sentenced to two years' rigorous imprisonment, and the appellant Raghunath to six months' rigorous imprisonment In the case of Narayan Singh, sentence was imposed on him only under S. 325 read with S 149, I. P. C.

The main aspects of the case are sufficiently clear, not only from the charge of the Additional Sessions Judge to the jury but also from his order of reference in the case of another accused Tukaram to this Court The result of that order of reference was that Tukaram, who had been acquitted by the verdict of the jury, has been convicted by another Judge of this Court of offences punishable under Ss. 147 and 325 read with S. 149, I. P. C. Both the order of reference and the judgment of Mohiuddin, A J. C., dated 11th September 1928, give an admirable summary of the facts of the case and it is unnecessary, therefore, to repeat them in any detail in the present judgment. It will suffice to say that in all 28 accused were tried in the Sessions Court for offences under Ss. 147 and 307, I. P. C The jury unanimously convicted 16 of the accused including the appellants. As regards 11 accused, whom the jury acquitted, the Additional Sessions Judge accepted the verdict and only disagreed with the verdict of the jury so far as the accused Tukaram was concerned. The result of the disagreement of the Additional Sessions Judge with the jury's verdict in the case of Tukaram has already been stated above.

The first question, which I have to consider in the case of each of the appellants (who have been represented by separate pleaders) is whether there is any ground on which I can interfere with the verdict of the jury as regards these two appellants in view of the law as laid down in Ss. 418 and 423, sub-S. (2), Criminal P. C.

I take up first the case of Narayan Singh This appellant was charged with offences under Ss. 147 and 325 read with S. 149, I. P C. The jury, however, as already stated, convicted the appellant of an offence under S. 147, and further held that he had been specifically guilty of an offence under S. 325, and the learned Additional Sessions Judge accepted this verdict and convicted the appellant accordingly On the strength of certain remarks made by Benson, J., in *Pattikadan Ummaru* v *Emperor* (1) it has been urged before me that, in accepting the verdict of the jury for the offence under S. 325, with which the appellant was not specifically charged, the learned Additional Sessions Judge in reality used the jury as assessors and that, therefore, this Court is competent to go into the facts of the case precisely as if the verdict of the jury amounted merely to an opinion as from assessors.

For my own part, with all respect, I prefer the view taken by Ayyangar, J., in the same case. The latter learned Justice was of opinion that the effect of S. 238, Criminal P. C., was to invest a jury trying an offence under S. 307, I. P. C., with authority to find that the facts proved only constitute a minor offence and to return a verdict of guilty of such offence. It cannot be disputed that, in view of the charge under S. 307, I. P. C, the fact that no charge under S. 325 was framed is not even a defect or irregularity and, as such, curable under S. 537 (a), Criminal P C., for the simple reason that, under S. 238 (1), Criminal P C., the appellant was liable, without any separate charge, to be convicted incidentally of the minor offence under S 325, I. P C. When S. 418, Criminal P C, moreover is read with S. 537 (a)

(1) [1903] 26 Mad. 249.

idem, the position seems to me perfectly plain and it would be a mere reductio ad absurdum to suggest that, because the jury has convicted the appellant of the minor offence under S. 325, this Court is competent to go into the facts, although it could not have done so had the conviction been for the more serious offence which was charged. I am therefore of opinion that, so far as this objection goes, the view taken by Ayyangar, J., in the *Madras* case quoted above is undoubtedly the correct one and, so far as this objection is concerned, there is obviously no ground on which I could interfere and go into the question of facts on which the jury delivered the verdict they did.

The next point, which has been urged on behalf of the appellant Narayan Singh, is that the opinion of the jury was wrong and perverse. It is difficult to understand how, in the present case, such a contention can be seriously urged. Apparently the position of the pleader for the appellant in this connexion is that, because, as held by a fellow Judge of this Court, the jury went wrong in the case of a single accused one out of 12 viz., Tukaram, a presumption should also be drawn that the jury had erred in the opposite direction in not acquitting the present appellant and the other accused against whom they returned a verdict of guilty. Such an argument hardly requires serious consideration, and the best proof of its utter want of substance is the fact that Mohiuddin, A. J. C, found it to be his duty to convict even the accused Tukaram.

It has again been urged, in what is obviously a somewhat unsubstantial attempt, to induce this Court to go into the questions of fact involved in the case on insufficient grounds, that the charge to the jury was not a proper and complete one, anyhow as regards the appellant Narayan Singh. For my own part, I desire to say in the first instance that, in this difficult, complicated and keenly contested criminal proceeding, the fair, full and lucid charge framed by the Additional Sessions Judge seems to me a model of what should be expected of a Judge in this connexion. I have been referred to the fact that, in para. 18 of the charge, the Judge only referred to certain alibi evidence produced by Narayan Singh and it has been suggested that only some two prosecution witnesses identified him out of the many others who had received injuries. This and other matters of fact arising out of the evidence were referred to by the appellant's pleader, but what I have, first of all, to determine before I go into such points of detail, is whether there is any prima facie reason on which I can hold that the charge was a wrong or illegal one in any respect. The present appellant is one of the three Rangdas who took a leading part in the riot, and the evidence, which had to be considered by the jury in the appellant's case, was referred to not only in para. 18 of the charge but in para. 10 and para. 13 as well, while the learned Additional Sessions Judge, in para. 13, put forward the possible plea of self-defence which might be offered on behalf of the appellants, and again, in para. 22, the question of the acceptance or otherwise of the alibis was very fairly and fully put before the jury.

Much of the argument, in fact, which has been adduced before me in connexion with the said charge, suggests that there has been some misunderstanding on the part of both the pleaders concerned as to the exact function of a Judge in charging a jury. It is not the duty of the Judge to discuss in detail each and every item of the evidence and any such discussion of the evidence by the Judge in the charge leads to a great risk of the Judge pressing his own view of the facts too positively The provisions in Ss. 298 and 299, Criminal P. C., are sufficiently clear in this connexion and, after carefully considering the case of the present appellants, I can find no ground whatever which would justify me in going into the facts of the case with a view to interfering with the verdict of the jury, a verdict in support of which there is overwhelming evidence on record.

Turning to the case of the appellant Raghunath, much what I have already said applies in his case also. It has, however, been suggested on behalf of the present appellant, Raghunath, that there was misdirection or at any rate want of sufficient direction in the charge to the jury as regards this appellant I have been referred to the fact that Ragho (P. W. 1), pp. 53 and 54 of the record, does not mention Raghunath at all, while Lahanu (P W. 13), p 141 of the record, says that Raghunath did nothing ; he

was merely present at the marpit and had no weapons in his hands. Again, Joseph (P. W. 23), p. 192 (reverse of the record) mentions that, amongst Tukaram's party, there were people like the present appellant who had neither stick nor gun with them . vide also the evidence of Karamchand (P. W. 28), p. 229 (reverse of the record), who says that except Nathu, no one mentioned Raghunath's name. This and other points of detail in the evidence have been put forward before me in support of the allegation that the Additional Sessions Judge failed to put the case of this appellant fairly and squarely before the jury.

I am of opinion, however, that when para. 22 of the charge is read with para. 10 thereof, in particular, as well as with much of the context, the learned Additional Sessions Judge obviously put the law applicable to the offence of rioting most fairly and squarely before the jury. Ragho (P. W. 1) did, as a matter of fact, state that Raghunath was present and was obviously an abettor of the rioters and making common cause with them, and the evidence of Lahanu (P. W 13) and Joseph (P. W. 23) clearly shows that this appellant was present amongst the rioters The evidence on record indeed goes to suggest that the present appellant was one of the ring-leaders who remained at the back directing the assault. It was open to the jury to have taken a view favourable to the appellant, but there were obviously very good grounds why they did not do so, and I am wholly unable to see that there is any legal ground on which I could hold that the extremely able and fair charge to the jury in any way prejudiced the case of this appellant. I am unable, therefore, to interfere with the conviction of either of the appellants.

As regards the sentences, it has been urged before me that, in any event, both the appellants are entitled to some degree of leniency, and an allusion has been made to the fact that the main ring-leader, Tukaram, has only been sentenced to six months' rigorous imprisonment and a fine of Rs 2,500. In the case of an extremely bold concerted and deliberate riot of the kind I am concerned with, in which fire-arms were used to the danger of life, and serious injuries were inflicted on various members of the other party, I am wholly unable to see any reason for reducing the sentence which has been imposed on either of the appellants. The sentence of six months' rigorous imprisonment on Raghunath is, in reality, a peculiarly lenient one, while as regards Narayan Singh it is plain that he was the first person to use force and took up a prominent and leading part throughout in the riot. I am not concerned with the quantum of punishment imposed upon Tukaram by my learned brother ; I have only to consider what is, in my opinion, a suitable penalty for the offences committed by the two appellants. A more grave case of disturbance of the public peace it is difficult to conceive of, and I am wholly unable to see any ground for mitigation of the sentences in the way of reduction thereof

Both appeals are accordingly dismissed.

K.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 298

KINKHEDE, A. J. C.

Gaurishankar and *others*—Defendants —Appellants.

v

Ibrahim Ali—Plaintiff—Respondent.

Second Appeal No. 178 of 1926. Decided on 29th November 1928, from a decree of Dist. Judge, Jubbulpore, D/- 10th December 1925, in Civil Appeal No. 33 of 1925

(a) Civil P. C., O. 21, R. 95—Withholding of possession after symbolical delivery of possession gives rise to fresh cause of action for possession—Adverse possession.

The possession of the judgment-debtor after symbolical delivery of property in execution of a final decree for foreclosure can only be regarded as a fresh act of trespass giving rise to a new cause of action. So if the judgment-debtor remains in possession after such delivery, the cause of action arises when formal possession is taken . 10 *N. L. R.* 60 , 29 *All.* 442 and 16 *Bom.* 343, *Rel. on* [P 301 C 1]

(b) Limitation Act, Art. 136—Under Art. 136 private purchaser has 12 years' limitation to sue for possession of immovable property sold by his vendor when out of possession at date of sale — Limitation starts from date when vendor is first entitled to possession.

Under Art. 136 a person in his capacity of a private purchaser has 12 years' limitation to sue for possession of immovable property sold to him by his vendor when out of possession at the date of sale, the starting point of limitation being the date when the vendor was first entitled to possession ; and the mere

circumstance that the purchaser takes five years to complete his title against his vendor cannot give him a fresh starting point of limitation as he can only sue in the right of his vendor : 2 *N. L. R.* 32, *Rel. on* [P 301 C 1]

(c) Possession—Adverse possession— Legal character of person's possession of property of another is to be determined by his animus —*N* in possession of property of *K*—Contract by *K* of sale of property to *M*—Subsequently *K* selling it to *N*—*N* takes possession in his own right and not under any express trust for benefit of *M* merely because *N* has notice of his prior contract of purchase.

When a person has possession of another man's property, the legal character in which he holds it is to be determined by his animus. [P 302 C 1]

N was in possession of property belonging to *K*. *K* made a contract of sale of the property to *M*. Subsequently *K* sold the property to *N*.

Held, that *N* had taken possession of the property in his own right under sale deed and that he could not be regarded as having taken possession under any express trust for the benefit of *M* merely because *N* had notice of his prior contract of purchase. [P 302 C 1]

(d) Limitation Act, S. 10 — Expression "trust for any specific purpose" means express trust.

The expression "trust for any specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the term "express trust of the English Law," both the terms being synonymous in meaning and thus the section excludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations 31 *Bom.* 222 ; 4 *Cal.* 455 ; *A. I. R.* 1923 *Mad.* 667 , *A. I. R* 1925 *Rang.* 289 and *A. I. R.* 1927 *Lah.* 773, *Rel on.* [P 302 C 2]

(e) Trusts Act, S. 91—Person buying with notice of previous contract for sale—S. 91 applies.

Where a bona fide contract is made for the sale of the property and another person afterwards buys the property with notice of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although his purchase may have been registered and although he has obtained possession, and the case of such subsequent purchaser falls under S. 91 . 27 *Cal* 468, *Rel on.* [P 303 C 1]

(f) Specific Relief Act, S. 27 (b)—Proper decree is to ask subsequent purchaser to execute conveyance to person previously contracting to purchase.

The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff : 22 *M. L. J.* 121 ; *A. I. R.* 1925 *Bom* 181, *Rel on.* [P 303 C 2]

(g) Limitation Act, Art. 113—Suit to specific performance barred—He cannot subsequently recover possession.

Vendee whose suit for specific performance is barred by Art. 113, cannot recover possession of the property sold because a suit for possession, i e., to enforce his right under the contract with reference to property is essentially one for specific performance of a contract to which Art. 113 applies : *A. I. R.* 1922 *P. C* 345, *Foll.* [P 304 C 1]

W. R. Puranik and *N. G. Bose*—for Appellants.

J. Sen and *Fida Husain*—for Respondent.

Judgment.—One Kanhaiyalal son of Ramprasad of Gadarwada obtained a preliminary decree for foreclosure on 10th September 1910, against Gaurishankar in Suit No 66 of 1908 brought on foot of a mortgage. The said defendant failed to redeem the mortgaged property, namely, fields of absolute occupancy tenure bearing Nos. 415 and 416, area 16.29, rent Rs 10 and 3 houses including a plot situate in Gadarwada, and the preliminary decree was consequently made final on 6th December 1911 (Ex. P-10). The decree was later on executed and possession of the fields foreclosed was taken on 12th April 1912, and that of the house property in June and December 1912, as per receipts Exs. P-7, P. 8 and P. 9. The actual possessior, however, remained with the judgment-debtor, and Kanhaiyalal looked upon him as being wrongfully in possession, as recited in the receipt dated 27th November 1916 (Ex. P-1), which he executed in favour of the present plaintiff. This receipt evidenced a contract for a sale of the self-same property to plaintiff, for a consideration of Rs 1,001 by Kanhaiyalal, who was being wrongfully kept out of possession by the person whom he had foreclosed. Kanhaiyalal had received Rs. 51 from the plaintiff by way of earnest money, and, it was agreed that the balance of Rs. 950 was to be paid at the time of the registration of sale-deed By the terms of Ex. P-1 and its counter-part Ex. D-8, the vendee was authorized to secure possession of the fields and the houses privately, or, by suit as he thought fit.

Plaintiff called upon Kanhaiyalal to perform his part of the contract of sale by executing a sale-deed in his favour, but for some reason or the other, the document of sale was not secured, and, consequently, the sale in his favour was not completed. Exhibits D-7, 9 and 10 are the notices which passed between the vendor and the vendee in connexion with the breach of contract of sale. These are dated 16th December 1916, 14th

December 1916, and 22nd December 1916, respectively. It appears that the matter remained in suspense after that for some time. In the meantime of 22nd January 1917, Kanhaiyalal executed a conveyance (Ex. D-1) of the property in favour of Gaurishankar and the two minor sons of Laxminarayan Dube his nephew. As one of the purchasers was a judgment-debtor and already held actual possession, there was no formal delivery of possession to the vendees. The possession which the judgment-debtor held in spite of its symbolical delivery by Court to the decree-holder in April, June, and December 1912, thus became lawful possession of the vendees entitled to hold it, in their own right, with effect from 22nd January 1917, subject to such rights, as there may be in favour of plaintiff by virtue of his contract of purchase dated 27th November 1916, (Ex. P-1).

On 27th November 1919, the plaintiff instituted Suit No. 668 of 1919, for specific performance of the contract of sale dated 27th November 1916, against Kanhaiyalal his vendor. Exhibit D-6 is the plaint in that suit. Exhibit D-5 is the judgment dated 23rd August 1920, and Ex. P-13 is the decree passed in that case. In pursuance of this decree, a sale-deed was executed by Kanhaiylal, on 12th February 1921, (Ex P-2), and the same was registered on 21st February 1921. The consideration of Rs. 950 which had to be paid before the Sub-Registrar was deposited in the civil Court on 18th November 1920, as per receipt Ex. P-3 and the same is said to have never been withdrawn by Kanhaiyalal as he had already received the full consideration of Ex. D-1 from the appellants in 1917.

As the property covered by the sale-deed Ex P-2 was in the possession of the present appellants, the plaintiff-respondent, on 23rd November 1922, instituted the present suit against them, for recovery of possession thereof with mesne profits. The first Court decreed the claim and the lower appellate Court confirmed that decree. Hence this second appeal.

It has been concurrently held by both the Courts below that the appellants' purchase, dated 22nd January 1917, (Ex D-1), was with full notice of the plaintiff's contract of sale dated 27th November 1916. The appellants' contention that the plaintiff being admittedly aware, at the date of his Suit No. 66 of 1919, of his vendor Kanhaiyalal having sold the property to the appellants already, and of their having been in adverse or wrongful possession of the same from before the date of his contract as recited in Ex. P. 1, was bound to implead them also in that suit, as subsequent purchasers with notice of the contract and to obtain a decree for specific performance and possession as against them, and that he having omitted to sue for that relief then, is precluded from bringing the present suit for possession under O 2, R 2, Civil P. C., was overruled It was held that, it was not necessary to ask for possession or to join the appellants in the former suit, and that the present suit was tenable. It was further held that the suit for possession of the absolute occupancy fields was in time, as the right to possession came into existence when the sale-deed was executed on 12th February 1921.

The appellants contest every one of these findings in second appeal But so far as the finding on the question of notice to them of the plaintiff's contract of sale is concerned, I think, it is not permissible to them to go behind it in second appeal. The only other points, which as questions of law can be gone into, are the following :

1. Whether the present suit for possession of the property comprising absolute occupancy fields and house property is barred by time as regards any portion?

2 Whether the present suit, for mere possession and mesne profits without a prayer for the relief of specific performance, is maintainable, in view of the admitted failure of plaintiff, to join the present appellants as co-defendants, and to obtain a decree for specific performance and possession, even as against them, in the former suit ?

In spite of the delivery of symbolical possession of the property through Court to Kanhaiyalal in 1912, the judgment-debtor Gaurishankar had been wrongfully keeping him out of actual possession and enjoyment of the same, for over four years at the date of the purchase as per Ex. D-1, dated 22nd January 1927. The possession of Gaurishankar was, admittedly, wrongful, as recited in Ex P-1 dated 27th November 1916. That such withholding of possession gives rise

to a fresh cause of action for a suit for possession is clear from *Dhansingh* v. *Ganpat* (1), where it is laid down that

" the possession of the judgment-debtor after such (symbolical) delivery can only be regarded as a fresh act of trespass giving rise to a new cause of action. "

Kanhaiyalal's cause of action had thus accrued, and limitation had begun to run against him from 12th April, 7th June and 6th December 1912, when formal possession was taken, as per receipts, Exs. P-7, P-8 and P-9, under Art 142, Lim. Act : cf. *Partap Chand* v *Saiyida Bibi* (2) and *Kashinath Sitaram* v. *Shridhar Mahadeo* (3) The starting point of limitation was the date of delivery of symbolical possession of the property comprised in the final decree for foreclosure as stated above. This period of limitation was to expire, so far as the fields were concerned, on 12th April 1924, and as to the house property, on 7th June and 6th December 1924. While he was thus wrongfully kept out of possession, but when his own right to sue was in time, he assigned by a private sale the benefit of the decree to plaintiff by an agreement dated 27th November 1916, and in pursuance of that agreement executed the sale-deed (Ex. P-2) in his favour on 12th February 1921 Under Art. 136, Sch. 1, Lim. Act of 1908, the plaintiff in his capacity of a private purchaser had 12 years' limitation to sue for possession of immovable property sold to him by his vendor when out of possession at the date of sale, the starting point of limitation being the date when the vendor was first entitled to possession . cf. *Ganpat Rao Bhonsle* v *Ganpat Rao Gopal Rao Ghatatey* (4).

I am not, therefore, prepared to hold that the mere circumstance that the plaintiff took five years to complete his title as against Kanhaiyalal could give him a fresh starting point of limitation, as he could sue only in the right of his vendor under Art. 136. So, irrespective of the question that the suit for possession was not brought by Kanhaiyalal, but by plaintiff, as his assignee, the starting point of limitation remained a constant factor, namely, the dates of the symbolical deliveries as per receipts for possession (Exs. P-7, P-8 and P-9) The present suit for possession was, so far as the house property was concerned, surely within time, as, on 23rd November 1922, the limitation of 12 years had not run out. No question of limitation, therefore, arises so far as the house property is concerned for the purposes of this second appeal unless it may under Art. 113, which I will consider later on

But it is contended by the appellants that as regards the absolute occupancy fields the position is quite different. The present claim for possession in regard to them was barred by limitation on 23rd November 1922, as it ought to have been instituted at the latest on 1st May 1921, in view of the provisions of S. 104 (2), C. P. Tenancy Act, read in conjunction with the special limitation prescribed by Art. 1, Sch., 2 of the said Act. In answer to this contention the plaintiff's learned pleader urged that as the appellants' purchase, dated 22nd January 1917, was with notice of his client's prior contract of sale dated 27th November 1916, no plea of limitation can be available to them, in view of S. 10, Lim. Act, and that, however wrongful the previous possession of Gaurishankar may have been, it became converted into possession derived from Kanhaiyalal, the lawful owner thereof, on the date of the sale, dated 22nd January 1917, and was stamped with the character of possession lawfully taken from plaintiff's vendor and as such the same was held by the appellants as trustees for him, or, at any rate, subject to such equities as may have been created in his favour by reason of the purchase being with notice of his prior contract.

The question as put by the learned pleader for the respondent turns upon the constructions and applicability of S. 10, Lim Act, to the facts of this case. In this connexion the period of possession between April 1912 and the date of the suit may be divided into parts :

(1) The period from April 1912 to 27th November 1916, (Ex. P-1) ,

(2) the period from 27th November 1916, to 22nd January 1917, (Ex. D-1) ;

(3) the period from 22nd January 1917, to 27th November 1919, the date of Suit No. 68 of 1919;

(4) the period from 27th November 1919 to 12th February 1921 (Ex. P-2), and

(1) [1914] 10 N. L. R. 60=24 I. C. 850.
(2) [1901] 23 All. 442=(1901) A. W. N. 137.
(3) [1892] 16 Bom. 343.
(4) [1906] 2 N. L. R. 32.

(5) the period from 12th February 1921 to 23rd November 1922

I will now deal with these periods.

As regards the first period there can be no doubt as to the wrongful or adverse nature of Gaurishankar's possession. Kanhaiyalal has frankly admitted it to be so in Ex. P-1 and the whole tenor of the document clearly shows that he did not want to undertake to procure delivery of possession to plaintiff but distinctly directed the latter to secure it as best as he could privately or by suit if necessary. As to the second period, there is nothing to show that the adverse character of possession was expressly changed The question, however still remains for consideration whether by reason of Gaurishankar and his minor grandnephews taking the sale deed (Ex. D-1) on 22nd January 1917, from Kanhaiyalal with notice of plaintiff's contract (Ex. P-1) they must be deemed to have converted their own adverse possession into a sort of possession held by them, as it were, in conjunction with Kanhaiyalal i e, as a trustee of plaintiff for working out the latter's right under his prior contract of sale? When a person has possession of another man's property, the legal character in which he holds it is determined by his animus. In purchasing the property from Kanhaiyal by payment of consideration they could not be considered to have expressly contracted to change the character of their possession At any rate Gaurishankar could not be said to have consented to hold possession for or on behalf of plaintiff As, on the contrary, he and the minors got Kanhaiyalal to covenant that they shall thereafter hold the property in their own right, they have shown their animus with sufficient definiteness Under the terms of their sale deed (Ex D-1) they cannot, therefore, be considered to have taken possession in any capacity other than that of legal owners, much less could they be regarded as having taken possession under any express trust for the benefit of plaintiff merely because they had no ice of his prior contract of purchase as per (Ex. P-1.) Let us next see whether law or equity superimposes a constructive trust.

In order to create a trust with reference to immovable property the Indian Trusts Act (2 of 1882), which is applicable to this case, requires a registered instrument signed by the author of the trust or the trustee and there must be a clear indication of an intention to create a trust. There is nothing in the wording of Ex. D-1 to show that either Kanhaiyalal the vendor or the appellants vendees intended to create any trust. S 10, Lim. Act, lays down that no suit against a person in whom property has become vested in trust for any specific purpose, for the purpose of following in his hand such property shall be barred by any length of time The words used are "in trust for any specific purpose" The expression "trust for any specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the term "express trust" by the English law and it means the same thing as the express trust of the English law both the phrases being synonymous in meaning: cf. *Mathuradas* v. *Vandrawandas* (5). The Trusts Act restricts the scope of the term trustee more closely than in England and considers constructive and resulting trusts as not trusts but as obligations, in the nature of trusts: see Chap. 9. It, therefore, follows that S. 10, Lim. Act excludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations: cf. *Kherodemoney Dossee* v. *Doorgamoney Dossee* (6), *Secretary of State* v. *Radhika Prasad Bapuli* (7), *Ma Thein May* v. *U Po Kin* (8) and *Kishan Dei* v. *Ram Chand* (9.) It is for this reason held that if a person has been in possession not being a trustee but still being in under such circumstances that a Court, on principles of equity, would hold him a trustee, he is not an express trustee and if the possession of such a constructive trustee has continued for more than 12 years, he may set up the statutes against the party who but for lapse of time would be rightful owner : cf. *Barkat* v. *Daulat* (10).

The position of a constructive trustee in the usual sense of the word, that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a Court of Equity was widely different (from that of an express trustee) and it had long

(5) [1907] 31 Bom. 222=33 Bom L. R. 329.
(6) [1879] 4 Cal. 455=3 C. L R 315.
(7) A I R. 1924 Mad. 667=46 Mad 259.
(8) A. I. R. 1925 Rang. 289=3 Rang. 206.
(9) A. I. R. 1927 Lah. 773.
(10) [1882] 4 All. 187=(1882) A. W. N 3.

been settled that time ran in his favour from the moment of his so taking possession. This rule is illustrated by the well known judgment of Sir William Grant, M. R., in *Beckford* v. *Wade* (11): "It is certainly true," said that learned Judge ":

"that no time bars a direct trust, as between cestui que trust and trustee; but if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, after the facts and circumstances happened, out of which it arises, I am not aware, that there is any ground for a doctrine, so fatal to the security of property as that would be, so far from it, that not only in circumstances, where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear, that relief would originally have been given upon the ground of constructive trust, it is refused to the party, who after long acquiescences comes into a Court of Equity to seek that relief see *Taylor* v. *Davies* (12)."

The underlying principle of S. 27 (b), Specific Relief Act and its illustrations, is that from the time of the contract for the sale of the land the vendor as to the land becomes trustee for the vendee and the vendee as to the purchase money a trustee for the vendor who has a lien upon the land therefor. Everyone coming in by subsequent and representative title and every subsequent purchaser from either with notice, becomes subject to the same equity as the party would be to whom he succeeds or from whom he purchased. It is for this reason provided that where a bona fide contract is made for the sale of the property and another person afterwards buys the property with notice of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although his purchase may have been registered and although he has obtained possession under his purchase: cf *Harnandun Singh* v *Jawad Ali* (13) The case of such subsequent purchaser falls under S. 91, Trusts Act. As such it is a trust created by operation of law or by conduct of parties and cannot be called an express trust. Being resulting or constructive trust it is outside the purview of S. 10, Lim. Act. I therefore, overrule the contention of the respondent that when the appellants took a sale from Kanhaiyalal on 22nd January 1917, they became trustees for a specific purpose within the meaning of S 10, Lim. Act. They, no doubt, became trustees but the nature of the trust instead of being express, was constructive, and, consequently, the Statute of Limitation ran in their favour from the moment of their taking possession as purchasers. They could, therefore, plead limitation to the same extent to which their vendor could have pleaded it in answer to a suit by plaintiff to enforce specific performance of the contract of sale. This will clearly show that the possession of Gaurishankar prior to 22nd January 1917 and that of himself and his grandnephews since that date, was clearly adverse to Kanhaiyalal, and, therefore, necessarily also the plaintiff The hostile nature of that possession might have been arrested in 1920 by obtaining against them a decree in Suit No. 68 of 1919 had the appellants been impleaded as parties thereto, and a decree obtained against them along with Kanhaiyalal.

The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with the plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff : *cf. Subiha Pillai* v. *Velappa Naicken* (14) and *Krishnaji Babaji* v. *Sangappa Muriyappa* (15) It, therefore, follows that in view of S. 27 (b), Specific Relief Act, S. 91, Trusts Act, it was open to the plaintiff to so frame his suit with reference to O. 2, R. 1, Civil P. C, as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. As the appellants were in possession under a subsequent purchase taken from the plaintiff's vendor Kanhaiyalal, and, if as found by the Courts below, their purchase was with notice of the plaintiff's prior contract of sale, he had really one cause of action to sue to enforce specific performance of the contract of sale and possession against the party to the contract, viz., Kanhaiyalal, and the subsequent transferees from him, viz., the appellants. Though the former Suit No 68 of 1919 was not liable to be de-

(11) [1805] 17 Ves 87.
(12) [1920] A. C. 636=123 L. T. 121=99 L. J. P. C 65
(13) [1900] 27 Cal. 468.
(14) [1911] 22 M L. J. 121=13 I. C. 176=(1911) 2 M. W. N 560.
(15) A. I. R. 1925 Bom. 181.

feated merely on the ground of non-joinder of the present appellants as parties thereto, as O. 1, R. 9 of the Code is clear on the point, it is clear that the mere obtaining of a decree in that suit and the execution of sale-deed (Ex. P-2) by the judgment-debtor Kanhaiyalal in pursuance of that decree behind the back of the appellants did not put an end to all controversy relating to or existing between all parties interested in the property comprised in that sale It was still left open to the appellants to contest the plaintiff's right to obtain specific performance of the contract of sale and possession of the property as a consequence of such performance being decreed against them. It gave them opportunity to raise a further plea of limitation as regards the present claim, and to even urge that the suit as brought for possession of the property without suing for specific performance or after such a suit for specific performance had become barred by limitation, was not maintainable as against them.

It is clearly laid down by their Lordships of the Privy Council in *Subbaraya Pillai* v *Venkata Perumal* (16) that a vendee whose suit for specific performance is barred by Art. 113 cannot recover possession of the property sold because a suit for possession, i. e., to enforce his right under the contract with reference to property is essentially one for specific performance of a contract to which Art. 113 applies. The right to possession springs out of the sale contract and the relief by giving possession is comprised in the relief by specific performance and it cannot be governed by any article except Art. 113. The right to possession being dependent on the sale contract, if the suit is barred for specific performance it cannot be maintained for possession of the property sold under the contract : *Muhiuddin Ahmad Khan* v. *Majlis Rai* (17) *Hargovindas Lakshmi Das* v. *Baji Bhai Jijibhai* (18) and *Venkanna* v *Venkatakrishnayya* (19).

The limitation for a suit for specific performance began under Art. 113 when the vendor refused to the plaintiff's knowledge to perform the contract. Such knowledge could be imputed to plaintiff when he demanded performance by his notice dated 14th December 1916, (Ex. D-9) and the vendor refused it by his notice dated 16th December 1916, (Ex. D-7) which reached plaintiff on 22nd December 1916 (Ex. D-10). The limitation having thus begun to run against him since 22nd December 1916, (Ex. D-10), the three years' period expired on 22nd December 1919. With the loss of limitation for enforcing specific performance against the present appellants, the plaintiff lost his right to recover possession also as already stated in para 16 above. The mere obtaining of decree subsequently on 23rd August 1920 (Ex. P-13) against Kanhaiyalal could not give plaintiff any additional right to obtain a decree for specific performance against the appellants after he had once lost his limitation, much less could the execution of the sale-deed, dated 21st February 1921, by Kanhaiyalal give him any new right to demand possession from persons not bound by the decree. They were transferees under a registered deed executed long prior to the institution of Suit No 68 of 1919. As such neither the decision (Ex D-6) nor the decree (Ex. P-13) could operate as res judicata as between plaintiff and the present appellants Plaintiff thus ceased to have any subsisting cause of action to enforce against the present appellants since 1919 and their suit for possession for house property and fields was bound to fail in view of the Privy Council decision quoted above.

In this view of the case it is unnecessary to go into the further question whether the suit would be barred under the provisions of S 104 (2) read with Art. 1, Sch. 2, C. P. Tenancy Act of 1920. If any decision were necessary on this point, I would be prepared to hold that when the plaintiff compelled Kanhaiyalal by means of the decree Ex. P-13 to give him a completed sale-deed (Ex. P-2) on 12th February 1921, he had still left to him more than three months to sue for possession, if he could maintain under law a suit for mere possession without a prayer for specific performance of the contract of sale The one year's grace period counted from 1st May 1920, the date of the commencement of the new Tenancy Act of 1920, granted by

(16) A. I. R. 1922 P. C. 345=45 Mad. 641=49 I. A 335 (P.C.).
(17) [1884] 6 All. 231=(1884) A. W. N. 42.
(18) [1890] 14 Bom. 222.
(19) [1918] 41 Mad. 18=33 M. L. J. 35=41 I. C. 807=6 M. L. W. 192.

S. 104 (2) had not then expired. In unnecessarily postponing the institution of the present suit even after that date, to 23rd November 1922, the plaintiff has done further damage to his own case, by allowing it to become barred by limitation even with reference to the requirements of the local tenancy law. It will thus be seen that the possession of the defendants-appellants which was adverse from its commencement continued to be so, throughout all the five periods mentioned in para. 10 of this judgment, and the suit as laid was liable to be dismissed altogether as barred by the statute of limitation, and also because a suit for possession without a prayer for specific performance which was barred by time could not lie.

No doubt plaintiff had offered to amend, and actually amended, the plaint by adding a prayer for the relief of specific performance. This amendment being dated 5th October 1923, when a suit for specific performance was clearly barred by limitation was of no avail. As a result of these conclusions, I allow the appeal and dismiss the suit for possession and mesne profits with costs throughout to be borne by the plaintiff.

P.N./R.K. *Appeal allowed.*

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* A. I R. 1929 Nagpur 305

KINKHEDE, A. J. C.

Sunderabai—Judgment-debtor — Applicant.

v.

Bapuna and *others*—Decree-holders—Non-Applicants.

Civil Revn. No. 122-B of 1927, Decided on 10th September 1928

(a) Civil P. C., O. 21, R. 66 (2), (3) — Application under R. 66 (3) for order for sale is absolute necessity and condition precedent to passing of order for sale.

Application under R. 66 (3) for an order for sale accompanied by a statement duly signed and verified and containing the matters required by R. 66 (2) to be specified in the proclamation is an absolute necessity and a condition precedent to the passing of an order for sale. [P 306 C 1]

(b) Deed—Execution.

Without fraud or wrong a document cannot be materially altered after its execution: *Doe* v. *Catomore*, 16 *Q.B.* 745 and *A. I. R.* 1924 *Nag.* 250, *Rel. on.* [P 307 C 1]

(c) Civil P. C., O. 21, R. 17, Proviso — Scope.

Under R. 17 (proviso) the Court can call upon the decree-holder to specify the approximate value of the land to be attached with a view to see whether the value of the property corresponds as nearly as may be with the amount due under the decree. [P 308 C 2]

(d) Civil P. C., O. 21, R. 85, and General Clauses Act, S. 10—Provisions of O. 21, R. 85, read with S. 10 contemplate deposit of three fourths being made into Court on day it re-opens after vacation.

The provisions of O. 21, R. 85, read with S. 10 contemplate the deposit of three-fourths being made into Court on the day it re-opens after the vacation. So a three-fourth balance of purchase money deposited, at the time when the civil Courts are closed, with a reader of a Sessions Court in charge of duties on the criminal side, cannot be regarded as duly deposited in the Court which ordered the sale as required by law. [P 310 C 1]

*** (e) Civil P. C., O. 21, R. 73—Purchase by pleader of decree-holder directly or indirectly is altogether void.**

A pleader of a decree-holder cannot bid at auction sale either directly or indirectly and if he does so the sale is altogether void. [P 311 C 1]

(f) Limitation Act, Art. 181—Petition for review of order confirming auction sale is application under S. 47 and governed by Art. 181 — Civil P. C., S. 47.

A petition for review of an order confirming an auction sale is an application under S. 47 and the petitioner is entitled to a longer period of limitation under Art. 181: *A. I. R.* 1928 *Cal.* 60 *Rel. on.* [P 311 C 1]

*** (g) Civil P. C., S. 115—Scope.**

An error of law which amounts to a usurpation of authority in the act of rejection of a petition for review of order confirming auction sale calls for interference under S. 115: 46 *Cal.* 962, *Rel. on.* [P 311 C 1]

W. R. Puranik—for Applicant.

G. G. Hatwalne and *W. B. Pendharkar*—for Non-Applicants.

Order.—In this case the judgment-debtor applies for revision of an order rejecting her petition for review of the order confirming an auction-sale held on 3rd May 1926, at which the non-applicant Parashram was declared to be the auction-purchaser. This revision raises somewhat intricate questions which have not received due attention and treatment at the hands of the lower Court. I think the auction-sale held in this case should have been treated as void and the application granted. It is consequently necessary for me to deal with the matter involved in the case at some length in this order.

Bapu, son of Suryabhan, patel of Kaulkheda, the client of the auction-purchaser's natural father Mr. Sunderlal Agarwal, pleader, Akola, obtained a money decree dated 6th February 1925, for Rs. 240 and costs against the present applicant Sunderabai in Suit No. 2985 of 1924 on the file of the Small Cause Court Akola. That Court sent a certificate of

non-satisfaction dated 25th July 1925, to the Court of the Subordinate Judge, Second Class, No.2 of Akola, for execution of the decree against the immovable property of the judgment-debtor. In due course, that is, on 16th September 1925, the decree-holder through his pleader Mr. Sunderlal applied for execution of the decree for recovering Rs. 281-2-0 by attachment and sale of the judgment-debtor's field Survey No. 26, area 23 acres and 29 gunihas, revenue Rs. 32 situate in mauza Kaulkheda. The aforesaid pleader acted all along on behalf of the decree-holder and did all the appearances, applications and acts which he would have been required to make, had he personally conducted the proceedings in the executing Court. On 21st September 1925, Mr. Sunderlal obtained an order for the attachment which took place on 8th October 1925, which was before the date of the hearing fixed for 24th October 1925. At this hearing again the decree-holder was represented by the said pleader, and the Court passed the order "sale notice be issued on decree-holder's sale application," and fixed the case for 28th November 1925.

It appears that the Subordinate Judge did not then realize that Rr. 64 and 66 of O 21, Civil P. C., require that the Court executing the decree must pass a formal order for sale by public auction, and that sub-R. (3) R. 66. further requires that there should be an application for an order for sale and the same must be accompanied by a statement duly signed and verified and containing the matters required by sub-R (2) of the said rule to be specified in the proclamation. Such an application accompanied by a duly verified statement is an absolute necessity and a condition precedent to the passing of an order for sale. I have ransacked the whole record in order to find out whether any application praying for an order for sale accompanied by the verified statement prescribed by law was put in on or before 24th October 1925 on which day the order for sale was passed. But I have not been able to find any having been made on that date On the contrary, at record p 15, I come across process form dated 29th October 1925, which shows that process-fee for the issue of notice to settle the terms of the proclamation for the hearing dated 28th November 1925, was then paid, with the following note:

"Statement will be filed at the hearing." This process parcha bears the signature of Mr. Sunderlal. On this a rubber stamp order: "Issue J. S. Paithanakar, Judge," was impressed under date 30th October 1925. The notice was served on the judgment-debtor on 10th November 1925, but she remained absent at the hearing dated 28th November 1925.

In the presence of the said pleader the Judge at once proceeded to enquire from the Nazir the date to be fixed for the sale of the property, and fixed 5th December 1925, for the receipt of the information. Even on 28th November 1925, the learned pleader did not care to put in the application and the verified statement. On 3rd December 1925, a memo, to be found at record p. 17, was sent to the Nazir asking him to propose a date for sale. The Nazir suggested 1st March 1926 for the sale at Akola. On 5th December 1925 also the application and verified statement was still unfiled. In spite of their absence the executing Court ordered the sale of the field to take place on 1st March 1926, at Akola and fixed the 6th March 1926 as the date for submission of the report and directed "sale warrant and proclamation" to be issued. The decree-holder's pleader was present at the hearing to know that the process fee was ordered to be paid in three days, but no process fee being paid no sale could be held. Mr. Sunderlal's explanation given at the hearing dated 6th March 1926 was to the effect that the process "was by oversight paid elsewhere." Even at this hearing neither the pleader nor the Presiding Officer of the Court cared to see, before giving a fresh date for sale and ascertaining it from the Nazir whether the prescribed application and statement were filed with the record. The case, was, however, adjourned to 13th March 1926, to await the fixation of the date of sale afresh by the Nazir. A memo, dated 10th March 1926, record p 18, was sent to the Nazir who returned it with a note that the proposed 3rd May 1926, " at Akola before the Court" was the date for holding the sale. On 13th March 1926, the Judge, in the presence of Mr Sunderlal, fixed 3rd May 1926, as the date for holding the sale at Akola, and 19th June 1926 for a report and ordered "sale proclamation to issue." Even on this day the aforesaid application and statement had not come on the record.

At record p. 21 of the same file C is to be found the process-fee parcha put in by Mr. Sunderlal on 16th March 1926, and at pp. 22 and 23, the application for an order for sale accompanied by the statement prescribed by R. 66 and verified by the decree-holder Bapu. The application is undated, but the statement purports to have been drawn up, signed and verified under date 1st November 1925, but the date seems to have been altered to 6th March 1926, by the pleader who presumably presented it on 16th March 1926. From the dates noted in the margin of the application (record p. 22) it can be inferred that the same purports to be drawn up in compliance with the proceedings dated 24th October 1925 for being filed at hearing dated 28th November 1925, fixed in the execution case based on the decree dated 6th February 1925, in suit No. 2985 of 1924. But here the original dates 24th October 1925 and 28th November 1925, were respectively changed to 6th March 1926, and 18th June 1926, presumably by the said pleader. This change of dates runs counter to the explanation that the process-fee "was by oversight paid elsewhere" and shows that the papers must have remained with the pleader and not found their way to the record of any other Court.

A further but a very important change is noticeable in the body of the verified statement at the place where the approximate value of the property to be advertised for sale was mentioned. The original figure of this value reads as Rs. 5,000. It has been altered to Rs. 1,000. This was a very material alteration in a statement verified by the decree-holder under his own signature. None of the above alterations is attested by the initials of the decree-holder or of Mr. Sunderlal, pleader, in token of its being genuine and made before it was signed by the executant, or some person having an authority to make it. Without fraud or wrong, a document cannot be materially altered after its execution :cf. *Doe* v. *Catomore* (1) and *Kanhayalal Tarachand* v. *Sitaram Tukaram* (2). If what I have seen from the present record of Mr. Sunderlal's writing and particularly his figures, entitles me to judge accurately the characteristics and peculiarities with which he writes figures, I may feel myself justified in drawing an inference pointing to a probability almost amounting to a certainty that these alterations in figures must have been made by the person from whose custody the application and the statement bearing them were produced, sometime before he actually filed them, in Court, on 16th March 1926.

Here again, I cannot shut my eyes to one more important circumstance which discloses a deplorable slackness in the matter of drawing up, signing and verifying plaints, applications for execution of decrees, and statements required by law to be verified. In my opinion, this is due to the very pernicious practice of leaving in the possession of either one's own signatures, which is prevalent in some parts of this Province, and I have noticed that the Akola District is not an exception to it. This may be quite well intentioned or innocent, and, even, facilitate business, but it cannot be gainsaid it throws a heavy responsibility on the custodian to guard against any improper use of documents signed by the client in anticipation in blank being made. I think if the legal profession owes any duty to itself, it must strive hard to stop this pernicious practice, lest it may one day recoil on itself. In the present case, the verified statement at record page 23 bears two signatures one above the other on its lower portion, with a verification clause pressed in between. It is not unlikely that the decree-holder Bapu may have affixed the signature first, and then the contents of the verification clause were written in the ordinary course along with the rest of the statement written above the upper one of the two signatures. Moreover, going by the test of ink of the signatures on the statement and the application for execution, it may not be unsafe to infer that all the four signatures being in the same deep black ink were simultaneously written by, or obtained from, Bapu. The contents of the application for execution as also of the statement being written in pale blue ink make the difference in ink marked and conspicuous.

On 17th March 1926, the warrant for sale and the proclamation were drawn up. The first was signed by the Judge himself while the second bears the rubber

(1) [1851] 16 Q. B. 745=20 L. J. Q. B. 864=15 Jur. 728.
(2) A.I.R. 1924 Nag. 250=20 N.L. R. 76 (79).

stamp impression of his signature. A bare description and not the particulars required to be specified under sub-R. (2) of R. 66, Civil Procedure Code, of property to be advertised for sale drawn up and signed by Mr. Sunderlal, pleader, was attached to the proclamation. The warrant for sale rightly directs the sale officer to sell only such part of the attached property as would just suffice to raise Rs 289-2 the amount of the decree on 3rd May 1926 at 12 noon at Akola after the expiry of 30 days from the date of affixing a copy of the notice of sale to the Court house and publishing the proclamation, but it vaguely mentions Akola as the place where the sale is to be held, it does not clearly state that the sale will be held in the precincts of the Court house. None of these documents of importance (record pages 24 to 26) is drawn up with any degree of care or bears any mark of scrutiny by the Judge. Even the report dated 26th March 1926, of the process server on the back of the proclamation and that of the Nazir, shows carelessness. It mentions that the proclamation was made and published at the property by beat of drum on 26th March 1926, and a copy thereof was affixed to the Collector's office and the Court house on 27th March 1926 How the affixation dated 27th March 1926, could be reported under date 26th March 1926, is difficult to imagine.

I wish the Judge of the Court below had been more conversant with, and careful enough to follow, the procedure prescribed by O 21, Civil P. C, and, also, more vigilantly exercised a more efficient control over his staff, and been more watchful of the interest of the judgment-debtor whose property he happens to sell under decrees coming up for execution before him, than what he was in this case. The pleader concerned, like all other legal practitioners, was an officer of the Court in which he practised and, as such, he also owed a duty not only to his own client but also to the Court to assist it in the administration of justice according to law and procedure. A very heavy responsibility thus lay on the pleader to conduct the proceedings in the case entrusted to him according to law andin a manner befitting the honourable profession to which he belongs. Undoubtedly, there has been, in this case, a failure of duty on the part of the Judge and also the pleader in the matter of compliance with the procedure prescribed by law. I need only add one or two instances of such non-compliance which I think vitiate the whole proceeding culminating in the sale.

It is a matter for regret that in this case, the Judge who ordered the sale was so negligent in the discharge of his duties that he does not seem to have directed his attention to the necessity of avoiding the levying on an excessive attachment as contemplated by the proviso to R. 17, O. 21, Civil P. C. Under that proviso, he could have called upon the decree-holder to specify the approximate value of the land to be attached, with a view to see whether the value of the property attached corresponded as nearly as may be with the amount due under the decree. It is needless to point out that this failure to observe even such little formalities, at the proper time very often results in dire consequences to the judgment-debtor's interest, and ultimately affects prejudicially the interest of the decree-holder and even the auction-purchaser Under R. 64, at least, at the time of making an order for sale, it was open to the Court to ascertain from the decree-holder's pleader whether in order to raise a sum below Rs. 300 the whole of the field of 23 acres and odd gunthas bearing the handsome assessment of Rs. 32 and situate in the rich tract of Balapur Parganah, was necessary to be sold. But this was not done because things are either done superficially, or usually left to the Court Reader entirely.

As stated above, sub-R. (2), R. 66, does not appear to have been duly complied with. No effort seems to have been made to comply, as far as possible, with the requirements of Cl. (e) of that sub-rule, apparently because the Judge never applied his judicial mind to the question of the materiality of the information which that clause requires to be specified as fairly and accurately as possible in the proclamation. I have already adverted to the failure to insist upon the filing of the application accompanied by a statement duly signed and verified as prescribed by sub-R. (3). The Judge did not care to scrutinize the truth of the explanation given at the hearing dated 6th March 1926, to get over the failure to pay the necessary process which entailed

a waste of Court's time since 5th December 1925 and necessitated the giving of a fresh date for sale two months ahead. In suggesting 1st March 1926, and 3rd May 1926, as the date for holding the sale at Akola, the Nazir, apparently contemplated holding the sale within the precincts of the Court house, presumably, either, understanding orders to that effect, or, with a view to seek any such directions from the Court as the requirement of the case may necessitate on the occasion.

On the basis of an order for sale which was passed in spite of the absence of a properly drawn up verified statement and which was proclaimed without due regard to the provisions of R. 66 and was, therefore, illegal, the auction-sale was held on the precincts of the Court house on 3rd May 1926, when the Civil Courts were open. The decree-holder had apparently left everything to his pleader. He was not present at the sale. The decree-holder's pleader, however, interested himself in attending the auction and brought his nephew Parashram Hiralal with him. The highest bid at the auction which was Rs. 500 was put in the name of Parashram Hiralal. The same was accepted and the one-fourth purchase-money realized on the spot. The remaining three-fourths purchase-money was tendered on 17th May 1926, i. e, when the Civil Courts were closed, to the Reader of the Sessions Court which was open in those days as Mr. Sunderlal pleader himself admits in his deposition Mr. Sunderlal admits having accompanied Parashram both at the auction and on the occasion of the payment of three-fourths purchase money. He in fact drew up the petition dated 17th May 1926, and got it signed by Parashram. He says Parashram went with him and was present when the application was handed over to the Reader, but he went away and the money was actually lodged by himself. Of course, he denies that the money was his own and calls it Parashram's money. But he had to admit that it is money paid out of a firm styled Parashram-Hiralal. The Reader of the Sessions Court put up the petition for orders before Mr. B. M. Vighney who was in charge of the current duties presumably on the criminal side, as the civil Courts were closed, but in spite of that an order was given to the Nazir to receive the deposit of Rs. 375 as sale-proceeds in civil Court deposit. The Judge signed it as A. D. J. for D J. Akola under date 17th May 1926.

So although the name of Parashram-Hiralal either personally or as a representative of the firm doing business in that name appeared on paper, the judgment-debtor's contention was that the real purchaser at the auction was Mr. Sunderlal. On a careful scrutiny of the evidence on record, I think this seems very likely. Mr. Sunderlal's object in accompanying Parashram or taking Parashram with him, at the auction could not be anything but to help him in bidding at the auction. On his own admission as a witness, that Parashram was a novice, his help became quite indispensable at such a point of time. The bids put in by or in the name of Parashram were, therefore, virtually his bids though stood in the auction list in the name of Parashram only to keep up appearances. This is corroborated by the prior and subsequent conduct of Mr. Sunderlal. There is internal or intrinsic evidence in support of this. One has only to read his deposition to be convinced of the fact that it was Mr. Sunderlal who was the real purchaser. The money came from the shop in which he is interested in spite of his so-called disclaimer of right. The application dated 17th May 1926, was written out by him, and peculiarly enough to it is fixed a court-fee label bearing his name presumably it must have been purchased by him. His conduct of personally depositing the money on 17th May 1926, during the civil Court vacation is consistent with his desire to acquire title as a purchaser to the field in the name of his own nephew. It points, at least, to a community of interest between him and his nephew. The evasive replies which Mr. Sunderlal has given as non-applicant's witness 1 on several points, point to the conclusion that he wanted to purchase the property indirectly at the auction. He was conscious that he being the pleader who actually conducted the execution case might be looked upon as an officer of the Court, or as a person who had a duty to perform in connexion with the sale and would, therefore, in all probability be disentitled under R. 73 from bidding, acquiring or attempting to acquire, either directly or indirectly, any

interest in the property sold. He, therefore, took the obvious precaution of putting in the bids in the name of his nephew Parashram.

Moreover, in presenting the application for deposit to the Reader of the Sessions Court he was following a quite out of the way procedure. It shows his undue haste and anxiety to retain the valuable property he managed to purchase for a small sum. The provisions of R. 85 read with S. 10 of the General Clauses Act of 1897 clearly contemplated the deposit of three-fourths being made into Court on the day it re-opened after the vacation, as on 15th day the Court was closed. I am, therefore, of opinion that not only was the purchase by Mr. Sunderlal void under R. 73 but that even three-fourth-balance of purchase-money cannot be regarded as duly deposited in the Court which ordered the sale as required by law, and hence the sale was bound to be disregarded and the purchaser regarded as having no legal claim to the five per cent commission.

But the judgment-debtor did not wish, as far as possible, to expose Mr Sunderlal, or so to contest the sale on that ground so long as she could succeed by other means, in saving her valuable estate. On 16th June 1926, the very first day when the civil Courts opened after the civil vacation her agent Ramdass made an application record p. 58 of Class 4, File C, praying for permission to deposit into Court the amount of Rs. 289-2-0 and Rs. 25 on account of five per cent commission payable to the auction-purchaser, total Rs. 314-2-0. This petition was granted on 16th June 1926, by the Subordinate Judge who ordered the District Nazir to receive the amount of Rs. 314-2-0 including the purchaser's commission and to report accordingly. But Sheocharansingh who was apparently interested in Mr. Sunderlal, and was cited by his nephew as his witness but was not examined in the case dissuaded the agent from making the deposit that day. This dissuation served the interest of the auction-purchaser's right enough.

Mr. Sunderlal as non-applicant's witness 1 admits that soon after the sale had taken place the judgment-debtor's agent was after him for settlement and for accepting money. He, however, put him off on some excuse or other. The judgment-debtor arranged for money by a mortgage on 12th June 1926, and had money ready for payment and in fact offered to deposit it in Court, on 16th June 1926, the day it reopened. In view of the conduct of Mr. Sunderlal which discloses his anxiety to retain the field it was very likely that, as shown above, Sheocharansingh sale amin had interceded in his interest just when the money was being offered for deposit on 16th June 1926, in the Nazaret as deposed to by Ramdas (applicant's witness 4). The property was admittedly worth much more than Rs. 500 and hence Mr. Sunderlal desired to retain it and could not lose the bargain. If the verified statement (record p. 23) and the certified copy of the deposition of the decree-holder Bapu which is Ex. A.-1 on the record have any evidentiary value on the point of the market value of the land, I think, a very strong motive existed for Mr. Sunderlal to try his level best to prevent private payment or payment into Court in time. In fact the auction-purchaser wished to beguile the applicant by his offer in this Court to give up all claims by accepting Rs. 1,000 which shows that he desired to make 140 per cent profit out of the bargain because after deducting Rs. 289-2-0 on account of the decree-holder's decretal amount from Rs. 1,000 a sum of Rs. 700 and odd would be left as a clear profit to him. I have no hesitation in discarding the testimony of non-applicant's witness 1 and Parashram non-applicant's witness 2 and in accepting that of Ramdas applicant's witness 4, corroborated as it is in material particulars by the rest of the evidence on record.

I believe the agent when he says that he first tried the most innocent method of offering payment privately and then depositing the amount into Court under R. 89 (16th June 1926), but when he failed in those attempts he wished to try his luck with an application under R. 90 the next day (17th June 1926). But when he found at the hearing dated 19th June 1926, that it was summarily thrown out without enquiry on the plea of limitation, he was compelled most reluctantly to bring to light the fraud practised in bidding at the auction and in preventing the payment into Court in time. I think, the judgment-debtor is entitled to call S. 18, Lim. Act, to her

aid under such circumstances. On the facts proved, I think, this was a fit case for reading the provisions of Art. 166 as qualified by S. 18, Lim. Act, unless the prohibition contained in R. 78, O. 21, Civil P. C, is made applicable here, and the pleader held disentitled to bid at the sale either directly or indirectly, in which case, the applicant would be entitled to urge that the sale held was altogether void under law and as such did not require to be set aside at all, she will have at any rate, a longer period of limitation under the residuary Art. 181 for pressing this petition for review as an application under S 47, Civil P. C.; *Monmatha Nath Ghose* v. *Luchmi Debi* (3). In either view of the case the applicant was entitled to succeed in the Court below.

Looking at the case from any point of view, I think there is an error of law which amounts to a usurpation of authority in the act of rejection of the petition by the lower Court, and calls for interference under S. 115, Civil P. C., cf. *Hindley* v. *Joynarain Marwari* (4). I, therefore, grant the petition for revision and granting the petition for review set aside the sale, and direct that unless the judgment-debtor has already deposited or hereafter deposits the full amount of the decree, the property be again advertised for sale and sold in the manner prescribed by law after due compliance with the provisions of the Civil Procedure Code in this behalf. The applicant will get her costs of both Courts from the non-applicant Parashram who will bear his own. I award Rs. 25 as pleader's fee in this Court.

P.N /R.K. *Revision allowed.*

(3) A. I. R. 1928 Cal. 60=55 Cal. 96.
(4) [1919] 46 Cal. 962=51 I. C. 439=24 C. W. N. 288.

A. I. R. 1929 Nagpur 311

SUBHEDAR, A. J. C.

Surajmal—Appellant.

v

Bapurao—Respondent.

Second Appeal No. 170-B of 1927, Decided on 14th March 1929, from decree of 1st Addl. Dist. Judge, Akola, D/- 10th March 1927, in Civil Appeal No. 245 of 1926.

Decree—Form of—Suit by two sons to recover possession of joint family field sold by father—Finding that part only of consideration for sale binding on sons—Decree should be passed directing delivery of possession of whole field by vendee on payment of 2/3rd consideration found proved for necessity and should contain declaration that vendee has acquired 1/3rd share of father and is entitled to obtain possession thereof in suit for partition.

If in a suit brought by two sons to recover possession of the ancestral joint family field sold by the father, it is found that a part only of consideration, being an antecedent debt not incurred for any immoral purpose, is for legal necessity and that the other part not being for any legal purpose is not binding on sons, the decree should be passed to the effect that on payment by sons to vendee of a sum representing their 2/3rd share and not the entire part of consideration found proved for necessity within a certain time, the vendee shall deliver possession of the entire field and the decree should also contain a declaration that vendee has acquired 1/3rd share and interest of father and is entitled to obtain possession thereof in a suit for partition : *A. I. R.* 1929 *Nag.* 60, *Rel. on*; *A. I. R.* 1924 *Nag.* 109, *Ref.* [P 312 C 2]

W. B. Pendharkar—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—Plaintiffs are the sons of Tikaram, defendant 2, who sold the ancestral joint family field which is the subject matter in dispute, to defendant 1 on 29th March 1915 for Rs. 850. The plaintiffs as the sons of Tikaram impeach the sale on the ground that the consideration for the sale was borrowed by their father for being spent on immoral purposes. The plaintiffs brought the suit to recover possession of the whole of the field. The contending defendant 1 stated that the whole consideration for sale was for legal necessity, a part of it being antecedent debt. It was denied that Tikaram was a person of immoral habits and it was pleaded that the field in dispute being the self-acquired property of Tikaram because he has got it by succession from his separated brother, the plaintiffs had no right to challenge the sale.

The trial Court held that Tikaram was not of immoral habits and that the debts that formed the consideration of sale were not spent by him for immoral purposes. It further found that out of the entire consideration, Rs. 414-4-0 only was for antecedent debt, and held that legal necessity for the balance of consideration (Rs. 435-12 0) was not proved. A decree for joint possession to the

extent of 87/170 share in the field was passed in palintiffs' favour. As this decision did not satisfy either the plaintiffs or defendant 1 both filed appeals in the Court of the Additional District Judge, Akola. (Civil Appeals Nos. 261 of 1926 and 245 of 1926), but both the appeals were disposed of by one judgment though two decrees were drawn up.

In para 6 of his elaborate judgment recorded in Civil Appeal No. 245 of 1926 the learned Additional District Judge, upon a review of all the evidence on record, concurred with the first Court's finding that Rs. 414-4-0 were proved to have been antecedent debt not incurred for any immoral purposes, and in para. 8 of his judgment he also concurred with the first Court and held it not proved that the balance of Rs. 435-12-0 was spent on any necessary purposes as alleged by defendant 1 It was, therefore, held that the sale for that sum could not bind the interest of the plaintiffs in the property conveyed by defendant 1. The lower appellate Court also found it not proved that defendant 1 had made any enquiries and it, therefore, held that he was not a bona fide purchaser In para. 10 of his judgment the learned Judge following the principle laid down in *Bhadaji* v *Ganeshrao* (1), modified the decree of the lower Court and passed in substitution thereof, one directing defendant 1 to deliver possession of the entire field to the plaintiffs conditional upon their paying to him the sum of Rs. 414-12-0 (apparently 0-12-0 is a mistake for 0-4-0).

As two separate decrees were drawn up in the said two first appeals by the lower appellate Court defendant 1 has filed two separate second appeals in this Court which are registered as Second Appeals Nos. 170-B of 1927 and 175-B of 1927 The grounds of appeal in both these appeals are the same and only one set of argument was addressed to this Court. The first four grounds of appeal merely challenge the several findings of fact concurrently arrived at by the two lower Courts, but these were wisely not pressed by the learned pleader for the appellant who took objection only to the form of the decree appealed against (in Civil Appeal No. 261 of 1926) and argued that it was not according to law. It was urged that on the finding that only Rs. 414-4-0 out of the entire consideration was for legal necessity, the decree should have directed payment by the plaintiffs to defendant 1 of the sum of Rs 276-2-8 only which represented their 2/3rd share and not the entire amount of Rs. 414-4-0. It was also urged that a declaration should have been inserted in the decree to the effect that defendant 1 was entitled to have possession of the 1/3rd share of the mortgaged property, representing the father's share, in any suit for partition that he may bring later on. There is no doubt that so far as the father's 1/3rd share is concerned, it passes out completely and irrevocably to defendant 1 and the plaintiffs could not challenge the sale to the extent of that share. Under circumstances similar to those of the present case this Court in a very recent case directed a decree to be drawn up in the manner contended for by the learned pleader for the appellant : see *Kamtaprasad* v *Madhorao* (2).

The decrees passed by the lower appellate Court in Civil Appeals Nos. 261 and 215 of 1926 are, therefore, set aside and in lieu thereof a decree will now issue to the following effect That if the plaintiffs pay Rs. 276-2-8 to defendant 1 within a period of two months from this date, defendant 1 shall deliver possession of the whole field No 83 area 22 acres and 11 gunthas, rental Rs. 10, situated at mouza Kawathal, Taluq Mangrulpir, District Akola, to the plaintiffs : it is also declared that defendant 1 has acquired the 1/3rd share and interest of Tikaram the father of the plaintiffs in the aforesaid property and is entitled to obtain possession thereof in a suit for partition, if he is so advised. If the plaintiffs fail to pay the aforesaid amount as directed above then their suit shall stand dismissed. Under the peculiar circumstances of this case I order that the costs of these appeals shall be borne by the parties as incurred.

P.N./R.K. *Decree set aside.*

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(1) A. I. R. 1924 Nag. 109=20 N. L. R. 4.

(2) A. I. R. 1929 Nag. 60=25 N. L. R. 28.

A. I. R. 1929 Nagpur 313

STAPLES AND MOHIUDDIN, A. J. Cs.

Abdul Rahiman and *others* — Appellants.

v.

Abdul Hafiz and *others*—Respondents.

First Appeal No. 78 of 1928, Decided on 31st July 1929, from decree of Dist. Judge, Chhindwara, D/- 15th March 1928, in Civil Suit No. 14 of 1927.

(a) Mahomedan Law—Legitimacy — Acknowledgment—Bringing up a boy is not acknowledgment of sonship.

Acknowledgment of sonship is sufficient under Mahomedan Law to establish paternity and legitimacy, but there must be a definite acknowledgment of sonship, i. e., the father must acknowledge the boy as the son of his body. For a man to say that he has brought up a boy is not an acknowledgment of sonship or paternity and is, in fact, rather the reverse. It contradicts the physical relation of father and son and instead asserts that the man has brought up some other boy as his son. Neither under Mahomedan Law nor any other law will such a statement prove paternity or legitimacy : 15 *N. L. R.* 1, *Ref.*

[P 314 C 1, 2]

(b) Mahomedan Law—Will — Sunni Law —Life estate is not recognized.

Under Mahomedan Law applicable to Sunnis no life estates are recognized and that when a life estate is given the effect is that a full share is transferred. The effect of a devise of a life interest in favour of the widows is to pass an absolute property in their favour, It therefore follows that a widow has full power to alienate the property and that the alienations made by her cannot be called in question : 28 *All.* 342 ; *A. I. R.* 1922 *All.* 205 , *A. I. R.* 1924 *All.* 20 ; 19 *O. C.* 319 ; *A. I. R.* 1925 *Mad.* 997 and 1 *Lah.* 302, *Ref.*

[P 314 C 2 ; P 315 C 1]

N. U. A. Siddiq and *M. R. Bobde*—for Appellants.

P. S. Kotval and *Abdul Razak* — for Respondents.

Judgment.—This is an appeal from the decree of the District Judge, Chhindwara. The appellants had brought a suit for possession of three villages in the Chhindwara District on the grounds that those villages belonged to their grandfather Naziruddin, and that they were bequeathed by him to his widow Amirbi and on her death to their father Abdul Karim. The District Judge at first framed the following two preliminary issues :

"1. Did the will if proved confer any vested interest on Abdul Karim ?

2. Whether acknowledgment of a son who is not a natural son and known not to be has the same effect in Mahomedan Law as acknowledgment of the fact of paternity ?"

The District Judge found, on the first issue, that Abdul Karim obtained no vested interest and that the plaintiffs had no case, and, on issue 2, that the acknowledgment of a son must be an acknowledgment of paternity. These findings, we think, were really sufficient to dispose of the case, as the appellants' whole case rested on the alleged fact that their father Abdul Karim was acknowledged as son by Nasiruddin The District Judge, however, allowed the appellants to file an amended plaint and then framed the following issues :

"1. Whether Nasiruddin acknowledged Abdul Karim as his legitimate son ?

2. Who or what were Abdul Karim's parents ?

3. Was such acknowledgment valid to make Abdul Karim an heir ?"

He then delivered the final judgment and in that judgment found that Nasiruddin did not acknowledge Abdul Karim as his legitimate son, that Abdul Karim's parents were a Gond woman and an unknown father, and that issue 3 did not arise, but that had there been an acknowledgment it would have been valid

The whole case depends upon whether Abdul Karim can be held to be the son of Nasiruddin or not. The case put forward by the learned counsel for the appellant is somewhat curious and we think that there is a confusion between acknowledgment of paternity and acknowledgment of legitimacy. A great number of authorities were cited in support of the proposition that according to Mahomedan Law, if a man acknowledged a child as his son, that acknowledgment was valid and sufficient to establish the fact of sonship, provided that the relationship of father and son was not impossible, i. e., the father was at least 12 years older than the son and there existed no insurmountable barrier to a valid marriage between him and the mother of the child. This matter has been very fully discussed in *Zakir Ali* v. *Mt Sograbi* (1) and we do not quarrel with the view of law as set forth by the learned counsel for the appellants, but in the present case the question is really one of fact, viz., whether there was any acknowledgment by Nasiruddin that Abdul Karim was his son. It is quite clear that there must be a definite acknowledgment of paternity and that any other acknowledgment is meaningless. Now,

(1) [1919] 15 N.L.R. 1=43 I.C. 883.

in the present case the only direct piece of evidence before us is the will executed by Nasiruddin on 9th April 1898, which is admitted by the parties and has been filed as Ex. P-1. That will contains the statement of Nasiruddin himself, and the relevant portion is :

"Mt. Amirbi my wife by marriage and myself have brought up Abdul Karim and Mt. Mariambi my wife by nika and myself have brought up Abdul Kadar, i. e., we have brought them up both as our own sons from their birth. They both shall be after my death the owners of the property left by us. That is, Abdul Karim shall be, after my death and the death of my wife Amirbi, owner of all moveable and immovable property, i. e., malguzari villages cash, etc., left by myself and my wife Ambirbi, and Abdul Kadar shall be, after my death and the death of Mt. Mariambi, my wife by nika, the owner of all the property left by me and my wife by nika."

Now, this, we think, cannot be construed into any acknowledgment of paternity. On the other hand, it seems clear that Nasiruddin states that he and his wife Amirbi had brought up a boy Abdul Karim and he and his other wife Mariambi had brought up another boy Abdul Kadar. The words used are "पाला हुआ" and "पालना" we think, means "to support and to bring up," it cannot import any meaning of paternity or sonship There is also a definite statement by the appellant Abdul Rahiman on record as the plaintiff as follows :

"I have no money, I do not know whose son Abdul Karim really was."

There is also the statement of the plaintiff's pleader Mr. Ghatpande as follows :

"Abdul Karim was not the natural son of Nasiruddin but was his acknowledged son. I do not know why he was acknowledged as a son."

It is not, then, even really contended that Abdul Karim was the natural son of Nasiruddin, but it seems to have been contended that he was acknowledged as a son and was brought up and treated as a son, and that such acknowledgment should be sufficient to establish sonship according to Mahomedan Law. We cannot, however, accept that proposition. No doubt, an acknowledgment of sonship will be sufficient under Mahomedan Law to establish paternity and legitimacy, as laid down in *Zakirali* v. *Mt Sograbi* (1) but there must be a definite acknowledgment of sonship, i. e., the father must acknowledge the boy as the son of his body. For a man to say that he has brought up a boy is not an acknowledgment of sonship or paternity and is, in fact, rather the reverse ; it contradicts the physical relation of father and son and instead asserts that the man has brought up some other boy as his son We are of opinion that neither under Mahomedan Law nor any other law will such a statement prove parternity or legitimacy. The numerous authorities cited by the learned counsel for the appellants therefore are beside the point and we hold that the finding of the lower Court as regards the alleged acknowledgment by Nasiruddin is correct.

The only other point to be considered, then, is whether the appellants can claim any title under the will executed by Nasiruddin. That will was executed on 9th April 1888 Nasiruddin died on 15th August 1891. The will which is filed as Ex. P-1 purports to give a life interest in the estate to the testator's two wives Amirbi and Mariambi, stating that they should both live together in harmony. It was further laid down that after Amirbi's death Abdul Karim should be the owner of the moveable and immovable property in her possession and after Mariambi's death Abdul Kadar should be in possession of all the moveable and immovable property left to Mariambi i. e in the terms of the English Law, a life estate appears to have been created in favour of the two widows and after their death to Abdul Karim and Abdul Kadar. The learned District Judge rightly held that under Mahomedan Law applicable to Sunnis no life estates are recognized and that when a life estate is given the effect is that a full share is transferred.

In this connexion reference was made to *Abdul Karim* v. *Abdul Qayum Khan* (2) and *Babulal* v. *Ghansham Das* (3). This position appears to be incontestable and, if the will is valid, the two widows Amirbi and Mariambi would take an absolute estate. The argument put forward by the learned counsel for the appellants was that only the usufruct of the property was given to the widows and that the will must really be read as a bequest in favour of the boys Abdul Karim and Abdul Kadar. This, we think, is clearly a forced and wrong interpretation of the will. There is no mention of usufruct

(2) [1903] 28 All. 342=3 A.L.J. 131=(1906) A.W.N. 25.

(3) A.I.R. 1922 All. 205=44 All. 633.

and, on the other hand, it is clearly stated that the two wives shall have the whole property, moveable and immovable, during their life. It is stated that Abdul Karim and Abdul Kadar shall be the owners of the property, but only after the death of the two wives. It is clear, then that there was to be no restriction upon the ownership of the two wives during their lifetime. We are of opinion that it must be held that there was a devise of a life interest in favour of the widows and the effect of such a devise will be to pass an absolute property in favour of the widows. It has also been rightly contended that under Mahomedan Law there is no limited estate. This proposition, in fact, is much the same as the proposition that Mahomedan Law does not recognize a life interest and it is also correct.

In this connexion we have been referred to *Mt. Amrit Bibi* v. *Mustafa Hussain* (*A I R* 1924 *All.* 20), *Bakhtawarkhan* v. *Farooq Ahmad* (4), *Rahiman Saheb* v. *Uthumansa Rowther* (*A. I. R.* 1925 *Mad.* 997) and *Nazir Ali Shah* v. *Sughra Bibi* (5). It follows, then, that Amirbi had full power to alienate the property and that the alienations cannot now be called into question.

Some attempt was made by the learned counsel for the respondents to argue that the will would be invalid unless it was assented to by the heirs. This point is not now material because, in any case, the appeal must be dismissed and the plaintiffs' case must fail, but is clear, we think, that such an argument cannot now be put forward in view of the fact that the will was clearly admitted by the defendants' pleader in the lower Court. It was also not contended that there were any other heirs of Nasiruddin or that the heirs did not assent to the will. It cannot now therefore, we hold, be pleaded that the will was invalid because it was not consented to by the heirs The will, then, must be held to he valid, but according to Mahomedan Law it passed an absolute estate to the two widows Amirbi and Mariambi and they had full powers of disposition over the property.

We are of opinion, therefore, that the suit was rightly dismissed by the District Judge on the preliminary issues framed and that there is no cause for interference in appeal, nor is it necessary to decide any other issues in the case. The appeal is therefore dismissed and the decree of the lower Court is confirmed. All costs of the appeal will be borne by the appellants. We allow only one set of pleader's fees for the respondents which shall be distributed in the following proportion ; three-fourths to respondents 1, 3 and 4 and one-fourth to respondents 2 and 5. Costs of the suit will be borne as ordered by the lower Court.

K.N./R K. *Appeal dismissed.*

(4) [1917] 19 O.C. 319=37 I.C. 423=3 O.L.J. 699.

(5) [1920] 1 Lah. 302=54 I.C. 859.

A. I. R. 1929 Nagpur 315

SUBHEDAR, A. J. C

Harakchand Hemchand Bhatia — Plaintiff—Applicant.

v.

Secy. of State—Defendant—Non-Applicant.

Civil Revn No. 275-B of 1928, Decided on 3rd July 1929, against judgment of Sm. Cause Court Judge, Akola, D/- 21st August 1928.

(a) Railways Act (9 of 1890), S. 72—Risk-notes A and B—Some bags consigned not delivered—Suit for damages—Initial burden is on company to show that there is loss of goods and not in company's control—Company showing whole consignment loaded in waggon which was sealed and at particular station some goods found lost—Lost goods not under company's control—Company has discharged initial burden.

Where out of 40 bags of sugar consigned under risk-notes in forms *A* and *B* only 33 bags are received and a suit is brought against the Railway company for damages, the initial burden lies upon the company of proving that there is in fact loss of the goods and that the same are not in the control of the Railway Administration; but where the company proves that the whole consignment was loaded in a waggon and it was closed and sealed according to the prevailing practice but at a station a door was found broken open and seven bags were discovered missing and further proves that the missing goods were not in control of the company, the company has adequately discharged the initial burden: *A. I. R.* 1928 *Cal.* 65, *Ref.* [P 316 C 1,2]

(b) Railways Act (9 of 1890), S. 72—Risk-notes A and B—Waggon sealed according to prevailing practice—Some goods missing—Company is not guilty of wilful neglect.

Where goods consigned under risk-note in forms *A* and *B* are loaded in a waggon and it is closed and sealed according to prevailing practice and some of the goods are found missing, the company is not guilty of wilful neglect though it does not lock the door of the waggon but merely seales it : *A. I. R.* 1928

Cal. 498; *Dist.*; *Civil Revn. No.*. 68 *of.* 1924 and *A. I. R.* 1928 *Lah.* 836, *Rel. on.* [P 317 C 1]

G. G. Hatwalne—for Applicant.

Order.—The facts of the case giving rise to this application for revision are these: On 1st April 1925, a consignment of 40 bags of sugar was booked from Wadi Bunder station, under risk notes in forms A and B to be delivered to the plaintiff at Akola. The plaintiff, however, received only 33 bags out of the aforesaid consignment and he, therefore, brought the suit, in the Small Cause Court, Akola, to recover from the defendant Railway Company Rs. 245-12-0 representing the damages sustained by him on account of the non-delivery of the seven bags. The defence was that the Railway Company was fully protected against the plaintiff's claim under risk-note forms A and B under which the consignment was booked. The first issue framed for trial was:

"Whether the seven bags of sugar (weighing 15 mds.) in question has been lost owing to wilful negligence of the defendant company?"

None of the parties having led any evidence, the issue was decided against the plaintiff and his claim dismissed. On revision Kinkhede, A. J. C., remanded the case for retrial holding that the defendant company must, in the first instance, discharge the burden that lay upon them under the principle enunciated in *G. I. P. Ry. Co.* v. *Jesraj Patwari* (1) of proving that there has, in fact, been a loss of the goods and that the same are no more in the control of the Railway Administration. It was further remarked in the order of remand that:

"It is hardly necessary to point out that that it is only after the loss is proved by the defendant company that the burden of proving "wilful neglect" as defined by their Lordships of the Privy Council in the recent case of *Ardeshir Bhicaji Tambole* v. *G. I. P. Ry., A. I. R.* 1928 *P. C.* 24, will be shifted to the plaintiff."

The order of remand by this Court is reported at *p.* 104 *of Vol.* 24 of the *Nagpur Law Reports.*

After remand four witnesses were examined by the Railway Company all of them are their servants who had to deal with the plaintiff's consignment in question. Their evidence proved that the whole of the plaintiff's consignment and other goods intended for Akola were loaded at Wadi Bunder in waggon No. 8314, that it was closed and sealed according to the prevailing practice, that at Nandgaon one of its doors was discovered broken open on one side and seven bags were found missing, and that the waggon was resealed and directed to Akola where on arrival the same shortage in its contents was noted. It was also proved that the missing goods were not in possession or control of the defendant company. The plaintiff did not lead any evidence to show that the loss was due to the "wilful neglect" of the Railway Company. The lower Court, therefore, again dismissed the plaintiff's claim and the plaintiff has again come up to this Court on revision.

(1) A. I. R. 1928 Cal. 65=55 Cal. 132.

The first point argued by the learned pleader for the plaintiff was that since the defendant company did not produce the reports made by its servants in connexion with the loss of the goods in question it should be held that they have failed to discharge the burden of proving the loss in the first instance and that under the circumstances it was not necessary for the plaintiff to have proved "wilful neglect" on the part of the defendant company. It is really difficult to uphold this contention. The law does not lay down any particular standard of proof in such matters and the direct evidence of those witnesses, who actually dealt with the consignment in question, was, in my opinion, the best available evidence that the defendant company have produced to prove the loss. If the plaintiff thought that the reports and correspondence in possession of the defendant company were likely to throw further light on the matter, he should have taken advantage of the provisions of O. 11, Civil P. C, to compel the defendant company to produce these documents. I concur, therefore, with the lower Court in holding that the defendant company have adequately discharged the initial burden that lay upon them to prove the loss of the goods in question.

The next contention advanced on behalf of the plaintiff was that the mere sealing of the waggon in question should be held to amount to such wilful neglect on the part of the Railway Company as to make them liable for the loss in spite of the protection afforded to them under risk-note form B. Reliance was placed

in support of this argument on a recent decision of a Bench of the Calcutta High Court in the case of *Karali Prosad* v *E. I. Ry. Co.* (*A. I. R.* 1928 *Cal.* 498) But the facts of the Calcutta case, as found, were quite exceptional in that the doors of the waggon from which the goods in question were stolen were not only not locked but did not even bear any seals, and therefore it was rightly held that there was wilful neglect on the part of the Railway Company which took the case out of the purview of the protection contained in the risk-note. "Whether mere sealing is at all effective" it was considered unnecessary to enquire in that case.

On the contrary, it was held by Baker, J. C., in the case of *G I. P. Ry. Co.* v. *Haji Umar Sharif* (*Civil Revn. No.* 68 *of* 1924) where the door of the waggon in question was only sealed but not locked, that the failure to lock waggon did not constitute wilful neglect for the reason that

"as the company owns thousands of waggons, it is impracticable to have a different lock for every waggon, and if one standard pattern of lock is used it will not be long before thieves will make keys fitting it."

The proved facts in the present case are on all fours with those in *Secy. of State* v. *Ghanaya Lal-Sri Krishan* (2) wherein it was held that the Railway Company was not guilty of wilful neglect as defined in *Ardeshir Bhicaji Tamoli* v. *G. I. P. Ry Co.* (3) because there was nothing on the record to show that the practice of sealing waggons in vogue had been proved to be an inadequate safeguard or that a system of locking waggons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the Railway Company. It is, therefore, clear that the plaintiff having failed to prove wilful neglect on the part of the defendant Company in the present case, his claim was rightly dismissed by the lower Court. The application for revision fails and is dismissed with costs. Pleader's fee Rs. 25.

P.N./R.K. *Revision dismissed.*

(2) A. I. R. 1928 Lah. 837=10 Lah. 329.
(3) A. I. R. 1928 P. C. 24=52 Bom. 169=55 I. A. 67 (P.C.).

A. I. R. 1929 Nagpur 317

JACKSON, A. J. C.

Gourishankar—Applicant.

v.

Debiprasad and *others*—Non-Applicants.

Civil Revn. NO. 452 of 1927, Decided on 7th August 1929, from order of Dist Judge, Jubbulpore, D/- 12th November 1927, in Misc. Case No. 39 of 1927.

(a) Succession Act (39 of 1925), S. 208—Person having remedy by suit under S. 208—No revision is necessary.

Where a person has a remedy by way of suit under S. 208, it is not necessary for the High Court to exercise its power of revision. [P 318 C 1]

(b) Civil P. C., S. 115—Scope.

Section 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. *A. I. R.* 1917 *P. C.* 71, *Foll.* [P 318 C 1]

(c) Succession Act (39 of 1925), S. 209—Person aggrieved by order in summary proceeding under part 7 should seek remedy by suit.

A person aggrived by an order passed in a summary proceeding under part 7 should seek his remedy by a suit and not by an application by revision. 2 *N. L. R.* 72, *Appl.* 34 *Cal.* 929, *Dist.* [P 318 C 1]

J. Sen—for Applicant.

B. K. Bose, *V. Bose* and *P. N. Rudra*—for Non-Applicants.

Order—This is an application for revision of an order passed by the District Judge, Jubbulpore, on an application made to him under S. 192, Succession Act. He has held that two persons, Dwarkaprasad and Jagdishprasad were entitled to possession of the property of one Shamlal on the death of Shamlal's daughter Dropadi Bai. The applicant claims to be the next reversioner to Dropadi Bai along with the two persons mentioned. His claim to possession has, however, been rejected by the learned District Judge because of a compromise entered into by the applicant in litigation between him and Dropadi Bai and others. It is argued on behalf of the applicant that this compromise amounted to a transfer of his reversionary rights and was invalid under S. 6 (a), T. P. Act. Rulings of the Privy Council both for and against this decision have been cited

There is I think a clear distinction between the two sets of rulings; but I do not propose to state my conclusion as to whether the compromise affects the applicant's rights, as I consider that

there are three other gro unds on which I must reject this application for revision.

In the first place, it is to be noted that the applicant has his remedy by way of suit, this remedy being preserved for him by S. 208, Succession Act. In the circumstances, it is not necessary for this Court to exercise its power of revision if it has such power in the present case. In the second place, there has been no assumption of or failure to exercise jurisdiction and no illegality or material irregularity in the exercise of jurisdiction. At the most the applicant contends that the learned District Judge has made a mistake in law. As has been laid down by the Privy Council in *Balakrishna Odayar* v *Vasudeva Ayyar* (1) (at p.799 *of* 40 *Mad*), S.115, Civil P.C.,is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

In the third place, it appears to me that S 209, Succession Act, is a bar to revision. That section lays down that the decision of a District Judge in a summary proceeding under part 7 of the Act shall have no other effect than that of settling the actual possession but for that purpose shall be final and shall not be subject to any appeal or review. Act 19 of 1841, which has been repealed by the Succession Act of 1925, had similar wording and has been held in *Khaja Kutubuddin* v. *Khaja Faizuddin* (2) not to permit revision That is a view with which I agree. It seems to me to have been the intention of the legislature that any person aggrieved by an order passed in a summary proceeding under part 7, Succession Act, should seek his remedy by a suit and not by an application for revision. In *Sato Koer* v. *Gopal Sahu* (3) a decision relied upon by the applicant, there is a finding that the Act did not apply in that particular case ; and the decision cannot therefore be authority for holding that revision is possible. I dismiss the application with costs. I fix pleader's fee at Rs. 15.

P.N./R.K. *Revision dismissed.*

(1) A. I. R 1917 P. C. 71=40 Mad. 793= 44 I.A. 261 (P. C.).
(2) [1906] 2 N. L. R. 72.
(3) [1907] 34 Cal. 929=12 C. W. N. 65.

A. I. R. 1929 Nagpur 318

JACKSON, A. J. C.

Kasturchand Bhikamchand Shop—Appellant.

v.

Atmaram and *another*—Respondents.

Second Appeal No. 229-B of 1928, Decided on 30th July 1929, from decree of Addl. Dist. Judge, Khamgaon, D/- 30th June 1928, in Civil Appeal No. 72 of 1927.

(a) Evidence Act, S. 110—Person tethering cattle for four months in year—Presumption of title arises but not definite proof.

Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is prima facie evidence of title, but Court should not say that the person's ownership is established : 13 *N. L. R.* 25, *Dist.* [P 319 C 1]

(b) Registration Act, S. 28 — Property included for effecting registration at particular place—Property belonging to transferrer and intended to be transferred—Registration is valid.

Though certain property is included in sale-deed to enable it to be registered in particular place, still if that property belongs to the transferror and was intended to be transferred by the parties, the registration cannot be invalid; *A. I. R.* 1921 *P.C.* 8; *A. I. R.* 1914 *P.C.* 67; 15 *N. L. R.* 75 and *A. I. R.* 1928 *Nag.* 1, *Dist.* [P 319 C 2]

(c) Transfer of Property Act, S. 53—Scope.

A transfer which satisfies some creditors cannot be held fraudulent. [P 319 C 2]

M R. Bobde—for Appellant.

S. B. Gokhale—for Respondents.

Judgment—This appeal arises from a suit for a declaration that two fields are liable to attachment and sale in execution of the plaintiff's decree against Lalchand, the father of defendant 2. The fields in question were sold by Lalchand on 8th December 1920 to defendant 1. In each of the sale deeds (Exs.1 D-2 and 1 D 3) a small piece of open land situated in mouza Wazar has been included and by this inclusion it was possible to register the deeds in mouza Amrapur. It is urged, in the first place, that the two sites in mouza Wazar did not belong to Lalchand, that they were included in the deeds merely to enable the registration to be obtained at Amrapur and that there has consequently been a fraud upon the law of registration.

As regards the question of ownership the lower Court has found that Lalchand was in possession of the two sites and

that he used them for four months of every year for tethering his cattle which he sent to Wazar for grazing. From this it finds that Lalchand's ownership has been sufficiently established. Its reasoning is open to criticism as regards the effect that it gives to the appellant's admission of the map filed on behalf of defendant 1 and as regards the misapplication of the maxim that possession follows title. What the lower Court should have done is to hold that possession is prima facie evidence of title under S. 110, Evidence Act, and its finding is not necessarily incorrect because of the mistakes referred to. It is argued that, as laid down in *Radhikadas* v. *Harmohanlal* (1), possession of the nature proved cannot be held to prove title, but I think that the argument is wrong. The possession proved is essentially different from that dealt with in the ruling cited. I hold that the possession proved is prima facie evidence of title and that the appellant had to prove that there was no title in Lalchand. This he has failed to do

It is argued, nevertheless, that there is a fraud on the law of registration, because these two sites of Wazar were included in order to enable the deeds to be registered at Amrapur That is a finding of the lower appellate Court, but it also finds that there was a real intention on the part of the parties that the sites at Wazar should be transferred. This is a finding with which I cannot interfere and it is sufficient to make the registration valid. In *Biswanath Prasad* v. *Chandra Narayan* (2), registration was held invalid because the deed was registered in the Muzaffarpur District in which the mortgagor had purchased a one kauri share in a village for registration purposes, but in that case it was held that it was not the intention of the parties that the one kauri share should vest in the mortgagor or pass under the mortgage. In *Harendra Lal Roy* v *Haridasi Debi* (3), the property included for registration purposes was found to be non-existent. In *Urkudya* v. *Doma* (4) it was found that the property did not belong to the mortgagor and in *Vyankatesh* v. *Annasa* (5) it was found that the property was not intended to be mortgaged. These cases are all differentiated from the present case by the fact that in the present case the property belonged to the transferrer and was intended to be transferred.

It is urged that, nevertheless, the transfer is fraudulent on the following grounds:

(1) That Lalchand's mother was the sister of defendant 1, (2) that payment of Rs. 1,000 of the consideration has been held to be doubtful, (3) that Lalchand and after him his son defendant 2 have been left in possession of the fields, (4) that Lalchand transferred nearly the whole of his property, (5) that the method of registration shows a desire for secrecy, and (6) that there was no pressing necessity to pay off at least one of the two mortgage debts said to have been satisfied as a result of the sale.

It must be admitted that there are several features in this case that go to indicate fraud in the transfer, but the lower appellate Court has found that out of the total consideration of Rs. 8,500, Rs 3,500 was due to defendant 1 on two promissory notes and Rs 4,000 was required to pay off the debts on two mortgages. That being so, I cannot find that S 53, T. P Act applies This is not a case of fraudulent preference under the Insolvency Act and a transfer which satisfies some creditors cannot be held fraudulent. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1917] 13 N. L. R. 25=39 I. C. 54.
(2) A. I. R. 1921 P.C. 8=48 Cal. 500=48 I. A. 127 (P.C.).
(3) A. I. R. 1914 P.C. 67=41 Cal. 972=41 I. A. 110 (P.C.).
(4) [1919] 15 N. L. R. 75=50 I.C. 764.
(5) A. I. R. 1928 Nag. 1=23 N. L. R. 143.

* A. I. R. 1929 Nagpur 319

MACNAIR, OFFG. J C.

Dwarkabai—Defendant 3—Applicant.

v.

Sakharam and *others* — Plaintiffs — Non-Applicants.

Misc. Judicial Case No. 71 of 1928, Decided on 9th September 1929, for leave to appeal in forma pauperis from decision in Civil Suit No 21 of 1928, D/- 17th November 1928.

(a) Civil P. C., O. 33, R. 1 — Entitled to property.

It cannot be assumed that the framers of O. 33, R. 1, thought that every one who is entitled to property was possessed of means to the value of that property. [P 320 C 2]

*** (b) Civil P. C., O. 33, R. 1 — Words "possessed of sufficient means" are not in-**

tended to be qualified by words "other than the subject matter of the suit."

It is not intended to qualify the words "possessed of sufficient means" by the words "other than the subject-matter of the suit"; and there is no reason whatever to think that because the subject matter of the suit must be excluded from property to which the party is entitled, it should be excluded from the means of which the party is possessed : 30 *Bom.* 593, *Rel. on.* [P 321 C 1]

G. G. Hatwalne—for Applicant.

P. S. Kotval and *R. B. Gadgil* — for Non-Applicants.

Order. — The applicant applied for permission to appeal as a pauper. The Court from whose decision the appeal was preferred was directed to enquire whether the applicant was on 18th December 1928 in possession of (1) house property claimed in the State of Bhor and (2) property which formed the subject matter of the suit, and whether the property of either class and also of both classes taken together is sufficient for the fee prescribed by law.

I need not consider the finding regarding the house property and land in the State of Bhor. It appears that this property is in reality the property of the sons of the applicant : the non-applicants admit this. The trial Court has found that the applicant was on 18th December 1928 in possession of jewellery and gold, property, which formed the subject matter of the suit, of ample value to cover the fee prescribed by law. The applicant has objected to this finding. In her evidence she admits that ornaments worth about Rs. 25,000 were taken in possession by her on the death of Vithal and remained with her till about two years ago Her assertion is that from time to time she used to hand over ornaments to her son Vinayak or Baboo in order that he might sell them and incur expenses. She is not able to give any details and she has not examined her son Vinayak : clearly it would have been possible for her to examine Vinayak and the persons to whom Vinayak sold the ornaments and thus furnish very strong evidence that most of the ornaments had been sold : it should not be difficult to furnish proof of the disposal of ornaments of considerable value

It is unnecessary to consider the vague evidence regarding the amount of expenses incurred by her. When she was living with Vinayak and Vinayak was a party to the various suits, it is clearly possible that most of these expenses were met by Vinayakrao. She has not proved the sale of a single ornament, and the inference that she is in possession of the bulk of the jewellery is proper. It is irrelevant that the trial Judge held that the prosecution for contempt of Court should not be sanctioned because it was not clear that she was in possession of this property at the time she was ordered to hand it over to the receiver ; this was not a finding in the course of the trial of the suit. It is not material that the applicant, after representing that she had no property when she was directed to hand it over to the receiver, applied for maintenance allowance, and the evidence of witnesses who say that she appeared to have no property is useless. I therefore hold that the applicant was on 18th December 1928 in possession of valuable property which formed the subject matter of the suit.

I have next to consider whether the applicant was on 18th December 1928 a "pauper," as defined by the explanation to R. 1, O 33, Sch. 1, Civil P. C. This explanation runs :

"A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject matter of the suit."

It is clear that the decision of the question whether a person is a pauper is to be governed by special considerations when no fee is prescribed by law for the plaint. Where a fee is prescribed, the person who desires to file the suit cannot be held to be a pauper if he possesses just sufficient means to pay the fee : he need not possess means to meet demands for process-fees, diet-money for witnesses and similar expenditure. In the special case where no fee is prescribed he must be considered a pauper unless he is entitled to some property : some consideration then is shown for the necessity to meet expenses necessary for the conduct of the suit, but the section considers it sufficient that he should be entitled to property It cannot be assumed that the framers of this rule thought that every one who is entitled to property was possessed of means to the value of that property : had they desired to lay down that the person must be possessed of means, presumably they would have re-

peated the words used in the beginning of the explanation. As the condition was that he should not be entitled to property, it was necessary to add the words that this property should be other than the subject matter of the suit. Clearly it would be unfair to lay down that a person could not sue as a pauper because he has a just claim to the property for possession of which he desires to sue.

It seems obvious that it was not intended to qualify the words "possessed of sufficient means" by the words "other than the subject matter of the suit" : this was held in *Krishnabai* v. *Manohar* (1). There is no reason whatever to think that because the subject matter of the suit must be excluded from property to which the party is entitled, it should be excluded from the means of which the party is possessed. O. 33, Sch. 1, Civil P. C , refers primarily to suits and it is ordinarily the case that the subject matter of the suit is out of the plaintiff's reach, but when the applicant for leave is a defendant-appellant, the case is different. The applicant has control over the jewellery and gold, of which she is in possession. I hold then that the applicant was not a pauper on 18th December 1928. The application is rejected. The application has not been made in good faith ; I reject the memorandum of appeal. Counsel's fee Rs. 60.

P.N /R.K. *Application rejected.*

(1) [1906] 30 Bom. 593=8 Bom. L.R. 671.

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* A. I. R. 1929 Nagpur 321

JACKSON AND SUBHEDAR, A. J. Cs.

Parashram—Defendant 1—Appellant.

v.

Shriram and *others* — Plaintiffs and Defendants 2 to 4—Respondents.

First Appeal No. 20-B of 1927, Decided on 19th July 1929, from decree of 1st Addl. Dist. Judge, Akola, D/- 21st February 1927, in Civil Suit No. 12 of 1925.

*** (a) Hindu Law—Adoption—Full owner of property by will bequeathing it to his wife *N* for life and after her to his widowed daughter-in-law *K* absolutely—Will giving permission to either widow to adopt — Widow *N* entering into contract relating to property and *K* bringing suit for its specific performance—Adoption made after estate had be come vested in two widows—Such subsequent adoption cannot oust *N* of her life interest nor can it after *N's* death prevent vesting of abolute estate in *K* and *N* can enter into such contract and *K* can maintain suit for specific performance — Specific Relief Act, S. 25.**

Where the adoption is made by a will by one who has full power over his property under which a portion of that property is carried away, subsequent adoption made by a widow in virtue of a power to adopt cannot affect the portion disposed of. [P 323 C 1]

A person who was full owner of the property executed a will bequeathing his entire estate to his wife *N* for life and after her to his widowed daughter-in-law *K* absolutely. The will also gave permission to either widow to adopt a son and enjoined upon them to take an agreement from the natural father postponing the rights of the adopted son till the demise of the widows. Widow *N* entered into a contract relating to property but died in a short time. Subsequently *K* brought a suit for specific performance of the contract. The adoption was made by *K* according to the directions in the will and after the estate had become vested in the two widows as devisees under the will of the full owner.

Held **: that the adoption could not oust *N* of her life-interest nor could it after the death of *N* prevent the vesting of an absolute estate under the terms of the will for the simple reason that the bequests had taken effect already long before the adoption, that *K* could enter into the contract and that *N* could maintain the suit for specific performance : *A. I. R.* 1927 *P.C.* 139, *Rel. on.* [P 324 C 1]**

(b) Contract Act, S. 63—Scope.

An agreement was arrived at between partners in a firm that partnership be dissolved and *K* one of the partners should purchase the concern and after payment of partnership debts out of the consideration distribute the balance between several partners according to their shares. A notice was sent by a promisee calling upon *K* to get the sale-deed executed by paying agreed amount and saying further that if he did not do that understanding that he was not willing to abide by settlement and considering it to be cancelled, a claim would be brought against him for rendition of accounts.

Held **: that the notice did not put an end to the contract. [P 324 C 2]**

M. V. Joshi and *R. K. Manohar*—for Appellant.

M. B. Niyogi — for Respondents 1 and 2.

Judgment.—The facts leading to this first appeal are briefly these. In the year 1904 a partnership was formed between the parties to start a factory at mouza Hiwarkhed in the Akola district known as "Narayandas Parashram Ginning factory". The several partners had varying shares in this concern, the plaintiffs having Rs. 0-9-3 and the defendants Rs. 0-6-9. It is admitted that

plaintiff 1 had authority for plaintiff 2 to act for him in this partnership concern while defendant 1 had similar authority from the other two defendants. The case for the plaintiffs was that on 4th October 1923 an agreement was arrived at between the firm of plaintiff 1 which was then represented by one Sonabai as owner thereof and defendant 1, that the partnership be dissolved, that defendant 1 should purchase the concern for Rs. 41,000 and after payment of partnership debts out of the consideration distribute the balance between the several partners according to their shares. As defendant 1 failed to carry out this contract the present suit was brought by the plaintiffs to have the agreement specifically enforced or in the alternative for a decree for dissolution of partnership and for recovery of the amount of assets due to them.

Defendant 1 alone contested the claim, the other defendants remained ex parte. Defendant 1 admitted the contract of sale but alleged that as he was doubtful of the capacity of Sonabai—who was a Hindu widow with limited powers—to enter into the bargain he had asked for and secured a guarantee from one Balkisandas, the uncle-in-law of the lady, to stand surety for the bargain. It was stated that on the strength of this assurance of suretyship the defendant made the agreement on 1st November 1923 and had even gone to the length of purchasing the necessary stamps for conveyance. The defendant, however, alleged that Balkisandas later on refused to stand surety and plaintiff 1 served him (defendant 1) with a notice dated 17th June 1924 whereby she cancelled the contract to which defendant 1 agreed. The right of Hirabai to represent the firm of plaintiff 1 in this suit was challenged on the ground that she had adopted a son who alone could have a right of suit. The alternative claim for dissolution and rendition of accounts was not resisted but it was alleged that the accounts were made up till 3rd November 1923. In reply the plaintiffs asserted that Fattelal, who was the original owner of the firm of plaintiff 1, had by his will made the two widows successively owners of the firm and that the natural father of the boy adopted by Hirabai having given an agreement in her favour constituting her the owner of the property for her lifetime, she alone and not the adopted son had the right to institute the present suit.

A fair idea of the further pleadings of the parties would be gathered from the following issues which were settled for trial :

"1. Whether Fattelal executed the alleged will dated 13th November 1916 ?

2. Are the conditions and directions in the said will valid in law and do they confer title on the plaintiff to bring this suit ?

3. Whether the contract of sale was terminated by the notice dated 24th June 1924 ? What is the effect of the notice ?

4. Whether Balkisandas had agreed to stand as guarantee for the sale transaction as alleged by the defendant ? Was it on such assurance of Balkisandas that defendant 1 agreed to have sale deed as alleged by defendant 1? Did Balkisandas refuse to stand guarantee as alleged by defendant 1?

5. Should a decree for specific performance of the contract of sale under the circumstances of the case be passed?

6. If not, whether the accounts were settled upto 3rd November 1923 as alleged by defendant 1 except in respect of points noted in the document dated 4th November 1923?

7. Since which date defendant 1 is liable to render account?

8. Has the plaintiff paid any unnecessary court-fees? If so, is the partnership estate liable for the same?

9. Is plaintiff 1 entitled to maintain the suit apart from the will? Did the adopted son Purushottamdas execute the deed dated 15th May 1924 through his natural father? Are the conditions therein valid and enforcible?

10. Did Sonabai possess power to enter into the alleged contract and can plaintiff 1 sue upon that?"

The learned Additional District Judge who tried the case, in an elaborate judgment, decided the several issues in plaintiffs' favour and decreed the claim for specific performance of the agreement. Defendant 1 alone has filed the present appeal.

The main argument advanced by Sir Moropant Joshi, the learned advocate for the appellant, was that Hirabai had no right to institute the present suit because she had already adopted one Purushottamdas on 15th May 1924 who alone from that date could and did represent the firm of plaintiff 1 on behalf of which the contract which is sought to be specifically enforced by the present suit was entered into by Sonabai on 4th November 1923. It was contended that in spite of the directions to the contrary contained in the will (Ex. P-3) of the last male owner of the firm, viz. Fattelal, and notwithstanding the

agreement (Ex P-4) given by the natural father of Purushottamdas, the vesting of the estate in the adopted son could not be postponed under the law and reliance was placed upon *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (1) in support of this contention. In the Privy Council case relied on by the appellant's counsel a Hindu full owner had executed a will whereby he disposed of his estate to certain specified persons including his own prospective adopted son Before the adoption he even took the precaution of taking a formal agreement from the natural father of the adopted boy consenting to the several testamentary dispositions. After the death of the testator in a suit brought by certain legatees against the adopted son to recover possession of the properties bequeathed to them, the latter challenged the validity of the will and it was held that the will on the strength of which the legacies were claimed was invalid because long before it came into operation on the death of the testator the properties disposed of by it had already become jointly vested in the adopted son and could not be effectualy disposed of by the will of the father who was merely a coparcener with the adopted son incapable under the Hindu law of making a will in respect of the coparcenary property even though the consent of the natural guardian of the adopted boy was secured to such testamentary dispositions before the actual adoption. The true principle governing the case was laid down by their Lordships of the Privy Council in the following words appearing at p. 525 of the report:

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself vi propria affect them."

(1) A. I. R. 1927 P. C. 189.

Applying the principle enunciated in the above quotation to the facts of the present case it is perfectly obvious that instead of supporting the case of the appellant it directly goes to support the case of the contending respondents. It is admitted that Fattelal was the sole owner of the firm of plaintiff 1 on 13th November 1916 when he executed his will (Ex P-3) whereby he bequeathed his entire estate, comprising the share he owned in the partnership of "Narayandas Parashram Ginning factory," to his wife Sonabai for life and after her to his daughter-in-law, Hirabai—the widow of his predeceased son Labhchand—absolutely The will also gave permission to either widow to take a son in adoption, in case the testator himself did not adopt any in his lifetime, and in order that the son so adopted may not enjoy the estate till after the demise of the two widows, it enjoined upon them to take, before adoption, an agreement to that effect from the natural father of the boy selected for being adopted. It is also admitted that Fattelal died on 24th May 1917 without himself making any adoption and it is not and could not be denied that as the sole owner he was under the law fully competent to make whatsoever disposition he liked of his estate The adoption of Purushottamdas by Hirabai was admittedly made some seven years after the death of Fattelal and long after the estate had become vested in the two widows as devisees under the will of the full owner. In other words in the language of their Lordships of the Privy Council the property was "carried away before the adoption" of Purushottamdas took place Under these circumstances neither the directions in the will (Ex. P. 5) nor the agreement (Ex. P-4) which was evidently taken in virtue of the said directions, can, on the principle already enunciated, affect the question of the validity of the will of Fattelal whereby Sonabai and Hirabai succeeded to the estate.

It was then in her capacity as the holder of a life estate by virtue of the will of her husband, and not as his natural heir under the Hindu Law, that Sonabai succeeded to the firm of plaintiff 1 and it was in this capacity that she must be deemed to have entered into the agreement with defendant 1 on

4th November 1923 which is sought to be specifically enforced by the present suit. By his adoption on 15th April 1924 Purushottamdas could not therefore oust Sonabai of her life interest in the firm of plaintiff 1 nor could he, after the death of Sonabai on 8th October 1924, prevent the vesting of an absolute estate in Hirabai under the terms of the will of Fattelal for the simple reason that the bequests had taken effect already long before his adoption. We have therefore no hesitation in holding, though for reasons somewhat different from those given by the lower Court, that Hirabai alone is the sole representative of the firm of plaintiff 1 after the death of Sonabai and as such entitled to maintain the present suit. The above finding also disposes of the other contention advanced on behalf of the appellant that under S. 25, Specific Relief Act, Hirabai could not maintain the suit for specific performance of the contract because she could not convey a valid title to defendant 1.

It was next argued that under the notice (Ex. D-5) dated 17th June 1924, plaintiff 1 having unequivocably rescinded the contract she was incompetent to maintain the present suit to enforce it although the appellant may not have been able to prove that he communicated his assent to the cancellation as alleged by him. The learned counsel for the appellant went so far as to assert that the assent of the defendant for rescission of the contract was unnecessary and this contention appears to be warranted by the language of S 63, Contract Act which provides that

"every promisee may dispense with or remit wholly or in part the performance of the promise made to him."

The only question for decision therefore is if the terms of the notice (Ex. D-5 favour the interpretation sought to be put upon them by the appellant's counsel and come within the purview of S. 63, Contract Act. The last portion of the notice (Ex. D-5) which requires correct interpretation is translated as under:

"My client having purchased a stamp paper for the sale deed is ready to execute the proper sale deed but you are evading to get the sale deed executed after paying the amount. You are therefore asked to get the sale deed executed by immediately paying the agreed amount together with its interest up to this date. If you do not do this, understanding that you are not agreeable to abide by the settlement of 4th November 1923 and considering it cancelled a claim would forthwith be brought against you for rendition of accounts from the commencement of the factory etc."

The matter relating to the construction and effect of this notice was embodied in issue 3 and is dealt with by the lower Court in para. 6 of its judgment. The learned Additional District Judge holds that the notice did not put an end to the agreement of sale but on the contrary reserved to the plaintiff the right to enforce it by a suit. The conduct of defendant 1 after receipt of the notice itself shows that he did not take the notice in the light of the cancellation of the contract for otherwise he would not have approached Mr. Athlay the pleader for the plaintiff (P. W. 7) for settlement of the dispute and got the draft of conveyance (Ex. P-8) prepared by Mr. Athlay in consultation with his own pleader Mr. Bapat on or about 2nd July 1924. The language of the notice also does not warrant the construction that it unequivocably cancelled the contract. For the reasons given above we uphold the decision of the lower Court on this point and hold that the notice in question did not put an end to the contract and that it does not in any way debar the plaintiffs from enforcing the contract specifically It was conceded, in reply, by the learned counsel for the appellant that since there is no allegation that plaintiff 1 was a party to the alleged arrangement between defendant 1 and Balkisandas, the plea of suretyship advanced by defendant 1 was absolutely out of place in the present suit which would not be affected in any way even if it be held proved that Balkishandas backed out of his promise to stand surety. It is therefore unnecessary to decide if as a matter of fact Balkisandas agreed to stand as surety and subsequently declined to do so.

The last argument of the counsel for the appellant challanged the principle of accounting adopted by the lower Court which did not first deduct the debts amounting to Rs. 13,050 out of the consideration of Rs 41,000 payable to the plaintiffs and defendants by the partnership before ascertaining the amount due to the plaintiffs under the terms of the agreement. This method of accounting was conceded by the advocate for the respondents to be wrong. According to the agreement (Ex. P-1) all the debts due from the partnership ought to be first.

deducted out of the consideration for sale and the balance in hand should then be distributed among the several partners according to their shares. On this principle of accounting the plaintiffs' share in the next balance after paying all the partnership debts will come to Rs. 24,989-12-9 and the lower Court's decree will therefore be modified by substituting this figure for Rs. 27,045-5-3 as payable by the defendants to the plaintiffs with interest at 0-7-9 per cent mensem thereon from 4th November 1923 to 21st February 1927 which comes to Rs. 4,785-15-0. Interest after that date till satisfaction will run at the rate of 0-8-0 per cent per mensem as already ordered by this Court on 22nd September 1927 by agreement of parties.

In the light of the original agreement (Ex. P-1) and the further agreement arrived at between the parties in this Court on 22nd September 1927 we do not see our way to raise the rate of interest as claimed by the plaintiffs-respondents in their cross-objection which is dismissed with costs. As the appeal has succeeded on a minor point conceded by the contending respondents, all the costs of the appeal must be paid by the appellant. Costs in the lower Court will be paid as already ordered by that Court.

P.N./R.K. *Decree modified.*

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STAPLES AND SUBHEDAR, A. J. Cs.

Kisandas—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 81 of 1929, Decided on 29th June 1929.

(a) Criminal Trial—Discrepancies in prosecution evidence on matters of detail—Evidence consistent in the main—Absence of evidence in rebuttal — Prosecution story held supported by evidence on record.

Discrepancies were found on matters of detail in the evidence tendered by witnesses for the prosecution, the evidence in the main being consistent. No evidence in rebuttal was tendered and it was contended that the prosecution story was unsupportable.

Held: that it was more natural than otherwise that such discrepancies should occur on account of the suddenness of the quarrel and the extremely short duration of the actual assault and that the evidence supported the prosecution story. [P 327 C 1]

***(b) Penal Code, S. 114—Conviction for abetment is illegal without definite charge.**

In the absence of a definite charge of abetment being framed against an accused which he had no opportunity to meet, his conviction for abetment of murder under S. 302 read with S. 114, Penal Code, is wholly illegal. [P 328 C 2]

(c) Penal Code S. 302—Assailant striking fatal blow not ascertainable—All assailants can be held guilty of murder.

Where it cannot be found who among the assailants struck the blow which proved to be fatal all the assailants can be held guilty of murder: 35 *All.* 329, *Foll.* [P 327 C 1, 2]

J. Sen and *Shaligram Trivedi*—for Appellant.

G. P. Dick—for the Crown.

Judgment.—On the afternoon of Sunday 31st March this year one Maru Kirar died at mouza Mathni in the Sohagpur Tahsil, Hoshangabad District, as a result of an assault made upon him by some village people with lathis. Eight wounds were found on the body of the deceased, seven of which were contusions not amounting to grievous hurt but the one on the head as described in the post-mortem report (Ex. P-9) fractured the skull and lacerated the brain and in the opinion of the Medical Officer (Ex. P-11) caused death.

The first information report (Ex. P-1) was made by Suka (P. W. 14), the son of the deceased, at Piparia station house at 9 p. m. on the same day, and implicated the following seven persons by name as the assailants responsible for the crime and the informant also gave the names of certain persons who witnessed the assault: (1) Kisandas Kirar, (2) Rajaram Kirar, (3) Nathuram Kirar, (4) Tunda Kirar, (5) Dhanna Kirar, (6) Gorelal Kirar and (7) Dalpat Kirar.

An investigation followed and all the aforesaid seven persons were challaned before Mr. Shrivastava, Magistrate, 1st Class, Hoshangabad, who, however, discharged the last three and committed the first four to take their trial before the Court of Session at Hoshangabad under S. 302, I. P. C., for the murder of the deceased Maru Kirar.

The trial was held by Mr. Amardekar, Additional Sessions Judge, who convicted Kisandas alone under S. 302 read with S. 114, I. P. C., for abetment of the murder of Maru and sentenced him to death. The other three accused Rajaram, Nathuram and Tunda were found guilty under S. 323, I. P. C., only and each of them was sentenced to one year's rigorous imprisonment.

Against their convictions all the aforesaid convicts have preferred separate

appeals to this Court which are registered here as Criminal Appeals Nos. 81 to 84 of 1929 and since they were connected and heard together this judgment will govern the disposal of all of them.

The story for the prosecution is a bit complicated and not quite easy to follow. In the early part of the afternoon of Sunday the 31st March last, a quarrel took place between two women Mt. Daiya (P. W. 11) and Mt. Gajaria (P. W. 2) on account of a son of the latter taking some khaderas (stalks of tuar plants) from the fencing of the former The women as usual ran at each others' throats but the deceased Maru intervened and separated the combatants, and peace was restored. Soon after Dhanna Sonar (P.W 4) the husband of Mt Gajaria returned home and found two persons Ghirisa and his namesake Dhanna Kirar at his door threatening his wife and Dhanna Kirar gave the Sonar a blow with his lathi which injured his finger (Ex. P-8). Dharamdas (P W. 12) then intervened and peace was again restored. About 24 minutes after this incident was closed the appellant Kisandas came upon the scene and enquired of the Sonar as to who his supporters were and on getting a reply in the negative he at once began to abuse the Sonar and the deceased Maru, who was then at his own house. There were then free exchange of abuses between the deceased and the appellant Kisandas and the latter is said to have asked Dhanna Kirar to give five shoeblows to the Sonar (P W. 4) and asked his grazier Kolha to fetch the other appellants and when they arrived they went over to the house of the deceased, where the appellant Kisandas pulled him out of the osari where he was sitting into the angan and all the appellants gave him lathi blows. The deceased then ran up to a munga tree followed by the appellants and was also beaten there and when he again went towards a pipal tree all the appellants again followed him and again gave him blows with the result that the deceased then fell down senseless, but died on route to the police house.

Upon a consideration of the evidence recorded by him the Additional Sessions Judge held :

"(a) that all the appellants gave the lathi blows to the deceased Maru but that it could not be proved who among the assailants gave the blow on the head of the deceased which lacerated the brain and caused his death ; (b) that there was no conspiracy between the appellants to kill Maru ; and (c) that excepting appellant 1 none of the other appellants had any intention of causing the death of Maru."

As a result of the aforesaid findings the learned Additional Sessions Judge found the first appellant guilty of murder or abetting the murder of Maru and the others of causing Maru simple hurt only and passed the sentence of death on the former and one year's rigorous imprisonment each on the latter

Mr. J. Sen who represented all the appellants in this Court addressed a very long and learned argument at the Bar challenging the correctness both of certain findings of fact arrived at by the Additional Sessions Judge and of the applicability of the law by him to the facts so found.

Before proceeding to examine the points of law involved in the case it is necessary in the first instance to dispose of the contentions raised in the first five and 10th and 11th grounds of appeal to the effect that the complicity of the appellants in the assault upon Maru has not been established. It was argued that since the whole lot of the prosecution witnesses who are alleged to have witnessed the assault were hostile and inimical to the appellants, and because they were discrepant on matters of detail their evidence was untrustworthy and should be rejected It was also contended that since in the first information report definite persons were named as eyewitnesses but who were not examined at the trial, a presumption adverse to the prosecution should be drawn, and that in the absence of disinterested witnesses having come forward to support the prosecution story it should be held that none of the appellants was really responsible for the assault which undoubtedly resulted in the death of Maru. It was further argued, as suggested in the written statements of the appellants filed in the Sessions Court, that Maru probably met his death in the assault made upon him by Gola Dhanna, Jherisa, Kishora and their relations.

It is undoubtedly well established that the eyewitnesses for the prosecution are not disinterested but certainly hostile to the appellants but under the peculiar

circumstances of this case, this fact alone is insufficient to discard their evidence as unreliable. There are undoubtedly two factions in the village of Mathni and that probably accounts for the absence of any but the persons interested in the deceased Maru who happened to witness the assault from coming forward to support the prosecution. The village is a fairly large one and the appellant Kisandas, who is the mukaddam, is admittedly the leader of one party. When the witnesses who are examined for the prosecution established a prima facie case against the appellants it should not in our opinion have been at all difficult for the defence to have supported their own story to the contrary as contained in their written statement, viz., that Maru was really assaulted by Gola, Dhanna and others.

The abstract principles detached from the facts found in the particular cases, as laid down in the several reported cases cited by the learned pleader for the appellants in support of this branch of his argument, cannot, in our opinion, apply to the facts of the present case and no adverse inference should be drawn against the prosecution, because they did not examine the witnesses named in the first information report. They were undoubtedly examined by the police in the course of the investigation but because probably out of fear of the appellants or partiality to them, they professed complete ignorance of the affair, they were naturally not examined at the trial. As to the discrepancies on matters of detail in the evidence of the prosecution witnesses, we agree with the Additional Sessions Judge that on account of the suddenness of the quarrel and the extremely short duration of the actual assault it was more natural than otherwise that such discrepancies should occur in their depositions. In the main their evidence is consistent and in the absence in rebuttal it supports the story of the prosecution that the four appellants did take part in the assault upon the deceased Maru which resulted in his death.

The next question that has to be considered is what offence was committed by the appellants who are proved to have taken part in the assault. The evidence on record does not prove who among the assailants struck the fatal blow, but the victim having died as a result of this assault it should not probably have been difficult for the learned Additional Sessions Judge to hold the whole lot of accused before him guilty of murder under the principle of law enunciated in the case of *Kanhai* v. *Emperor* (1), instead of convicting three of them for simple hurt only under S. 323, I. P C.

But since there is no appeal preferred by the Local Government against the acquittal of these three appellants of the charge of murder it is not open to this Court to take any independent view of the evidence and come to a finding contrary to the one arrived at by the Additional Sessions Judge in this matter : *Kishan Singh* v. *Emperor* (2). The finding that these three accused were only guilty of an offence under S. 323, I. P. C, must therefore stand and on the basis of this finding and on the finding that Kisandas did not give the fatal blow it is clear that the conviction of the appellant Kisandas for the murder of Maru or for abetment thereof cannot be sustained.

It has been a matter of considerable difficulty to understand if the learned Additional Sessions Judge convicted the appellant Kisandas of murder under S. 302, I. P. C., or of abetment of murder under S. 302 read with S. 114, I. P. C. Para. 14 of the judgment appealed against which deals with this matter is really incapable of a correct interpretation and the learned pleader for the appellants very rightly characterized it as full of faulty reasoning, illogical conclusions and confused findings. The matter is not even made clear by referring to the form containing the finding and sentence which follows the judgment, because it also states that Kisandas:

"is guilty of the offence specified in the charge, namely, that he committed the offence of murder and has thereby committed an offence punishable under S. 302 read with S. 114, I. P. C."

It may be noted that the operative words of the finding are not filled in the said form by the Judge himself but apparently by his reader though the form bears the signature of the Judge.

(1) [1913] 35 All. 329=21 I. C. 657=11 A. L. J. 752.

(2) A. I. R. 1928 P. C. 254=50 All. 722=55 I. A. 390 (P.C.).

Having found in the earlier paragraph of his judgment that the fatal blow was not given by Kisandas, that there was no conspiracy to kill Maru,

"that even if as stated by P. W. 9 Kisandas asked his followers to strike it is doubtful if each of the followers did intend to kill Maru,"

the learned Judge inconsistently begins para. 14 of the judgment by stating that "it appears that he did wish that Maru should be killed," and that because Maru ran from the spot near the osari to save his life

"that is to say, that he probably perceived that Kisandas was so violently excited that he with the help of others, might even kill him,"

therefore:

"Under the circumstances, the fatal blow must be deemed to have been given at the instance of Kisandas."

No authority has been cited by the learned Judge for fastening upon Kisandas a constructive liability for the fatal blow which has not been proved to have been given by any one of his three followers, viz, the other appellants.

But the matter does not rest here for the learned Judge goes on to state that the fatal blow:

"was given in his presence by one of his followers if he himself did not give it. He who gave the blow with a heavy stick on the head which fractured the skull and lacerated the brain must be deemed to have intended to cause death. Murder was thus committed either by Kisandas himself or by one of the other three accused in consequence of the abetment and in the presence of the abettor (Kisandas). Regard being had to the provision of S. 114, I. P. C., Kisandas must be deemed to have murdered Maru if he himself did not kill him."

Further on the learned Judge states that:

"It also appears that the situation developed somewhat suddenly. But it is clear that there was premeditation and that he who gave the fatal blow acted in a cruel and unusual manner. I find accordingly that Kisandas either actually committed murder or that he must be deemed to have committed that offence."

Inconsistency and confusion of ideas and uncertainty in arriving at a definite conclusion are thus patent on the face of para. 14 of the judgment from which the above quotations are taken. When on his own finding none of the other three appellants had any intention to kill Maru nor did any of them actually kill him by striking the fatal blow, it was clearly illogical to hold Kisandas constructively responsible for the fatal blow given by somebody else who was not his follower and on the further finding that Kisandas did not himself give the blow, it was manifestly wrong to have convicted him of murder under S. 302, I. P. C.

The substantive charge of murder having failed in the case of the other three appellants, Kisandas could not in law be convicted of murder on the short ground that the substantive offence itself is not found proved in the case. Moreover, it is equally clear upon the authorities cited by the learned pleader for the appellants that in the absence of a definite charge of abetment being framed against Kisandas which he had no opportunity to meet his conviction for abetment of murder under S. 302 read with S. 114, I. P. C, was wholly illegal: *Reg.* v. *Chand Nur* (3), *Empress* v. *Dongria* (4), *Padmanabha Panjikannaya* v. *Emperor* (5), *Emperor* v *Raghya Nagya* (6), *Hulas Chand Baid* v *Emperor* (7), *Emperor* v. *Mahabir Prasad* (8) and *Kadira* v *Emperor*, *A. I. R* 1928 *Cal.* 466.

The result is that the appeals of Rajaram, Nathuram and Tunda are dismissed and that of Kisandas partly allowed by setting aside his conviction for murder or for abetment of murder and convicting him under S. 323, I. P. C., and sentencing him to one year's rigorous imprisonment.

K.N./R.K. *Order accordingly.*

(3) [1874] 11 B. H. C. 240.
(4) [1900] 13 C. P. L. R. 167.
(5) [1910] 33 Mad. 264=5 I. C. 145=20 M.L. J. 84.
(6) A. I. R. 1924 Bom. 432.
(7) A. I. R. 1927 Cal. 63.
(8) A. I. R. 1927 All. 85=49 All. 120.

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SUBHEDAR, A. J. C.

Kashiram Hazari — Accused—Applicant.

v.

Asaram — Complainant — Non-Applicant.

Criminal Revn. No. 101 of 1929, Decided on 18th July 1929, from decision of Sess. Judge, Raipur, D/- 8th March 1929, in Criminal Appeal No. 39 of 1929

(a) Criminal P. C., S. 118—High Court can interfere on merits of orders under S. 118 if

Court under S. 406 has not really gone through evidence on record.

It is true that the High Court will not ordinarily interfere on the merits of orders passed under S. 118, except in very exceptional circumstances provided that the Court under S. 406, shows in its judgment that it has really, and not merely nominally, gone through the evidence on the record, which it can do by stating clearly what it believes the evidence proves giving a short summary of that evidence, and making such criticisms as go to show that the evidence is reliable, but if the judgment does not satisfy these requirements and also fails to come up to the required standard of a legal judgment, and there is a clear misconception of such evidence as is considered, it is not only just but imperative on the High Court to see how far the judgment in appeal is correct even on matters which it purports to decide expressly: *6 A. L. J.* 487, *Rel. on.*; 8 *N.L.R.* 84, *Ref.*

[P 330 C 2, P 331 C 1, 2]

(b) Criminal P. C., S. 107—Threatening to beat person or asking person to give up serving another on pain of being involved in litigation does not justify passing order under S. 107.

Threatening to beat a person saying why he served a particular person and asking another to give up serving a particular person on pain of being involved in litigation are not threats of violence of such a nature as would in law justify the passing of an order under S. 107. [P 332 C 2]

(c) Criminal P. C., S. 107—Scope.

Dispute about the cultivation of a bund and a proclamation forbidding people on payment of fine and shoe-beating from picking fruit from a Ber tree do not come within the purview of S. 107. [P 330 C 1]

(d) C. P. Land Revenue Act, S. 188 (2)—Lambardar of undivided village has no sole right to appoint village servants.

There is no authority to support the proposition that a person as the lambardar of the undivided village has the right to appoint persons who simply make a living in the village by their labour as village servants and a cosharer has no right to interfere with their appointment. [P 331 C 2]

K. V. Deoskar—for Applicant.

G. P. Dick—for the Crown.

B. K. Bose, *V. Bose* and *P. N. Rudra*—for Non-Applicant.

Order.—This rule was issued at the instance of the applicant Kashiram to revise the order passed by the Sub-Divisional Magistrate, Baloda Bazar, under S. 107 read with S. 118, Criminal P. C., and confirmed in appeal by the Sessions Judge, Raipur, binding over the applicant for one year to keep the peace. The history of this case is a deplorable reading of the lack of promptitude and tact displayed by the Magistrate concerned in regard to taking proper timely measures for preventing possible breach of the peace, as the delay seems to have given ample opportunity to the other side to improve upon the otherwise simple case in its origin. As far back as 19th December 1927 a petition (Ex. P-1) was presented to the Sub-Divisional Magistrate by Asaram Malguzar and other cosharer Kashiram (1) that he had allowed:

"the winter crop to be grazed by his cattle and is allowing the summer crop also to be grazed up by his cattle,"

and (2) that he threatened to beat the sons of the village watchmen if next time his cattle were impounded This complaint was forwarded by the Magistrate to the police "for report if any action under S. 107 is necessary." On 29th January 1928, the police returned the complaint with their report which stated that since 1927 there was a dispute between the lambardar Asaram and the cosharer Kashiram over the cultivation by the latter of a portion of the bund of a tank and other waste land, that in spite of the proceedings taken under S. 145, Criminal P C., on 16th September 1927, Kashiram refuses to leave possession of the field or bund but offers other land in exchange which Asaram refuses to take, and that there was thus a likelihood of the dispute getting more acute

Instead of taking any action forthwith the Magistrate recorded the following curious order on the police report on 15th February 1928:

"The crops are now cut, there can be hardly any breach of the peace now. Put up later in May or June."

On 11th June 1928, the learned Magistrate again endorsed the following order on the very same police report:

"Ask Sub-Inspector of Police whether there is still likelihood of a breach of the peace."

It is indeed difficult, if not impossible, to understand the significance of the last portion of the first order and the second order. If the police report was correct it certainly disclosed the necessity of taking prompt action under S. 145, Criminal P. C., against both the contending parties who were fighting about the lands in dispute. The papers were, however, again forwarded to the Sub-Inspector of Police who submitted his second report on 4th July 1928 and on the same date, the case was registered and the preliminary order under S. 112, Criminal P. C., was passed against the appli-

cant and his brother Ajab. It is apparent that the two main causes of trouble given in Ex. P-1 had totally disappeared in the seven months that elapsed since the presentation of the original application, and three entirely new matters all subsequent to the first police report cropped up in the meanwhile leaving the bone of contention, viz., the alleged forcible cultivation of the land between the two tanks, intact. The three additional matters introduced in the second police report were·

(i) That Kashiram and his brother had threatened the village servants of the other cosharers and prevented them from working; (ii) that they had wrongfully turned a man out of his house and put someone else into it ; and (iii) that they had wrongfully prevented a man using a lane in the village.

In recording evidence of the prosecution witnesses the Magistrate did not take care, as he should have done, to confine the witnesses to depose only to the four facts enumerated above and which were embodied in the preliminary order of 4th July but allowed them to depose to the four following additional facts against the accused :

(i) that Kashiram had issued a proclamation forbidding people on payment of fine and shoe-beating from picking fruit from a Ber tree on the embankment of the tank ; (ii) that the two brothers had shut up cattle and their owners and extorted money from the latter on the allegation of damage done to their crops ; (ii) that they had beaten one Sobharam ; and (iv) that Kashiram had threatened to beat Asaram. The proceedings dragged on up to 2nd January 1929, when the Magistrate passed his final order and holding all the charges proved against the applicant bound him over for one year to keep the peace but discharged his brother Ajab.

On appeal the Sessions Judge relying on the evidence of P. Ws. 2, 3, 5, 7, 8 and 9 held that

" in April or May 1928 Kashiram threatened the village servants appointed by Asaram and turned one of them, (sic) Sakharam Lohar, out of the house in which he was living and put Luddu Dhobin into the house in his place. "

The learned Judge, however, rightly held that the cultivation of the bund and the proclamation about the Ber trees did not come within the purview of S. 107, Criminal P. C., and without discussing the evidence relating to the remaining four charges he simply stated in para. 8 of his judgment as follows :

" There is a good deal of evidence to show that Kashiram has acted in a highhanded way on many occasions, and it appears to me likely that if the lower Court's order is cancelled a breach of the peace would result. "

With regard to the complaint of the applicant that the introduction of the additional charges disclosed in the evidence but not covered by the preliminary order had prejudiced him and had vitiated the trial, the learned Judge held that since the applicant had sufficient notice of them their omission from the preliminary order was a mere irregularity and did not vitiate the trial.

Three points which have been stressed for the applicant and require consideration are :

(i) that the Sessions Judge has wholly misconceived the evidence relating to the incident of ousting Khamman Lohar from his house and putting Luddu in it , (ii) that the evidence on the point of alleged threats to village servants was so meagre and unreliable as to be insufficient in law to sustain the order in question ; and (iii) that the judgment of the Sessions Judge is not a legal and proper disposal of the appeal because it does not at all deal with the merits of the four other charges on which the order against the applicant was also based

It was contended by the learned Government-Advocate for the Crown and Mr Vivian Bose for Asaram who appeared to oppose the rule that since the Sessions Judge concurred with the trying Magistrate in finding the case against the applicant proved this Court should not interfere. It is true that the High Court will not ordinarily interfere on the merits of orders passed under S. 118, Criminal P. C., except in very exceptional circumstances provided that the Court hearing the appeal under S 406 *ibid* shows in its judgment that it has really, and not merely nominally, gone through the evidence on the record ; and as remarked in *Shiam Lal* v. *Emperor* (1) :

" This it can do by stating clearly what it believes the evidence proves against the appellant, giving a short summary of that evidence, and making such criticisms as go to show that the evidence is reliable. "

In the present case 20 witnesses for the prosecution were examined and the

(1) [1909] 6 A. L. J. 487=2 I. C. 225=9 Cr. L. J. 528.

case was keenly contested by the applicant who examined 12 witnesses in defence. Even a cursory examination of the materials placed upon the record should have disclosed that Asaram was rightly or wrongly offended at the conduct of the applicant in encroaching upon waste lands of the village, and for the last two years was trying to regain possession of these lands. Before the present proceedings were started there were other criminal cases between the parties, viz., the criminal case started against the applicant admittedly at the bidding of Asaram by his watchman Hiraman which resulted in acquittal of the applicant and the case started by the applicant against Asaram and 18 others for illegal seizure of his cattle in which all the accused were fined. The proceedings under S. 145, Criminal P. C., started against the applicant at the instance of Asaram also failed. The defamation case filed against Kashiram by a tenant Kunju in which Asaram had figured as witness 3 for the prosecution was also held to be false and in which the Sessions Judge regarded Asaram as "the wire-puller": see the judgment in Criminal Appeal 33 of 1928 filed by the defence and to be found at p. 69 of the record. The attention of the trying Magistrate is invited to the omission of drawing up the list of documents admitted for the defence. The documents are also not marked. Under these circumstances when strongly partisan evidence for the prosecution was produced in the present case, it was very incumbent upon the appellate Court to carefully weigh it in the light of all circumstances and the defence evidence to find out for itself the real truth of the matter. Asaram seems to have furnished the key to the whole situation when at p. 35 of the record he made the admission that,

"If Kashiram leaves the 'Gothan' the 'Paar' and the Dhalsa there will be an end of the dispute unless he goes on quarrelling."

The judgment of the learned Sessions Judge not only does not satisfy the requirements suggested in the *Allahabad* case noted above in spite of the fact that by grounds 3, 6 and 7 of the memorandum of appeal the Judge was pointedly invited to consider the probabilities of the prosecution evidence being untrue and the defence evidence but it also fails in my opinion to come up to the standard of a legal judgment as laid down by this Court in *Jairam* v. *Emperor* (2). Moreover, as I shall show later on, there has been a clear misconception of such evidence as was considered by the learned Judge. For all these reasons it is not only just but imperative on me to see for myself how far the judgment in appeal is correct even on matters which it purports to decide expressly. As regards the first point it was conceded by Mr. V. Bose that there has really been some confusion in the mind of the learned Judge. The evidence in cross-examination of Khamman Lohar (P. W. 18) makes it quite clear that one of the three rooms meant for blacksmiths which was in the occupation of another blacksmith by name Rampershad and who used to work for the applicant Kashiram last year was allotted to Luddu Dhobin and not the one room which was originally allotted to this witness and which was still in his occupation. It is thus evident that the whole lot of prosecution witnesses are a set of liars when they come forward and say that the applicant turned Khamman Lohar out of his house and put the Dhobin in it.

This apparent misconception of the evidence by the learned Sessions Judge on an important point justifies my examining the evidence about the other complaint of alleged threats to "village servants." It was rightly conceded by Mr. Bose that the expression "village servants" has rather been loosely used in the judgment of the Sessions Judge and that there is no authority to support the proposition that Asaram as the lambardar of the undivided village had the right to appoint either of the four prosecution witnesses, viz, Nos. 5, 7, 8 9, and that Kashiram had no right to interfere with their appointment. This initial mistake in the conception of the supposed right of appointment of these witnesses who simply make a living in the village by their labour has very largely influenced the learned Judge in accepting their meagre testimony on the question of threats as true and upholding the order of the trying Magistrate. Puran (P. W. 5) the washerman stated that until Kashiram brought Anandram Dhobi this year he used to wash the

(2) [1912] 8 N. L. R. 84=15 I. C. 975=13 Cr. L. J. 559.

clothes of the whole village, that Kashiram " threatened me not to wash the clothes of Labbu Teli " but in cross-examination he had to admit that except on this occasion the applicant did not prevent him from doing the work of any tenant in the village. What was the nature of the threat the witness did not say and he admitted that when it was given none was present. It is ridiculous to accept this sort of evidence as enough in law to bind a man down to keep the peace.

Sarwan (P. W. 7) who is a grazier employed to graze cattle of Asaram and other tenants stated that once Kashiram threatened to beat him saying " why I was serving Munari Teli and so I gave up grazing cattle of Munari." Sheonath (P. W. 8) who is another grazier stated that Kashiram once came to his house and asked him to give up grazing cattle of the Chamars of his patti on pain of being involved " in the litigation " and so he gave up grazing cattle of some Chamars. Parsu Barber (P. W. 9) stated that he used to shave all tenants but that because Kashiram abused and asked him " not to shave Munari Teli " he gave up shaving Munari. In cross-examination, however, the witness admitted that Kashiram did not in any way administer any threat to him. Budhram (P. W. 2) and Asaram (P. W. 3) have no personal knowledge of the threats alleged to have been given to the aforesaid four witnesses, and, therefore, their evidence must be excluded from consideration in connexion with this point.

Neither the defence evidence in rebuttal on this point nor the probabilities of the case have been taken into consideration by the learned Sessions Judge in accepting the version of the prosecution witnesses 5, 7, 8 and 9, as true. I had, therefore, to scrutinize all the evidence with some care. The evidence of these witnesses appears to me to have been concocted for the occasion. All these witnesses belong to Asaram's party and are admittedly dependent upon him for their very living. The second enquiry suggested by the Magistrate's order dated 11th June 1928 undoubtedly gave Asaram a fresh opportunity to easily cook up this evidence against his bitter enemy and present it before the Sub-Inspector of Police. That Asaram is not incapable of such a feat can be gathered from his own admission that he had instigated his watchman Hiraram to start a criminal case against Kashiram which failed, evidently because it was false. For these reasons I am not prepared to accept this evidence as true. Moreover, the testimony of Puran (P. W. 5) and Parsu (P. W. 9) even if true does not establish any threats at all while that of the two graziers fails to point out any " threats of violence " of such a nature as would in law justify the passing of an order under S. 107, Criminal P. C. The evidence for the defence establishes that there are two parties in the village and each party makes its own arrangements for the services of dhobis, graziers, barbers and blacksmiths, etc., and this should indeed be the normal outcome of party feeling. I, therefore, hold there is no substance in either of the first two charges enumerated in para. 6 of this order, and that the order for furnishing security should not, therefore, be sustained on the basis of these charges. The learned Sessions Judge has already rightly held that the other two allegations about the Ber tree do not come within the scope of the proceedings under S. 107, Criminal P. C. There then only remains the consideration of the other four charges which has not been done by the learned Sessions Judge when disposing of the appeal. In view of the dictum laid down in *Jairam* v. *Emperor* (2) it cannot be said that para. 8 of the Sessions Judge's judgment legally disposed of the appeal so far as these four points are concerned. Following the course suggested in the reported case, I, therefore, remand the case for retrial of the appeal and its disposal by a legal judgment, but the fresh hearing and disposal will be confined only to the four points left undecided by the previous judgment.

P N./R.K. *Case remanded.*

A. I. R. 1929 Nagpur 332

MOHIUDDIN, A. J. C.

Mulchand Balbadhar--Accused—Applicant.

v.

Municipal Committee, Gondia—Non-Applicant.

Criminal Revn. No. 161 of 1929, Decided on 29th July 1929.

C. P. Municipal Act (16 of 1903), S. 105 (1) (b), Bye-law 5 (a)—Lease can only be terminated according to law and it does not come to end at mere will of Committee—Transfer of Property Act, S. 106.

A lease can only be terminated according to law and it does not come to an end, at the sweet will of the Committee, by passing a resolution. [P 333 C 2]

A Municipal Committee granted a lease of immovable property. The lease was from month to month. No 15 days notice as required by law was given, but the Committee passed a resolution by which the lessee was to quit the land after seven days notice. On lessee's failure to do so he was convicted for breach of the bye-law 5 (a).

Held: that the lease could only be terminated with 15 days notice and as no such notice was given there was no breach of the bye-law 5 (a), and the conviction was illegal. [P 333 C 1, 2]

Samiullakhan—for Applicant.

G. A. Dixit—for Non-Appllicant.

Order.—The applicant Mulchand has been convicted under the Municipalities Act for committing a breach of bye-law 5 (a) under S. 105 (1) (b), Act 16 of 1903, and has been ordered to pay a fine of Rs. 40, by Mr Todkar, 3rd Class Magistrate, Gondia He had filed an appeal in the Court of the District Magistrate, Bhandara, who dismissed it on 15th March 1929.

Bye-law 5 (a) runs as follows:

"Every person the term of whose lease has expired shall, on the date of the expiry of his lease, at once without notice, vacate the shop, chabutra or stall, or site leased to him, unless the same is again leased to him and he pays the rent in advance as provided in by-law 4 above."

It is, therefore, necessary to find out the term of the lease, granted to the applicant. There is no doubt that he was a monthly tenant, as appears from the rent receipts Exs. D-1 to D-4. Ex. D-4 is dated 15th August 1928, and is a receipt given to the applicant under the signature of the Secretary, Municipal Committee, for the months of June and July 1928. A lease of immovable property can only be determined on the expiration of a notice to determine the lease or to quit, and as this was a lease from month to month, 15 days notice expiring with the end of a month of the tenancy ought to have been given. No such notice was given. Resolution dated 5th August 1928 runs as follows:

"These persons should be given seven days notice. If they do not remove the mandwa within the time specified, in that case legal action will be taken."

The Municipal Committee was entitled to pass the above resolution, but, it was the duty of its executive officer to give a proper and legal notice, which he failed to do. A lease can only be terminated according to law and it does not come to an end, at the sweet will of the Committee, by passing a resolution. The lease was not for any fixed term and the Committee by accepting rent for the month of July treated the applicant as a leasee from month to month. There has been no breach of the by-law 5 (a) and therefore the conviction is illegal. I set aside the conviction and sentence and direct the fine if recovered to be refunded.

P.N./R.K. *Conviction set aside.*

A I. R. 1929 Nagpur 333

MACNAIR, OFFG. J. C.

B. P. Byramji and *Co.*—Applicant.

v.

Khemkaran—Non-Applicant.

Civil. Revn. No. 138 of 1929, Decided on 29th July 1929, from order of Sm. Cause Court Judge, D/- 28th January 1929, in Execution Proceedings in Sm. Cause Suit No. 133 of 1926.

Civil P. C., O. 21, R. 48—O. 21, R. 48 has no application in case of persons in private service.

Order 21, R 48, has no application in the case of persons who are in private service.

If the Court issues a preliminary order against an employer of a person on 23rd of a month attaching his pay for the whole of the month, such order is illegal as the pay that would fall due on the first of each month is not a debt on the date of the order; nor can the pay of the 23 days be attached as an employee engaged by the month is not entitled to wages for the current month if he wrongfully leaves employment during the month and so the right to receive pay for 23 days is contingent on the due performance of service for the entire month: 27 *Cal.* 38 and 18 *Cal.* 80, *Rel. on.* [P 334 C 1].

J. K. R. Cama—for Applicant.

G. R. Deo—for Non-Applicant.

Order.—The Small Cause Court Judge has held that the pay of Mr. Prichard which falls due on the 1st of every month is in the nature of a debt due on the 1st of each month and that therefore a prohibitory order can issue against his employer in view of Rr. 46 and 48 O. 21, Sch. 1, Civil P. C. The order was passed on an application presented a year previously asking in vague terms for the attachment of the pay of Mr. Pri-

chard. The order is in my opinion contrary to the provisions of law. O. 21, R. 48, has no application as Mr. Prichard is in private service. The pay which would fall due on the 1st of each month was not on the date of the order a debt: *Haridas Acharjya* v. *Baroda Kishore* (1). It is argued for the non-applicant that an order might have been passed with regard to the pay for 23 days of January on the ground that this amount had become due on the date of the order. This proposition was not apparently put forward in the Small Cause Court: the order of the Judge states that the pay would become due on the 1st of the month. It is well established that an employee engaged by the month is not entitled to wages for the current month if he wrongfully leaves employment during the month: *Dhumee Behara* v. *C. H. C Sevenoaks*, (2) The right to receive pay for the 23 days of January then was contingent on the due performance of service for the entire month The wages for that period were not on 23rd January a debt which could be attached. I therefore set aside the prohibitory order. Costs in this Court will be borne by the non-applicant Khemkaran. Counsel's fee Rs. 25.

P.N./R K. *Order set aside.*

(1) [1900] 27 Cal 38=4 C. W. N. 87.
(2) [1886] 13 Cal. 80.

A. I. R. 1929 Nagpur 334

JACKSON, A. J. C.

Karan Singh—Appellant.

v.

Nandkishore and *others*—Respondents.

First Appeal No. 141 of 1927, Decided on 27th March 1929, against decree of Addl. Dist. Judge, Bilaspur, D/- 29th August 1927.

(a) Criminal P. C., S. 550—Sub-Inspector of Police closing shop on report of cheating—His action is unnecessary, but not illegal.

Where a Sub-Inspector of Police on a report made to him of theft and cheating closed a shop in order to be able to show to the Magistrate in the case of cheating that the shop or rather the goods contained in it had been sold to the shop-keeper for an inadequate price, it was unnecessary and undesirable to close the shop and put a stop to the business, but it was not illegal. [P 335 C 1]

(b) Tort—Malicious Prosecution — Shop closed during pendency of criminal trial against shop-keeper by Sub-Inspector of Police—Application made to Court to release shop but its consideration postponed by consent till end of trial—Accused knew that shop was in control of Court and not in possession of Sub-Inspector—Sub-Inspector acting in good faith is not responsible for loss to shop-keeper.

A shop was closed by Sub-Inspector of Police and remained closed pending the criminal trial against the shop-keeper. Application was made to the Court to release the shop alleging the shop was in the possession of the Sub-Inspector, but consideration of such application was postponed till the disposal of the case with the consent of the applicant.

Held: that the applicant who subsequently brought a suit for malicious prosecution against the Sub-Inspector knew that the shop was under the control of the Court and he being lax in obtaining its release, the Sub-Inspector of Police who was found to have acted in good faith was not responsible for the loss caused by the shop being closed.

[P 336 C 1]

G. P. Dick—for Appellant.

G. R. Deo and *J. Sen*—for Respondents.

Judgment.—The original plaintiffs in the suit out of which his appeal arises were Motichand, a pleader of Bilaspur, and his brother, Randhir Sahai. Motichand died during the course of the trial and his sons were brought on the record in his place. Motichand and Randhir Sahai were prosecuted for offences punishable under S 380 and S. 420, I. P. C., and were discharged. The prosecution originated in a report made to the police by Mt Jima Bai, defendant 1, and the investigation was conducted by Sub-Inspector Karan Singh, defendant 2. After Motichand and Randhir Sahai had been discharged they filed the suit out of which this appeal arises for damages for malicious prosecution. As regards Karan Singh, the present appellant, the suit was founded on the allegation that he had conspired with Mt. Jima Bai to prosecute the plaintiffs on charges of theft and cheating knowing them to be false, and that in the course of the investigation he maliciously closed Randhir Sahai's shop and kept it closed during the criminal proceedings, thereby causing loss to Randhir Sahai. The lower Court has passed a decree for Rs. 3,556-4-5 against Jima Bai as damages for malicious prosecution and for Rs. 3,838-8-9 against Karan Singh on the ground that he is liable for damages because of his gross negligence in dealing with Randhir Sahai's shop.

In appeal it is contended on behalf of Karan Singh that as he has been found to have acted in good faith, he has been wrongly found liable to pay damages. The question of his good faith has again been raised on behalf of the respondents, but I entirely agree with the reasons given by the lower Court for finding that he did act in good faith. Certain alleged irregularities in his procedure, not mentioned by the lower Court, have been placed before me, but some of them are not irregularities at all, and none of them leads me to suspect that Karan Singh acted otherwise than in good faith: that, however, does not dispose of the case against him.

It has been held by the lower Court that Karan Singh's action in closing the shop of Randhir Sahai was unjustified. Karan Singh has said that he closed the shop in order to be able to show to the Magistrate in the case of cheating that this shop, or rather the goods contained in it, had been sold to Randhir Sahai for a very inadequate price. He claims to have acted under S. 550, Criminal P. C. The lower Court holds that this reference to S. 550 is an afterthought I do not understand what the lower Court means. The reason for closing the shop may be an afterthought, as it was hardly likely to show to the Magistrate that the goods had been purchased for an inadequate price six months earlier, but as regards S. 550, whether Karan Singh's reference of his action to that section was or was not an afterthought, the question is whether the section covers his action. It has been urged that the goods, can, in no circumstances, be said to have been "found," but it seems to me they can very well be said to have been found in the possession of the plaintiff, Randhir Sahai, in circumstances creating suspicion of an offence. It seems to me that it was unnecessary and undesirable to close the shop and put a stop to the business, but I cannot say that it was illegal. It is, however, for subsequent negligence that Karan Singh has been held liable by the lower Court.

The question, then, is whether he can be held responsible for the loss resulting to Randhir Sahai from the shop having been kept closed for the period during which the criminal trials proceeded. The shop was closed on 19th September 1918, and the chalan under S. 420, I. P C., was presented on 8th October 1918, with the chalan the seizure memorandum was submitted to the Court, and it is contended on behalf of the appellant that the shop then came into the possession of the Court, that it was open to the plaintiffs to move the Court to release the shop, which they failed to do and that therefore no responsibility rests on Karan Singh. The seizure memorandum is not on the record, but it is clear from the deposition of Karan Singh (2 D. W. 3) that it was filed with the chalan. It was produced in order to refresh his memory as to the person to whom the key of the shop was given when it was closed. The memorandum should be on the record, but the reason why it is not appears to be that at the stage of pleadings the parties had not in mind Karan Singh's possible liability on the ground of negligence. It is true that in para. 24 of the plaint it is alleged that Karan Singh kept the shop closed under his charge, without placing it in the custody of the Court or taking care to preserve the goods. The reply in para 7 of Karan Singh's written statement is that the seizure of the shop was made under the Criminal Procedure Code in accordance with the law and was duly reported to the District Superintendent of Police and the Magistrate concerned. Nothing further was pleaded about the Sub-Inspector's failure to place the shop under the control of the Court, but in para. 4 of the plaintiffs' written reply, it is said that:

> "the arrest and closing of the shop and consequent damages were the results of malicious prosecution,"

and clearly the suit went to trial on the basis that Karan Singh's liability would depend on whether he had acted in good faith in prosecuting the plaintiffs and in closing the shop. It appears to me that it was only at the time of judgment when malice was negatived that the question of his liability on account of negligence came prominently before the lower Court.

It is contended on behalf of the respondents that Karan Singh continued throughout the criminal proceedings in possession and control of the shop. It is true that on two occasions during the proceedings they made applications to

the Court in which it was alleged that the Sub-Inspector of the Police was in possession of the shop. On 12th October 1918: see Ex. P-3, which is a copy of the order sheet in the case under S. 380, an application was made to the Court to direct the Sub-Inspector to produce certain books and papers. On 14th July 1919, the application, of which Ex. 2 D-8 is a copy, was made to the Court for the release of the shop, which was said to be kept locked and guarded by the police. But in spite of these allegations as to possession and control, the fact that the applications were made to the Court show that the plaintiffs recognized that the shop was in the control of the Court, as it clearly would be when the seizure memorandum was filed with the chalan.

It is clear that the plaintiffs took no steps to obtain the release of the shop till they made the application dated 14th July 1919 above referred to, and it is significant that there is an endorsement on that application dated 26th August 1919, which shows that consideration of the application was postponed with the consent of the applicants till the disposal of the case. After the case was disposed of, on 15th November 1919, the order sheet (Ex. P-2) shows that the Court directed the property (shop) to be made over to the person from whom it had been seized. It seems to me clear that the shop was under the control of the Court, that this fact was recognized by the plaintiffs and that they were lax in trying to obtain release. In these circumstances it seems to me clear that that the Sub-Inspector Karan Singh cannot be made liable for the loss caused by the closing of the shop on the ground that it was kept closed 15 months owing to his gross negligence. In view of the above finding, I need not go into the questions of limitation and assessment of damages. The appeal succeeds and the decree of the lower Court is set aside as against Karan Singh, who will get his costs in both Courts.

M.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Nagpur 336

MACNAIR, OFFG. J. C. AND JACKSON, A. J. C.

M. E. R. Malak—Applicant.

v.

Commissioner of Income-tax, Nagpur—Non-Applicant.

Misc. Petn. No. 33 of 1929, Decided on 25th July 1929 for leave to appeal to Privy Council against decision of Judicial Commissioner, D/- 11th April 1929, in Misc Judicial Case No. 25 of 1928, D/- 18th April 1929.

*** (a) Income-tax Act (11 of 1922), S. 66-A—S. 66-A excludes from right of appeal cases which fall within requirements of S. 110, Civil P. C.—Civil P. C., S. 110.**

The words "to be a fit one for appeal to His Majesty in Council" coupled with the words "so far as may be" in para. 3, S. 66-A, exclude from any right of appeal cases which fall within the requirements of S 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council : *A. I. R.* 1927 *P. C.* 242, *Foll.* [P 337 C 1]

(b) Income-tax Act, S. 11 (11) (a) (b)—Determination by Board of two Abidi years to be previous year for assessment—Objection to such order—It was not shown that there were other assessees making accounts according to Abidi year—Sum in dispute about Rs. 20,000 — Point is not one of great private or public importance and case cannot be certified as otherwise fit—Civil P. C., S. 109.

The Central Board of Revenue determined the period of the two Abidi years which ended during one calendar year to be the previous year for the purpose of assessment. It was contended by the assessee that it was not within the competence of the Board to pass such an order. The sum in dispute was about Rs. 20,000. It was not shown that there were other assessees who took as their previous year a year which is consistently less than calendar year.

Held : that the point in dispute was not of great public or private importance and the case could not be certified to be otherwise fit for appeal to Privy Council : 23 *All.* 227 (*P. C.*) and *A. I. R.* 1927 *P. C.* 242, *Ref.* [P 337 C 2]

M. B. Niyogi—for Applicant.

D. N. Choudhry—for Non-Applicant.

Order.—The applicant Moulana Mohammad Ibrahim Riza Malak asks for leave to appeal to the Privy Council against the final order passed by this Court on 18th April 1929 on a reference made by the Commissioner of Income-tax under S. 66 (2), Income-tax Act 11 of 1922. The right of appeal to the Privy Council from such a decision is given by sub-S. (2), S. 66-A and is confined to a case which the

High Court certifies to be a fit one for appeal to his Majesty in Council. Their Lordships in *Delhi Cloth and General Mills Co. Ltd.* v. *Income tax Commissioner, Delhi* (1) state that the words "to be a fit one for appeal to his Majesty in Council" coupled with the words "so far as may be" in para. 3, S. 66-A exclude from any right of appeal cases which fall within the requirements of S. 110, Civil P. C., and are operative to confine that right to cases which are certified to be otherwise fit for appeal to his Majesty in Council. The sum is admitted to be over Rs 10,000 so that the case thus falls within the requirements of S. 110, Civil P. C, for the appeal need not involve a substantial question of law when an order of this Court is passed otherwise than on an appeal. But S. 66-A excludes from right of appeal cases which fall within the requirements of S. 110 of the Code. We have to decide whether the case is otherwise fit for appeal to his Majesty in Council.

Their Lordships of the Privy Council in *Banarasi Prasad* v. *Kashi Krishna Narain* (2) have stated that the provision authorising a High Court to certify that the case is fit for appeal "otherwise" is clearly intended to meet special cases: such, for example, as these in which the point in dispute is not measurable by money, though it may be of great public or private importance. This statement of their Lordships must be considered with reference to the point which they desired to decide. They had pointed out that the section corresponding to the present S. 110, Civil P. C., did not allow an appeal in any case where the value of the subject matter in dispute was less than Rs. 10,000 and they were dealing with cases where the point in dispute in so far as it was measurable by money could not be said to be an amount of Rs. 10,000 or upwards. It cannot then be inferred from the statement that their Lordships considered that the point in dispute could not be held to be of great private importance to the parties for the sole reason that it involved a very large sum of money. It may well be then that if the subject matter of the suit is a sufficiently large amount a High Court may be authorised to certify that the case is fit for appeal on the ground that it is o great private importance: but their Lordships' judgment in *Delhi Cloth and General Mills Co. Ltd.* v. *Income-tax Commissioner, Delhi* (1) shows that no certificate should be given merely because the sum in dispute is in excess of Rs. 10,000 by an amount which is not very great. The sum in dispute is stated in the application to be Rs. 22,084-7-0. It is in reality less as the applicant admitted liability for some income-tax: it is probably in the neighbourhood of Rs. 20,000. In our opinion it cannot be said that the point in dispute is of great private importance merely because the sum in dispute is about Rs 20,000. We do not consider that Rs. 20,000 can be said to be very greatly in excess of Rs. 10,000 for the purpose of deciding whether a dispute affecting it is of great private importance and admittedly the main point in dispute will not affect the payment of income-tax in the near future. The only ground on which we are asked to grant a certificate is that the point in dispute is of great public or private importance. We cannot, then, certify the case to be fit for appeal unless the point is of great public importance.

In the application it is said that the case involves an important question of law, namely, the meaning of the word "previous year" within the meaning of Ss. 2 (11) (a) and (b), Income-tax Act 11 of 1922. The facts which led to the reference were briefly these. Under S. 3, Act 11 of 1922 income-tax for any year is charged in respect of the income, profits and gains of the previous year. The "previous year" is ordinarily the twelve months ending of 31st March next preceding the year for which the assessment is to be made, but S. 2 (11) (a) allows the assessee to take as his previous year a year ending on a date within 12 months before that 31st March if his accounts have been made up in respect of that year. This previous year chosen by the assessee need not be 12 calendar months: it is very common for commercial years to differ from periods of 12 calendar months, but ordinarily these years, sometimes longer and sometimes shorter than 12 calendar months and in the same season: so that the total

(1) A. I. R. 1927 P. C. 242=9 Lah. 284=54 I. A. 421 (P. C.).
(2) [1901] 23 All. 227=28 I. A. 11=7 Sar. 825 (P. C.).

length of a number of these years varies little from that of an equal number of calendar years. Now the assessee and his adherents form the "Atba-e-Malak Badar Community" and have for a number of years made up accounts according to what they term an abidi year. This year is always 10 or 15 days shorter than a calendar year. At intervals of about 30 years two of these abidi years will end during the 12 months preceding 31st March. The assessee for the year 1925-1926 paid in respect of income, profits and gains of the abidi year ending on 4th April 1924. The next abidi year ended on 25th March 1925 and when the question of income-tax for the year 1926-1927 arose he claimed that he should be charged in respect of the profits for the abidi year from 25th March 1925 to 13th March 1926 thus escaping tax on the profits on the intervening abidi year. The Central Board of Revenue determined the period of the two abidi years to be the previous year for the purpose of assessment for the year 1926-1927.

The question of law raised by the applicant is that it is not within the competence of the Board to make such an order. It has not been shown to us by the applicant that there are other assessees in India who take as their previous year a year which is consistently less than 12 calendar months. We do not know then that this question of law is ever likely to arise with respect to any other assessee. The question will not arise again with regard to the present assessee for a period of about 30 years. We must, therefore, hold that the point in dispute is not of great public or private importance. We cannot therefore certify the case to be "otherwise fit for appeal to his Majesty in Council." We dismiss the application with costs on applicant. Counsel's fee Rs 100.

P.N./R K. *Application dismissed.*

A. I. R. 1929 Nagpur 338

MACNAIR, Offg J. C.

Nagoba and *another*—Applicants.

v.

A. V. Zinzarde—Non-Applicant.

Civil Revn. Appln. No. 134 of 1929, Decided on 9th September 1929, from order of Dist. Judge, Nagpur, D/- 4th January 1929, in Misc. Appeal No. 15 of 1928.

(a) Provincial Insolvency Act, S. 4 — As soon as Court finds that receiver is wrongly given possession, Court should direct him to deliver possession to proper person.

The receiver is an officer of the Court and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper person. If the insolvency Court, owing to a mistaken view of the law, does not pass such an order, the person aggrieved may appeal and the appellate Court should pass the order and appeal should not be dismissed merely because insolvent delays in asking to be put in possession. [P 339 C 1]

(b) C. P. Tenancy Act, S. 49—"To occupy any portion of his sir land as proprietor."

The words "to occupy any portion of his *sir* land as a "proprietor" in S. 49, mean to enjoy the proprietary rights in any portion of *sir* land. [P 339 C 1]

(c) C. P. Tenancy Act, S. 49—Owner of sir land adjudged insolvent—Order passed vesting his land in receiver—Owner becomes occupancy tenant of sir land—Provincial Insolvency Act, S. 28 (5).

The intention of S. 49 appears to be that whenever proprietary possession temporarily passes from the owner of *sir* land he becomes an occupancy tenant. If an owner of *sir* land is adjudged insolvent and order is passed vesting his property in the receiver, he no doubt loses his right to proprietary rights in the *sir* land but by the vesting order he becomes the occupancy tenant of the *sir* land and is entitled to possession of the land: *A. I. R* 1924 *Nag.* 159, *Rel. on.* [P 339 C 2]

M. R Bobde and *V. V. Kelkar* — for Applicants.

V. Bose and *P. N. Rudra* — for Non-Applicant.

Order — The applicants are insolvents. On 27th April 1926 an order was passed in virtue of which all the property of the insolvents including *sir* lands was vested in the receiver and given into his possession. In the beginning of 1928 the insolvents asked that they should be put into possession of the *sir* lands on the ground that they, by the order dated 27th April 1926, had become exproprietary occupancy tenants under the provisions of S. 49, C. P. Tenancy Act. The insolvency Court held that they had not become tenants: in appeal the learned District Judge, Nagpur, held that they had become tenants but considered that because the insolvents had not urged this point sooner, the appeal failed. The learned Judge remarked that it might be open to the lower Court to return possession of the occupancy rights in the *sir* lands to the insolvents.

The insolvents have applied for revision and S. 75, Provl. Insol. Act, gives

me ample power to set aside the order if it is not according to law. I do not think the appeal of the insolvents ought to have been dismissed on the ground that the applicants had failed to take a plea at a previous stage of the case or had delayed their application. The receiver is an officer of the Court and as soon as the Court finds that he has wrongly been given possession and ought not to remain in possession, the Court should direct him to deliver possession to the proper persons. If the insolvency Court owing to a mistaken view of the law, does not pass such an order, the person aggrieved may appeal and the appellate Court should pass the order.

I have therefore to consider whether or not the insolvents were in reality entitled to possession when they applied for possession. If this was the case, the receiver will be directed to deliver possession to the insolvents. The insolvents had not asked for and will not receive, anything in the nature of compensation for the profits of the lands during the period during which the receiver was in possession I have to construe the following words extracted from S. 49, C. P. Tenancy Act (1 of 1920):

"A proprietor, who temporarily . . . loses, whether under a decree or order of a civil Court or a transfer or otherwise his right to occupy any portion of his *sir* land as a proprietor, shall, at the date of such loss, become an occupancy tenant of such *sir* land."

Now in a series of rulings reference has been made to the possessory as apart from the cultivating right of a proprietor in *sir* land. I cite a sentence from *Diwan Zalimsingh* v *Chhadamilal* (1) at p. 136:

"In the present case the plaintiffs are entitled to bring to sale the entire rights, i. e., the possessory and the cultivating rights of the proprietor in the *sir* land."

In *Sheolal* v. *Nanhelal* (2) at p. 127 it was stated:

"that the proprietary and cultivating rights are co-existing and component parts of the *sir* right,"

The words "to occupy any portion of his *sir* land as a "proprietor," in S. 49, C. P. Tenancy Act, appear to me to refer to this view and to mean to enjoy the proprietary rights in any portion of *sir* land. There can be no doubt that by the vesting order the insolvents temporarily lost their right to enjoy the proprietary rights in the *sir* land: after the vesting order the receiver deals with these rights in the manner he considers most beneficial to the interests of both creditors and insolvents. It is not necessary to consider whether the insolvents temporarily lost their proprietary rights in the *sir* lands: What has to be considered is whether they temporarily lost their rights to proprietary enjoyment, i. e., to proprietary profits etc. The intention of S 49, Tenancy Act, appears to be that whenever proprietary possession temporarily passes from the owner of *sir* land, he becomes an occupancy tenant I therefore hold that the order causes the insolvents to become occupancy tenants of the *sir* lands. Prideaux, A J. C., in a judgment passed on 31st August 1923 in *Shrikishan* v. *Nagoba*, *A. I. R.* 1924 *Nag* 158 considered the question whether a receiver could apply for sanction of the sale of the cultivating rights in *sir* land, he held that by the vesting order the insolvents acquired occupancy rights and I fully agree with his reasons for so holding.

It is clear that the right of an occupancy tenant cannot be attached and sold in execution of a decree: S. 12, (2), Tenancy Act, and, therefore, the tenancy rights do not vest in the receiver (S. 28 (5), Provl. Insol Act). At the date of the application the insolvents were occupancy tenants and the receiver was not entitled to possession of the cultivating rights: the insolvency Court should therefore have directed delivery of possession of the *sir* land to the insolvents. I set aside the orders of the insolvency and appellate Courts and direct that the insolvents shall now be placed in occupation of the land which formed their *sir* land. Costs in all Courts will be paid from the funds in the hands of receiver. Counsel's fee in this Court forty rupees.

P.N./R.K. *Order set aside.*

(1) [1894] 11 C. P. L. R. 133.
(2) [1912] 8 N. L. R. 123=17 I. C. 129.

A. I. R. 1929 Nagpur 339

SUBHEDAR, A. J. C.

Ganeshlal—Appellant.

v.

Sardarmal—Respondent.

First Appeal No. 118 of 1928, Decided on 19th April 1929, from decree of Addl. Dist. Judge, Raipur, D/- 6th June 1929 in Civil Suit No. 9 of 1922.

Civil P. C., O. 21, R. 2—Pre-decree arrangement not to execute decree is no bar to its execution.

A pre-decree arrangement by which a decree is not to be executed cannot be pleaded in bar of the execution of the decree: 11 *N. L. R.* 110; 29 *Cal.* 810 and 31 *Cal.* 179, *Rel. on.*; *A I.R.* 1926 *Mad.* 582, *not Foll.* [P 340 C 2]

S. K. Ghosh—for Appellant.

Abdul Razak—for Respondent.

Judgment—In Civil Suit No. 9 of 1922 on the file of the Additional District Judge, Raipur, a final decree for foreclosure was passed against the defendants-appellants on 19th March 1927. The respondent on 3rd August 1928 filed an application for execution of the said decree asking for delivery of possession of the foreclosed properties and a warrant for possession was issued, but returned unexecuted because it was reported that the houses were locked. On 22nd September 1928 a fresh warrant was issued with directions to break open the locks and deliver possession of the houses to the respondent decree-holder.

On 26th September 1928 the appellants judgment-debtors presented an application to the lower Court contending that on account of a certain agreement arrived at between the parties before the preliminary decree was passed the decree could not be executed otherwise than in terms of the alleged agreement which are set out in para. 2 of the application in these words:

"That these Judgment-debtors contend that prior to the passing of the decree there was an agreement between the parties that in case the subsequent-mortgagee Madhoram Parasram would fail to redeem and pay up the decretal amount this decree-holder would not execute the decree against these judgment-debtors and accept the decretal money in three annual instalments ten months after the decree absolute. That the consideration for this agreement was that these judgment-debtors would not dispute the decree-holders' claim under the mortgage which part of the agreement the judgment debtors have performed."

The lower Court overruled the objection on the short ground that it could not go behind the decree. It is against this order that the judgment-debtors have come up in appeal to this Court.

Reliance was placed by the learned pleader for the appellants on the case of *Venkatasubba Mudali* v. *Manickammal* (1), which, following an earlier Full Bench case of the same Court, lays down that a pre-decree arrangement, by which a decree was not to be executed, can be pleaded in bar of the execution of the decree. On the other hand, in the case of *Hukamchand* v. *Radhakisan* (2) this Court following the law propounded by the Calcutta High Court in the cases of *Benode Lal* v. *Brojendra* (3) and *Hassan Ali* v. *Gauzi Ali Mir* (4), has held exactly the opposite view after expressly dissenting from that taken by the Bombay High Court in the case of *Laldas* v. *Kishordas* (5)

We prefer to follow the view of this Court and hold that the appellants cannot plead the agreement set up by them in bar of the execution of the final decree for foreclosure The result is that this appeal fails and is dismissed with costs. Pleader's fee Rs. 50.

P.N./R.K. *Appeal dismissed.*

(1) A.I.R. 1926 Mad. 582=49 Mad. 518.

(2) [1915] 11 N. L. R. 110=29 I. C. 838.
(3) [1902] 29 Cal. 810=6 C. W. N. 898.
(4) [1904] 31 Cal. 179.
(5) [1898] 22 Bom. 463.

A. I. R. 1929 Nagpur 340

FINDLAY, J. C.

Bhagwan Prashad—Plaintiff—Appellant.

v.

Ramcharanlal and *others*—Defendants—Respondents.

First Appeal No. 97 of 1926, Decided on 13th December 1927, from decree of First Class Sub-Judge, Chhindwara, D/- 14th September 1926, in Civil Suit No. 10 of 1926.

Transfer of Property Act, S. 43—Transfer by one of the widows of part of property of her husband — Transfer by another widow of her portion also — Compromise between widows not to contest each other's transfers—Transferee from one widow afterwards succeeding otherwise to the property as legal heir—Compromise does not hold good — S. 43, T. P. Act, has no application.

Where there was on the part of defendant 1, a transferee from one of the widows of the deceased owner of the property, a promise not to contest the rights of the other widow of the deceased in the property she was then holding, while she also made a similar mutual promise as regards the property in possession of defendant 1, and thus there was a mutual compromise that in future each would not contest the other's right, but where later on defendant 1 in the course of law, obtained an indefeasible title to the property independant of the widow.

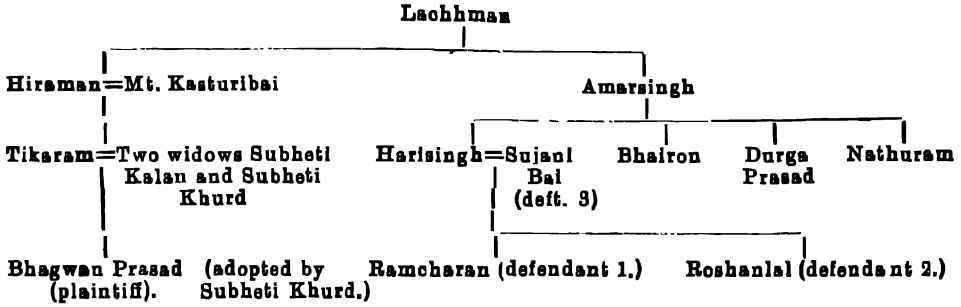
***Held*: that the compromise ceased to have any effect and so the transferee from the first widow cannot say that defendant 1 was estop-**

ped from suing for the claim of his share in the property. S. 43 T. P. Act, has no application in such case : *A. I. R.* 1923 *All.* 204 ; *A. I. R.* 1923 *All* 387 (*F.B*) a d *A. I. R.* 1924 *All.* 826, *Dist. Smith* v. *Osborne*, (1857) 6 *H. L. C.* 875, *Ref.* [P 343 C 1]

A. V. Khare and *V. R. Dhoke*—for Appellant.

B. K. Bose, *V. Bose*, *P. N. Rudra*, *S. V. Mangrekar* and *D. K. Ghosh Chaudhry*—for Respondents.

Judgment—A somewhat interesting question of law arises in the present case. The following genealogy is not disputed.



Hiraman was the owner, amongst other property, of mouza Bagdari (Chhindwara) and of the *sir* and khudkasht fields therein mentioned in para. 9 of the plaint. He died about 1869, having been predeceased by his son Tikaram. Hiraman also owned mouza Lingpani, mouza Bhaliwara and an eight annas share of mouza Bilanda On Hiraman's death, the property went to his widow Mt. Kasturibai ; she died in 1886, and the two widows of Tikaram Subheti Kalan and Subheti Khurd then took possession of the property. During their lifetime about 1890, they effected a partition of the property as follows : Subheti Kalan took mouza Bhaliawara and the eight annas share of mouza Bilanda, and Subheti Khurd took mouza Lingpani and mouza Bagdari. The present plaintiff is said to have been adopted by Subheti Khurd in 1892 ; Subheti Kalan had the adoption declared null and void in a litigation which progressed about the year 1901.

In 1909, Subheti Kalan executed a will in favour of Ramcharan (defendant 1), and placed him in possession of the property held by her. Subheti Khurd, thereupon, was on the point of filing a suit for cancelling the will and for recovery of the property held by Ramcharan, but the two ladies effected a mutual settlement, whereby it was agreed that neither of them should disturb the transfers made by the other. As a result of this settlement, defendant 1 continued to hold Bhaliwara and the eight annas share of mouza Bilanda, while Subheti Khurd, in 1912, made a gift of mouza Bagdari to the plaintiff and gave him possession of mouza Lingpani and other property in 1921 shortly before her death. Prior to this in 1916. Subheti Khurd had filed Civil Suit No, 33 of 1916 in the Court of the District Judge, Chhindwara, against Ramcharan and others for possession of the property he held. The case came up on second appeal to this Court and, during the pendency of the said second appeal, a compromise was arrived at between Subheti Khurd and the defendant, whereby, inter alia, the former recognized the latter as the owner of the property concerned in the said suit, while the latter declared that he had no rights over mouzas Bagdari and Lingpani and agreed to recognize the gift of mouza Bagdari made by Subheti Khurd in favour of the plaintiff

We now come to the year 1921. In that year, Subheti Khurd died. The father of Ramcharan, Harisingh, filed Civil Suit No. 147 in the year 1922 in the Court of the First Class Subordinate Judge, Chhindwara, against the plaintiff and his father Gopal Prasad for possession of the 16 annas share of mouza Bagdari and Lingpani and succeeded in getting possession from the Court. Harisingh died in 1925 and, on his death, Ramcharan and his brother Roshanlal succeeded to the property obtained by their father in Civil Suit No. 147 of 1922.

Plaintiff's case apparently was that the defendant Ramcharan was bound by the compromise in suit No. 33 of 1916 and was bound to restore mouza Bagdari to

him. The Subordinate Judge, by his order of 21st August 1926, held that the plaint did not disclose a cause of action and returned it for amendment. The amendment made, as shown by the Subordinate Judge in his order of 14th September 1926, left matters, to all intents and purposes, as had previously been, and the Subordinate Judge accordingly dismissed the suit. Against this judgment, dated 14th September 1926, the plaintiff has now come up on appeal.

The main contention urged on behalf of the plaintiff-appellant in this appeal is that Bhagwan Prasad has a right to the property in suit by virtue of the principle laid down in S. 43, T P. Act, and reference has been made to the decicisions in *Kanhai Lal* v. *Brij Lal* (1), *Bahadur Singh* v. *Ram Bahadur* (2), *Fateh Singh* v. *Rukmini Ramanji Maharaj* (3) and *Kunti* v. *Gajraj Tiwari* (4), in this connexion. In the first case quoted, *B*, one of three brothers, was, by survivorship, the sole owner of the estate of a Hindu joint family, and his widow became entitled to that estate for life. Her title was, however, disputed by *A* and *P* and *K*, the widows of pre-deceased brothers of *B*. *A* set up a claim to the entire family estate based on the allegation that he had been adopted by *P* to her deceased husband, and was entitled as such adopted son to the whole property. *P* supported the claim of *A*, and together with *K* alleged that the three brothers had separated and that their widows were each entitled to one-third share of the estate. The widow of *B* brought a suit against *P* and *K* for a declaration that *B*, her husband, had been the sole owner of the family property. Before this suit came on for hearing, *B's* widow, her daughter, *P*, *K* and *A* entered into a compromise.

Their Lordships of the Privy Council held that *A* was precluded from claiming as a reversioner by his having been a party to the compromise, which as well as the awards made in accordance with it were binding on him.

In the first *Allahabad* case (2) quoted, one *S* had died leaving two surviving daughters and two cousins who were separated, both from him and each other. All four of these entered into an agreement whereby they divided *S's* property between them in equal shares. One of the cousins sold the share so acquired ; the other cousin died leaving three sons who succeeded to their father's share. On the death of one of the daughters, her husband claimed possession of her share in the property of her father, and in this he was resisted by the three sons of the deceased cousin who claimed title in themselves.

It was held therein that the defendants, although no parties to the agreement by which the property of *S* was divided, yet had received the benefit of it on the death of their father, and could not be permitted to question its validity. In the other *Allahabad* case quoted, a reversioner to the estate of a deceased separated Hindu had expressly assented to an alienation of the property forming part of the estate made by the widow in possession. It was held that such a reversioner cannot, on succeeding to the estate after the widow's death, repudiate his action and sue for possession of the property alienated by the widow. In the *Kunti* v *Gajraj* (4), decision quoted, Walsh, Ag. C. J. and Ryves, J., held that, according to equity and good conscience, when parties having agreed not to go to law, carried out by a mutual arrangement their mutual promises, the Courts in India will not permit any of such parties to repudiate what has been done, and will prohibit any person claiming under such party from attempting the same thing.

It has been urged on behalf of the plaintiff-appellant in this Court that, as he was a party to the compromise of 1918, by which Subheti Khurd and he arrived at a compromise by which the former recognized defendant-respondent 1 as the owner of the property then in suit, while Ramcharan declared that he had no rights over Bagdari and Lingpani and agreed to recognize the gift of Bagdari made by Subheti Khurd in the plaintiff's favour, Ramcharan is now estopped from contesting the plaintiff's right to the property in suit. It is further urged that now, as Ramcharan has succeeded to the property as heir to his father Harisingh, he cannot, in equity, be allowed to question the title of the plaintiff : cf.

(1) A.I.R. 1918 P.C. 70=40 All. 487=45 I.A. 118 (P.C.).
(2) A.I.R. 1923 All. 204=45 All. 277.
(3) A.I.R. 1923 All. 387=45 All. 389 (F.B.).
(4) A.I.R. 1924 All. 826=46 All. 847.

Smith v. *Osborne* (5) and it has further been urged in this connexion that, under S. 23, Cl. (c), Specific Relief Act, the present plaintiff-appellant has a right to enforce performance of the compromise arrived at in 1918.

For my own part, I am wholly unable to accept the contentions which have been urged on behalf of the appellant in this connexion. There can be no question but that, by the compromise of 1918, defendant-respondent 1's rights entirely disappeared for the time being and that the latter was bound by the compromise so far as the title to the property in dispute was concerned. That title it will be remembered, was derived from the will of Subheti Kalan made in 1909 In the present case, however, a wholly different set of facts came later into operation. The father of defendant 1, who had not been a party to the compromise of 1918, brought a suit in 1922 against the plaintiff and his father Gopal Prasad for possession of mouza Bagdari and mouza Lingpani and succeeded in getting possession thereof. Harisingh thus got an indefeasible title against the present plaintiff and, as he died in 1925, I am of opinion that his estate properly devolved on defendants 1 and 2

I do not think, in the circumstances of the case, there can be any question of applying the principle laid down in S. 43, T P. Act. So far as the compromise of 1918 was concerned, there was no transfer of any property. There was only, on the part of defendant 1, a promise not to contest the rights of Subheti Khurd in the property she was then holding, while Subheti Khurd made a similar mutual promise as regards the property in possession of Ramcharan As regards the dispute of title then in question, there was a mutual compromise that in future each would not contest the other's right. Now, however, a wholly different state of affairs has arisen. The father of defendant 1 has meanwhile, in course of law, obtained an indefeasible title to the property and his son Ramcharan has now succeeded as one of the heirs thereto. It is difficult, in those circumstances, to find the slightest ground for the present suit. The position of the appellant seems to me a forced and an unnatural one.

Let us assume in the present case that, after the compromise, Subheti Khurd had mortgaged all her property to a stranger and that the mortgage not having been satisfied, it had passed in whole to the mortgagee. Let us assume also to take an extreme case that the mortgagee in question had thereafter made a gift or a sale of the property in favour of defendant 1. On the position taken by the appellant in this Court, defendant 1 would even thereafter be estopped from denying the title of the plaintiff to the property in question. The position, in short, taken up by the plaintiff in this case leads to a sheer reductio ad absurdum. I am of opinion, therefore, that the case has been rightly decided by the lower Court and that, in reality, the plaint discloses no valid cause of action.

The appeal is accordingly dismissed. The appellant must bear the respondents' costs.

Costs in the lower Court as already ordered.

N.K./R.K. *Appeal dismissed.*

(5) [1857] 6 H.L.C. 375=6 W.R. 21=3 Jur. (n.s.) 1181=108 R.R. 161.

A. I. R. 1929 Nagpur 343

JACKSON, A. J. C.

Gulabchand—Defendant—Appellant.

v.

Bhaiyalal and *others* — Plaintiffs — Respondents.

Second Appeal No. 288 of 1928, Decided 12th August 1929, from decree of Dist. Judge, Jubbulpore, D/- 13th February 1928, in Civil Appeal No. 134 of 1927.

(a) Civil P. C., S. 100—Point not raised in first appeal should not be allowed to be raised in second appeal.

When a person does not state in his grounds of first appeal anything about marriage of *A* with *B*, he should not be allowed to urge in second appeal that the marriage took place and was valid. [P 344 C 1]

(b) Evidence Act, S. 18—Admission of points of law cannot bind person.

Admission by a person that a Brahmin widow was admitted into the caste of Ahirs and that she was Kari wife of an Ahir, includes an admission of a point of law which would not bind him. [P 344 C 2 ; P 345 C 1]

(c) Evidence Act, S. 114—Persons who cannot prima facie contract valid marriage living together as man and woman—No presumption of valid marriage arises.

Presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an Ahir and a Brahman widow,

who cannot prima facie contract a valid marriage. [P 345 C 1]

(d) Civil P.C., S. 100—Court holding that document is so worded as to obscure its meaning—It is not interpretation of document.

Where the Court holds that the document is so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender, it is not an interpretation of a document and such finding does not involve a point of law. [P 345 C 1]

M. R. Bobde and *R. N. Padhye*—for Appellants.

G. R. Deo—for Respondents.

Judgment. — This judgment will govern two second appeals Nos. 288 and 289 of 1928. They arise from two suits, in one of which the malguzar sues for possession of certain fields in mouza Dhangawan. In the other the three plaintiffs, Bhaiyalal, Jhunni and Chutti, have sued for mesne profits of the said fields for the period during which they were dispossessed by the malguzar. Gulabchand's suit and his defence in the other suit are based on two surrender deeds, one executed by Mt. Phuljariya who, he alleges, was the Kari wife of Chunnu, the deceased brother of Bhaiyalal, Jhunni and Chutti. The other surrender deed has been executed by Jhunni and Chutti. It is the finding of the two lower Courts that Phuljariya, who was a Brahmin widow, was not and could not be legally married to Chunnu, an Ahir, and that the alleged surrender deed executed by Jhunni and Chutti was not intended by them to be a surrender deed, they were overreached by the malguzar and that they were merely executing a compromise in respect of certain criminal cases that had been filed in connexion with the dispute about the land.

The lower appellate Court has pointed out that in the grounds of appeal before it nothing was stated about the marriage of Phuljariya with Chunnu. In these circumstances I am inclined to think that Gulabchand should not be allowed in second appeal to urge that the marriage took place and was valid ; but at the same time I should like to state my opinion that on the record it could not be held proved that a valid marriage took place. My attention has been drawn to the following sentence in Russell's Tribes and Castes of the Central Provinces, Vol. 2, p. 23 :

"But though the Ahir caste takes its name and is perhaps partly descended from the Abhira tribe, there is no doubt that it is now and has been for centuries a purely occupational caste, largely recruited from the indigenous tribes."

It is argued from this that the Ahirs cannot be held to be bound strictly by the doctrines of Hindu Law, and, in particular, marriage among them must be regarded as governed by usage It is urged that it was pleaded in the trial Court that, by usage, the marriage of an Ahir male with a Brahmin female is a valid marriage and that the trial Court has failed to go into the plea of usage. An issue was framed as regards the marriage of Chunnu and Phuljariya in the following words :

(a) Whether Chunnoo married Mt. Phuljhariya in the Kari form of marriage?

(b) If so what was the legal effect of the marriage of Brahmin widow and an Ahir ?

Under this issue it was open to Gulabchand to prove the alleged usage and show that such a marriage was valid ; but he has not done so. *Bai Gulab* v. *Jiwanlal Harilal* (1) has been cited. In that case it has been held that in the Bombay Presidency a marriage between a Vaishya male and the illegitimate daughter born of Vaishya father and a Sudra mother is valid. That decision is, however, no authority for holding that the marriage between a Sudra and a woman of a higher caste is valid. Assuming that Chunnu and Phuljariya did go through a form of marriage, I am unable to hold that it has been proved to be valid.

On behalf of Gulabchand an argument has been based on the fact that on 21st September 1926 Bhaiyalal admitted that Phuljariya was admitted into the caste of Ahirs and that she was Kari wife of Chunnu. The trial Court allowed this pleading to be withdrawn, although it remarked that it doubted whether Bhaiyalal was unable, as he alleged, to understand the meaning of Kari wife. It is urged that this amendment should not have been allowed and that the admission by Bhaiyalal was sufficient to prove the fact of the marriage and usage which made it valid. I am unable to accept this argument, because I find that Bhaiyalal's admission was in direct contradiction of the pleading made by him on the same day, and it includes in any case, if the contention on behalf of Gulabchand is correct, an admission of a

(1) A. I. R. 1922 Bom. 32=46 Bom. 871.

point of law which would not bind him. It has also been urged that as Chunnu and Phuljariya admittedly lived together as man and woman, it should be presumed that they were validly married ; but that presumption cannot, however, be drawn in the circumstances like those of the present case in which the union is between a man and a woman who cannot, prima facie, contract a valid marriage.

The surrender deed executed by Phuljariya can be given no effect. As ragards the other surrender deed the finding of the two lower Courts is a finding of fact. It is urged that a point of law is involved as the finding depends upon the interpretation of a document. That does not seem to me to be the case. The lower Courts in effect hold that the document was so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender. This is not the interpretation of a document ; and I see no reason for interfering with the finding of fact by the two lower Courts that Jhunni and Chutti did not intend to execute a deed of surrender. It must, I think, be found that Gulabchand had no right to possession of the fields and that his claim to possession was rightly dismissed and the claim against him for mesne profits rightly decreed. I dismiss both appeals with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 345

SUBHEDAR, A. J. C

Vishnu—Applicant.

v.

Secy. of State—Non-Applicant.

Civil Revn. No. 136-B of 1928, Decided on 25th February 1929, from order of Small Cause Court Judge, Akola, D/- 15th March 1928, in Civil Suit No. 2497 of 1927.

(a) Berar Land Revenue Code, S. 160 (3) —Rules framed under R. 4—Chaudi.

If a Chaudi could conveniently accommodate a school or vice versa, it would none the less be regarded a Chaudi. [P 346 C 1]

(b) Berar Land Revenue Code, S. 160 (3) —Rules under, R. 5—Rule 5 does not provide for notices to be given to assessees individually.

Rule 5 does not provide for notices to be given to the assessees individually and if only one notice to all the assessees in the village is posted in the Chaudi along with the copy of the register, it is sufficient compliance with R. 5. [P 346 C 2]

(c) Berar Land Revenue Code, S. 160 (3) —Rules under, R. 4—Identification of assessment registers made in December is proper.

There is no provision in the Code or the rules framed thereunder, which prohibits the verification of assessment registers by the Revenue Officers after 30th November and declares such an action on their part as void, and so if verification is made in December, it is perfectly in order. [P 346 C 2]

(d) Berar Land Revenue Code, S. 175— Scope.

If the procedure adopted by the Revenue Officers acting under rules made under S. 160 (3) is irregular, person's remedy is by way of appeal to the higher revenue authorities and not by a civil suit. [P 346 C 2]

G. G. Hatvalne—for Applicant.

G. P. Dick—for Non-Applicant.

Order.—This application for revision arises out of a suit brought by the plaintiff-applicant in the Small Cause Court, Akola, to recover Rs. 2 from the Secy. of State for India, the defendant-non-applicant, alleged to have been illegally recovered from him by the Tahsildar of Akola on 11th May 1927, in respect of Mahar Jaglia cess for the year 1926-1927.

The principal ground on which the right of suit was founded is contained in para. 1 of the plaint wherein it is stated that the assessment was ultra vires because no notice, as required to be given under the rules regulating the assessment and collection of cesses, was given to the plaintiff. These rules are framed by the Local Government under S. 160 (3), Berar Land Revenue Code, and published as Notification No. 1448-738-12, dated 17th May 1923. Rules 4 and 5 may usefully be reproduced below :

"(4) Between October 1st and November 30th, the Tahsildar with the assistance of the village officers will decide whether the persons entered in the register are liable to be assessed and in which class each person falls. (5) On completion of the assessment of each village the register shall be forwarded to the tahsil and a copy shall be posted in the chaudi accompanied by a notice informing assessees that an appeal may be presented to the Sub-Divisional Officer under the Berar Land Revenue Code not later than 45 days after the date on which the register was posted."

In para. 3 of his written statement the defendant stated that legal notice was given as mentioned in R. 5 above and that one was posted in the chaudi as required by the said rule. It was further contended by the defendant that the

plaintiff's suit was barred under the provisions of Ss. 171 (i) (3) and 175, Berar Land Revenue Code.

Further oral pleadings were recorded by the lower Court, an idea of which could be gathered from the following issues :

" (1) Is there a Chaudi Alanda ? (2) Was a copy of the assessment register posted to the Chaudi ? (3) Was the assessment ultra vires as not being made before 30th November ? (4) Is the suit barred under Ss. 171 and 175, Berar Revenue Code ? "

All these issues were decided against the plaintiff and his claim was dismissed. He has therefore come up to this Court in revision In challenging the findings of the lower Court the learned pleader for the applicant has taken me through the entire evidence on record, upon a careful consideration whereof I have no hesitation in concurring with the lower Court in holding that there was a chaudi in the village alanda, though the building is also used for holding a school, and that a copy of the register of assessment together with a notice as required by R. 5, Assessment Rules, was posted in this building the very next date after the verification of the register was made by the Naib Tahsildar, Mr. Deshmukh, who has been examined as P. W. 1.

It was very vehemently contended by the learned pleader for the applicant that when R. 4 only speaks of a chaudi the posting of a copy of the assessment register and the notice in a building used both as a chaudi and a school is not in strict compliance with the requirements of the rule, and therefore the assessment was ultra vires I have been referred to no authority for this strange proposition. The word " chaudi " is admittedly nowhere defined, and if a chaudi could conveniently accommodate a school or vice versa, it would in my opinion none the less be regarded a chaudi, as was understood in the village alanda by the village officers, the patwari (D. W. 1), the patel (D. W. 2) and the village mahar (D. W. 3).

It was urged that R. 5 requires individual notices to be given to the assessees. I am unable to appreciate this contention in the face of the clear wording of the said rule. The effective words are that a copy (of the register) " shall be posted in the chaudi accompanied by a notice informing assessees that an appeal may be presented to the Sub-Divisional Officer. "

I, therefore, hold that if only the notice to all the assessees in the village is posted in the chaudi along with the copy of the register it is a sufficient compliance with R. 5, of the said rule. The rule in question does not provide for notices to be given to the assessees individually.

It was next contended that because the Naib Tahsildar did not admittedly verify the register between 1st October and 30th November, as required by R. 4, but did it on 4th December, therefore the whole basis of the assessment was illegal and the assessment itself ultra vires. There is also no force in this contention. The learned pleader for the applicant was unable to point out to me any provision in the Berar Land Revenue Code, or the rules made thereunder, which prohibits the verification of assessment registers by the revenue officers after 30th November and declares such an action on their part as void. In the absence of any prohibition to that effect I hold that the verification made by P. W. 1, Mr. Deshmukh, in the present case was perfectly in order.

But assuming that the procedure adopted by the Naib Tahsildar was irregular, it is rightly contended by the learned Government Advocate, who appeared for the non-applicant, that the plaintiff's remedy was by way of appeal to the higher revenue authorities and not by a civil suit. S. 175, Berar Land Revenue Code, is clear on this point. It says :

" No suit shall be brought in any civil Court against the Government on account of any act or omission of any Revenue Officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present. "

It is admitted that the applicant failed to appeal to the revenue authorities against the irregularities complained of, and therefore S. 175 aforesaid bars the present suit. On this ground alone the plaintiff was out of Court but I have considered the case on the merits as well because of its importance and the vehemence with which it was argued. The application for revision, therefore, fails and is dismissed with costs. Pleader's fee Rs. 15.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Nagpur 347

JACKSON, A. J. C.

Premsukhdas—Appellant.

v.

Shankerdas—Respondent.

Civil Revn. Appln. No. 357-B of 1928, Decided on 29th July 1929, from order of 2nd Cl. Addl. Sub-Judge, Khamgaon, D/- 19th November 1928, in Civil Suit No. 1 of 1927.

(a) Civil P. C., O. 7, R. 8—Plaintiff claiming property by ownership as successor to person in mahantship and in his reply to defendant's written statement pleading that he was entitled, even if not owner, to its management, first claim cannot include second and case falls under O. 7, R. 8.

Where a plaintiff in his plaint claims a property by virtue of ownership as successor to a person in the mahantship of a temple and in his reply to the defendant's written statement he pleads that he is entitled, even if not the owner, to the management of the property, though he claims the same relief namely possession on both grounds and claims it in both cases by virtue of his title to be mahant but as in one case he claims that the mahant is the owner of the property and in the other that the mahant is entitled to possession as manager, the first claim cannot include the second and he has two distinct claims, founded on separate and distinct grounds and the case falls under O. 7, R. 8. [P 347 C 2]

(b) Civil P. C., S. 115—Issues framed not arising from plaint—Revision lies.

Where the Court under a mistake frames issues which do not arise from the plaint as drafted and rejects application to confine issues to the matters set up in the plaint, revision of the order is possible : 12 *Bom.* 617 and 42 *Cal.* 926, *Rel. on.* [P 347 C 2]

P. S. Kotval and *W. R. Puranik*—for Appellant.

M. R Bobde—for Respondent.

Order.—The plaintiff Shankerdas in his plaint claimed the property in dispute by virtue of ownership, as successor to one Thakurdas in the mahantship of the Balaji temple. In para. 14 of his written reply he pleaded that he was entitled, even if not the owner, to the management of the property. Subsequently he applied for permission to amend his plaint by adding a claim as manager. His application was allowed, but this Court in revision reversed the lower Court's order. In this Court it was pleaded on behalf of the plaintiff that the application, though called one for the amendment of the plaint, was not an application for amendment but only contained an explanation of his position as owner. This Court held that on that explanation by the plaintiff no amendment was necessary. This Court's order has clearly been misunderstood by the lower Court as holding that no amendment of the plaint was necessary, as the claim to be manager had been pleaded in the written reply. Issues have accordingly been framed on the view that the plaintiff's right to be manager can be considered without amendment of the plaint. An application was made for the issues to be confined to the plaintiff's original case based on ownership but that has been rejected and the defendants now apply for revision of the order rejecting it.

The question arises whether O. 7, R. 8, applies to the present case. That order runs as follows :

" Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly."

It is urged on behalf of the plaintiff that on both the grounds set up by him he is claiming the same relief ; but that does not take the case out of the purview of the rule. He is claiming the same relief possession, and he is claiming it in both cases by virtue of his title to be mahant ; but, in one case, he claims that the mahant is owner of the property, and, in the other, that the mahant is entitled to possession as manager. The first claim cannot be held to include the second ; and it seems to me that he has two distinct claims founded on separate and distinct grounds and he should have included his claim as manager separately and distinctly in the plaint. It is not enough for him to set up that claim in the pleadings. He had to obtain leave to amend the plaint and that leave has now been denied him. It follows that his claim to possession as manager does not arise in the suit and no issue should have been framed relating to that claim.

It has been contended on behalf of the plaintiff that under S. 115, Civil P. C. there can be no revision of the order. It has, however, been held in *Venkubai* v. *Lakshman Venkoba* (1) that in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case

(1) [1888] 12 Bom. 617.

and bases its decision of the case on its determination of that issue, it acts with material irregularity in the exercise of its jurisdiction. The same view has been taken in *Sivaprasad Ram* v. *Tricomdas Coverji Bhoja* (2) and I am of opinion that revision of the order is possible. In the latter of the two cases mentioned, it was an interlocutory order that was revised. Any issue relating to the claim to possession as manager must be struck out. The application for revision is allowed with costs. I fix Rs 30 as pleader's fee.

P.N./R.K. *Revision allowed.*

(2) [1915] 42 Cal. 926=27 I. C. 917.

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* A. I. R. 1929 Nagpur 348

JACKSON, A. J. C.

Lajbarkhan and *another*—Plaintiffs—Applicants.

v.

Nanhu—Defendant—Non-Applicant.

Civil Revn. No. 116 of 1929, Decided on 20th September 1929. from order of Small Cause Court Judge, Sohagpur, D/- 22nd December 1928, in Small Cause Suit No. 611 of 1928.

*** Usurious Loans Act S. 3 (1)—Custom in locality allowing interest at 75 per cent per annum and double that in default—Interest is still excessive—Court can under S. 3 (1) order repayment of excessive interest and no claim for such relief is necessary.**

Even if it is proved that it is the custom in the locality to charge interest at 75 per cent. per annum and 150 per cent per annum in case of default, the rate of interest can still be held to be excessive and Court has, under S. 3 (1), power to re-open transaction and order repayment in respect of excessive interest and no claim for such relief is necessary. [P 348 C 2]

Samiullakhan—for Applicants.

Order.—This is an application for revision of a decree passed by the Small Cause Court, Sohagpur, in a suit brought on a bond, dismissing the plaintiffs' suit and directing them to pay Rs. 42-8-0 on account of surplus recoveries. The bond, on which the suit was brought, was executed on 16th January 1926 for Rs. 50. The rate of interest stipulated for was one anna per rupee per mensem and in default two annas per rupee per mensem. The suit was brought on 24th September 1928, less than three years after the execution of the bond. By that time the defendant had paid Rs. 122-8-0. The Judge of the Small Cause Court, acting on the Usurious Loans Act, reopened the transaction, found that the rate of interest stipulated for was exhorbitant and penal and, allowing interest at two per cent per annum, found that only Rs. 80 was due to the plaintiffs and gave a decree to the defendant for Rs. 42 8-0 paid in excess. It is objected that the defendant never asked for this relief, but it does not seem to me that any such claim is necessary; under S. 3 (1), Usurious Loans Act the Court has power to order repayment.

It is also objected that the plaintiffs were not allowed to show that the interest was not excessive. Reference has been made to *Ruldu Mal Thakar Das* v. *Allah Ditta* (1), where it is laid down that in deciding whether the rate of interest charged is excessive, the Court must have regard to the prevailing rate of interest on similar transactions in the locality, the security offered to the plaintiff, the nature of the dealings between the parties and the period during which the account was outstanding for less than three years. Periodical payments were being made by the debtor and though no security was offered and no evidence given as to the prevailing rate in the locality for loans of the description of the one now under consideration, I consider that the Small Cause Court was right in holding the rate to be excessive. Even if it were proved that it is the custom in the locality to charge interest at 75 per cent per annum and that 150 per cent. per annum in case of default, I should still hold the rate of interest to be obviously excessive. It has been pointed out that the debt was to be repaid in three months and if that payment had been made within that period, the interest would only have been Rs. 9. It does not, however, alter the fact that it would be interest at the rate of 75 per cent per annum. I decline to interfere in revision and I dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

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(1) A. I. R. 1927 Lah. 621.

A. I. R. 1929 Nagpur 349

JACKSON, A. J. C.

Abdul Sattar -- Defendant 2 — Appellant.

v.

Bansgopal—Plaintiff—Respondent.

Second Appeal No. 592 of 1927, Decided on 14th March 1929, from decree of Dist. Judge, Hoshangabad, D/- 29th August 1927, in Civil Appeal No. 63 of 1927.

Civil P. C., S. 97—Appeal against preliminary decree after passing of final decree is competent.

An appeal filed aginst a preliminary decree after the final decree is passed is competent even though no appeal is filed against the final decree : 37 *Mad.* 29 ; 37 *Mad.* 455 and 36 *All.* 532, *Rel. on* : 36 *Cal.* 762 and *A. I. R.* 1921 *Cal.* 109, *not Foll* : *A. I. R.* 1928 *Cal.* 325, *Ref.* [P 350 C 1]

Fida Hussain—for Appellant.

J. Sen—for Respondent.

Order.—A preliminary objection has been taken that this appeal is incompetent, because it is directed against a preliminary decree for sale and no appeal against the final decree, which was passed before this second appeal was filed, has been presented. In *Mackenzie* v. *Narsingh Sahai* (1), it was held that when after a final decree had been passed, an appeal was preferred against the preliminary decree only, it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

It was pointed out that if the appeal against the preliminary decree succeeded the final decree would still stand. A similar view has taken in *Kulada Prosad* v. *Ramananda Pattanaik* (2), in which *Khirodamoyee Dasi* v. *Adhar Chandra Ghose* (3), was distinguished on the grounds that it dealt with a case in which the appeal against the preliminary decree had been preferred before the final decree had been passed, and that it must be assumed that the subsequent proceedings were subject to the result of the appeal against the preliminary decree. The latter decision shows that the existence of a final decree, not appealed against, is hot an insuperable bar to an appeal against a preliminary decree being allowed. Another reason has, however, been given in *Salim* v. *Hajira Bibi* (4), in which it was held that, when a defendant appealed against an order of remand after the suit had been decided against him on the merits, his appeal was not maintainable, that reason being his consent to the proceedings subsequent to the remand, implied by his not appealing against the order of remand during those proceedings. But there is not in every case such an implied consent. Certainly, in the case with which I am dealing there is no implied consent to the proceedings after the final decree. The facts speak for themselves. The preliminary decree was passed on 21st September 1926 ; the first appeal was filed on 8th November 1926 ; while it was pending decision, on 25th April 1927 application for a final decree was made but time was granted on the application of the present appellant till the first appeal was decided ; the appeal was decided ; that appeal was decided on 29th August 1927 ; and the final decree was passed on 6th September 1927.

The decision in *Salim* v. *Hajira Bibi* (4) would also distinguish between the cases in which the appeal against the preliminary decree or order was filed before the final decree or order was passed and those in which it was not. No such distinction, however, has been made in *Lakshmi* v. *Maru Devi* (5) and *Ramien* v. *Veerapaudayan* (6) in which it has been held that it is competent to a party to prefer an appeal against an order of remand or a preliminary decree, although before the appeal is presented the final decree has been passed, because with the reversal of the earlier order or decree, the final decree which depends on it for its validity ipso facto ceases to have any force. A similar view has been taken in *Kanhaiya Lal* v. *Tirbeni Sahai* (7), which dealt with a case in which the final decree was subsequent to the appeal against the preliminary decree ; but Chamier, J., remarked that the passing of a final decree should not be a bar either to the institution or to the hearing of an appeal against the preliminary decree. In this matter I prefer to follow

(1) [1909] 36 Cal. 762=1 I. C. 413=10 C.L.J. 119.
(2) A. I. R. 1921 Cal. 109=48 Cal. 1036.
(3) [1918] 18 C. L. J. 321=21 I. C. 516.
(4) A. I. R. 1928 Cal. 325=55 Cal. 506.
(5) [1914] 37 Mad. 29=12 I. C. 664=21 M. L. J. 1069.
(6) [1912] 37 Mad. 455=22 M. L. J. 217=14 I. C. 394=(1912) M. W. N. 117.
(7) [1914] 36 All. 532=24 I. C. 827=12 A.L. J.987.

the decision of the Madras and Allahabad High Courts, and although the present appeal has been filed after the final decree was passed, I hold it to be competent.

P.N./R.K. *Appeal allowed.*

A. I. R. 1929 Nagpur 350

SUBHEDAR, A. J. C.

Shamlal and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 85 of 1929, Decided on 11th June 1929, from judgment of 1st Class Mag., Bhandara, D/- 13th April 1929, in Criminal Case No. 31 of 1929.

(a) Penal Code, S. 307—Abrasions found on person of accused—Incriminating circumstance not proved against him—Accused cannot be called upon to explain them—Criminal P. C., S. 342.

Where an accused was charged under S. 307 and the trying Magistrate, in convicting him, relied on the fact that some abrasions were found on his person.

Held, that unless an incriminating circumstance is proved by the prosecution to exist against an accused person he should not be called upon to explain away its existence. [P 352 C 1]

(b) Evidence Act, S. 26—Incriminating admissions of accused before police officers are inadmissible in evidence.

Incriminating admissions of an accused, under admitted circumstances that he took the whole of the investigating staff of the police officers round the scene of offence and admitted before them his own guilt, are inadmissible in evidence under S. 26. [P 353 C 2]

(c) Evidence Act, S. 27—Places already known are not places "discovered" within S. 27.

Incriminating admissions of an accused before the police officers cannot be said to lead to the discovery of several places pointed out by the accused where they are already known and cannot be said to have been "discovered" in consequence of the said admissions within the meaning of S. 27. 12 *Mad.* 153, *Foll.* [P 353 C 1]

(d) Evidence Act, S. 30—Self-exculpatory statement of co accused is inadmissible

Where a statement is volunteered by a co-accused to the effect that when he arrived on the scene of offence after hearing the cry of the complainant he noticed another accused in the act of assaulting the complainant, such a self-exculpatory statement is inadmissible in evidence. [P 353 C 1, 2]

(e) Evidence Act, S. 27—Confessions of accused proved through prosecution witness—Court must be very cautious to believe in such evidence especially when accused is charged under Penal Code, S. 307.

(*Obiter*) Bald evidence introduced through the mouth of a prosecution witness to prove the confessions of an accused under cover of S. 27 ought to receive very little credence by the Court, more especially when the accused stands charged with grave offence as an attempt to murder and particularly, when more direct evidence to prove the same points are available to the prosecution and which they do not take care to produce before the Court. [P 353 C 1]

Kedar—for Appellant 2.

Razak—for Appellant 3

G. P. Dick—for the Crown.

Judgment.—Three persons, Shamlal Lodhi, Nilkanth Lodhi and Mantya Mahar hereinafter to be referred in this judgment as the first, second and third appellant respectively, have been convicted by Mr. V. A. Bambawale, Magistrate, First Class, Bhandara, having powers under S. 30, Criminal P. C., of an offence under S. 307, I P. C, read with S. 34, *ibid* and sentenced respectively to 7, 4 and 3 years rigorous imprisonment.

All the aforesaid convicts have preferred appeals against their convictions and these are registered in this Court as Criminal Appeals Nos. 85, 67 and 86 of 1929. This judgment will govern the disposal of all the three appeals.

The case for the prosecution briefly is that on the night of 22nd December last the complainant Motia Mahar (P.W. 10) had gone, after the evening meal, to sleep in a hut in his khala, that while he was there sitting by the fire which he had lit before retiring, all the three appellants came there and had a chat and smoke with him Appellant 1 Shamlal had a sword (Art D) with him while appellant Nilkanth was armed with a pharsa and appellant 3 Mantya had carried a tutari (Art. A) While the others were engaged in conversation the appellant Shamlal lay down in the hut of the complainant and went to sleep and was not disturbed when the other two appellants parted to go to their khalas. The complainant also then lay down beside appellant 1 in the hut, but about midnight he was awakened on account of a feeling of pain in the region of his stomach. He then found that appellant 1 Shamlal had given him a thrust with the sword which he grappled and in the struggle that followed Shamlal left the sword and ran away. The complainant Motia further stated that with the sword in his hand he then ran after Shamlal for some distance, ap-

parently to catch him but the latter ran away. When Motia came out of his hut following Shamlal he stated that he had seen the other two appellants standing outside the hut and they also ran away.

The shouts of the complainant for help were heard by his brother Jaitram (P.W. 2), who soon came to the hut, and later on Jagannath (P.W. 3) and Kanhai (P.W. 4) also arrived on the scene. Jagannath then went to call Bapu (P.W. 11) from the neighbouring village, and on his arrival at the scene of the crime with other Mahars the complainant's wound was dressed up and he was removed to the village on a cot. It is the prosecution story that soon after the arrival of all the aforesaid witnesses at the hut the complainant Motia gave out the names of all the three appellants and the part each had taken in the commission of the crime

The first information report of the offence recorded in Ex. P-1 was made to the Police Station House at Amgaon by Sheoram (P.W. 5) at 8 a. m on 23rd December last, and before the Sub-Inspector (P.W. 1) arrived on the scene another report, Ex. P-11, was scribed by Chandanlal (P W. 6) in the Kotwar's book, On his arrival the Sub-Inspector (P.W. 1) also recorded a statement of the complainant Motia at 11 a. m the same day as he found his condition rather serious this is Ex. P-2. Another statement of Motia was recorded by Mr. Babukhan, Second Class Magistrate, Gondia, at 9-15 p. m. on 23rd December.

The motive for the crime is alleged to be a longstanding dispute between the complainant Motia and his brother Jaitram (P.W. 2) on the one hand and the first two appellants on the other over a field which is now recorded as the occupancy holding of Jaitram. It is also alleged that about three months prior to the present incident a quarrel took place between Jaitram (P.W. 2) and the appellant Nilkanth on account of the former having taken some water out of the tank belonging to Jit Singh the brother of the appellant Nilkanth when a threat was given by this appellant to the complainant and his brother.

It is undoubtedly a fact that a most cowardly and a brutal attack was made on the life of Motia on the night in question but it is to be ascertained if the evidence on record connects the appellants with this crime. In my opinion there is no such evidence forthcoming.

Messrs Kedar and Razak appeared for the second and third appellants respectively, while the learned Government Advocate representated the Crown at the hearing of these appeals in this Court. The first appellant was unrepresented! It may at the outset be remarked that the evidence of Motia (P.W. 10) so far as it relates to the visit of all the appellants on the night in question stands without any corroboration. None of the other witnesses examined for the prosecution speaks of having seen any of the appellants at or near about the khala of the complainant on the night of 22nd December last, nor is there an iota of evidence to support that the three appellants had conspired together to commit the crime, nor has any connexion between the appellants inter se been established. The learned trying Magistrate seems to have assumed that the appellant Mantya was a servant of the appellant Nilkant. No evidence was pointed out to me in the course of arguments to establish this point. The theory of the motive for the crime alleged by the prosecution appears to be too farfetched. Even on his own admission the dispute over the field between Jaitram (P W. 2) and appellant 1 had come to an end some 4 or 5 years ago when Gokul purchased the village. The complainant himself also admits that Shamlal had since Ashadh last become so friendly that:

"he used to come to me with a sword and also sleep near me with a sword."

It is thus impossible to hold upon this evidence that the motive for the crime was the dispute over the field.

The story of the dispute over the taking of the water from the tank belonging to Jit Singh cannot also furnish any motive for the dastardly crime assuming the story to be true. Jaitram (P.W. 2) admits that the appellant Nilkanth has got no right over this tank and it is therefore not clear that he should have protested against the use of the water by the witness and threatened him as alleged. It is also to be noted that no mention of this quarrel was made to the police during the course of the investigation or in any of the documents, Exs. P-1, P-2 and P-11, as furnishing any cause for the alleged cowardly assault by the appellants.

There are obviously several other difficulties in the way of the prosecution. The case appears to have been apparently mishandled by the police and the learned trying Magistrate seems to have bestowed very little attention to the solution of these difficulties. (The judgment then discussed evidence regarding the night attack and the sword (Ex. D) and concluded that there is no trustworthy evidence on the record to identify Art. D as belonging to the appellant Nilkant). Moreover it is apparent that if this sword was not the one that was used by the appellant to inflict an injury upon Motia as has been found by me, it is a matter of little consequence if the Art. D belongs or does not belong to the appellant Nilkant.

A great deal of unnecessary stress has been laid by the learned trying Magistrate on the fact that some abrasions were found on the persons of the first two appellants. In the absence of any legal evidence on the part of the prosecution the Magistrate was wrong in assuming, as he has evidently done, that the injuries were caused to these appellants in the course of their alleged flight from the scene of the crime. It is an elementary proposition of law that unless an incriminating circumstance is proved by the prosecution to exist against an accused person he should not be called upon to explain away its existence. Even the investigating officer (P. W. 1) has not in his evidence given any explanation as to why in the absence of any evidence connecting these injuries with the alleged flight of these two appellants he got the two appellants medically examined and placed upon the record an irrelevant piece of evidence in the shape of medical reports, Exs. P-7 and P-10, for the consideration of the Court. These remarks apply equally to the production of the Loi (Art. E). There is no evidence placed upon the record to prove that this Loi was used by the appellant Shamlal on the night in question so that the minute bloodstains detected in it would be held to be an incriminating piece of evidence against this appellant.

Another piece of inadmissible evidence through the mouth of Jodhi (P. W. 7) in the shape of certain statements made by Shamlal while in police custody has been introduced in the case and acted upon by the learned Magistrate. This is what Jodhi has stated :

"On Monday at mahatni time the S. I. Police took us and the accused Shamlal to the khala of Motia. Daroga, Circle Saheb, Patwari, Umedi Mahajan and one Kanhai who is not a witness (sic). S. I. Police asked Shamlal to show the places and he showed the place where he was sleeping, where Motia was sleeping and was stabbed and where others were standing. Shamlal also showed the place where he fell down. Patwari saw all these places and took measurements."

In the first instance neither the Sub-Inspector (P. W. 1) nor the witness Jodhi tells us the circumstances under which the appellant Shamlal came to take the whole of investigating staff of police officers round the scene of offence and admitted before them his own guilt by showing them the different places marked out in the map Ex. P-6 prepared by Tikaram Patwari (P. W. 8). These places were admittedly known to the complainant Motia Maharfrom whom in the ordinary course the investigating officer must have ascertained them, and it is not explained why it was found necessary to have the discovery of these places made through appellant 1, unless it be for the purpose of using his own confessions against himself and to bring the case within the purview of S. 27, Evidence Act.

In his evidence the Sub-Inspector (P. W. 1) said that the appellant Shamlal took him to the spot :

" and showed the spot and the different places"

while Jodhi (P. W. 7) stated that :

"the Sub-Inspector, Police took us and the accused Shamlal to the khala of Motia,"

that

"the Sub-Inspector Police asked Shamlal to show the places"

and the latter showed them. In this conflict of evidence on the point if the offer of the appellant Shamlal to show the several places was voluntary or enforced and in the absence of the knowledge of the circumstances preceding it and further having regard to the case with which evidence of this sort can be made available, I am not prepared to hold that the appellant Shamlal did point out the several places and make the incriminating statements imputed to him in supplying the descriptions of the several places as given in the map Ex.P-6.

But assuming that this evidence is true I am further of opinion that these incriminating admissions of the appel-

lant Shamlal under the admitted circumstances in which they were made are inadmissible in evidence in this case under S. 26, Evidence Act.

It is clear that these incriminating admissions embodied in the description of the several places as contained in the explanatory notes on the map, Ex. P-6, cannot possibly come within the purview of S 27, Evidence Act. They cannot possibly be said to have led to the discovery of the several places pointed out in the said map because these were already known to the complainant Motia and his brother and could not be said to have been "discovered" in consequence of the said admissions within the meaning of the said section. As laid down in the case reported as *Queen-Empress* v. *Commer Sahib* (1) :

"the test is: was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?"

Shamlal is also alleged to have shown the place where he fell down, marked No. 4 in Ex. P-6. Jodhi does not tell us if Shamlal also told the assemblage the circumstances under which or the day and the time on which he fell down at the particular place shown in the map and therefore assuming that the admission of Shamlal contained in the sentence just quoted is admissible and true, it fails to establish (1) that he fell down on the night of 22nd December last in the course of his alleged flight from the scene of the offence after being pursued by Motia and (2) that the injuries found on his person were the result of that fall.

The bald evidence of the type introduced through the mouth of Jodhi to prove the confessions of an accused under cover of S 27, Evidence Act, ought to receive, to say the least of it, very little credence by the Court, more especially, when the accused stand charged with such a grave offence as attempt to murder, and particularly, when more direct evidence of the complainant to prove the same points was already available to the prosecution and which they have not taken care to produce before the Court. It may be observed that Motia (P. W. 10) has not at all been questioned on the several points noted in Ex. P-6

The last point that remains to be decided is the admissibility or otherwise of the statement volunteered by the appellant Mantya to the effect that when he arrived on the scene of the offence after hearing the cry of Motia he noticed Shamlal in the act of assaulting the complainant. This statement has been used by the learned trying Magistrate against the appellant Shamlal. Suffice it to say that under S. 30, Evidence Act, this statement could not be used against Shamlal because it was self-exculpatory.

Upon a careful and anxious consideration of the materials on the record and the probabilities of the case my conclusion therefore is that the charge as laid cannot be brought home to any of the appellants. I accordingly allow all the appeals and setting aside the convictions of the appellants order them to be set at liberty.

V.S./R.K. *Appeals allowed.*

(1) [1889] 12 Mad. 153.

A. I. R. 1929 Nagpur 353

JACKSON, A. J. C.

Kesheo—Plaintiff—Appellant.

v.

Pandurang—Defendant—Respondent.

Second Appeal No. 307-B of 1928, Decided on 22nd August 1929, from decree of Addl. Dist. Judge, Amraoti, D/- 30th August 1928, in Civil Appeal No. 71 of 1928.

(a) Berar Land Revenue Code, S. 205—"In favour of specified person."

The words "in favour of a specified person" refer only to the case of relinquishment. [P 354 C 1]

(b) Berar Land Revenue Code, S. 205—Fact that property is sold by Official Receiver does not take away rights of co-occupant to pre-empt.

The Official Receiver or the owner, if he decides to auction the property, can and should hold the sale subject to the right of the co-occupants to pre-empt and before confirming the sale to the highest bidder, he can and should offer the property to co-occupants at the figure bid and the mere fact that property is sold in an auction by the Official Receiver does not take away the rights of a co-occupant to pre-empt: 4 *N. L. R.* 138, *Dist.*; *A. I. R.* 1927 *P. C.* 113, *Appl.*; 24 *C. W. N.* 1072, *Ref.* [P 354 C 2]

G. V Deshmukh—for Appellant.

N. G. Bose—for Respondent.

Judgment.—In this case I have to deal with a claim to pre-emption under the Berar Land Revenue Code of 1896. Both the lower Courts have held, on the authority of *Maidabi* v. *Tejabai* (1), that

(1) [1908] 4 N. L. R. 138.

there is no right of pre-emption in the case of an auction sale by the Official Receiver in an insolvency case. In *Maidabi* v. *Tejaba* (1), it is held that there is no right of pre-emption when the interest of a co-occupant in a survey number in Berar is sold by auction in pursuance of a mortgage decree for sale of the mortgaged property; but it does not follow that a sale by the Official Receiver stands on the same footing as that of a sale in execution of a decree. It has been held in *Entazuddi Sheikh* v. *Ram Krishna Banik* (2), that sales by the receiver are really sales by the owner and may be either by public auction or by private treaty; and that the procedure governing sales in execution of a decree under the Civil Procedure Code does not apply to them. I am not impressed by the reasons given in *Maidabi* v. *Tejabai* (1), for holding that no right of pre-emption arises when the sale is held in execution of a decree. The real reason is given in the Privy Council decision in *Sheobaran Singh* v. *Kulsum-un-nissa* (3), where the following passage occurs:

"It was pointed out that a sale in execution of a decree transferred the property free from a claim of pre-emption. The reason is simple. The Civil Procedure Code arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights."

It is argued, however, that this case must be decided with reference to the provisions of the Berar Land Revenue Code 1896, and that those provisions makes the Privy Council decision inapplicable to the present case. It is first pointed out that S. 205 only gives a right of pre-emption when the interest of a co-occupant in a survey number is transferred

" by sale, foreclosure of mortgage or relinquishment in favour of a specified person for valuable consideration ";

and it is argued from this that the section cannot apply to an auction sale which is not to a specified person. This argument is based upon a misreading of the section, as the words " in favour of a specified person " can only refer to the case of relinquishment.

Reference has next been made to S. 206, sub-S. (2), in which it is laid down that notice to be given to the co-occupants who have the right of pre-emption shall be given through the Tahsildar and shall be deemed to have been sufficiently served if it be posted at the chauri or some other public place and proclaimed by beat of drum in the village in which the survey number is situated. It is assumed that the Official Receiver in holding a sale follows the procedure laid down for sales in execution of a decree; but he is not required to do so and there is no evidence in the present case that he did so. Very probably he did, but it cannot be assumed; and without evidence on the point I cannot accept the plea, now raised for the first time, that the Official Receiver's proclamation of sale amounted to notice under S. 206, Berar Land Revenue Code.

Finally it is argued that no due notice could be given because S. 206, sub-S. (1), requires the vendor to specify in the notice the price at which he is willing to sell and no notice can be specified in the case of an auction sale. This is one of the grounds put forward in *Maidabi* v. *Tejabai* (1), for holding that there is no right of pre-emption, when property is sold in execution of a decree; but, as I have already stated, it does not appeal to me, and I consider in view of what is contained in *Sheobaran Singh* v. *Kulsum-un-nissa* (3) that it is not the real ground for the view stated. I see no reason to hold that that Privy Council decision does not apply to the present case.

It is pointed out by their Lordships that, if there is no right of pre-emption when the property is sold by the Official Receiver, it means that the insolvency of the owner renders his property more valuable in the hands of the Official Receiver than it was in his own. The argument now put forward would go further than that and would mean that the owner of an interest in a survey number in Berar could defeat his co-occupants' right to pre-empt by disposing of his property by auction. I am not impressed with the difficulty of intimating to the co-occupants the price at which it is proposed to sell. The Official Receiver or the owner, if he decides to auction the property, can and should hold the sale subject to the right of the co-occupants to pre-empt and before confirming the sale to the highest bidder, he can and should offer the property to the co-occupants at the figure bid. I am satisfied that the admitted right of the appel-

(2) [1920] 24 C. W. N. 1072=60 I. C. 745.
(3) A. I. R. 1927 P. C. 118=49 All. 867=54 I. A. 204 (P.C.).

lant to pre-empt has not been taken away by the fact that the property was sold in an auction by the Official Receiver. The decree of the trial Court, which was upheld by the lower appellate Court, is set aside and the appellant will be given a decree entitling him to pre-empt for the price at which the property was sold in the auction. The respondent will bear the costs of the appellant throughout. The purchase money shall be paid within three months.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Nagpur 355

JACKSON, A. J. C.

Kisanrao—Defendant 3—Appellant.

v.

Mangniram and *others*—Plaintiffs and Defendants 1 and 2—Respondents.

First Appeal No. 31-B of 1918, Decided on 8th October 1929, from the decree of Addl. Sub-Judge, Khamgaon, D/- 17th December 1927, in Civil Suit No. 19 of 1927.

Civil P. C., S. 34—Contractual obligation to pay interest allowed by rule of damdupat coming to end before filing of suit—Court has discretion to award interest from date of suit in addition to interest allowed by rule—Damdupat.

Where the rules of damdupat applies, the contractual obligation, as regards interest, comes to an end as soon as the maximum limit of interest is reached and it is not correct to say that the contractual obligation remains until a decree is passed. When that obligation has come to an end before the suit is filed, the Court has discretion to award interest from the date of suit over and above the amount of interest allowed by the rule: 37 *Bom.* 326 (*P.C.*); 22 *Bom.* 86 and *A.I.R.* 1924 *Nag.* 348, *Rel. on.*; *A. I. R.* 1929 *Nag.* 117; *A. I. R.* 1922 *Nag.* 155 and 40 *Cal.* 710, *Cons.*; 34 *Cal.* 150 (*P. C.*), *not Appl.* [P 356 C 1, 2]

M. B. Niyogi—for Appellant.

M. R. Bobde—for Respondent 1.

Judgment.—This appeal arose from a suit on a mortgage for Rs. 3,500. Under the rule of damdupat the amount recoverable at the time of the decree was only Rs. 7,000 on the day on which the suit was filed. The lower Court has allowed interest from the date of suit to the date fixed for payment by the preliminary decree and the only question that I have to decide in appeal is whether the lower Court was right in doing so. It is contended on behalf of the appellant that the rule of damdupat prevents the interest included in the sum payable on the dies datus from exceeding the principal. I have been referred to a decision of this Court in *Narayan* v. *Khiwaraj* (1), in which it has been held that the rule of damdupat applies until the matter is removed from the domain of contract, that is, until the date fixed by the Court in the preliminary decree for sale. The question, however, does not appear to have been really considered as it is recorded that the counsel for the respondents admitted that the fourth ground of appeal must succeed, that ground being that no interest should have been allowed from the date of suit to the date of the decree, as the rule of damdupat covers this period. In *Narain* v. *Nathmal* (2) it has been held that the rule of damdupat applies only so long as the relation of creditor and debtor exists but not when the contractual relation has come to an end by reason of the decree; and the view may be inferred that the rule does apply until a decree is passed which would in effect mean up to the date fixed for payment. But that view has not been expressed and it is to be noted that in that case interest was actually allowed from the date of suit. Similarly, in *Nanda Lal Roy* v. *Dhirendra Nath* (3) all that was held was that the rule of damdupat does not apply to the interest accruing after the date fixed for redemption; and it was not laid down affirmatively that the rule does apply to the period between the date of the suit and the date fixed for redemption.

Sundar Koer v. *Rai Sham Krishen* (4) has been cited by the appellant. It is a Privy Council decision which does not deal with the rule of damdupat, but reliance is placed upon the following passage at p. 161:

"In the present case, their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that

(1) A. I. R. 1929 Nag. 117.
(2) A. I. R. 1922 Nag. 155=17 N. L. R. 200.
(3) [1913] 40 Cal. 710=21 I. C. 974.
(4) [1907] 34 Cal. 150=34 I. A. 9=11 C. W. N. 249 (P. C.).

day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree."

It is argued that the general account to be taken once for all must be governed by the rule of damdupat, which must fix the interest to be included in the aggregate amount, to be stated in the decree, as due on a fixed day. This argument, it seems to me, ignores the point that the matter of interest has passed from the domain of contract once the rule of damdupat becomes applicable. The remarks made by their Lordships of the Privy Council cannot be applied to a case which is essentially different from the one they were considering by reason of the applicability of the rule of damdupat. In *Hiralal Ichhalal* v. *Narsilal Chaturbhujdas* (5), in which their Lordships were dealing with a suit for redemption, it was admitted that the trial Court had discretion to allow interest between the date of suit and the actual date of redemption, although the rule of damdupat applied and the interest to be allowed up to the date of suit was limited to an amount equal to the capital sum. Again in *Dhondshet* v. *Ravji* (6) it has been definitely held that the discretionary power as to awarding interest conferred on the Courts by S. 209, Civil P. C., 1882, (corresponding to S. 34 of the present Code) may be exercised without reference to the law of damdupat, even in a suit brought on a mortgage. That view has also been taken by a Judge of this Court in *Motilal Ramlal* v. *Reni* (7).

It seem to me that the view taken in the last three cases cited is the correct view. Where the rule of damdupat applies, the contractual obligation, as regards interest, comes to an end as soon as the maximum limit of interest is reached and it is not correct to say that the contractual obligation remains until a decree is passed. When that obligation has come to an end before the suit is filed, the Court has discretion to award interest from the date of suit over and above the amount of interest allowed by the rule.

As I hold that the lower Court had discretion to make the order regarding interest that it has made, I dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

(5) [1918] 37 Bom. 326=18 I. C. 909=40 I. A. 68 (P.C.).
(6) [1898] 22 Bom. 86.
(7) A. I. R. 1924 Nag. 348

A. I. R. 1929 Nagpur 356

JACKSON, A. J. C.

Marotirao—Applicant.

v.

Govind—Non-Applicant.

Civil Revn. No. 245 of 1929, Decided on 25th September 1929, from order of 2nd Class 2nd Sub-Judge, Wardha, D/- 21st March 1929, in Misc. Judl. Case No. 2 of 1929.

Provincial Insolvency Act, S. 29—*N* obtaining decree against *K* and attaching according to *A*, *A's* property in execution—*K* adjudged insolvent during pendency of *A's* ojection to attachment — Objection dismissed for want of jurisdiction—Order dismissing objection is incorrect—Such order can be revised though remedy is open under O. 21, R. 63—Civil, P. C., S. 115.

N obtained a decree against *K* and in execution thereof attached according to *A*, *A's* property. During pendency of *A's* objection to attachment *K* was adjudged insolvent. The Court dismissed the objection holding that its jurisdiction had ceased.

Held : that in view of S. 29 the order dismissing objection was incorrect.

Held further : that though *A* had a remedy by way of suit under O. 21, R. 63, that rule is not an inflexible one and might be departed from in special cases and that the order could be revised. [P 357 C 1]

W. H. Dhabe—for Applicant.

D. T. Mangalmurti—for Non-Applicant.

Order.—Non-applicant 1 had obtained a decree against non-applicant 2 and in execution thereof attached, according to the applicant, the applicant's property. Non-applicant 2 was adjudged insolvent during pendency of the applicant's objection to the attachment. The lower Court then held that its jurisdiction had ceased and dismissed the objection. The applicant seeks revision of the lower Court's order.

It is clear that the lower Court's order is incorrect. Under S. 29, Prov. Ins. Act, the Court had only two alternative courses to select from and could only stay the proceedings or allow them to continue on terms. It is urged, how-

ever, that, in accordance with the practice of this Court and other High Courts, there should be no revision, because the applicant has a remedy by way of suit under O. 21 R. 63. But the rule is not an inflexible one, and may be departed from in special cases. The lower Court in the present case has, without any jurisdiction to do so, deprived the applicant of his right to have his claim decided in objection proceedings, and there has been no default or neglect on his part requiring condonation. I consider that he should not be at this stage forced into bringing a suit. I set aside the order of the lower Court which will now decide which of the two alternative courses permitted by S. 29 should be followed. Non-applicant 1 will bear the applicant's costs. I fix pleader's fee at Rs. 15.

P.N /R.K. *Order set aside.*

A. I. R. 1929 Nagpur 357

MOHIUDDIN AND STAPLES, A. J. Cs.

Kashinath—Judgment-debtor—Appellant.

v.

Harda Central Bank—Decree-holder—Respondent.

First Appeal No. 48 of 1929, Decided on 26th September 1929, from decree of Addl. Dist. Judge, Harda, D/- 2-3-1929.

Civil P. C., S. 47—Executing Court can within certain limits question validity of decree where question of jurisdiction is involved.

The authority of the executing Court to question the validity of the decree will depend on the facts and circumstances of the particular case under consideration and no hard and fast rule can be laid down in this matter. The executing Court can within certain limits question the validity of a decree where the question of jurisdiction is involved. [P 357 C 2; P 358 C 1]

Dispute regarding money owed by *K* to a bank was referred to the Registrar of Co-operative Societies and he gave an award. It was ordered in the award that in case the full sum due by *K* to the Bank was not collected, *K* should execute a mortgage over his immovable property. It was objected in execution of award that such direction in the award was outside the power of the Registrar.

Held: that the execution Court should consider the objection: *A. I. R.* 1924 *Lah.* 448; *A. I. R.* 1926 *Pat.* 202 and *A. I. R.* 1927 *Nag.* 216, *Dist.*; *A. I. R.* 1925 *Cal.* 907 (*F. B.*), *Rel. on.* [P 358 C 1]

M. R. Bobde—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—This is a judgment-debtor's appeal against the order passed by Additional District Judge, Harda, on 2nd March 1929. The appellant Kashinath Yeshwant owed money to the Harda Central Bank, and as he was not paying it up, the dispute between him and the Bank was referred to the Registrar Co-operative Societies, who gave an award on 1st September 1928. Decree-holder filed an application for the execution of the award which has the force of a decree on 3rd September 1928, and judgment debtor's immovable property was attached. After this, notice was issued to the judgment-debtor, to execute the mortgage-deed, as ordered by the Registrar, and the judgment-debtor filed written statements on 10th November 1928 and 16th February 1929. The following issue was framed:

"Whether the Court can entertain objections to the validity of the award raised by judgment-debtor."

The finding was recorded in the following words:

"I would accordingly hold that this Court cannot entertain objections to the validity of the award."

First ground in the memorandum of appeal runs as follows:

"The lower Court ought to have held that the award of the Registrar of the Co-operative Societies in so far as it directs the appellant to execute a mortgage-deed for money due by him, was outside the power of the Registrar, being thus ultra vires and unenforceable."

The appellant had raised this objection in para. (3) (iii) of his written statement dated 10th November 1928, but the learned Judge has not referred to it, in his order. The Court framed a general issue and recorded a finding but failed to consider this objection, about the jurisdiction of the Registrar to pass an award, which contained the following direction:

"I also order that in case the full sum of Rs. 10,025-10-0 with interest at the rate of 9 per cent. per annum from 1st September 1928 to the date of realization, be not collected from Pandit Kashinath Yeshwant forthwith, he shall execute a mortgage over his immovable property of the minimum market value of Rs. 20,000 at once, as security."

It seems to us that the authority of the executing Court to question the validity of the decree will depend on the facts and circumstances of the parti-

cular case under consideration, and no hard and fast rule can be laid down in this matter. The limits within which an executing Court can question the validity of a decree were pointed out by the Full Bench of Calcutta High Court in *Gora Chand Haldar* v. *Prafulla Kumar Roy* (1) in which it was held :

" where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree the executing Court was entitled to refuse to execute it on the ground that it was made without jurisdiction. "

The learned advocate for the respondent cited *Lahore Bank* v. *Ghulam Jilani* (2), *Amrit Lal* v. *Jagat Chandra* (3) and *Babhutmal* v. *Madhoji* (*A. I. R.* 1927 *Nagpur* 216). In *Lahore Bank* v. *Ghulam Jilani* (2) Shadi Lal, C. J., and LeRossignol, J., held that the broad and clear rule was that an executing Court had no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. In that case the executing Court had refused action on the gound that the minor had not been represented before the liquidation Court. The objection in this case related to the procedure of the Court which issued the decree and not to the question of jurisdiction. *Amrit Lal Seal* v. *Jagat Chandra Thakur* (3) and *Babhutmal* v. *Madhoji* (*A. I. R.* 1927 *Nag.* 216) were cases in which mortgage decrees were passed, and the decrees were attacked in execution proceedings on the ground that the property ordered to be sold was not legally saleable, and this attack upon the legality of the decree was not allowed. In none of these cases the question of jurisdiction was raised. We are of opinion that the executing Court, within certain limits can question the validity of a decree where the question of jurisdiction is involved and as this objection was not considered by the trial Court, the case is sent back to the Additional District Judge, Harda, to record clear and definite statements on the question of jurisdiction and to decide the following point :

" Whether the Registrar had jurisdiction to pass the order mentioned in the last paragraph of the award and as to whether that order can be challenged in the execution proceedings. "

(1) A. I. R. 1925 Cal. 907=53 Cal. 166 (F. B.).
(2) A. I. R. 1924 Lah. 448=5 Lah. 54.
(3) A. I. R. 1926 Pat. 202=4 Pat. 696.

The next point pressed is that the debtor was the firm " Onkardas Narayandas " and that the award must be taken as being against the firm and not against the appellant. The award is quite clear on the point, that the debtor is the appellant Kashinath Yeshwant and the executing Court, cannot consider this question. Lastly, it is urged that the execution proceedings are in violation of Ss. 51, 52 and 53, Provl. Insol. Act and therefore, cannot be entertained. This objection was about the insolvency petition filed against the firm and not against the appellant. The award is against the appellant not against the firm. The objection is futile. As the appeal succeeds on a point which was not considered by the Court below and as the judgment of the Court below is upheld on the other points raised in the appeal, we order that the costs of this appeal should be borne by the parties as incurred.

P.N./R.K. *Case remanded.*

A. I. R. 1929 Nagpur 358

MOHIUDDIN, A. J. C.

Laxmanlal and *others*—Defendants 7 to 10—Appellants.

v.

Narayan and *another* — Plaintiffs—Respondents.

First Appeal No. 67-B of 1924, Decided on 24th September 1929, from decree of Addl. Dist. Judge, Amraoti, D/- 9th September 1924, in Civil Suit No. 21 of 1923.

Civil P. C., O. 22, R. 9—Suit for joint possession decreed without separately defining shares of plaintiffs—Appeal against decree abating against one plaintiff—Appeal cannot proceed in absence of heirs of dead plaintiff and is incompetent.

A suit was brought for joint possession and a joint decree in plaintiffs' favour was passed without separately defining the shares of the various plaintiffs. An appeal was preferred against the decree and it abated as against one of the plaintiffs.

Held : that if a decree was passed in favour of appellant, there would be two conflicting decrees and would lead to absurd results and that the appeal could not proceed in the absence of the heirs of the dead plaintiff and was incompetent : *A. I. R.* 1926 *Cal.* 893, *Rel. on.* : *A. I. R.* 1925 *Bom.* 122, *Dist.*; 91 *Cal.* 487 ; *A. I. R.* 1925 *All.* 103 and *A. I. R.* 1926 *All.* 284, *Ref.* [P 360 C 1]

M. B. Marathe and *W. B. Pendharkar* —for Appellants.

T. L. Sheode—for Respondents.

Judgment.—This appeal and appeal No. 72-B of 1924 are connected appeals, arising from the same judgment and decree dated 13th September 1924, passed by Additional District Judge, Amraoti, in Civil Suit No. 21 of 1923 and, therefore, this judgment will govern both the appeals. This suit was filed on 12th January 1923 by Walla Bai, Narayan and Maroti for recovery of Arjun's property, which was alienated by his widows. Walla Bai claimed the property as Arjun's daughter and Narayan and Maroti were added as co-plaintiffs, as they had purchased a portion of the undivided property from Walla Bai. After the institution of the suit Walla Bai sold the remaining portion of the property to Narayan and Maroti, who became the sole plaintiffs in this suit and the name of Walla Bai was removed from the record on 3rd September 1924. The appellants in First Appeal No. 67-B of 1924 are Laxmanlal, Kunjilal, Laxman and Zibal, and they were defendants 7, 8, 9 and 10 in the suit. The decree passed against them is contained in paras. (6) and (7) of the decree, which runs as follows :

"6. That defendants 7 and 8 shall put plaintiffs in possession of S. No. 67 of mouza Rajura and 2/3 of the house as described in the schedule annexed, shall pay Rs. 500 as mesne profits for the three years, shall pay future mesne profits till the date of recovery of possession of the field by the plaintiffs and shall pay 1/10 of the aggregate costs of the suit viz., Rs. 140."

"7. That defendants 9 and 10 shall put plaintiffs in possession of the remaining 1/3rd of the house as described in the schedule annexed and shall pay 1/20 of the aggregate costs Rs. 70 to the plaintiffs."

The appellant in First Appeal No. 72-B of 1924 is Mt. Kashi Bai, and she was defendant 3 in the suit. Para. (3) of the decree relates to the claim decreed against her. It runs as follows :

"3. That defendant 3 do put the plaintiffs in possession of the following fields at mouza Rajura Taluq Chandur.

S. No.	P.H. No.	A.G.	R. A. P.	Share.
5	1	9.34	10-14-6	Whole
5	3	7.1	7-12-3	"with 8 mango
14	2	20.22	38-0-0	" trees.
15	1	6.34	10-5-6	"

and shall pay Rs. 1900 as mesne profits for the 3 years (1920-23) and shall pay future mesne profits till the date of recovering possession of the aforesaid fields and shall also pay ⅛ of plaintiffs' aggregate costs viz. Rs. 350."

After the filing of the appeals the respondent Maroti died at mouza Rajura on 12th May 1926, and the appellants filed applications to bring the legal representatives of the deceased respondent on record. The appeal abated on 12th August 1926 as against Maroti and as sufficient cause was not shown for setting aside the abatement, the applications were dismissed on 3rd April 1929.

The learned pleader for the respondent raised a preliminary objection that the appeal could not proceed against the other respondent Narayan in the absence of the dead co-respondent or his duly substituted representative. He contends that as the suit was one for joint possession by the plaintiffs and was decreed as such, the appeal is incompetent in the absence of one of the respondents. In support of his contention he referred to *Raj Chunder Sen* v. *Ganga Das Seal* (1), *Midnapur Zamindary Co. Ltd.*, v. *Amulya Nath Roy* (2), *Wajid Ali Khan* v. *Puran Singh* (3) and *Narain Das* v. *Sheo Din* (4). The learned counsel for the appellants argued that Narayan and Maroti were tenants in common and not joint tenants, that their interest was separate and could be separated, and, therefore, Maroti or his legal representative were not necessary parties to the appeal, and he cited *Shankarbhai Manorbhai* v. *Motilal Ramdas* (5). In the last mentioned case the plaintiffs were uncle and nephew and claimed the land as tenants-in-common. It was conceded in that judgment, that a difficulty may arise when the abatement is not set aside under R. 9, and the relief which the Court can grant as against the other respondents in appeal is not likely to be effective, and it was pointed out, that difficulty must depend largely upon the nature of the suit and the possible relief that can be granted in appeal, under the circumstances of the particular case. The facts of that case and the case under consideration are not analogous and, therefore, the law laid down in it is not of universal application and should not apply to this case. In this

(1) [1904] 31 Cal. 487 = 31 I. A. 71 = 8 Sar. 623 (P.C.)
(2) A. I. R. 1926 Cal. 893=53 Cal. 752.
(3) A. I. R. 1925 All. 108=47 All. 100.
(4) A. I. R. 1926 All. 234=48 All. 251.
(5) A. I. R. 1925 Bom. 122=49 Bom. 118.

case the shares of the respondents have not been separately defined, and a joint decree in their favour was passed. As pointed out in *Midnapur Zamindary Co Ltd.* v. *Amulya Nath Roy* (2), at p. 755 (of 53 *Cal.*) if a decree in favour of the appellants, setting aside the decree of the Court below, so far as the respondent on record is passed, such a decree would be incapable of execution, because the decree in favour of the heirs of the dead respondent stands, and under that decree, they are entitled to possession. If a decree in favour of the appellants is passed, there will be two conflicting decrees in existence, and will lead to absurd results. The plaintiffs sued for joint possession and obtained a decree. Under these circumstances, the appeals cannot proceed in the absence of the heirs of the dead respondent, and are incompetent, and must be dismissed. The appeal is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 360 (1)

MACNAIR, OFFG. J. C.

Secy. Municipal Committee, Nagpur—Complainant.

v.

Yenka Khatik—Accused.

Criminal Revn. No. 298 of 1929, Decided on 25th September 1929, made by Sess. Judge, Nagpur, on 5th August 1929.

C. P. Municipal Act, S. 199—Words "every day after the first" must be interpreted as every day after first day to which conviction relates.

The words "every day after the first" must be interpreted as every day after the first to which the conviction relates. If a person has been committing a breach of a bye-law since 8th July 1928, he can be properly fined Rs. 50 on 21st November 1928. It is misreading S. 199 to think that he should be fined Rs. 5 only on 21st November 1928 because he was on that date continuing the offence. [P 360 C 2]

Samiulla Khan—for Accused.

Order.—Yenka was convicted under the provisions of S. 199, C. P. Municipalities Act, for disobedience to a bye-law. He was fined Rs. 50 for his breach of the bye-law on 21st November 1928 and Rs. 5 for the subsequent days in which he persisted in the breach. The learned Sessions Judge has made a report under S. 433, Criminal P. C, as in his opinion Yenka should only have been fined Rs. 5 for his offence on 21st November 1928 The learned Sessions Judge states that Yenka had been committing the breach since 8th July 1928 and was only continuing the offence on 21st November 1928. Yenka had been convicted and fined for his disobedience during the period 9th July 1928 to 20th Nov. 1928.

In my opinion the learned Sessions Judge has misread S. 199, Municipal Act. S. 199 clearly states that disobedience of a lawful direction shall be punishable by fine which may extend to Rs. 50. The words :

"and, in the case of a continuing breach, with further fine which may extend to five rupees for every day after the first during which the breach is proved to have been persisted in,"

do not detract from this provision. "Every day after the first" then must be interpreted as every day after the first day to which the conviction relates. If it were interpreted otherwise, the result would be that Yenka could have been fined Rs. 5 for 21st November 1928 and the subsequent days in addition to the fine of Rs 50 inflicted in accordance with the preceding provision of the section. There is then no necessity for interferance.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Nagpur 360 (2)

MACNAIR, OFFG. J. C.

Bhaulal—Applicant.

v.

Kallu—Non-Applicant.

Criminal Revn. No. 319 of 1929, Decided on 5th October 1929, from order of Sess. Judge, Nagpur, D/- 29th July 1929.

Criminal P. C., S. 436—Scope.

Where a Magistrate completes an enquiry and discharges the accused, further enquiry should not be ordered except for very strong reasons. [P 361 C 1]

V. N. Herlekar—for Applicant.

H. D. Mulak—for Non-Applicant.

Order.—The order in this criminal revision will govern the disposal of *Criminal Revision No.* 320 *of* 1929 (*Dinbandhu* v. *Kallu*). On 6th September 1928 Kallu made a complaint that a petty assault had been committed seven months earlier. The Magistrate heard all the witnesses produced by the complainant and states clearly that he disbelieves them. He gives some substantial reasons such as that the complainant

has not told a consistent story. He then made a reference to the documents filed by the defence, but remarked that it was not necessary for him to do so as he had found no corroborative evidence to support the prosecution. He discharged the accused saying that the prosecution had failed to establish the case.

In revision the learned Sessions Judge stated that the Magistrate should not have taken help of the documents filed by the accused in order to decide whether a particular witness was reliable or not. He also remarked that too great stress should not be laid on discrepancies and exaggerations and directed further enquiry into the complaint. In my opinion it was improper to direct further enquiry. The trying Magistrate had considered all the evidence produced and had come to the conclusion, apart from the documents, that that evidence did not make out a prima facie case. The learned Sessions Judge has not dealt with the reasons given for this conclusion. Where a Magistrate completes an enquiry and discharges the accused, further enquiry should not be ordered except for very strong reasons. I therefore set aside the order directing further enquiry.

P.N./R.K. *Order set aside.*

A. I. R. 1929 Nagpur 361

SUBHEDAR, A. J. C.

Babusingh—Defendant 3—Appellant.

v.

Godawari—Plaintiff—Respondent.

Second Appeal No. 77-B of 1928, Decided on 5th March 1929, against decree of Second Addl. Dist Judge, Akola, D/- 16th September 1927.

Civil P. C., O 41, R. 22—Person not entitled to appeal against order—His mere addition as respondent in appeal against order does not entitle him te raise cross-objection to that order.

Where a person cannot prefer an independent appeal against an order, as nothing is decided therein against him, his mere addition as pro forma respondent in the appeal against the order would not entitle him to raise any cross-objection to the order.

[P 362 C 1]

W. R. Puranik—for Appellant.

M. B. Niyogi—for Respondent.

Judgment. — As the judgment appealed against does not sufficiently mention the facts, it is necessary to give the same in some detail here. In Civil Suit No. 127 of 1918 a preliminary decree for foreclosure was obtained by two plaintiffs, Godawari and Sunderbai, against four defendants, (1) Babu, (2) Lalsingh, (3), Babusingh and (4) Bhagwandas, in the Court of 2nd Subordinate Judge, Akola, on 8th September 1919. Various appeals were preferred later, the last of which was decided by this Court on 17th December 1924, as Second Appeal No. 188-B of 1923. The preliminary decree, as ultimately modified by this Court, was made absolute on 27th March 1926, ex parte the defendants and possession of the mortgage property was obtained by the plaintiffs decree-holders on 24th June 1927, and the decree was struck off as fully satisfied on 30th July 1927.

On 7th April 1926, defendant 3, Babusingh applied to the lower Court for setting aside the ex parte decree absolute for various reasons given in the application which was registered as Misc. Case No. 29 of 1926. On 23rd April 1926, defendant 4, Bhagwandas, made a similar application and this was registered as Misc. Case No. 35 of 1926. Both these cases were contested by the plaintiffs decree-holders and separate orders rejecting the applications were passed by the lower Court on 9th April 1927. Defendant 3, Babusingh, did not prefer any appeal against the adverse order passed against him in Misc. Case No. 29 of 1926.

Against the order passed in Misc. Case No. 35 of 1926 defendant 4, Bhagwandas filed an appeal in the Court of the 2nd Additional District Judge, Akola (Misc. Appeal No. 2 of 1927) making the plaintiffs as the first two respondents and defendants 1 2 ,and 3 as respondents 3, 4 and 5 respectively. On 19th November 1927, defendant 3 as respondent 5 in the aforesaid appeal filed cross-objections to what he styled as "the final decree for foreclosure passed in this case" on various grounds one of which was that the lower Court should not have passed an ex parte decree absolute when notices were not properly served upon the defendants. On the date of the hearing of the appeal on 1st December 1927, the defendant 4, Bhagwandas, who was the sole appellant through his pleader, withdrew his appeal and in spite of the protest of defendant 3, Babusingh, respondent 4, that his cross-objection should be heard and decided on merits, the lower appellate Court overruled him on the ground that

the so-called cross-objections were not maintainable because they were in the nature of an appeal against the order passed in Misc. Case No. 29 of 1926 which was not appealed against. It is against this last order of the lower appellate Court that the present second appeal is filed. The only question for decision is whether the cross-objections filed by the present appellant in the lower appellate Court were in order and if so whether the lower appellate Court was justified in refusing to dispose of them on merits.

Order 41, R. 22, Civil P. C., lays down that any respondent though he may not have appealed from any part of the decree may not only support the decree on any of the grounds decided against him in the Court below but take cross-objection to the decree which he could have taken by way of appeal. Applying the principle of this rule to the case of the appellant, it is clear that he had no right whatsoever to take any cross-objection to the order passed in Misc. Case No. 35 of 1926 which was the subject matter of Misc. Appeal No. 2 of 1927 in the lower appellate Court. It is conceded by the learned pleader for the appellant that he could not have preferred any independent appeal against the said order, as nothing was decided therein against him. That being the case his mere addition as pro forma respondent in the appeal would not entitle him to raise any cross-objection to the order appealed against. As a matter of fact the appellant himself styled his memorandum of cross-objections as one not against the order refusing to set aside the ex parte decree against defendant 4, Bhagwandas, but as one directed against the final decree for foreclosure passed ex parte. On the face of them these cross-objections were therefore, out of place in the appeal before the lower appellate Court.

The order of the learned Additional District Judge is perfectly correct and this appeal fails and is dismissed with all costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 362

JACKSON, A. J. C.

Raghunath—Plaintiff—Appellant.

v.

Mt. Yamunabai — Defendant — Respondent.

Second Appeal, No. 102-B of 1928, Decided on 4th October 1929, from decree of Dist. Judge, East Berar, Amraoti, D/- 3rd March 1928, in Civil Appeal No. 38 of 1927.

Hindu Law — Partition — Revision—After partition members living together and managing property in common — Family represented as joint in litigation—Such evidence does not prove reunion.

Partition was effected among all the members of the joint Hindu family. After partition members lived together and managed their property in common. The family was also represented as a joint family in litigation in which only one adult member was suing.

Held: that though the evidence was consistent with reunion did not necessarily prove it as the allegation of jointness might have been merely for the purposes of litigation: 30 *Cal.* 738 (*P. C.*), *Rel. on*; *A. I. R.* 1923 *P. C.* 136; *A. I. R.* 1928 *Mad.* 1113 and *A. I. R.* 1920 *P. C.* 24, *Ref.* [P 363 C 2]

D. T. and *S. T. Mangalmurti*—for Appellant.

P. S. Kotwal and *T. S. Dehode*—for Respondent.

Judgment.—This appeal arises from a suit by one member of a Hindu family against the widow of another member for possession of property now in her possession. Harbaji, the grandfather of the plaintiff Raghunath and of the deceased Gulab, husband of the defendant, had three sons, Sarawan, the father of Gulab, Parashram and Jhyango, the father of Raghunath. It has been held by both the lower Courts that these four separated from each other in 1903 and that the defendant Mt. Yamuna is entitled to the property of her husband Gulab. The plaintiff's case is that Parashram alone separated from the other three members of the family in 1903 and that the other three either remained united or reunited and that the plaintiff in either case is entitled to all the property that belonged to the members of the family that did not separate. The plaintiff relies on certain statements made in mutation proceedings after the death of Sarawan in 1912 by Harbaji, Parashram and Bhagirathi, Sarawan's widow (Exs. P. 7, P. 8 and P. 9) in

which they say that Parashram has been separated in mess and estate for the last 9 years from which it is inferred that only Parashram separated. On the other hand, there are statements made by Jhyango and Harbaji in other mutation proceedings on the same occasion (Exs. D. 16 and D. 17) in which they say that all the property had been divided, although they admit that Harbaji, Sarawan and Jhyango continued living together. He also relies on certain exhibits e.g., Ex. P. 14 and P. 15, which are copies of plaints filed in 1921 and 1923, in which Gulabrao and Raghunath and the widow of Sarawan, Bhagirathi, have sued as members of a joint family and on the fact that there have been joint purchases and other transactions by the members of the family excluding Parashram and his branch.

As regards the finding that all the members of the family separated, I find myself unable to interfere; there is oral evidence which the lower Courts have believed, namely, that of Ganpat (D. W. 1) and Amrit (D. W. 1), which shows a complete separation of all members of the family. It is also a fact that at the partition four shares were defined in the landed property and the partition is mentioned in the Record-of-Rights and the fields are recorded in the names of the persons to whose share they fell. It is pointed out that in *Nageshar Bakhsh Singh* v. *Ganesha* (1) the Privy Council have laid down that a definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation and is not sufficient to rebut the ordinary presumption of jointness; but that ruling can have no application to the facts of the present case. It is not merely on the entries in the revenue records that the defendant relies. As I have laid, there is also oral evidence and there is at least the admitted fact that a partial partition did take place.

It has been laid down in *Balabux* v. *Rukhmabai* (2) that there is no presumption when one coparcener separates from the others that the latter remain united and an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact, a view that has been re-affirmed in *Jatti* v. *Banwari Lal* (3). As I have already held on the evidence, all members of the family separated in 1903 and none of them remained united. The plea as to reunion is not very definite and there is no evidence of any specific agreement to reunite. *Mahalakshmamma* v. *Suryanarayana* (4) is cited in support of the view that reunion can be inferred from subsequent conduct. The subsequent conduct has already been indicated, namely, that Harbaji, Sarawan and Jhyango lived together after the partition and appear to have managed their property in common; the family has even been represented as a joint family in litigation. The evidence may be consistent with reunion, but it does not necessarily prove it. After partition members of the family might, as the Privy Council has recognised in *Balkishen Das* v. *Ram Narayan Sahu* (5), elect to enjoy their share separately or to continue to live together and enjoy their property in common; whether they did one or the other would affect the mode of enjoyment but not the tenure of the property or their interest in it. The statements of Harbaji and Jhyango (Exs. D 16 and D. 17) point to the latter alternative having been elected and the only facts that point definitely to reunion are the plaints in which the family has been representud as a joint one. In all of them I find that only one adult male was suing and the allegation of jointness may have been merely for the purposes of the litigation.

There is one piece of evidence which goes to show that the family was not really reunited and that is Ex. D. 41, a partition deed between the plaintiff and the defendant. It is urged on behalf of the plaintiff that this deed could only have been executed if the family had been joint; but it is clear that it would not have been executed at all if the family had been joint, because in that case she would have been entitled only to maintenance. The reason why this partition deed was necessary, even though the family was not

(1) A. I. R. 1920 P. C. 46=42 All. 368=23 C. C. 1=47 I. A. 57 (P. C.).
(2) [1903] 30 Cal. 725=30 I. A. 130=8 Sar. 470 (P. C.).
(3) A. I. R. 1923 P. C. 136=4 Lah. 350=50 I. A. 192 (P. C.).
(4) A. I. R. 1928 Mad. 1113=51 Mad. 977.
(5) [1903] 30 Cal. 798=30 I. A. 139=8 Sar. 489 (P. C.).

joint, is that it relates to property acquired after the partition which the members of the family would hold as tenants-in-common. I hold that Harbaji, Sarawan and Jhyango did not remain united and did not re-unite on or after the partition of 1903 and I dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Nagpur 364

JACKSON, A. J. C.

Krishnappa—Plaintiff—Appellant.

v.

Kashinath and *others* — Defendants—Respondents.

First Appeal No. 68-B of 1926, Decided on 24th July 1929, from decree of 1st Class Sub-Judge, Yeotmal, D/- 15th September 1926, in Civil Suit No. 6 of 1924.

(a) Hindu Law—Partition—Ascertainment of share of outgoing coparcener virtually separates all — Reunion, however, of the remaining may be presumed by conduct of coparceners remaining together after partition.

Where it is necessary, in order to ascertain the share of the outgoing coparceners, to fix the shares which the others are, or would be, entitled to, the separation of one may be said to be the virtual separation of all. And even though there is no evidence of any specific agreement among the remaining coparceners to remain united, such a reunion shall be presumed by the evidence showing that they did so remain : 30 *Cal.* 725 (*P. C.*), *Expl.*

[P 364 C 2 ; P 365 C 1]

(b) Hindu Law — Will of coparcener of reunited family cannot operate as will—Such will, if acted upon, binds coparceners.

The will of a deceased co-parcener belonging to a reunited joint Hindu family cannot operate as a will, but it may act as a family agreement which, if acted upon, will be binding on the members of the family : 35 *All.* 397 (*P. C.*) and *A. I. R.* 1926 *P. C.* 54, *Foll.*

[P 365 C 2]

M. B. Niyogi—for Appellant.

K. V. Deoskar, *K. G. Deshpande* and *W. B. Pendharkar*—for Respondents.

Jackson, A. J. C.—This appeal, like First Appeal No. 2-B of 1927, arises from a suit for partition of the Nim Jagir village of mouza Pardi. In it I have to consider the other half share of the village in which the appellant, Krishnappa, claims to have a quarter share, that is, two annas of the whole village. It is not disputed that he and his uncle Vishwanath are together entitled to four anna share. The question is whether that four anna share is to be divided between them equally or whether the appellant Krishnappa is to get one anna and Vishwanath three annas.

There were four brothers, Ramji, Harba, Manappa and Mahadappa, who owned the half share in mouza Pardi. They also own fields in mouza Wai. In 1896 Harba and his branch separated from the rest of the family and the fields at Wai were divided between all four branches. The other three branches went to live at Pardi and there they appear to have lived and managed their affairs as a joint family. In 1903 Manappa died and his branch became extinct. Before his death he executed a will, Ex. 7 D 4, dated 21st August 1903, in which he bequeathed his two anna share in Pardi and his other property to Vishwanath, the son of his brother Ramji. Krishnappa, the appellant, is the son of Sonba, Vishwanath's brother. His claim is that, though the will of Manappa was inoperative as Manappa was a member of a joint family, it proves a family settlement by which Vishwanath was to get Manappa's interest in the family property leaving his brother Sonba, the appellant's father, to succeed to the whole interest of Ramji. Viswanath's case is that he is entitled to two annas under the will of Manappa and to one anna as the son of Ramji. The lower Court has found in favour of Vishwanath.

The lower Court has found that the separation of Harba's branch in 1896 amounted to a complete disruption of the family ; consequently Manappa was competent to make a will, and the will conferred on Vishwanath Manappa's two anna share without depriving him of the one anna to which he would naturally succeed as the son of Ramji. It is urged on behalf of the appellant that the lower Court's finding as to separation is based on a misconstruction of *Balabux* v. *Rukhmabai* (1) in which the Privy Council have laid down the law as follows :

"There is no presumption when one coparcener separates from the others that the latter remain united. Where it is necessary in order to ascertain the share of the outgoing coparcener, to fix the shares which the others are or would be, entitled to, the separation of one may be said to be the virtual

(1) [1903] 30 Cal. 725=30 I. A. 180=8 Sar. 470 (P.C.).

separation of all. And an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other facts"

When Harba's branch separated and the fields at Wai were divided it was clearly necessary to ascertain the share to which each branch was entitled. The presumption then would be in favour of a partition between all the branches of the family. Nevertheless it is open to the appellant to contend that there was an agreement between the three branches that went to live at Pardi to remain united. It is not a question, as the lower Court supposes, of pleading and proving reunion. What the appellant pleaded was that the three branches in question did not separate. There is no evidence of any specific agreement to remain united, but there is, I think, good evidence to show that they did so remain.

Three members of the family have appared as witnesses, Krishnappa (P. W. 1), Vishwanath (7 D. W. 1) and Bhagwan (9 D W. 1), who represents the branch of Harba which did separate in 1896 Their evidence seems to me to show that though Harba's branch separated in that year and the fields at Wai were then divided between all four branches, the other three branches remained joint for some time longer, and that it was not till 1916 that the branch of Mahadappa separated from that of Ramji. The wording of the so-called will of Manappa on the whole bears this out. Although it purports to bequeath Manappa's share to Vishwanath it deals with the whole of the property belonging to the three branches of the family living at Pardi, and though it specifies the share to which each shall be entitled, it clearly considers them to be living in a state of jointness. It has been urged on behalf of Vishwanath that Ex. P 23 to P 28, which are extracts from the Record-of-Rights of mouza Wai, prove complete partition ; but that is not necessarily the case, and if Exs. P-30 and P-31 are considered, which are extracts from the Record-of-Rights of mouza Belora in which also the family had fields, it will appear that as the oral evidence shows, there was a partition between Krishnappa and Vishwanath on the one hand and Kashinath, the son of Mahadappa, on the other in 1916. Having regard to the evidence of the record I am not satisfied that the separation of Harba's branch in 1896 effected a complete disruption of the family, and I consider it satisfactorily proved that the remainder of the family remained joint till 1916.

The result is that Manappa's will cannot operate as such, but it may be a family arrangement which, if acted upon, will be binding on the members of the family, a document called a will having in such circumstances, been given effect to as a family arrangement by the Privy Council in *Brijraj Singh* v. *Sheodan Singh* (2) and *Lakhmi Chand* v. *Anandi* (3). What the family settlement was is clearly enough set forth in the will which makes it evident that Vishwanath was to get Manappa's share, his brother Sonba the father of the appellant, retaining the share that appertained to their branch. The will has been witnessed by Kashinath, son of Mahadappa, and by Sonba, and although this attestation by them cannot by itself prove that they knew the contents of the will and assented to them, it is proved by the subsequent conduct of members of the family the settlement was recognised and acted upon. As regards Vishwanath, it has been urged that he was a minor at the time of the will and so cannot be bound by any arrangement then come to by the other members of the family. I consider this to be a false plea. The evidence of Bhagwan (9 D. W 1) would make Vishwanath about 25 in 1903, and the last statement but one made by Vishwanath himself in his examination-in-chief would make him over 23 in that year.

After the partition with Kashinath in 1916, an application dated 6th March 1918 was made to the Deputy Commissioner, Yeotmal, signed by Vishwanath and Krishnappa as well as other members of the family in which it was stated that Kashinath, son of Mahadappa, had a two anna share in the village, Krishnappa had a two anna share, Vishwanath had a two anna share and Narayan and Bhagwan, sons of Harba, had each a one anna share. Ex. P-2 is copy of this application and the subsequent proceedings, as

(2) [1913] 35 All. 337=93 I. C. 826=40 I. A. 161 (P. C.).
(3) A. I. R. 1926 P. C. 54=48 All. 318=53 I. A. 123 (P. C.).

Ex. P-3 and Ex. P-4 show, resulted in the shares specified being entered in the revenue records. In 1922 a plaint, of which Ex. P-1 is a copy, was filed on behalf of Krishnappa and Vishwanath. It is signed by both and it represents each as having a two anna share in the village. On 24th April 1924 Ex. P-19 was executed by Vishwanath and Krishnappa. It is a deed of partition and allots to each a two anna share in mouza Pardi. It is, however, Vishwanath's contention, which has been accepted by the lower Court, that he executed this deed under misrepresentation and undue influence

The deed, Ex. P-19, was executed after the institution of the suit but before the first hearing, that is, before Vishwanath had set up his claim to a three anna share. His explanation of the circumstances in which he claimed to execute this deed is not convincing. It must be explained, in the first place, that before Manappa executed his will in 1903, it was at one time intended that he should adopt Vishwanath. The adoption was for some reason found impracticable But nevertheless the execution of the will appears to have been considered in some way to place Vishwanath in the position of a son of Manappa and he has at times described himself as Vishwanath, the son of Manappa, though at other times he has signed himself as Vishwanath, the son of Ramji. According to him, Krishnappa used the fact that he sometimes signed as Vishwanath, the son of Manappa, to coerce him into signing the partition deed. His evidence is as follows :

"My signature on the farkhat was taken by force by Krishnappa. He said that unless I agree to take two annas share in all, I would not get even that and he threatened to beat me. Hence I signed the farkhat. He said I must get Manappa's share only as I used his name in place of the name of my father Ramji."

I cannot believe this explanation. The evidence of Vishwanath on the point is unsupported and it is contradicted by that of Bhagwan, who as a member of Harba's branch of the family can have no interest at all in supporting Krishnappa. This deed and the other actions of the parties satisfy me that the arrangement come to at the time when Manappa executed his will was recognized as valid until after the institution of the suit. In the circumstances, I think, that the arrangement must be given effect to, and that Vishwanath must be held to be entitled only to a two anna share.

The appeal is allowed and the decree of the lower Court will be modified by Krishnappa being shown as entitled to a share of two annas instead of one anna and Vishwanath to two annas instead of three annas. Vishwanath will bear the appellant's costs.

V.S./R.K. *Appeal allowed.*

A. I. R. 1929 Nagpur 366

SUBHEDAR, A. J. C.

Shamrao—Defendant—Appellant.

v.

Chandrabhagabai—Plaintiff—Respondent.

First Appeal No. 74-B of 1928, Decided on 25th July 1929, against judgment of 1st Class Sub-Judge, No. 1, Akola, D/- 30th June 1928.

Hindu Law—Maintenance—Income from ancestral property alone bears all maintenance charges.

The income from ancestral property alone bears all maintenance charges. Therefore, the income from Deshmukhi and Patwaripari should not be taken into consideration in fixing a person's maintenance allowance because the income from these sources is dependant on personal service. [P 367 C 1]

W. B. Pendharkar—for Appellant.

R. W. Fulay—for Respondent.

Judgment.—The facts of the case out of which this first appeal has arisen are shortly these: The plaintiff's husband Purushottamrao, who died in 1917, was a step-brother of the defendants and formed a joint Hindu family with them. Up to 1922 the plaintiff stayed on with the defendants when difference arose and she took up her residence with her brother who has since been maintaining her. She, therefore, brought the suit in the lower Court claiming Rs. 50 a month as a suitable maintenance allowance and arrears for three years at this rate. She put down the family income at Rs. 10,000. In reply the defendants stated that the annual income from all sources was not more than Rs. 1,500 and as there were five members to support the plaintiff should not be allowed more than Rs. 100 a year if she did not care to stay with the defendants.

The lower Court in a very careful judgment reviewed all the evidence cri-

tically and came to the conclusion that the annual net income from the fields was Rs. 1,250, that from Deshmukhi Rs. 267 and from Patwaripan Rs. 198 total Rs. 1,665. Making allowance for everything the learned Subordinate Judge fixed Rs. 20 a month as a suitable maintenance allowance to the plaintiff in future and ordered three years' arrears to be paid to her at this rate.

The defendants come up in appeal and it is contended on their behalf that the income from Deshmukhi and Patwaripan should not have been taken into consideration in fixing the plaintiff's maintenance allowance because the income from these sources is dependant solely on personal service to be rendered by one or the other defendant. Strictly speaking, the income from ancestral property alone bears all maintenance charges. I, therefore, accept this contention of the defendants. The result will then be that the net income of defendants will be considered to be only Rs. 1,259 a year and the allowance fixed by the lower Court will accordingly be reduced proportionately. The plaintiff will be thus entitled to a monthly allowance of Rs. 15 only instead of Rs. 20.

The next contention advanced is that since the plaintiff left the defendant's house of her own free will and accord without any good reason she is not entitled to claim any arrears of maintenance more particularly when there is no evidence that any notice of demand was ever given by her to the defendants. Mr. Fulay, who appeared for the plaintiff-respondent states that since this question of want of notice was not raised by the defendants in their pleadings the plaintiff had no opportunity to plead and prove that demand was in fact made. Under these circumstances I remand the case to the lower Court for taking pleadings and evidence on the point of notice of demand and disposal of the question of arrears afresh in the light of fresh findings. Since there has been a divided success in this Court the costs of this appeal will be borne by the parties as incurred by them.

P.N./R.K. *Case remanded.*

A. I. R. 1929 Nagpur 367

SUBHEDAR, A. J. C.

Yashodi and *another*—Defendants—Appellants.

v.

Chandrabhan and *another*—Plaintiffs—Respondents.

Second Appeal No. 137-B of 1928, Decided on 25th September 1929, against decree of Addl. Dist. Judge, Akola, D/- 23rd January 1928, in Civil Appeal No. 242 of 1927.

Hindu Law—Adoption—Bombay School—Adoption by widow of coparcener without husband's or coparcener's consent is invalid.

Adoption made by a widow of a coparcener without having authority from her husband and without obtaining the consent of the coparceners is invalid: *A. I. R.* 1926 *Bom.* 435 (*F.B.*) and 6 *Bom.* 498 (*F.B.*), *Foll.* and *A. I. R.* 1922 *P. C.* 216, *Ref.* [P 368 C 2]

M. R. Bobde—for Appellants.

S. A. Pande—for Respondents.

Judgment.—This is a second appeal by the defendants. The genealogical tree of the parties is as under:

Chandrabhan (Plff. 1)	Sitaram =	(1) Parwati (2) Yashodi (Deft. 1)
Mahadu (Plff. 2)		Maroti (Deft. 2)

Sitaram died on 24th April 1923, and after his death disputes arose between the parties as regards possession of a field S. No. 4 pot hissa No. 3 of mouza Kothadi which was ultimately attached by the criminal Court. The present suit was, therefore, filed by the respondents for a declaration that the said field is theirs and that the appellants have no right over it. The plaintiffs' case was that Sitaram died as a member of a joint family consisting of himself and the plaintiffs, and therefore after Sitaram's death the latter became owners of the field in dispute by right of survivorship and that the adoption, if any, of the second by the first defendant was invalid because defendant 1 was the junior widow of Sitaram and was not authorized by him to make the adoption. The defence was that Sitaram separated in estate from the plaintiff in 1921, that the field in dispute came to him at the partition, and that the adoption was made and was valid because it was authorized by Sitaram. The trial Court found for the defendants and dismissed the plaintiffs' suit, but on appeal by the

plaintiffs the Additional District Judge Akola, held that the partition set up by the defendants was not established, and that the adoption of defendant 2, though made, was invalid in law as neither the authority of Sitaram nor the consent of the coparceners was proved. The lower appellate Court therefore set aside the trial Court's decree and decreed the plaintiffs' claim with all costs.

In second appeal Mr. Bobde for the appellants argued that the lower appellate Court misconstrued the documents (Exs. P-1, P-3 and P-4 and Exs. D-1 and D-2) and wrongly inferred that they proved jointness rather than separation of the brothers. There is certainly no evidence to prove that plaintiff 1 got his own name inserted in the first three documents to the knowledge of Sitaram and the lower appellate Court's assumption to that effect has undoubtedly given the plaintiffs' advocate some ground to challenge the inference drawn by the learned Judge against Sitaram's conduct in acquiescing in the said entries. But the simple question for consideration is how far these documents support the plea of partition set up by the defendants. Having gone through the several documents, I have come to the same conclusion, as the two lower Courts did, that the entries in these documents being to some extent conflicting, the documents are not conclusive either way. It is, however, clear that they cannot lead the inference that that there was a partition between the brothers in 1921.

Because the documentary evidence was not correctly appreciated by the lower appellate Court, it was suggested that its appreciation of the oral evidence was also biased and, therefore, Mr. Bobde took me through the entire oral evidence which bore on the question of partition and argued that it supported the plea of partition. To my mind no Court of justice would consider the type of oral evidence furnished in the present case by the appellants as sufficient to controvert the ordinary presumption of Hindu Law that a family is joint until the contrary is proved. I accept the analysis and criticisms of this evidence given by the lower appellate Court in paras. 6 and 7 of its judgment and concur with it in holding that the partition set up between the plaintiffs and Sitaram has not been established.

The next question that was argued and remains for decision is if the adoption of defendant 2 by defendant 1 was valid on the findings (1) that the husband of defendant 1 died as a member of the joint family of himself and the plaintiffs, (2) that Sitaram had left no direction to defendant 1 to make any adoption to him, and (3) that the plaintiff's consent to the adoption of defendant 2 was neither asked for nor given. On the authority of the observations of their Lordships of the Privy Council appearing in para. 1 at pp. 155 and 158 of the report of the case of *Yado* v. *Namdeo* (2), Mr. Bobde argued that the adoption in question must be deemed to be valid in spite of the fact that the consent of the plaintiffs' coparceners was not given to the adoption. It is undoubtedly true that the aforesaid observations fully support the contention and seem in a way to overrule the dictum to the contrary laid down in *Ramji* v. *Ghamau* (2).

But it was argued by the respondents' pleader that the aforesaid observations were in the nature of obiter dicta as they were not necessary for the actual decision of the case before their Lordships of the Privy Council as was pointed out by the Full Bench of Bombay High Court in the case of *Ishwar Dadu* v. *Gajabai* (3), where it was held that the decision in *Yadao* v. *Namdeo* (1), did not overrule *Ramji* v. *Ghamau* (2). As the Bombay School of law is admittedly applicable to Berar it follows that the latest authority of the Bombay High Court laying down the law applicable to facts similar to those of the present case must be followed. I, therefore, concur with the lower appellate Court in holding that the adoption of defendant 2 was not valid. The appeal fails and is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1922 P. C. 216=17 N. L. R. 145=49 Cal. 1=48 I. A. 518 (P.C.).
(2) [1881] 6 Bom. 498 (F.B.).
(3) A. I. R. 1926 Bom. 495=50 Bom. 468 (F.B.).

END

THE

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1929

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IN GRATEFUL RECOGNITION OF

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OUDH CHIEF COURT

1929

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Puisne Judges :

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" Khan Bahadur Syed Mohammad Raza, B. A., LL. B.

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THE

ALL INDIA REPORTER

1929 OUDH

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929, with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

Table No. I.

Showing seriatim the pages of Indian Law Reports, Lucknow Series for the years 1928 and 1929, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 3 and 4 Lucknow.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 3 Lucknow=All India Reporter.

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
1	1928	*O*	1	167	1928	*O*	152	323	1928	*O*	404	459	1928	*O*	273	608	1928	*O*	306
19	"	"	49	170	"	"	195	326	"	"	307	472	1929	"	88	610	"	"	338
76	"	*PC*	87	182	"	"	199	363	"	"	226	478	1928	"	265	616	"	"	369
89	1927	*O*	363	199	1927	"	562	366	"	"	229	482	"	"	258	628	"	"	362
102	"	"	478	220	"	"	489	368	"	"	237	487	"	"	359	636	"	"	344
107	"	"	482	237	"	"	465	372	"	*PC*	202	494	"	"	277	645	"	"	342
113	"	"	510	241	"	"	484	392	"	*O*	241	506	"	"	251	650	"	"	355
118	"	"	476	244	1928	"	15	403	"	"	482	521	1929	"	97	661	1929	"	269
126	1928	"	30	253	1927	"	526	411	"	"	490	571	1928	"	266	664	1928	"	401
130	"	"	8	256	1928	"	125	413	"	"	239	578	"	"	286	668	"	"	391
133	"	"	23	273	"	"	95	416	"	"	233	580	"	"	337	674	"	"	384
139	"	"	19	282	"	"	99	430	"	"	486	584	"	"	297	680	"	"	402
142	"	"	88	287	"	"	104	436	"	"	223	588	"	"	263	684	1929	*PC*	19
145	"	"	108	298	"	"	143	439	"	"	289	591	"	"	340	700	1928	*O*	378
150	"	"	214	302	"	"	203	446	1929	"	80	598	"	"	287	719	"	"	442
154	"	"	133	314	"	*PC*	162	456	"	"	86	603	"	"	303				

I. L. R. 4 Lucknow=All India Reporter

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
1	1928	*O*	396	52	1929	*O*	371	101	1929	*O*	25	155	1928	*O*	494	193	1929	*O*	32
13	"	"	439	57	"	"	373	107	1928	"	465	159	"	"	503	201	"	"	35
22	"	"	376	68	1928	"	472	122	1929	*PC*	121	168	1929	"	16	203	"	"	54
26	1929	"	364	76	"	"	418	138	1928	*O*	509	181	"	"	68				
39	"	"	129	93	1929	"	26	147	1929	"	30	185	"	"	22	206	"	"	414

I. L. R. 4 Lucknow=All India Reporter—(*Concld.*)

ILR)	A. I. R.			ILR)	A.I.R.			ILR)	A.I.R.			ILR)	A. I. R.			ILR)	A.I.R.		
209	1929	*O*	76	284	1929	*O*	60	404	1930	O	124	529	1930	*O*	171	649	1929	*O*	529
220	"	"	362	291	"	"	72	415	"	"	178	535	"	"	193	665	1930	"	176
225	"	"	475	305	"	*PC*	149	421	1929	*PC*	259	539	1929	"	389	667	"	"	2
235	"	"	90	339	1930	*O*	177	429	"	*O*	225	562	"	"	385	669	"	"	196
237	"	"	59	343	1929	"	520	452	"	"	198	573	"	"	341	679	1929	"	190
241	"	"	71	347	"	"	91	480	1927	"	539	592	"	"	153	684	"	"	294
243	"	"	334	353	"	"	87	483	1929	*PC*	283	597	"	"	160	690	"	"	296
250	"	"	463	355	"	"	121	491	"	*O*	251	603	"	"	172	705	"	"	248
261	"	"	521	363	"	*PC*	139	503	"	"	284	622	"	"	185	713	"	"	275
265	"	"	83	370	"	*O*	265	510	"	"	155	635	"	"	235	721	1930	"	57
270	"	"	67	390	"	"	376	517	"	"	484	643	"	"	214	726	"	"	60
279	"	"	422	396	1930	"	101	524	"	"	158								

Table No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER

6 Oudh Weekly Notes=All India Reporter.

OWN)	A. I. R.			OWN)	A. I. R.			OWN)	A. I. R.			OWN)	A.I.R.			OWN)	A.I.R.		
1	1929	*O*	463	287	1929	*O*	296	637	1929	*PC*	228	869	1929	*PC*	279	1070	1930	*O*	165
10	"	"	121	299	"	*PC*	61	644	1930	*O*	13	876	"	"	238	1073	"	"	6
17	"	"	82	305	"	*O*	290	649	1929	"	399	880	"	*O*	483	1080	"	"	121
19	*B. R Case*			309	"	"	272	652	"	"	402	885	"	"	491	1085	"	"	81
29	1929	*PC*	19	316	"	"	225	661	"	"	389	891	1930	"	32	1088	"	"	105
40	"	*O*	280	334	"	"	231	681	"	"	516	901	1929	"	527	1099	"	"	53
43	"	"	150	369	"	*Notes*	34*b*	689	"	"	406	902	"	"	529	1094	"	"	69
45	"	"	151	372	"	*O*	256	704	"	"	419	903	"	"	539	1099	"	"	129
49	1930	"	195	374	"	"	265	707	"	*Notes*	21*d*	908	1930	"	46	1105	"	"	104
51	1929	"	134	391	"	"	287	710	"	*O*	413	915	1929	*PC*	75	1109	"	"	54
97	"	"	154	393	1930	"	178	714	"	"	424	921	"	*O*	524	1112	"	"	131
100	"	"	149	407	1929	"	294	718	"	"	449	925	"	"	536	1134	"	"	55
104	"	*PC*	1	412	"	"	278	722	"	"	415	932	1930	"	64	1136	1929	*PC*	297
109	"	*O*	305	417	"	*PC*	92	725	"	"	469	937	1929	"	548	1143	1927	*O*	124
118	"	"	148	423	"	"	95	737	"	"	427	940	"	"	535	1144	"	"	112
121	"	"	158	431	"	*O*	311	750	"	"	441	942	"	"	527	1146	"	"	102
125	"	"	155	437	"	"	313	757	"	"	488	943	1930	"	67	1150	"	"	240
131	"	"	157	441	"	"	321	759	"	"	467	947	1929	*Notes*	27*a*	1198	"	"	132
133	"	"	160	456	"	"	251	763	"	*PC*	259	953	1930	*O*	58	1202	"	"	306
138	"	"	153	465	"	"	541	768	"	*O*	439	957	1929	"	526	1211	"	"	369
142	"	"	162	469	"	"	353	771	"	"	451	960	1930	"	41	1212	1926	"	383
151	"	*PC*	69	473	"	*PC*	103	776	"	"	479	963	"	"	39	1214	"	"	348
159	"	*O*	167	483	"	"	149	780	"	"	444	969	"	"	10	1217	"	"	428
169	"	"	198	491	"	*O*	321	786	"	*PC*	231	974	1929	*Notes*	33*a*	1223	"	"	509
191	"	"	172	493	"	"	316	801	"	*O*	453	977	1930	*O*	36	1227	"	"	464
206	1930	"	176	503	"	*PC*	152	804	"	"	456	982	"	"	20	1232	"	"	601
208	1929	"	213	510	"	"	143	809	"	"	426	1002	"	"	3	1238	"	"	487
211	"	"	243	517	"	"	135	813	"	"	493	1007	"	"	57	1243	1928	"	20
213	"	"	284	526	"	"	128	815	"	*Notes*	30*a*	1011	"	"	195	1248	1926	"	169
218	"	"	190	536	"	*O*	337	818	"	*O*	528	1012	"	"	194	1251	1929	"	97
222	"	"	254	545	"	"	381	822	"	*PC*	240	1014	"	"	1	1285	"	"	129
226	"	"	235	549	"	"	494	829	"	*O*	433	1017	"	"	113	1296	"	*PC*	121
233	"	"	185	589	"	*PC*	166	832	"	*Notes*	29*d*	1035	"	"	184	1308	"	*O*	414
244	"	"	238	590	"	*O*	417	835	"	*PC*	269	1036	"	"	43	1310	"	"	362
249	"	"	257	604	"	"	385	843	"	*O*	435	1042	"	"	49	1315	"	"	334
264	"	"	244	613	"	*PC*	174	848	"	"	515	1046	"	"	108	1320	1930	"	124
270	"	"	248	617	"	"	179	851	"	"	455	1056	"	"	60	1329	"	"	178
276	"	"	240	622	"	*O*	458	854	"	"	437	1060	"	"	110	1334	"	"	101
277	"	"	301	624	1930	"	29	859	"	"	447	1064	"	"	65	1341	1929	"	475
281	"	"	275	630	1929	"	486	862	"	*PC*	289	1068	"	"	56				

For 11 & 12 All India Criminal Reports=All India Reporter.
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

For 30 Cr. L. J., 113 to 120 I. C. & I. R. 1929 Oudh=All India Reporter.
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

For 1929 Criminal Cases=All India Reporter.
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Oudh Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Oudh. Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

A. I. R. 1929 Oudh=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R	Other Journals	A.I.R	Other Journals
1	5 O W N 1001	72	5 O W N 1101	149	115 I C 107	235	4 Luck 635
	113 I C 785		114 I C 762	150	6 O W N 43	238	6 O W N 244
11	111 I C 521		4 Luck 291		115 I C 846		117 I C 450
12	5 O W N 905	76	5 O W N 1053		30 Cr L J 544	240 (1)	117 I C 452
	114 I C 305		115 I C 444		12 A I Cr R 359		30 Cr L J 799
	10 L R A Rev 316		4 Luck 209	151	6 O W N 45	240 (2)	6 O W N 276
15	111 I C 370	79	5 O W N 1126		116 I C 57		117 I C 480
16	5 O W N 936		114 I C 761		30 Cr L J 557	241	113 I C 367
	114 I C 314	80	3 Luck 446		12 A I Cr R 437	243	5 O W N 211
	4 Luck 168		5 O W N 202	153	6 O W N 138		116 I C 208
21	5 O W N 990		110 I C 56		115 I C 101	244	6 O W N 264
	111 I C 837	82	6 O W N 17		4 Luck 592		118 I C 85
22	5 O W N 920		30 Cr L J 381	154	6 O W N 97		4 Luck 643
	114 I C 755		114 I C 810		30 Cr L J 384	246	118 I C 846
	4 Luck 185	83	5 O W N 1122		114 I C 814	248	5 O W N 270
25	5 O W N 980		115 I C 99	155	6 O W N 125		120 I C 820
	113 I C 494		4 Luck 265		115 I C 102		4 Luck 705
	4 Luck 101	85	5 O W N 1131		4 Luck 510		31 Cr L J 181
26	5 O W N 873		30 Cr L J 360	157	6 O W N 131	251	5 O W N 456
	4 Luck 93		114 I C 782		115 I C 839	FB	118 I C 419
	115 I C 105	86	3 Luck 456		30 Cr L J 543		4 Luck 491
30	5 O W N 974		10 A I Cr R 129		12 A I Cr R 357	254	6 O W N 222
	113 I C 46		5 O W N 216	159	6 O W N 121		117 I C 473
	4 Luck 147		29 Cr L J 452		117 I C 477	256	6 O W N 372
32	5 O W N 1031		108 I C 900		4 Luck 524		116 I C 64
	113 I C 81	87	5 O W N 1136		7 O W N 226		30 Cr L J 559
	4 Luck 193		113 I C 926	160	6 O W N 139		12 A I Cr R 431
35 (1)	5 O W N 1037		30 Cr L J 134		115 I C 97	257	6 O W N 249
	114 I C 319		4 Luck 353		4 Luck 597		118 I C 87
	4 Luck 201		12 A I Cr R 93	162	6 O W N 142	263	117 I C 764
35 (2)	5 O W N 1044	88	3 Luck 472		117 I C 412	265	6 O W N 374
	114 I C 310		5 O W N 210	167	6 O W N 159	FB	115 I C 433
40	5 O W N 1041		110 I C 79		30 Cr L J 360		4 Luck 370
	117 I C 403	90	5 O W N 1133		114 I C 771	272	5 O W N 309
41	111 I C 843		113 I C 736	172	5 O W N 191		117 I C 737
43	5 O W N 1076		4 Luck 235	FB	116 I C 200		30 Cr L J 829
	114 I C 320	91	5 O W N 1117		4 Luck 603		1929 Cr C 14
44	111 I C 817		114 I C 507	178	112 I C 296	275	5 O W N 281
54	5 O W N 1091		4 Luck 347	185	6 O W N 233		118 I C 766
	114 I C 811	93	112 I C 156		4 Luck 622		4 Luck 713
	4 Luck 203	96	112 I C 229	190	5 O W N 218	278	5 O W N 412
55	111 I C 760	97	3 Luck 521		116 I C 193		118 I C 813
56	5 O W N 1070		117 I C 395		30 Cr L J 567	280	6 O W N 40
	114 I C 759		6 O W N 1251		12 A I Cr R 420		116 I C 207
59	5 O W N 1094	113	5 O W N 1111		4 Luck 679		30 Cr L J 570
	114 I C 769		114 I C 801	193	6 O W N 169		12 A I Cr R 442
	4 Luck 237	116	112 I C 486		120 I C 387		1929 Cr C 13
60	5 O W N 1085	117	112 I C 205		4 Luck 452	282	115 I C 839
	114 I C 753	121	6 O W N 10	204	114 I C 113	284	6 O W N 213
	10 L R A Rev 220		115 I C 299	211	121 I C 288		116 I C 195
	4 Luck 284		4 Luck 355	213	6 O W N 208		4 Luck 503
63	5 O W N 1081	124	112 I C 494		118 I C 759	286	113 I C 734
	4 Luck 181	125	112 I C 201		30 Cr L J 969	287	6 O W N 391
	115 I C 294	126	112 I C 593	214	121 I C 286		118 I C 816
65	111 I C 805	129	4 Luck 89	215	115 I C 279	289	118 I C 603
67	5 O W N 1062		112 I C 884	225	6 O W N 316	290	5 O W N 305
	114 I C 806		6 O W N 1285	FB	117 I C 739		117 I C 409
	10 L R A Rev 280	134	6 O W N 51		4 Luck 429	292	...
	4 Luck 270		117 I C 456	231	6 O W N 334	294	6 O W N 407
71	5 O W N 1134	148	6 O W N 118	FB	117 I C 748		118 I C 883
	113 I C 86		116 I C 58	235	6 O W N 226		4 Luck 684
	4 Luck 241	149	6 O W N 100		117 I C 471		

A. I. R. 1929 Oudh=Other Journals—(*Concld.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
296	6 *O W N* 287	369	29 *Cr L J* 745	419	120 *I C* 398	483 (1)	6 *O W N* 757
	118 *I C* 760		110 *I C* 681	420	117 *I C* 766	483 (2)	6 *O W N* 880
	4 *Luck* 690		5 *O W N* 598	422	4 *Luck* 279		121 *I C* 273
301	6 *O W N* 277		1929*Cr C* 345		5 *O W N* 1097	486	6 *O W N* 630
	118 *I C* 801	370	115 *I C* 302		114 *I C* 783		119 *I C* 459
303	114 *I C* 309	371	4 *Luck* 52	424	6 *O W N* 714	489	119 *I C* 431
305	6 *O W N* 109		5 *O W N* 776		121 *I C* 93	491	5 *O W N* 885
	115 *I C* 197		113 *I C* 20	426	6 *O W N* 809		121 *I C* 281
309	113 *I C* 733	373	4 *Luck* 57	FB	119 *I C* 967	493	6 *O W N* 813
311	6 *O W N* 431		5 *O W N* 1022	427	6 *O W N* 737		
	118 *I C* 417		116 *I C* 59		10 *LRARev* 329	494	6 *O W N* 549
313	6 *O W N* 437	376	115 *I C* 846		121 *I C* 882		119 *I C* 337
	117 *I C* 454		10 *LRARev* 185	433	6 *O W N* 820	515	6 *O W N* 848
314	114 *I C* 499		7 *O W N* 70		10 *LRARev* 351		121 *I C* 90
316	6 *O W N* 493		4 *Luck* 390	435	6 *O W N* 843		1929*Cr C* 589
	117 *I C* 405	378	10 *LRARev* 198	437	6 *O W N* 854		31 *Cr L J* 205
320	114 *I C* 503		118 *I C* 811	439	6 *O W N* 768	516	6 *O W N* 681
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	118 *I C* 423		30 *Cr L J* 967	444	6 *O W N* 780	520	4 *Luck* 343
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	4 *Luck* 248	FB	4 *Luck* 539	453	6 *O W N* 801		1929*Cr C* 641
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OUDH CHIEF COURT

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STUART, C. J. AND RAZA, J.

Mohammad Yusuf Husain—Plaintiffs—Appellants.

v.

Wilayat Husain and *others*—Defendants—Respondents.

First Appeal No 101 of 1927, Decided on 21st August 1928, from order of Sub-Judge, Rae Bareli, D-/ 14th March 1927.

*** (a) Civil P.C., O.2, R.2—Family property enjoyed by all as tenants-in-common—Member *S* separating as regards some portion of property and getting possession over moiety of it—Member *P* suing for his share only of that property — Second suit by *P* claiming share in other property is not barred under R. 2.**

The members of a certain family were enjoying the whole family property as tenants-in-common. One member *S* separated from the others in respect of certain portion of the property only and obtained possession over a moiety of that portion. Another member *P* brought a suit to claim his share of this portion of the property and asserted that *S* was not entitled to the property over which he got possession. *P* afterwards brought another suit claiming his share in the remaining property of the family.

Held: that this second suit was not barred by his first suit because in the first suit the cause of action was only with regard to that particular portion of property, as the remaining property still continued to be enjoyed by all members as tenants-in-common. O. 2, R. 2, therefore would not be applicable here. [P 5 C 1]

*** (b) Civil P. C. Sch. 2, Para. 15—Arbitrator not applying rules of succession of law to which parties belong but making award according to what he thought proper in the circumstances—He giving three annas share to one who was ordinarily entitled to eight-annas share—Award is binding on him.**

Certain family governed by the Imamia Law referred the family disputes to a sole arbitrator *S* whose honesty was not questioned. The award given by him did not apply the rule of succession contained in the Imamia Law. One of the members who under the provisions of the Imamia Law was entitled to an eight annas in the property was given only a three-anna share under the award. The arbitrator did not state in the award that he was awarding the shares according to the rules of intestate succession in the Imamia Law. He was only following his own views as to what was right and proper in the circumstances of the family. The award was attacked on the ground of a technical misconduct by the arbitrator in so far as he applied a perverse view of the law while giving the award.

Held :—If *S* had stated in the award that he was awarding the share according to the rules of intestate succession in the Imamia Law and then proceeded to arrive at the award which he actually made, there might have been an error in law and the award could have been set aside. But here there was no error in law as *S* has made the award according to his own views as to what was right and proper in the circumstances. There was no technical misconduct on the part of *S* and the award was therefore binding on the member to whom only three anna-share was given, though he was entitled to eight-anna share : 18 *Cal.* 414 (*P.C.*) ; 23 *All.* 383 (*P.C.*) ; and 21 *Cal.* 590 ; *Rel. on. A. I. R.* 1923 *P. C.* 66, *Dist.* [P 9 C 2]

Niamat Ullah and *Kalbi-i-Abbas*—for Appellants.

Gulam Husain Naqvi, *Mirza Abid Husain*, *Mehai-uz-zaman*, *A. P. Sen* and *S. C. Dass*—for Respondents.

Judgment.—This is an appeal by the plaintiffs against the dismissal of their suit by the learned Subordinate Judge of Rae Bareli. The judgment and decree are dated 2nd April 1927. It is necessary to state the facts fully. A certain Saiyed Nurul Husain, a Shia governed by the Imamia law, resided in Jais in the Rae Bareli District. He owned landed pro

perty which consisted in the main of the village of Kura in the Fatehpur District of the Agra province He owned this village in entirety He further owned shares in Miranpur Saidana, Bahadurpur and Mahmudpur in the Rae Bareli District He died on 7th April 1857 He left surviving him the following persons, who were entitled under the Imamia law, to succeed to his inheritance

An elder wife Nidha Bibi

Tajuddin, his elder son by Nidha Bibi

Ahsan Husain, his second son by Nidha Bibi

A younger wife Madina Bibi

An elder son Mohammad Husain by Madina Bibi.

A younger son Bande Husain by Madina Bibi

It appears that after his death his son Tajuddin was admitted by the revenue authorities to engage for the revenue on behalf of all this property It is difficult to follow accurately after this lapse of time the subsequent deaths of the members of this family , but it appears that Mohammed Husain, Madina Bibi's elder son, died very shortly after his father and it appears that Nidha Bibi died before 1876 Tajuddin is said to have died on 23rd April 1876 He had married three wives By his second wife, Nabi Bandi, he had a son Ejaz Husain who died a few months after his father on 1st October 1876 He had also by his wife Kaniz Fatima, a daughter called Ahmad Bandi It appears that on the death of Tajuddin, his brother Ahsan was allowed by the revenue authorities to engage for the payment of the land revenue in respect of the landed property in question He died in 1894

We have now to see who were the surviving members of the family at the time of Ahsan Husain's death

Ahsan Husain left surviving him a widow called Hausan Bibi and two sons Moinuddin Husain and Iftikhar Husain

There were further in the family Ahmad Bandi, Tajuddin's daughter (who, it is to be noted, married her cousin Moinuddin Husain), Madina Bibi and Bande Hasan

Madina Bibi died in 1899-1900

Hausan Bibi died on 13th June 1907.

Moinuddin Husain died on 3rd December 1910

Ahmad Bandi is dead

Moinuddin Husain and Ahmad Bandi had a daughter Khatun Bandi. She married Sayed Zaki Jan and had two sons Makbul Husain (now dead) and Matlub Husain and a daughter Jafar Bandi.

Bande Hasan died on 2nd August 1910. He left two sons Yusuf Husain and Yakub Husain who are the present plaintiffs After their father's death Iftikhar Husain became their guardian

Iftikhar Husain died on 25th November 1919, leaving a son Wilayat Husain

Khatun Bandi is now dead Her heirs are Saiyed Zaki Jan, Matlub Husain and Jafar Bandi

We now come to certain litigation and family arrangements which have an important bearing upon the decision of the appeal

Tajuddin had died in 1876 As we have already said Ahsan Husain was allowed by the revenue authorities to engage for the payment of land revenue in respect of the property and his name was entered in the revenue papers Nabi Bandi applied to have her name recorded in respect of a moiety share in the Rae Bareli property only The revenue authorities, acceded to this application and continued to record the name of Ahsan Husain in respect of a moiety. These entries ignored the rights of Bande Hasan Bande Hasan then instituted suit No 57 of 1880 in the Court of the Subordinate Judge, Rae Bareli, against Ahsan Husain, Nabi Bandi and Ahmad Bandi He claimed a moiety of the property in question asserting that he had inherited the rights of his brother Mohammad Husain The plaint in this suit is Ex A-2 This plaint was replaced by an amended plaint Ex 45 It is to be noted that in this amended plaint Bande Hasan claimed to have obtained the share of his mother Madina Bibi, and thus to have obtained a moiety in the Rae Bareli property left by his father Nurul Hasan. Ahsan Husain did not contest his title to succeed to a moiety, but asserted that only a portion of the property in dispute was the property of Nurul Hasan and that the remainder had been acquired by Ahsan Husain himself Ahsan Husain's written statement is Ex A-3. She contested Bande Hasan's title on the allegation :

"That he was born of a beruni woman whose nikah and dower are not known. Therefore according to custom prevalent in the families of respectable men in Jais and also according to Mahomedan law such son is not entitled to any inheritance in the presence of

sons of married wives whose dower debt may also be proved unless the dower debt is paid up."

This plea is very vague and involves a number of disputable points. The word "beruni" means no more than the opposite of "khandani" or "*ahel i biradari.*" The designation of Madina Bibi as a "*beruni*" woman meant no more than that she was of a lower tribe and of lower status The plea did not explicitly assert that she was not legally married to Nurul Hasan, although Nabi Bandi subsequently suggested this The point is, however, of little importance in view of the decision in the suit The suit was decided on 18th September 1880 by a judgment Ex 7 It was found that the whole of the property in suit, that is to say, the whole of the Rae Bareli property was the ancestral property of Nurul Hasan It was found that Nurul Hasan was legally married to Madina Bibi, and it was found that Bande Hasan was in no way debarred from inheritance under the Imamia law Bande Hasan's suit was accordingly decreed and he was awarded possession over a moiety in the Rae Bareli property.

There was next a litigation in 1886. Ahmad Bandi claimed, as daughter of the deceased Kaniz Fatima, her mother's dower against her father's widow Nabi Bandi and her father's brother Ahsan Husan, and claimed to charge the liability of her dower on the ancestral property in Kura and on other property. Her plaint is Ex 37 This was suit No 286 of 1886 It was instituted in the Court of the Subordinate Judge of Rae Bareli Ahsan Husain's written statement is Ex F-10 He stated further in Ex 16 that Tajuddin had transferred to him (Ahsan Husain) his interests in Kura by an oral gift prior to his death We have not the decision in the case but the parties appear to be agreed that Ahmad Bandi obtained a decree in respect of the dower but did not obtain a charge upon any portion of the property We have next to refer to an important statement made by Ahsan Husain in a previous case between Ahmad Bandi and Nabi Bandi in regard to which we have no particulars This is Ex. 49 Here Ahsan Husain deposed :

"There were four brothers by two mothers, i. e., two brothers by each mother, I and Tajuddin by one mother and Mohammad Husain deceased and Bando Hasan who is alive, by the other. All were joint and the eldest of all the brothers was Tajuddin Husain "

There is next an extract from the dastur-i-dehi in respect of the village of Bahadurpur in the Rae Bareli District. This is Ex 27 It is dated 1893-94

"The nature of this Mahal is in favour of a zamindari held in common, Moin Husain, Iftikhar Husain, Mt Ahmad Bandi and Bande Hasan are joint among themselves in mess and business and Abeen Ullah Zahur Ullah and Wali Ullah " (these are members of another family who had shares in the mahal) are joint among themselves in mess and business. The remaining cosharers are separate. "

The translation in the printed book is incorrect This is the correct translation.

So far although there had been an important decision in respect of the Rae Bareli property there had been nothing showing title in respect of the Kura village in the Fatehpur District which had been recorded in the revenue papers first in the name of Nural Hasan, next in the name of Tajuldin and next in the name of Ahsan Husan When Ahsan Husain died in 1894 there was a dispute in the family and this dispute was decided by an award which is one of the most important pieces of evidence in the present suit This award is Ex. A-6. It was made on 24th November 1894 The arbitrator who made the award was Saiyed Mohammad Taki, a well-known vakil of Jais He died two years after he made the award We shall state later our construction of this award It is sufficient to note here that as a result of this award the following entries were made for the first time in the revenue papers of Kura :

"Iftikhar Husain 5 annas 6 pies.
Moinuddin Husain 3 annas 6 pies.
Ahmad Bandi, Moinuldin Husain's wife and Tajuddin's daughter 2 annas.
Ahsan Husain's widow Husain Bibi 2 annas."
Bando Hasan 3 annas"

No alteration was made in respect of the entries of the Rae Bareli property. There is no direct evidence as to the alterations in the khewat of Kura made as a result of the award, but the parties are agreed that these alterations were made. When Moinuddin Husain died Iftikhar Husain took his place entirely Iftikhar Husain had been made lambardar under the award As we have noted he was guardian of Bande Hasan's sons, the present plaintiffs When Iftikhar Husain died on 25th November 1919 the questions in dispute were first brought before the revenue authorities of the Fatehpur

District The parties claiming the right to engage for the land revenue were :

Wilayat Husain, the son of Iftikhar Husain Respondent No. 1.

Yusuf Husain and Yakub Husain, the present plaintiffs, sons of Bande Hasan.

Khatun Bibi who was then alive

The Assistant Collector by an order of 10th April 1920 (Ex. A. 22) entered Wilayat Husain's name in respect of 13 annas in place of his father Iftikhar Husain and referred the other parties for redress to the civil Court Yusuf Husain and Yakub Husain, however, took no action for a considerable period, and in the meanwhile Wilayat Husain transferred on 20th July 1922 a four annas share in Kura to his wife and Kazmi Begam respondent 2 in lieu of her dower. He executed mortgages in respect of a 5 annas 3 pies share in Kura on 4th February 1923 on 5th October 1923 and on 17th February 1923 in favour of Kura Chandra Bhukhan respondent 3 and by a sale on 22nd January 1926 transferred the equity of redemption in those mortgages to the mortgagee On the same date the 22nd January 1926, he transferred a 3 annas 9 pies share in Kura by sale to the same person It will thus be seen that by 22nd January 1926, Wilayat Husain had divested himself of all title to the Kura property. On 10th April 1926, Yusuf Husain and Yakub Husain instituted the suit out of which this appeal has arisen. Their learned counsel has been unable to give a complete explanation as to why they waited six years before they brought their claim in the civil Court Their delay has added to the difficulties of decision of a suit which was already sufficiently difficult owing to the lapse of time which followed inevitably after the death of Nurul Hasan over seventy years ago Their claim is to this effect. They assert that the property had devolved after Nurul Hasan's death absolutely according to the rule of succession of the Imamia law, but that for reasons of convenience and considerations of a family nature from the death of Nurul Hasan to the death of Iftikhar Husain in 1919 the various members of the family had enjoyed the property as tenants-in-common leaving at their own desire the management of the property to the person who at the time was the head of the family, permitting him to realize all profits, and that the other members enjoyed the income as he distributed it to them. According to this allegation Tajuddin was the first manager, Ahsan Husain was the next manager, Moinuddin Husain was the third manager and Iftikhar Husain was the fourth manager From the date of the death of Iftikhar Husain the disputes according to these allegations commenced and the plaintiffs demanded their rights under the law Their claim was divided into three parts They have succeeded their father in having their names entered in respect of the three annas share in the village of Kura, but they claimed therein five annas more giving them a full eight annas share They claimed nothing in respect of the village property in the Rae Bareli District as their father had obtained an entry of a moiety in that property in the proceeding of 1880, but they claimed their share in a moiety in certain towns, lands and buildings in Jais and they further claimed a moiety in certain property which had been obtained by Nurul Hasan as mortgagee by mortgages, redemption of which has now become extinct

The learned trial Judge has dismissed their suit in entirety He found in the first place that the suit was barred because he considered that Bande Hasan should have included all the reliefs now sought when he filed his suit of 1880. Applying the provisions of O 2, R 2, Civil P C he dismissed the suit. He further dismissed the suit as being time-barred. He dismissed the suit for a third reason because he considered that under the terms of the award (Ex A-6) the suit could not lie We have first to consider whether the suit has been rightly dismissed under the provisions of O. 2, R 2, because Bande Hasan did not in the suit of 1880 include these reliefs. He was certainly under an obligation under the provisions of the law to include the whole of the claim which he was entitled to make in respect of the cause of action, and an omission to sue would debar a suit in respect of the portion so omitted. We do not, however, agree with the learned trial Judge in his view that the present claim was in respect of the cause of action in that suit The case put forward by Bande Hasan in 1880 was that the members of the family were enjoying the whole of the family property as tenants-in-common. That is the case which is put forward now. He continued that

Nabi Bandi had separated from the other tenants-in-common in respect of the village property in Rae Bareli and nothing else, and had obtained possession over village property to which she was not entitled This action disclosed no cause except as to the village property in Rae Bareli to which it related The assertion was impliedly that the remaining property continued to be enjoyed by the members of the family as tenants-in-common and thus the provisions of O 2, R 2 in no way affect the validity of the present suit.

We are also not in agreement with the learned trial Judge in his views as to the effect of the law of limitation. In our opinion the article governing this suit is Art 144, Sch 1, Act 9 of 1908 This was a suit for

"possession of immovable property or any interest therein not hereby otherwise specially provided for"

and the time from which the period began to run was when the possession of the defendant became adverse to the plaintiff

As we shall show later we have arrived at the finding that the members of the family were tenants-in-common of the property in suit. The learned trial Judge did not arrive at the finding. We shall show our reasons for disagreeing with him upon that point If this was the case there was no question of adverse possession up to the time of the death of Iftikhar Husain which took place on 25th November 1919 It is unnecessary to discuss the law on the question as the law is very well-known and is contained in the leading case decided by their Lordships of the Privy Council: *Corea* v *Appuhamy* (1)

There seems to us to be no doubt as to the fact that the property in suit, that is to say, the Kura property and the town property in Jais and the rights under the deeds of mortgages were held by the members of the family as tenants-in-common There is a mass of documentary evidence to support this view and the oral evidence against it appears to us to be worthless in face of the documentary evidenc (Here the judgment states and discusses evidence and proceeds) We have no hesitation in finding that the plea advanced by the plaintiffs to the effect that the property derived from Nurul Hasan was enjoyed by all the members of the family as tenants-in-common has been established by evidence. This evidence shows that there was always one member of the family who managed the affairs of the estate on behalf of the remainder and distributed the profits among them. This arrangement continued until the death of Iftikhar Husain.

So far the appeal has succeeded. But in respect of the greater portion of the claim put forward by the appellants the appeal fails This is the portion in respect of the extra five annas share in the village of Kura The claim is not in our opinion barred so much by limitation as by the failure to defeat the award. It is true that if this suit had been brought as a suit to set aside the award of 1894 (Ex A-6) it could have been successfully met on the plea of limitation under the provisions of Art. 91, Sch 1 Act 9 of 1908 But the question of limitation is here of less importance for we have to consider the award upon the arguments of the learned counsel for the appellants If we accept these arguments Art 91 might not stand against the appellants' claim If we do not accept those arguments (as our decision will show we do not accept them) this portion of the suit fails because the award bars it. It is true that if the learned counsel for the appellants had pressed a plea taken before the lower Court to the effect that the award was a result of fraud and misrepresentation the plea of limitation would have been of greater importance. But the learned counsel has very properly abandoned that plea as being unsupported by any reliable evidence. We shall consider later that effect of limitation and plea of technical misconduct. He attacks the award in the following manner He does not suggest that the pleader of Rae Bareli Saiyed Mohammad Taki was in any way dishonest. He does not suggest any but technical misconduct. He does not impute bad faith He does not dispute the factum of the award His case is that there is nothing to show what was the agreement to refer and that in these circumstances the award is not binding. He further takes the position that even if the award is binding it does not stand in the way of the plaintiffs upon a proper construction of its contents. His argument is that if the award does not stand against his clients they are en-

(1) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 896.

titled under the Imamia law to an eight annas share in Kura and that, as they have so far obtained a three annas share, they should be given a decree for an additional five annas share.

There is no evidence which, if it stood alone, would be able to establish how this award came into being The respondents have produced evidence which if believed, would show that it came into being in the manner in which they asserted. The appellants have produced oral evidence to prove the contrary The learned trial Judge has accepted the respondents' evidence and refused to accept the appellants' We consider that he has taken a right course in this view not because the oral evidence on either side would have been of great value, had it stood by itself, but because the contents of the award itself support the respondents' contention and involve the rejection of the contention of the appellants

There is no primary evidence as to the reference to arbitration There has been considerable cross-swearing as to the custody of the document containing the reference We are not satisfied that the evidence on either side is true as to the custody It is more likely than not that the document containing the reference remained in the custody of Mohammad Taki Khan It has disappeared and secondary evidence is admissible to prove its contents The secondary evidence produced by the defendants-respondents to prove its contents goes to show that the reference took place to settle a dispute which arose on the death of Ahsan Hasan and the sons of Ahsan Husain. Against this the plaintiffs produced evidence to show that the dispute was between Moin-ud-din Husain and Iftikhar Husain and that it had arisen owing to the gross extravagance of Moin-ud-din Husain, who had become manager of the family property The principal witness produced by the plaintiffs-appellants on this point was Mohammad Razi the nephew of the deceased Mohammad Taki the arbitrator Mohammad Razi was also married to Mohammad Taki's daughter On this point we have no hesitation in accepting the defendant respondents' allegation, as their evidence is corroborated absolutely by the contents of the award itself. The translation of the award (Ex. A-6) in the paper book contains some clear inaccuracies, one of the greatest of which is that at p. 79 line 26, the word "not" has been omitted between the words "shall" and "apply." In discussing the award we shall give the correct translation. The award commences as follows :

"Copy of an award in re .—Saiyed Bande Hasan, son of Saiyed Nurul Hasan v. Saiyed Moin-ud-din Husain and Saiyed Iftikhar Hussain, sons of Saiyed Ahsan Husain."

This is sufficient to show that the dispute was not between Moinuddin Husain and Saiyed Iftikhar Husain, but a dispute between Bande Hasan on the one side and Moinuddin Husain and Iftikhar Husain on the other side, and the body of the award shows clearly that it was in respect of the whole of the family property We find therefore against the appellants that it is proved sufficiently that Saiyed Mohammad Taki (his name is wrongly printed as Mohammad Naki) was asked to determine disputes between Saiyad Bande Hasan on the one side and Saiyed Moinuddin Husain and Iftikhar Husain on the other side in respect of the whole of the family property

The next point taken by the learned counsel for the appellants is that the award was bad because the whole of the members of the family were not parties to the deed of reference As we have not got more than general evidence as to the reference to refer we cannot say who signed the deed of reference We know, however, who at the time were the members of the family alive who would have interest in the matter The members of the family then alive, who had an interest in the matter, were

Husain Bibi the widow of Ahsan Hussain, who may be taken as having been represented for the purposes of a family settlement by her sons Moinuddin Hussain and Iftikhar Husain.

Moinuddin Husain and Iftikhar Hussain who were clearly parties to the reference.

Madina Bibi the mother of Bande Hasan and Bande Hasan

As we have already pointed out Bande Hasan had in 1880 claimed to represent his mother Madina Bibi and to have obtained all her interest in the property.

There was further Ahmad Bandi the daughter of Tajuddin. Nabi Bandi Tajuddin's wife was dead Ahmad Bandi was the wife of Moinuddin Husain and was sufficiently represented by him.

We consider that the members of the family were all sufficiently represented in the award. The point is of little importance, except in so far as Bande Hasan is concerned, for the plaintiffs, who are the only persons who are objecting claim through Bande Hasan The most that could have been said on this point is that Bande Hasan did not represent his mother Madina Bibi and that this award cannot affect Madina Bibi who is not shown to be a party to it, and that the appellants can set up the title of Madina Bibi as having been subsequently inherited by their father and then by them But they cannot take this position in view of the fact that their father in 1880 asserted that Madina Bibi had no interest in the family property having made over all title which she possessed to him, and the fact that the plaintiffs in the plaint accepted this position in para. 5, where they stated that Madina Bibi gave her entire property to her son Bande Hasan during her lifetime We therefore decide on the second point that Bande Hasan was bound by the award Bande Hasan himself signed the award and the learned counsel for the plaintiffs has abandoned all pleas to the effect that his consent was obtained by fraud or undue influence. We thus have it that Bande Hasan represented his mother Madina Bibi and represented the whole of the branch of the family from Madina Bibi We further have it that he was bound by the award We now have to consider the award. After stating that disputes had arisen after the death of Ahsan Husain between his sons (that is to say Moinuddin Husain and Iftikhar Husain) and his stepbrother (that is to say Bande Hasan, the translator has incorrectly written stepbrothers) and that these parties instead of going to Court had agreed to refer their disputes for decision to Saiyed Mohammad Taki, Saiyed Mohammad Taki continues that after giving his full and deliberate consideration to the preservation of the name the family unity and the property and also considering that on account of continuous and long mutual disputes the property was sure to be ruined owing to debts and costs and to prevent disunion among the family, he Mohammad Taki, decides (the translation says "proposes") as follows :

He distributed the property in Fatehpur District, that is to say in the village of Kura in the following sharers He gave to Bande Hasan a three annas share and that was all which he gave to that branch. He divided the remaining thirteen annas share as follows :

A share of five annas and six pies to Iftikhar Husain

A share of three annas and six pies to Moinuddin Hussain

He gave Hausan Bibi, Ashan Husain's widow, a share of two annas for life, and

He gave Ahmad Bandi, the daughter of Tajuddin and the wife of Moinuddin Husain, a share of two annas for life

He added that none of these persons had a right of transfer, nor was one of these persons competent to encumber the property. As will be seen later this restriction was only to be binding upon the persons mentioned This disposed of the Kura property He then proceeded to dispose of the remaining property This would be the Rae Bareli property He said that he left that property

"undivided as it was in the life-time of Mir Ahsan Husain and the entire affairs relating to zamindari property pertaining to Jais . . . , and also household affairs shall remain joint."

He added here that the entire affairs relating to Kura should also remain joint. We have no difficulty in determining the meaning here He had awarded shares in Kura in a manner unauthorized by the Imamia law. We shall discuss later a possible reason for his taking this course When he came to the Jais property he left the shares as they were under the Imamia law. Now it is to be noticed that the shares in the Jais property had been settled by the litigation from 1880 and he made no alteration in those shares The question of shares, however, did not cover the question of management and he left the management of the property as it had been before, that is to say to the head of the family In para 3 while leaving the management to the head of the family he laid down that the quota of profits should be handed over to each sharer, but that any accumulated funds should be used for the improvement of the property and in para 4 he placed as the first charge upon the income the payment of the interest on debts incurred by Ahsan Husain In para 5 he provided for the possibility of disputes and stated that if any member of the family were dissatisfied with the apportionment of the profits he could recover his profits

from the lambardar. The head of the family had formerly been the lambardar, but he now appointed a new lambardar and he introduced a provision that if the members of the family were dissatisfied with the lambardar they could by a majority of votes appoint a new lambardar with the approval of Government In para 6 he provided for the appointment of a lambardar as distinct from the manager He directed that Iftikhar Husain and not Moinuddin Hussain, should be appointed lambardar and he directed that Bande Hasan should be appointed Sarbarahkar, that is to say, superintendent over the smaller details and here he put in a very important clause which has not been correctly translated He said :

" Every person, who is meant by me to be a cosharer in the property, can get his share in the village divided according to his share in the profits fixed."

We have no doubt that this is the literal meaning of the words The translator has said : "can get the profits divided" but the words are "can get the share divided according to the share in the profits." He added here that certain expenses were to remain as a joint charge upon the whole property In para. 7 he laid down subsequent rules as to succession He stated that on the death of Hasan Bibi her share was to devolve equally upon Moinuddin Husain and Iftikhar Husain and that upon the death of Ahmad Bande her share was to go to her male issue and in absence of her male issue her famale issue was to get maintenance only. He laid down that after Bande Hasan, Moinuddin Husain and Iftikhar Husain their male issue only were to succeed He stated that the restriction upon transfer was not to apply to subsequent successors He laid down other provisions which are unimportant.

The learned counsel for the appellants has asked us to place the following construction on this award His case is in the first place that as far as the will of Kura is concerned, this is really the only important point, the arbitrator divided the profits only, and did not divide the property. We are unable to accept this On our construction he clearly divided the village of Kura into separate shares. His next plea was that if we accept the construction which we have accepted, to the effect that separate shares were awarded in the village of Kura the award is bad in law His argument here was that the award on this construction is absolutely opposed to the Imamia law and as such cannot be upheld The law on the subject of the validity of award has been discussed in a large number of reported cases. We consider it sufficient to refer only in this connexion to certain authoritative decisions of their Lordships of the Judicial Committee These are contained in the decisions in : *Muhammad Newaz Khan* v *Alam Khan* (2), *Mokund Ram Sukal* v *Salıq Ram Sukal* (3), *Jafri Begam* v *Ali Raza* (4) and *Champsey Bhara and Co* v *Jivraj Balloo Spinning and Weaving Co Ltd* (5)

In *Muhammad Newaz* v. *Alam Khan* (2) their Lordships say at p 77 (of 18 *I. A.*).

"The plaintiffs then rely on misconduct of the arbitrator as invalidating his award. There is no independent case or testimony to sustain or, indeed to give colour to such a charge. They merely rely on the award itself as showing such partiality and making such statements as to amount to misconduct That contention seems to be mainly founded on an entire misconception of the agreement to arbitrate. It was not an agreement that the arbitrator was to be controlled in his decision by any custom or Mahomadan law, or otherwise. It was an agreement to refer the matter in dispute generally to his decision. He appears to have decided according to what he conceived was the wish and intention of the deceased Maddat Khan. He was within his right in so doing. Some criticizms have been offered on some of the reasons assigned by the arbitrator for arriving at his decision These criticizms even if justified, could not amount to any proof of misconduct. The arbitrator appears to have acted on the broad view of giving effect to the deceased's intentions. He was selected by reason of his knowledge of the circumstances of the family. Their Lordships see no ground for imputing misconduct to him."

In *Makund Ram Sukal* v. *Salıq Ram Sukal* (3), their Lordships laid down that even where an award might be held to be ultra vires consent of the persons affected would validate it. Here it is true that we do not know more than generally what was the nature of the disputes referred to Mohammad Taki We are on firm ground in finding that one portion of the dispute related to the title in the village of Kura We know that Bande Hasan was the person who had made the complaint That is clear

(2) [1891] 18 Cal. 414=18 I A. 73=6 Sar. 26 (P.C.).
(3) [1894] 21 Cal. 530=21 I. A. 47=6 Sar. 423 (P C).
(4) [1901] 23 All 383=28 I. A. 111=8 Sar. 27 (P.C).
(5) A. I. R. 1923 P. C. 66=47 Bom. 578=50 I. A. 324 (P.C.).

from the fact that his name appears as what may be conveniently called the name of the plaintiff. It is true that the award does not apply the rule of succession contained in the Imamia law. We are not in a position to know why Mohammad Taki awarded Bande Hasan a 3-annas share when apparently under the provisions of the Imamia law he was entitled to an 8-annas share in the village of Kura A suggestion can be made by way of surmise that he was affected by the view that Madina Bibi, although married legally to Nurul Hasan, was not as a matter of fact of the same status as her husband This, however, is merely a surmise We do not know what was operating in the mind of Mohammad Taki This much, however, we know. Bande Hasan had asked Mahommad Taki to decide his claims to the village of Kura and also to certain other claim. Mohammad Taki awarded him 3-annas share only in the village of Kura Bande Hasan signed the award Mutation took place in accordance with the terms of the award. Bande Hasan at no time objected to the award and died with his name recorded as in possession of a 3-annas share in Kura.

We have, however, to consider whether there is anything in the subsequent decision in *Champsey Bhara and Co.* v. *Jivraj Ballo Spinning & Weaving Co. Ltd.* (5) which should modify the view of the law which we have taken. We do not find that there is anything in that decision which should modify our views Their Lordships there distinguished the decision in *Landaur* v *Asser* (6) and approved the decision in *Hodgkinson* v *Fernie* (7). They stated that an award could be set aside on an error in law on the face of the award They interpreted the words "error in law on the face of the award" to mean that if there is the award or document actually incorporated thereto (as for instance a note appended by the arbitrator stating the reasons for his judgment) some legal proposition which is the basis of the award and that legal proposition is erroneous there is an "error in law on the face of the award." But there is nothing in that decision which affects this award. If Muhammad Taki had stated in the award that he was awarding the shares according to the rule of intestate succession in the Imamia law and then proceeded to arrive at the award which he actually made there might have been an error in law But he nowhere suggested that he was following the Imamia law. He was following his own views as to what was right and proper in the circumstances of the family, and such being the the case there can be no error in law In any circumstances it would be difficult for the learned counsel for the appellants to show that this plea is open to him in view of the provisions of Art 91, Sch 1, Act 9, 1908 We have still to refer to the decision in *Jafri Begam* v *Ali Raza* (4). Their Lordships laid down at p. 118 (of 28 *I A*) that in the case before them in which under the terms of an award a certain lady was directed not to effect partition of property which was partible under the personal law to which she was subject the restraint could not bind her son although it might have bound herself. The argument here would be that the attempt of the arbitrator to lay down restraints upon transfer and to set up a succession unknown to the Imamia law vitiated the whole award We are of opinion that this attempt did not have the effect of vitiating the whole award It may well be argued that the provisions in respect to succession have no effect We express no opinion as to whether they have any effect or not We are concerned here only with the question as to whether that portion of the award which gave Bande Hasan a share of 3-annas in the village of Kura is binding upon the plaintiffs as the sons of Bande Hasan.

We can sum up our arguments and our conclusions here The plaintiffs have attacked the award on account of an alleged technical misconduct by the arbitrator Their learned counsel has not imputed misconduct in the ordinary sense of the term. He has recognized the honesty of Mohammad Taki, the arbitrator. The only misconduct which he alleges is the technical misconduct of applying a perverse view of the law We find apart from the point of limitation that there was no such misconduct We further find that the consent of Bande Hasan operates as a bar to the plaintiffs in respect to the extent of the share in Kura. We

(6) [1905] 2 K. B. 184=74 L J. K. B. 659=10 Com. Cas. 265=93 L. T. 20=21 T. L. R. 429=53 W. R 534.

(7) [1887] 3 C. B. (n. s.) 180=3 Jur. (n. s) 818=27 L. J. C. P. 66=6 W. R. 181.

do not find that the award is bad on the ground of an error of law, and we further find that although, certain restrictions in the award may not have been operative, the award is operative as confining the title of Bande Hasan to a 3-annas share in the village of Kura and preventing his sons asserting a claim to a greater share

The disposition can also be supported as a family settlement, but we need not go into that question in detail We find that the transactions constituted a family settlement This disposes of the major part of the appeal It is to be noted that the descendants of Ahmad Bandi who were defendants 2 to 4 in the trial Court did not contest the plaintiffs' suit and filed a written statement supporting the plaintiffs' claim There are two points in the appeal which remain to be considered The first point as to the share in what is known as the Kothi in Jais and other town lands in Jais with such buildings as there are upon them, that is to say the property in list *B* of the plaint. The second point is as to the property in list *C* obtained under the mortgage rights in the Rae Bareli District On these points the appeal must succeed There is nothing in the award Ex A-6 which militates against the appellants' claim to this property Mohammad Taki, the arbitrator, left their shares in all the property with the exception of Kura as they had been before and under the Imamia law the appellants are entitled to an 8-annas share in the property in lists *B* and *C* This portion of the appeal affects only defendants 1 to 5 As has already been stated defendants 2 to 4 did not contest and the contest here is only on behalf of the defendants 1 and 5. The position taken by defendants 1 and 5 is somewhat pecular. Their main pleas referred only to the Kothi in Jais which was admittedly built during the period that Moinuddin Husain was manager of the family The peculiarity of their position is this They have asserted that this Kothi was constructed with funds provided by Moinuddin Husain himself. There is little evidence as to the source of these funds but they must have been either family funds or Moinuddin Husain's private money If the funds were family funds the plaintiffs are entitled to an 8-annas share in the Kothi If the funds were not family funds the structure was the individual property of Moinuddin Husain and defendants 1 and 5 have admittedly no title to succeed Moinuddin Husain. Moinuddin Husain's heirs are represented by defendants 2 to 4 and defendants 2 to 4 support the plaintiffs's claim Further Zaki Jan, who was defendant 2 and who has not been impleaded as a respondent, who himself was one of the heirs of Moinuddin Husain having married Khatun Bandi, now deceased, the daughter of Ahmad Bandi, has deposed distinctly that although Moinuddin Husain got the Kothi built with his own money the Kothi was built for the benefit of all the members of the family as it was used by all—see his evidence at p. 37. Thus defendants 1 and 5 who are the only persons concerned in contesting this portion of the appeal have had to fall back on the plea that the plaintiffs' case in respect of the Kothi is barred under the provisions of O 2, R. 2 because no relief was sought in respect of the Kothi when Bande Hasan instituted his suit in 1880 We have already dealt with that plea We have further to note in this connexion that the Kothi in question was not built until many years after 1880 The appeal must succeed in respect of the property in list *B*

It must equally succeed in respect of the property in list *C* The property here was property which was acquired by Nurul Hasan himself It is distinctly family property and the appellants are entitled to a share of 8-annas in it

The result is that the decree of the learned trial Judge is modified. The appellants will be given a decree for an 8-annas in the property in list *B* and an 8-annas share in the property in list *C*. Otherwise the appeal is dismissed, and the decree of the lower Court is upheld.

We now come to the question of costs. The principal contesting respondent was Kuar Chandra Bhukhan Singh a transferee of 9-annas in the village of Kura The case against him was rightly dismissed He was rightly awarded his costs in the Court below The plaintiffs-appellants will pay his costs in this appeal. As against Wilayat Husain and Mt. Kazmi Begam, the suit was rightly dismissed in respect of the Kura property but should have been decreed against the remaining property They will receive and pay costs in this Court and the Court below according to their own success and

failure. It is to be noted that they were represented jointly in the Court below. Here they have been represented separately as defendant 5's case differs from the case of her husband defendant 1 Costs will be awarded separately in this Court in respect of these two respondents. Except as already stated the plaintiffs-appellants will pay their own costs.

S.N /R.K. *Decree modified.*

A I. R. 1929 Oudh 11

MISRA AND NANAVUTTY, JJ.

Sital—Plaintiff—Appellant

v.

Harpal and *others*—Defendants—Respondents

Second Appeal No 23 of 1928, Decided on 20th July 1928, against decree of Sub-Judge, Partabgarh, D/- 14th October 1927

(a) Oudh Rent Act (22 of 1886), S 48—Hindu female dying leaving no heirs through husband—Her nearest relative through father sharing in cultivating her holding—After her death Court of Wards leasing out holding before expiry of five years—Such lease was inoperative.

A Hindu female who was the tenant of the land in dispute had died issueless, and there were no heirs of her husband existing. The only collateral heirs of the lady were to be found in the family of her father. *H* was the nearest relation amongst them who had also shared in the cultivation of the holding with the deceased. Before the expiry of five years after her death the Court of Wards had granted a lease of the land to another person.

Held: that *H* was the heir of the deceased within the meaning of S 48 and was therefore entitled as such to retain occupation of the holding for five years after her death. The Court of Wards could not under these circumstances be considered to be entitled to give a lease of the said land to any person during that period, and the same was inoperative.

[P 12 C 2]

(b) Hindu Law—Succession—Stridhan—A Hindu female dying issueless leaving no heirs of her husband—Stridhan property will devolve on her blood-relations.

In the case of stridhan property on the death of a childless Hindu female, the property devolves first on her husband's heirs, if there are no other nearer heirs and on failure of those heirs it devolves on the blood relations of the deceased 37 *Mad.* 293, *A. I. R* 1921 *Bom.* 138, and *A. I. R.* 1926 *All.* 663, *Foll.* [P 12 C 2]

R D. Sinha—for Appellant.

Radha Krishna—for Respondents.

Judgment—This appeal arises out of a suit for recovery of possession of certain plots of land situate in village Bansi District Partabgarh, and for damages. The plaintiff-appellant alleged that he had obtained a lease, dated 22nd March 1925, in respect of the land in suit from the Court of Wards and that the defendants-respondents had no title to the said plots and were not, therefore, entitled to remain in possession thereof The defendants contended that they were the heirs of one Mt Maharaji who was the tenant of the land in dispute and had died issueless in the month of February 1925, and they were, therefore, entitled to remain in occupation of the said land for five years from the date of her death, under S 48, Oudh Rent Act (22 of 1886) They also contended that they had shared with her in the cultivation of the tenancy as required by the said section to qualify them for being her heirs The plaintiff denied that the defendants were heirs of Mt Maharaji or that they had shared with her in the cultivation of the holding.

The main point, therefore, for decision in the trial Court was whether the defendants-respondents could be considered to be the heirs of Mt Maharaji within the meaning of S 48, Oudh Rent Act

The learned Munsif of Partabgarh who tried the suit came after recording the evidence to the finding that Mt Maharaji had died childless, that there were no heirs of her husband existing, that the only collateral heirs of the lady were to be found in the family of her father and that defendant 1, Harpal, was the nearest relation amongst them He also found that he (Harpal) had shared in the cultivation of the holding with the deceased, Mt Maharaji On these findings he held that the defendants-respondents were the heirs of the deceased lady within the meaning of S 48, Oudh Rent Act and that the Court of Wards had no right to give the lease of the land in dispute to the plaintiff without having allowed the defendants to hold the said land for five years from the date of Mt. Maharaji's death. He, therefore, held the lease executed by the Court of Wards in favour of the plaintiff to be void and inoperative and consequently dismissed the plaintiff's suit

The plaintiff carried the matter further in appeal, and the learned Subordinate Judge of Partabgarh by his decision, dated 14th October 1927, agreed with the findings arrived at by the learned Munsiff

and in result dismissed the plaintiff's appeal.

The matter has now been brought before us in second appeal, and it is contended again on behalf of the plaintiff-appellant that the defendants-respondents are not the heirs of Mt. Maharaji, as found by the Courts below

We have heard the arguments of the learned advocate for the plaintiff-appellant at great length, and have come to the conclusion that the findings arrived at by the Court's below on the question of heirship of the defendants-respondents are correct It has been found by the learned Subordinate Judge that Mt Maharaji died issueless, and that there was no heir out of her husband's relations now existing. It was urged that there was no evidence on the record in proof of this assertion. We went through the evidence on the record, and we found that P W 1 Abid Husain, distinctly stated that he knew that there was nobody surviving her (Mt. Maharaji's) husband's family This was elicited in the cross-examination of the said witness Harpal Shukla who is defendant 1 in this case, went into the witness-box and the plaintiff himself put this question to him and he stated that he had beeu to Gareri and had inquired from one Pandohi, a member of Mt Maharaji's family whether anybody belonging to her husband's family was still alive, and he received the information that there was none It may be that this evidence may not be strictly admissible in evidence, but there can be no doubt on the evidence of plaintiff's witness 1 that there was no person now living who might be said to belong to Mt Maharaji's husband's family. Indeed the plaintiff-appellant himself has not been able to point to any such person beyond a mere assertion that such heirs might still be in existence We are, therefore, of opinion that the finding arrived at by the Courts below on this point is quite correct, and that Mt Maharaji died issueless and that at the time of her death there was no person living who might be said to belong to her husband's family.

We have now to determine whether under those circumstances the defendants, who are members of the family of Mt Maharaji's father can be considered to be her heirs. In support of this position we may refer to the followiug three rulings: *Kanakammal* v. *Ananthamathi Ammal* (1), *Ganpat Rama* v *Secretary of State* (2) and *Moti Chand* v. *Kalikanand Singh* (3).

It has been clearly held, in these cases, that in the case of stridhan property on the death of a childless Hindu female, the property devolves first on her husband's heirs, if there are no other nearer heirs; and on failure of those heirs it devolves on the blood relations of the deceased There can be no doubt that the defendants-respondents being related to Ballu Shukla, the father of Mt. Maharaji, are such relations of the lady, and are, therefore, her heirs.

It has also been found by both the Courts below that defendant-respondent 1 Harpal, shared in the cultivation of the holding with the deceased Mt Maharaji This finding has not been contested before us Indeed it could not, as it was based upon the evidence on the record The result is that the defendant-respondents are the heirs of Mt. Maharaji within the meaning of S. 48, Oudh Rent Act and are, therefore, entitled as such to retain occupation of the holding for five years after her death. The Court of Wards cannot, under those circumstances, be considered to be entitled to give a lease of the said land to any person during that period. As the lease given by the Court of Wards is inoperative, the plaintiff-appellant is not entitled to recover possession of the land cultivated by Mt Maharaji aud his suit has been, therefore, rightly dismissed.

We, therefore, dismiss this appeal with costs.

S N /R.K. *Appeal dismissed.*

(1) [1914] 37 Mad 293=25 I. C. 901.
(2) A. I. R. 1921 Bom. 138=45 Bom. 1106.
(3) A. I. R. 1926 All. 663=48 All. 663.

A. I. R. 1929 Oudh 12

STUART, C. J. AND RAZA, J
on reference by
SHRIVASTAVA, J

Krishna Kumari Devi — Plaintiff — Appellant.

v

Tribhuwan Dat—Defendant—Respondent

Second Appeal No 160 of 1928, Decided on 2nd October 1928, from the decree of the Sub-Judge, Gonda, D/- 25th February 1928.

(a) Oudh Rent Act, S. 8 — Thekadar's power to grant pattas expressly withheld—Thekanama should be strictly construed like power-of-attorney—Pattas granted by thekadar are invalid.

Per Srivastava, J.—A thekenama containing a distinct provision preventing the thekadar from granting pattas to the tenants on his own authority should be strictly construed like a power-of-attorney. He is not an authorised agent and pattas granted by him are invalid. *Cooper* v. *Martin*, (1867) 3 *Ch.* 47 and *Lawrenesson* v. *Butler*, 1 *S. & L.* 13, *Foll.* [P 13 C 2]

(b) Oudh Rent Act, S. 37 —Thekadar cannot give statutory right to his tenant.

A thekadar is not a landowner within the meaning of the section and a lease granted by him to a tenant does not give a statutory right to the tenant. (1893) *A. W. N.* 8 and *A. I. R.* 1928 *Oudh* 240, *Diss. from No.* 52 *of Rent Rulings published by U. C. Banerji, Ref* [P 15 C 1]

(c) Oudh, Rent Act, S. 108—Suit by landlord to eject tenant of thekadar after the expiry of theka is triable by civil Court.

A thekadar is a tenant of a holding from which he ejects the last holder When it comes into his possession it is open to him either to cultivate it himself or to transfer its cultivation to another person who becomes his sub-tenant As a sub-tenant the transferee can acquire no rights, and when the thekadar's theka expires his sub-tenancy also expires. If, after that he continues in possession he is a trespasser and as such he can be ejected by a civil Court [P 15 C 2]

A. P. Sen—for Appellant

Aditya Prasad—for Respondent

Referring Order .—This is a second appeal, arising out of a suit for possession of certain plots of land in village Rukmangadpur and for Rs 100 on account of damages brought by the plaintiff-appellant taluqdar against the defendant on the allegation that the latter had wrongfully taken possession of the land in suit in July 1926 The defence was that the suit was not cognizable by the civil Court inasmuch as the defendant held the land as a tenant under a patta dated 9th December 1925, executed in his favour by Hafizullah Khan, who held a theka of the village from the plaintiff

The trial Court held that Hafizullah Khan had no authority under the terms of the thekanama in his favour to let out the land to tenants and, therefore, the patta granted by him to the defendant was invalid Thus in its opinion the defendant was a trespasser and the suit was cognizable by the civil Court The learned Subordinate Judge of Gonda on appeal disagreed with the opinion of the trial Court and held that as the plaintiff had failed to prove that the defendant was aware of the incompetency of the thekadar to grant leases he must be deemed to have acted in good faith in taking the patta from him and that under the circumstances he must be considered to hold the land as a tenant.

The only question which arises for determination in the appeal is whether the patta granted by the thekadar is valid and binding on the plaintiff. If the question is decided against the plaintiff it will follow that the status of the defendant is that of a tenant and in that case the suit would obviously be not cognizable by the civil Court The learned Subordinate Judge has based his decision on the Selected Decisions of the Board of Revenue No 9 of 1892 [*Lal* v *Raja Udey Partab Udya Dutta Singh* (1)] and a decision of a single Judge of this Court in *Gur Saran* v *Jagannath* (2), which approves the above-mentioned decision of the Board of Revenue I am not aware of any provision of law imposing the duty upon a landlord to proclaim to his tenantry the restrictions imposed by him on the powers of his thekadars Both these cases seem to have overlooked the provisions of S. 8, Oudh Rent Act, which show that pattas granted to tenants must be signed either by the landlord or his authorized agent. Cl 10 of the thekanama distinctly provides that pattas granted to tenants without the consent and signature of the landlord would be invalid I do not think that it can be possible to treat the thekadar as an authorized agent in the face of a distinct provision preventing him from granting pattas on his own authority It is admitted in this case that no sanction was obtained from the plaintiff nor did she sign the patta relied upon by the defendant It is settled law that powers-of-attorney and other similar instruments should be construed strictly: —see Bowstead on Agency, 6th edition p. 73 and Story's Commentaries on the Law of Agency, 9th edition p 84 I think the same principle should govern the construction of document like the thekanama in the present case In *Cooper* v *Martin* (3) it was held that

" Courts of equity will never uphold an act which will defeat what the person creating the power has declared, by express or necessary implication, to be a material part of his intention."

(1) [1893] A W. N 8
(2) A. I. R. 1928 Oudh 240.
(3) [1867] 3 Ch. 47 = 17 L. T. 587 = 16 W. R. 234.

In Farwell on Powers, 3rd edition, at p. 382, referring to a case, which I have not been able to find in the library, the learned author says.

"In *Lawrnesson* v. *Butler* (4) a tenant for life had power to lease with consent ; he agreed to grant a lease, without having obtained the consent. The Court refused to aid."

In the present case the plaintiff's intention seems to be clear that the thekadar should not have the power to grant pattas. The view taken by the lower Court defeats this intention of the landlord. I am doubtful if the view taken in the cases referred to above is in consonance with the sound principles of law. I think it is desirable that there should be an authoritative pronouncement of a Bench of two Judges on the question involved in the appeal I therefore certify the case as a fit one for being heard by a Bench of two Judges under S. 14, Oudh Courts Act

Judgment. — The decision of this second appeal has been referred by a Judge of this Court to a Bench in view of the importance of the point raised and in view of the fact that he considered that a decision of a single Judge of this Court should be examined The facts are simple Rani Krishna Devi is the owner of the village of Rukmangadpur in the Gonda District She gave a theka of this village to a certain Hafiz-ullah Khan This theka was from 30th November 1922 to 31st July 1926. On 9th December 1925 Hafiz-ullah Khan granted a lease over the holding in suit to Tirbhuwan Dat This lease was for the cultivation of the holding. It was a lease for the remainder of the agricultural year and expired on 31st July 1926. Hafiz-ullah Khan continued in possession after the expiration of his theka He was subsequently ejected by Rani Krishna Devi in July 1927 Tirbhuwan Dat continued to hold cultivating possession over the holding and refused to vacate it when required to do so by Rani Krishna Devi. She accordingly sued to eject him as a trespasser on 2nd July 1927. The main question in dispute in this appeal is whether Tribhuwan Dat is to be treated as a trespasser who can be ejected by the civil Court or whether he is to be treated as a tenant who can only be ejected by the revenue Court. The learned Munsiff found that he was a trespasser, ordered his ejectment and awarded damages against him The learned Subordinate Judge on appeal found that he was a tenant and that the civil Court had no jurisdiction. He accordingly dismissed the suit The present appeal is preferred The argument put forward on behalf of the appellant is as follows: Her case is that in the thekanama granted by her to Hafiz-ullah Khan there was a clause in which it was stated distinctly that no leases issued by the thekadar would be valid or binding unless they were approved and countersigned by her. Apart from that it is argued that as soon as Hafiz-ullah Khan's theka came to an end any rights which Tirbhuwan Dat had obtained from Hafiz-ullah Khan terminated also, and that after the conclusion of Hafiz-ullah Khan's theka Tirbhuwan Dat became a trespasser The learned counsel for Tirbhuwan Dat has replied that the lease granted by Hafiz-ullah Khan was a good lease whatever may have been stated in the thekanama inasmuch as under the provisions S 188, Contract Act (Act 9 of 1872) Hafiz-ullah Khan had necessarily authority to lease the land which he was holding in theka How far this argument would be of avail in view of the distinct assertion in the thekanama that he should not issue such leases without the authority of the lady it is not necessary to discuss as we are not concerned with the period during which Tirbhuwan Dat cultivated the land that was included in the period of Hafiz-ullah Khan's theka

The learned counsel, however, continues further that when that theka came to an end Thribuwan Dat did not cease to be a tenant but that he acquired under the provisions of S 37, Local Act 22, 1886 (the Oudh Rent Act) the position of a statutory tenant who could not be ejected for ten years His case here is mainly that civil Courts have no jurisdiction Whether the revenue Courts can eject such a tenant is another matter His case is that in no circumstances can a civil Court eject. In support of this view he has referred us to the Selected Decision of the Board of Revenue in the case of *Lal* v. *Raja Udey Partap Udya Singh* (1) In that appeal it was decided by Mr J. R Reid, S. M , and Mr. W. Kye, J M that under the provisions of S 37, Local Act, 22, 1886— that section has been since amended but not in such a manner as to affect the argument—a thekadar was a landowner

(4) 1 Sch. & Lef. 13.

within the meaning of that section and that a lease granted by a thekadar to a tenant gave a statutory right to that tenant. The members of the Board of Revenue noted at the time that their decision was in direct conflict with a decision of Mr. Young, the then Judicial Commissioner, of Oudh which is reported in *Maharaja Jagatji Singh* v. *Rupal Murai* (5) Mr Young took the view that no thekadar could bind his landlord, and that lease executed by him were only effective during the period of the theka. The view of the Board of Revenue was accepted by Pullan, J, in *Gursaran* v *Jagannath* (2), but this finding was not absolutely essential to the decision of the appeal by Pullan, J., as in that case the landlord had accepted rent from a person whom the thekadar had put in possession We are unable to accept the view taken by the Board of Revenue We have considered that view with special care out of respect for the two distinguished members of the Board who were parties to that decision But we cannot see how it is possible to hold the view that a thekadar can create the right of statutory tenancy The decision appears to us to turn upon the provisions of another section of Local Act 22 of 1886

The rights conferred upon tenants by S 37 cannot be acquired by a person holding land as a thekadar, mortgagee or sub-tenant This right is enumerated amongst other rights in S. 67 and S. 68 says that a person holding land as a thekadar, mortgagee or sub-tenant shall not, while so holding acquire any of the rights enumerated in the last foregoing section in any of the land comprised in his theka, mortgage or sub-tenancy. What was the position of Hafizullah Khan in respect of the holding in question. He was the thekadar of that holding. In other words he was a tenant of that holding The holding had come into his possession because he had ejected the last holder. When it came into his possession it was open to him either to cultivate himself or to transfer its cultivation to another person He transferred its cultivation to Tirbhuwan Dat and Tirbhuwan Dat clearly became sub-tenant of the holding. It is true that as tenant-in-chief Hafiz-ullah Khan was landlord of the holding in reference to Tirbhuwan Dat, who was sub-tenant of the holding because Thrbhuwan Dat had to pay his rent to him as tenant-in-chief but Tirbhuwan Dat was a sub-tenant and as a sub-tenant he could acquire no rights. It is clear that when Hafiz-Ullah's theka expired Tirbhuwan Dat's sub-tenancy expired Tirbhuwan Dat then became a trespasser and as a trespasser he can be ejected by a civil Court The learned counsel for Tirbhuwan Dat has pointed out that if we decide that he is not a tenant we are deciding a question which would fall within the purview of the revenue Courts It is impossible to avoid such seeming conflict in Oudh, for if the revenue Court decided that he was not a trespasser it would be deciding a question which is within the purview of the civil Courts We consider that it is within the purview of the civil Courts to decide that he is a trespasser Of course if we had decided that he was not a trespasser but a tenant we should have dismissed the suit as not within our jurisdiction. But in order to decide whether he is or is not trespasser we are inevitably obliged to look into the provisions of the Oudh Rent Act We, therefore, allow this appeal, set aside the judgment of the learned Judge of the lower appellate Court and restore the decision of the learned Munsif Tirbhuwan Dat will pay his own costs and those of the appellant in all Courts

W S R K *Appeal allowed*

(5) No. 52 of the Rent Rulings published by U. C. Banerji in 1915.

A I R 1929 Oudh 15

STUART, C J, AND RAZA, J.

Shiv Ram Lal and *others* —Defendants —Appellants

v.

Ganga Shankar and *others* — Plaintiffs and Defendants—Respondents

Second Appeal No 349 of 1927, Decided on 29th February 1928, from decree of Dist Judge, Fyzabad, D/- 27-7-1927

(a) Civil P. C., S. 11—Alluvial land in present suit not the same in previous suit but newly formed while old land disappeared — There can be no res judicata or estoppel—Evidence Act, S. 115.

A land was added to a village by the river changing its course Some of the zamindars claimed ownership to it on the basis of a previous suit many years ago in which they had asserted their rights to land which had subsequently ceased to exist and had gone back into the river.

Held that there can be no question of res judicata or estoppel. [P 16 C 1]

(b) Alluvion and Diluvion — Every zamindar has a right according to his share.

Where a land has been added to a village by the river changing its course, every zamindar has a right to the alluvial land according to his interest in the village. [P 16 C 1]

Niamatullah and *Ghulam Hasan*—for Appellants.

Bisheshwar Nath, *Radha Krishna* and *Ram Narain Lal*—for Respondents.

Judgment—The matters in dispute between the parties to this appeal have been discussed at great length both in the judgments of the trial Court and the lower appellate Court; but the actual points for decision by us can be stated very shortly. The river Ghogra flows between the village of Raunahi in the Fyzabad District and villages of Gonda District It is now accepted by both sides that in relation to alluvial accretions the midstream rule applies Thus any land which is added to Raunahi by alluvial accretion belongs to Raunahi, wherever it may come from on the Gonda side Here we are concerned with land which has so been added to Raunahi and the dispute is as to whether that land belongs to all the zemindars of Raunahi in proportion to their shares or only to certain favoured individuals, who in a previous suit many years ago asserted their rights The land to which those persons then asserted their rights has now ceased to exist It has gone back into the river but in its place other land has been since thrown up There can be no question here of res judicata or estoppel It is perfectly clear to us that every zemindar in Raunahi has a right to his share in this alluvial land according to his interest in the village and the plaintiffs-respondents are entitled to their share in this manner. Many other points have been raised before us, but it is unnecessary to discuss them as upon this broad principle we can decide the appeal, Para. 4, Regn 11 of 1825 does not affect the case. The appeal, therefore, fails and is dismissed accordingly with costs

We now come to the cross-objection The trial Court arrived at a conclusion, which we cannot accept, to the effect that a certain number known as 598, which is an area of 209 bighas odd, was the sole property of the owners of patti Raunahi. We find no reason to accept that view which is based, in our opinion, upon an incorrect conclusion as to the law. The plaintiffs-respondents have filed a cross-objection in this respect; but, in our opinion, they cannot enforce this, except against that portion of these 209 bighas as is in possession of the defendants-appellants They cannot enforce this, in our opinion, against their fellow respondents but only against the appellants. The matter is most unimportant. If they succeed in full in their objections they would obtain 11 bighas more of absolutely worthless land, but as it is we award them all to which they are entitled, that is 2 bighas of absolutely worthless land as against the defendants-appellants. The costs of the cross-objection will be borne by the parties

W. S./R. K. *Appeal dismissed.*

A. I. R. 1929 Oudh 16

GOKARAN NATH MISRA AND SRIVASTAVA, JJ

Mt. Fakhre Jahan Begam—Plaintiff—Appellant.

v.

Mohamed Hamidullah Khan—Defendant—Respondent.

Second Appeal No 170 of 1928, Decided on 8th October 1928, from decree of 1st Sub-Judge, Kheri, D/- 15th March 1928.

(a) Mahomedan Law—Divorce—Parties belonging to different sects—Law of defendant is to be applied.

In a suit by a Shia against his or her Sunni spouse for dissolution of marriage, the question at issue should be determined by reference to the law of the sect to which the defendant belongs. [P 18 C 2]

(b) Mahomedan Law—Divorce—Accusation of laan by husband—No material difference between Shia and Sunni sects—Retraction can nullify the effect on marriage tie.

There is no material difference between the Shia law and the Sunni law on the question of retraction of accusation of adultery by the husband in respect of its effect on the dissolution of the marriage tie. Such a retraction can nullify the effect of imputation of adultery and the marriage cannot be dissolved. [P 19 C 1]

(c) Mahomedan Law—Divorce — Original Islamic law should be followed in spirit in the present circumstances

In the changed circumstances of the present day it cannot be possible to follow the letter of the original Islamic law. But the spirit of the law should be kept in view and the principles underlying it should be adhered to as far as possible, 41 *All.* 278, *Foll.* [P 19 C 2, P 20 C 1]

(d) Mahomedan Law—Marriage—Accusation of laan by husband—Dissolution applied for by wife—Husband availing himself of

locus poenitentiae before dissolution—Marriage cannot be dissolved.

Where a wife appeals to a Court of law for dissolution of marriage, on the ground that she has been falsely accused of adultery, by the husband the husband is allowed a locus pœnitentiæ before the marriage is dissolved. If he avails himself of this locus pœnitentiæ he may be liable for punishment for the slander or defamation but the marriage cannot be dissolved : *A. I. R.* 1927 *All.* 56, *Foll.* [P 20 C 1]

(e) Mahomedan Law—Marriage—Wife suing husband for dissolution of marriage on accusation of laan—Husband admitting but expressing regret—Retraction is valid.

A wife sued her husband for dissolution of marriage on the ground of accusation of adultery. The husband from the first moment admitted the accusation made by him and although he tried to explain the circumstances under which he made it, he made no attempts to substantiate it and on the contrary expressed regret for it.

Held . that the retraction was valid . *A.I.R.* 1927 *All.* 56, *Dist.* [P 20 C 2 , P 21 C 1]

(f) Mahomedan Law—Divorce—True accusation of laan against wife is no ground for divorce.

One of the conditions laid down under the Mohamedan law in respect of laan entitling wife to a divorce is that she should be innocent. If, therefore, the accusation is true, the wife cannot maintain a claim for divorce on that ground : *A. I. R.* 1928 *Bom.* 285, *Rel. on.* [P 21 C 1]

Naimullah—for Appellant.

M. Wasim—for Respondent.

Judgment.—This appeal arises out of a suit by a wife belonging to the Shia sect against her husband, who belongs to the Sunni faith, for dissolution of marriage on the ground that the husband had accused her of committing adultery and of her leading an unchaste life. The parties belong to respectable families but unfortunately their married life has been an unhappy one. They have been living separate for a long time In 1912 the defendant husband instituted a suit for restitution of conjugal rights The wife in her defence pleaded that she had been divorced and that the husband had been treating her very cruelly. The plea of divorce was rejected but legal cruelty was proved and the suit for restitution was dismissed on that ground. Some years later in 1920 the plaintiff brought a suit for a declaration that she had been divorced and in the alternative for cancellation of the marriage on the ground of legal cruelty It was held that the plea of divorce was barred by res judicata by reason of the decision in the previous suit and that the claim for cancellation of marriage on the ground of legal cruelty was time barred On 10th October 1925 the husband filed a complaint in the criminal Court under S 498, Penal Code, against one Abdul Wahid on the allegation that the accused had been detaining his wife with criminal intent Abdul Wahid was convicted by the trying Magistrate The conviction was upheld by the Sessions Judge but was set aside by this Court on the ground that the case did not fall within S 498 of the Code The plaintiff based her claim for dissolution of marriage in the present case on the imputations which had been made by the defendant in the above-mentioned complaint in the criminal Court In the beginning a plea of legal cruelty was also raised but it was abandoned in the trial Court and, therefore, we are no longer concerned with it

As regards the ground about the husband having accused her of adultery and infidelity, we have to note that the plaintiff in her plaint does not say one word either admitting the accusations made against her or alleging that they were false The defendant in his written statement pleaded that he had made the accusation in good faith and said that he withdrew his previous statements unconditionally. As much of the arguments in this appeal have been based upon the attitude taken up by the defendant in his defence it would be useful to reproduce the relevant portions of the written statement below :

" Para 16. The defendant filed a complaint against Abdul Wahid Khan, mentioned in para. 10 of the plaint, in good faith on the basis of certain facts within his personal knowledge and of some facts which he learnt on reliable information and the defendant brought no accusation against the plaintiff knowing it to be wrong, groundless and false. "

" Para 18. If it be proved that the defendant had brought any false charge against the plaintiff in the complaint, mentioned in para. 10 of the plaintiff, or on any other occasion, the defendant withdraws such charges and expresses his regret for the same. "

" Para 19. This suit has not been brought by the plaintiff in good faith. The plaintiff has been making effort to get the marriage dissolved in any way but she remained unsuccessful up to this time. Now the plaintiff tries to do the same in another way so that the marriage be cancelled and the plaintiff may have every freedom but the defendant wishes to maintain the relationship of husband and wife between the parties and if it be held that the plaintiff is entitled to sue for cancellation of marriage even if the charge brought against her be true, the defendant withdraws those charges unconditionally. "

On the date on which the issues were framed the defendant's counsel made the following statement in explanation of the pleas contained in the written statement:

"The defendant never made any false imputation. The defendant only filed a complaint against Abdul Wahid Khan to the effect that the plaintiff was being detained by him for adultery. This imputation was not false and does not give rise to any cause of action. If true imputation can give rise to the cause of action, the defendant withdraws it. Even if the imputation was false the defendant withdraws it unconditionally."

Neither of the parties produced any oral evidence The arguments were heard by the learned Munsif on 5th and 6th December 1927 It appears that in the course of the arguments it was argued on behalf of the plaintiff that the imputations were false and the defendant thereupon made two applications to the trial Court one on 5th December and the other on the following day In the application made on 5th December it was stated that

"the defendant unconditionally withdrew all his words and statements made in any application or in any Court on any occasion from which it might be inferred that the defendant made any imputation about the plaintiff having committed adultery with Abdul Wahid or with any other person and expressed his regret and prayed that the plaintiff's suit might be dismissed."

Again in his application made on 6th December he stated that

"he had filed the complaint in good faith believing the facts mentioned therein to be true, the defendant himself not being an eye-witness of the ocurrence . that since however it was argued for the plaintiff that the imputation was false the defendant now unconditionally withdrew the said imputation with these words that it was false and the defendant was sorry for it."

The learned Munsif in a careful and well-considered judgment decided that a true imputation of unchastity cannot annul the marriage and the plaintiff having made no attempt to show that the imputation against her was false and in any case the imputation having been withdrawn, the plaintiff could not get a decree for dissolution of marriage On appeal the learned Subordinate Judge has held that the defendant having in his application dated 6th December 1927 admitted the imputation to be false it was not necessary for the plaintiff to give any evidence to prove it to be so but agreed with the trial Court that there had been a valid retraction and, therefore, the suit had been rightly thrown out.

The plaintiff comes here in second appeal Two contentions have been urged by her learned counsel in support of the appeal. The first is that the Shia law should govern decision of the dispute and that according to that law the retraction by the husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage tie The second contention is that there has been no valid retraction in the present case.

In support of the first contention he has referred to Mulla's Principles of Mahomedan Law, 8th edition, p 12, where the learned author says that a Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law and that the same proposition would hold good of a Shia woman marrying a Sunni We accept this proposition as perfectly correct but it is of no help in determining the rule of law which should govern decision of a dispute between the parties one of whom is a Shia and the other a Sunni It is not necessary for us to arrive at a definite decision on this point because, as we will show presently there is no material difference between the Shia and the Sunni law on the question of retraction as it arose in the present case However, we are inclined to think that in a case like the present the question at issue should be determined by reference to the law of the sect to which the defendant belongs

Then, as regards the alleged difference between the Shia and the Sunni law the learned counsel for the appellant has referred us to Baillie's Digest of Imamia Law, p 157 The passage referred to is as follows :

"If he should give himself the lie, or retract in the midst of the lian or refuse to take it, the liability to hudd is established against him, but none of the other consequences are established . . If he should give himself the lie, or retract after the lian the child's paternity is restored, and with it his right of inheritance but neither the father, nor any one related through him can inherit to the child, while the mother, and those related through her, retain their right of inheritance to him. Her wifehood, however, does not return, nor is there any abatement of the prohibition."

As against this he has referred to Hamilton's Hedaya by Grady, Book 4, Chap. 10, p 125. The passage referred to is as follows :

"If, after imprecation, the husband should acknowledge that his accusation was false, by saying, 'I falsely laid adultery to her charge,' he becomes privileged with respect to her, that is to say, it is lawful for him to marry her as well as any other person. This is according to

Hanifa and Muhmamad. Abu Yusuf says that she is for ever prohibited to him, and that he cannot marry her, the prophet having said, "those who make imprecation can never come together, which shows the separation established between them to be perpetual; wherefore his marriage with her is illegal."

On the authority of the extracts quoted above it has been argued by the learned counsel for the plaintiff that according to the Shia law the status of a wife does not return even after retraction nor is there any abatement of the prohibition against any remarriage between the parties thereafter, whereas according to the Sunni Law, at least according to Abu Hanifa and Muhammad, they can remarry after the retraction Apart from the difference between Abu Hanifa and Muhammad on the one hand and Abu Yusuf on the other the alleged difference between the Shia and the Sunni law is of no consequence in the present case, firstly because the retraction referred to in the authorities quoted is retraction after lian and secondly because the difference, if any, is as regards remarriage with which we are not concerned in this case We must accordingly hold that the plaintiff has failed to cite any authority in support of the proposition that under the Shia law a retraction by the husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage tie We therefore overrule the contention

The second contention as regards the validity of the retraction makes it necessary for us to make a reference to the law and procedure relating to lian as laid down in the authoritative works on Muhammadan law. In Hamilton's Hedaya by Grady, Book 4, Chap 10, p 124, the form of imprecation and the manner of making it is stated in the following terms

"The manner of imprecation is as follows—The Kazee first applies to the husband, who is to give evidence four separate times, by saying, 'I call to witness to the truth of my testimony concerning the adultery with which I charge this woman:' and again, a fifth time, 'may the curse of God fall upon me if I have spoken falsely concerning the adultery with which I charge this woman,'—after which the Kazee requires the woman to give evidence, four separate times by saying "I call God to witness that my husband's words are altogether false, respecting the adultery with which he charges me"; and again, a fifth time "may the wrath of God alight upon me if my husband is just in bringing a charge of adultery against me" . . . . . And on both making imprecation in this manner, a separation takes place between them; but not until the Kazee pronounces a decree to that effect"

In an earlier passage in the same chapter it is laid down that

"It is also a condition of imprecation that the wife require her husband to produce the ground of his accusation . . . . and if he decline it, the Magistrate must imprison him until he either make an imprecation, or acknowledge the falsity of his charge by saying "I falsely attributed adultery to her" as this is a right due from him to his wife."

It is stated further on

"If a husband after imprecation, contradict himself by acknowledging that he had accused his wife falsely, let the Magistrate punish him because he then acknowledges himself liable to punishment."

The Right Hon'ble Mr. Ameer Ali in his work on Mahomedan Law, 4th edition at p 595 remarked as follows.

"When both the parties have taken the oath in the prescribed form and the charge has been conclusively established, the Kazi must draw up an order of separation between the parties, and in accordance with such decree, the husband must divorce his wife. If he refuse to do so, the Judge himself is to pronounce a divorce between them. The marriage, however, continues in existence with all its concomitant rights until the Judge has made the order. All the schools are agreed in the opinion that proceeding by imprecation can be validly effected only before the Kazi or Hakim, and that until he has made his order dissolving the marriage, it continues intact.

Khan Bahadur Mahomad Yusoof Khan in his Mohamedan Law (Tagore Law Lectures, 1891-92), Vol 3, p 352, explains the reason of the rule as follows:

"The husband having accused the wife of a Zina, he would have been liable to the punishment of kuzuf or slander but for this procedure, and, therefore, the punishment for slander is extinguished and lian takes its place—and so far as the woman is concerned, her evidence or testimony standing in the place of Hudd-i-zina, that is, the punishment for zina having extinguished, lian takes the place of the punishment for zina so far as the woman is concerned, because to invoke God, when giving evidence, is more destructive in its effect than punishment "

It is obvious that in the changed circumstances of the present day it cannot be possible to follow the letter of the original Islamic law We are in entire agreement with the observations of Sir Pramada Charan Banerji, J , in the case of *Zafar Husain* v *Ummatur-Rahman* (1), that

" the Mahomedan Law of evidence being no longer in force and the ordinary Courts having taken the place of Kazis, these Courts are the authorities which would make a decree for divorce on being satisfied according to the

(1) [1919] 41 All. 278 = 49 I. C 256 = 17 A. L. J. 78.

ordinary rules of evidence ; it is unnecessary to comply with the formalities of laan "

But we venture to add that the spirit of the law should be kept in view and the principles underlying it should be adhered to as far as possible

The principles which can safely be deduced from the above rules are, firstly, that mere accusation by the husband cannot affect the relationship of husband and wife between the parties. Dissolution of marriage takes place only by means of a decree for divorce passed by the Kazi for whom we should now substitute our law Courts Secondly, when such accusation is made and the wife moves the Kazi in the matter the husband can either retract the accusation or substantiate it by taking oath and making the imprecation invoking the curse of God upon him if his accusation is false If the husband retracts at this stage he is liable to punishment for slander If, on the other hand, he persists in the accusation and makes the necessary oath and imprecation the said oath and imprecation save him from punishment for slander. After this the wife can either admit the charge in which case she would be liable for punishment for adultery or she can repudiate it by taking oath and imprecation invoking the wrath of God against her if her denial is false In this case her taking the oath and making the imprecation saves her from punishment for adutery. It is only after going through this procedure that the Kazi can pronounce a decree for divorce No doubt the truth or falsity of the charge has to be determined at the present day according to the rules of evidence and procedure governing British Courts of law yet it is clear that when wife appeals to the Court o law for dissolution of marriage the husband is allowed a locus pœnitentiæ before the marriage is dissolved If he avails himself of this locus pœnitentiæ he may be liable for punishment for the slander or defamation but the marriage cannot be dissolved We are supported in this view by the following observations of Sulaiman, J , in *Rahima Bibi* v *Fazil* (2).

" The real basis of the procedure of the Mahomedan law seems to be that when the wife appeals to the Kazi and asks for the dissolution of the marriage on the ground that she has been falsely accused by her husband of adultery, it is open to the husband to admit that he had made a false accusation and thereby render himself criminally liable, or to substantiate the accusation."

(2) A. I. R. 1927 All. 56=48 All. 894.

Now it remains for us to see whether the retraction made in the present case is or is not valid and sufficient. In agreement with both the Courts below we are of opinion that it is valid In para. 16 of his written statement the defendant simply alleged that he acted in good faith in making his complaint against Abdul Wahid Khan which as would appear from the statement made by his pleader in the course of oral pleadings was only to the effect that the plaintiff was being detained by Abdul Wahid Khan for adultery and not that any adultery had actually been committed He justifies his making of the charge but not the charge itself The written statement was unfortunately somewhat argumentative but this much is quite clear that the defendant did not undertake to prove that the accusation was true or that the plaintiff had as a matter of fact committed adultery We think that the subsequent applications made by the defendant on 5th and 6th December 1927 were quite unnecessary However, they confirm the view which we take about the defendant making a retraction and not trying to substantiate the charge.

The learned counsel for the appellant in support of his contention about the retraction being invalid has relied on *Rahima Bibi* v *Fazil* (2). That case is quite distinguishable. In that case the defendant denied his making any defamatory statement and wished to make a retraction after evidence on both sides had been recorded. The Court held that the essential element of a retraction is the withdrawal of a statement previously made and as the defendant denied making a defamatory statement he could not make any retraction. It was further held that as the defendant sought to make a retraction at a very late stage and in the light of his conduct during the trial of the case there was no proper retraction In the present case the defandant from the first moment admitted the accusation made by him and although he tried to explain the circumstances under which he made it he made no attempt to substantiate it and on the contrary expressed regret for it.

Lastly, there remains the fact that the defendant raised a plea to the effect that a true accusation does not give rise to

any cause of action, though he coupled it with the statement that if a true imputation can give rise to a cause of action the defendant withdrew it We are of opinion that this was merely a legal plea which is also well-founded. One of the conditions laid down under the Mahomedan Law in respect of laan entitling wife to a divorce is that she should be innocent. It follows from this condition that if the accusation is true the wife cannot maintain a claim for divorce on that ground. This view is supported by the decision of the Bombay High Court in *Khatijabi* v *Umarsaheb Anserasaheb* (3) This legal plea, therefore, can at best amount only to this that the plaintiff in order to claim a divorce must prove that the accusation made against her was false But in the light of the entire pleadings it cannot mean that the defendant undertook to prove that the accusation was true Under these circumstances we cannot regard the fact of the defendant raising this plea as detracting from the validity of his retraction.

For the above reasons we hold that the retraction was valid and proper and the claim of the plaintiff for dissolution of marriage had been rightly dismissed The appeal fails and is dismissed with costs.

W S /R K *Appeal dismissed.*

(3) A. I. R 1928 Bom. 295=52 Bom 295.

A I. R 1929 Oudh 21

SRIVASTAVA, J

Mt Mushrafi Begam—Judgment-debtor —Appellant

v

Mohammad Mustajabullah Khan — Decree-holder—Respondent

Execution of Decree Appeal No 15 of 1928, Decided on 14th September 1928, from order of Sub-Judge, Kheri, D/- 21st April 1928

Civil P. C., S. 47—Decree against husband —Wife impleaded as representative on his death—Property in her hands attached—Objection by her that the property did not form assets of her husband is one covered by S. 47 and not by O 21, R. 58—Summary rejection is illegal—Civil P. C , O. 21, R. 58.

A decree was passed against a judgment debtor, on whose death, the wife was impleaded as his legal representative. On certain property being attached, the wife filed an objection to the effect that the property in question did not form part of the assets of the deceased judgment-debtor, and hence it was not liable to attachment. The lower Court rejected the objection summarily.

Held . that the objection was one covered by S. 47, and not by O. 21, R 58, as the objector was a party to the execution proceedings as the legal representative of the deceased judgment-debtor The lower Court was wrong in throwing out the objection without considering it on merits. [P 21 C 2]

Ali Mohammad—for Appellant

Khaliquzzaman—for Respondent.

Judgment —This is an execution of decree appeal by the judgment-debtor. Certain property was attached from the hands of the judgment-debtor on 4th October 1927 On 21st April 1928 the judgment-debtor filed an objection to the effect that the property in question was not liable to attachment in execution of the decree on the ground that the decree was against her husband on whose death she was impleaded as his legal representative and the property in question did not form part of the assets of the deceased judgment-debtor The application purports to have been made under S 47 and O 21, R. 58, Civil P C. The learned Subordinate Judge rejected the objections summarily without any inquiry on the very date on which they were filed on the ground that they had been filed " with the evident intention to delay the sale."

There could be justification for the lower Court to adopt this course if the objection was one under O 21, R 58 and if the Court considered that the objection had been designedly or unnecessarily delayed But it is clear that the objection in the present case was one covered by S 47, Civil P C as the objector was a party to the execution proceedings as the legal representative of the deceased judgment-debtor This being the position, the lower Court was not justified in throwing out the objection without considering it on the merits. The order of the lower Court is clearly wrong I set it aside and remand the case under O 41, R 23, Civil P C with directions to re-admit the case under its original number and to dispose of it according to law The appellant will get her costs for the appeal from the respondent. The other costs will abide the event

W S /R K *Case remanded.*

A. I R. 1929 Oudh 22

GOKARAN NATH MISRA AND RAZA, JJ

Jiyaoo Singh—Defendant—Appellant.

v.

Jageshar Singh— Plaintiff — Respondent

Second Appeal No 29 of 1928, Decided on 29th September 1928, from decree of Addl. Sub-Judge, Sultanpur, D/- 24th October 1927.

Pre-emption —Transfer — Nature of sale— Vendor out of possession but having title— Price definitely stated — Transaction is out and out sale in praesenti and not sale of doubtful right.

The mere fact that a person is out of possession would not alone justify the Court in holding that a sale of property by him is a sale of a share in law suit, if it is not accompanied by other circumstances such as a doubtful right. [P 24 C 1]

A was the original owner On his death the property was mutated in the name of his widowed daughter-in-law *B* who remained in possession till her death. During her lifetime *C* and *D*, nearest collateral heirs of *A*, instituted proceedings against *B* in relation to *A*'s property, and subsequently transferred a moiety of it in possession of *B* by virtue of a sale-deed for a price part paid and part retained by vendee for meeting the expenses of the litigation relating to that property.

Held : that the sale was out and out a sale in praesenti, that it was not a sale of doubtful right and that a definite sum was stated in the sale-deed as sale price of property 21 *Cal.* 496, *Dist.*. 9 *O. C.* 86 , 3 *O. C.* 331 ; and *A. I. R.* 1922 *Oudh* 223, *held to be widely stated* *A I R.* 1922 *Oudh* 156, *Foll* . *A. I R.* 1926 *Oudh* 296, *Ref.* [P 24 C 2]

R D. Sinha and *A C Mukerji*—for Appellant

Bhagwati Nath and *Bishambhar Nath* —for Respondent

Judgment —This is an appeal arising out of a pre-emption suit

The facts of the case are that one Ramanand Singh was the original owner of certain properties situate in villages Sarangpur, Ahrani and Pipri, Pargana Barausa, District Sultanpur, and died in 1925 leaving behind him his widowed daughter-in-law Mt Marjadi Kuar and the defendants Surajpal Singh and Lakhni Singh (defendants 2, 3 and 4) as his collateral heirs. On his death Mt Marjadi Kuar, his widowed daughter-in-law, applied for mutation of names in respect of the said property in her own favour. The aforesaid defendants raised objection in the revenue Courts to mutation being effected in favour of Marjadi Kuar Th plaintiff Jageshar Singh was also an objector in the same proceedings Durin the course of mutation proceedings defendants 2 to 4 named above executed a sale deed in favour of defendant 1, Jiyaoo Singh who is now the appellant before us, o 22nd March 1926. By virtue of that sale deed defendants 2 to 4 transferred moiety of the properties belonging t Ramanand Singh, and to which they alleged they were entitled, for Rs 1,000 Under the terms of the sale-deed Rs. 20 alone were paid to the vendors at th time of the execution of the sale-deed an the remaining Rs 800 were left with th vendee Jiyaoo Singh for meeting the expenses of the litigation relating to th property in suit from time to time It might be mentioned here that although Mt Marjadi Kuar was successful in obtaining mutation in her favour from th lowest revenue Court, yet she subsequently died and the mutation of names wa ultimately effected in favour of defendant 2 to 4 who were the collaterals of Ramanand Singh and were entitled to the entire property left by him

The plaintiff-respondent Jageshar Singh has brought the present suit for pre-emption in respect of the half-share transferred by defendants 2 to 4 in favour of defendant 1 under the sale-deed mentioned above He claimed pre-emption on the payment of Rs 175 only which had been paid to the vendors at the time of the execution of the sale-deed He claimed pre-emption on the ground that he was preferentially entitled to the property in suit, it being situate within Mahal Ramanand Singh in which he himself was a cosharer

The defendant-appellant Jiyaoo Singh contested the suit on two grounds Firstly that the sale evidenced by the deed dated 22nd March 1926 was merely a sale of a law suit and could not therefore form the subject of pre-emption and secondly that if the plaintiff be held entitled to pre-empt he must be ordered to pay Rs. 1,000, the price of the property entered in the sale-deed

The learned Munsif of Musafirkhana at Sultanpur by his decree dated 1st August 1927 held that the deed in suit was not a sale of a doubtful claim amounting to a sale of a law suit but was a sale-deed relating to the property belonging to the vendors and was therefore one which

could validly give rise to a right of pre-emption. He found that the actual price paid was Rs 175, Rs 25 having been spent in purchasing stamp and meeting other costs of execution of the deed, and this the vendee was bound in law to bear On these findings he decreed the suit of the plaintiff-respondent, Jageshar Singh and gave him a decree in respect of the property covered by the sale-deed on payment of Rs 175.

The vendee-appellant Jiyaoo Singh appealed to the Court of the Additional Subordinate Judge of Sultanpur who passed a decree dated 24th October 1927 allowing his appeal to this extent that he decreed pre-emption in favour of the respondents on payment of Rs. 1,000 instead of Rs 175 as decreed by the learned Munsif On an interpretation of the sale-deed he agreed with the learned Munsif and came to the conclusion that the transaction was not a sale of doubtful rights which could be considered as a sale of a share in a law suit and as such not liable to pre-emption

The vendee Jiyaoo Singh has now appealed to this Court The case was originally set down for hearing before one of us but as it appeared that the question involved was one of importance it was referred for decision to a Bench of two Judges and the case is now before us

The case has been argued at great length and the only point which we have to decide is whether the transaction evidenced by the sale-deed of 22nd March 1926 amounts to such a sale of the property covered by it as would validly give rise to a right of pre-emption or whether it is merely a sale of a doubtful claim falling within the description of a sale of a share in a law suit which would not give rise to a right of pre-emption

We have read the deed carefully and have come to the conclusion that on a proper interpretation of the same it cannot be held to be a sale of a law suit, and we now proceed to give our reasons for holding this opinion The deed recites that the property belonged to Ramanand Singh and on his death the vendors were his nearest collaterals and that Mt Marjadi Kuar had no right to the property in suit. It further states that the said lady had filed an application for mutation of her own name after the death of Ramanand Singh to which the respondent Jageshar Singh and other persons as well as the vendors had objected It was further stated in the deed that a litigation (*muqadma bazi*) was therefore going on in the revenue Courts and as the vendors were not possessed of sufficient means to fight the case they were compelled to transfer a half-share in the properties left by Ramanand Singh to the appellant Jiyaoo Singh, for a sum of Rs 1,000. Out of this sum, a sum of Rs. 200 was stated to have been received by the executants for their own expenses as well as to meet the costs of the stamp and registration of the deed, and a sum of Rs 800 was left with Thakur Jiyaoo Singh for the purpose of fighting out the case. It was further stated in the deed that the consideration for the sale had been fixed at Rs. 1,000 which was to be treated as the purchase money (*zarsaman*) and that if the vendee had to spend more than Rs 800 left with him for the litigation expenses he would not be entitled to recover it from the vendors and if he spent less they would not be entitled to claim any refund of the said amount In the end the deed was described as a deed of absolute sale (*bainama qatai*)

From the provisions of the deed which we have stated above it would be clear that the price fixed in the deed was an ascertained sum, it being Rs. 1,000 It would also appear from the terms of the deed itself as well as from the facts proved that there was no doubt of any sort as to the rights of the vendors Surajpal Singh and others Mt Marjadi Kuar being the widowed daughter-in-law of Ramanand Singh could not be considered to have any right to the property left by him under Hindu law, her husband having predeceased Ramanand Singh The appellant has not drawn our attention to any circumstance which might enable us to hold that the right of the vendors in this case was a doubtful one It was only pointed out that the vendors were out of possession and consequently the sale of the property must be held to be a sale of a law suit We regret that that circumstance alone, unless it is accompanied by other circumstances, would not justify us in holding that the property sold was merely a law suit In *Abdul Wahid Khan* v *Shalika Bibi* (1), a suit for pre-emption brought by the appellant Abdul Wahid Khan was dismissed on the ground that he had pre-

(1) [1894] 21 Cal. 496=21 I. A. 26 (P.C.).

viously denied the title of the respondent Mt Shaluka Bibi and which had compelled her to raise money to defray the costs of a suit to recover her share and the consideration of the sale-deed executed by her was for the purpose of providing the money necessary for carrying on the suit, the amount of which could not be estimated In these circumstances the Privy Council dismissed the suit holding the transaction to be one which should be called a sale of a share in a law suit We asked the learned Advocate for the appellant to point out to us whether the respondent Jageshar Singh had at any time denied the title of the vendors of the appellant, namely Surajpal Singh and others. He had frankly admitted that he was unable to do so We are, therefore, compelled to hold that the two elements, namely, denial of the right of the vendors by the person claiming pre-emption and the sale-price being not an ascertained one were not present in the present suit and consequently the present case was one which could clearly be distinguished from the case decided by their Lordships of the Privy Council

Our attention was next drawn to three cases decided by the late Court of the Judicial Commissioner of Oudh reported in *Mirza Mohammad Abbas Ali* v *A Quieros* (2), *Khurshaid Ali* v *Rashid Husain* (3) and *Babu Lal* v *Ali Ahmad Khan* (4) In these cases it was held that where property was not in possession of the vendor at the time of the sale and he had only a doubtful right to recover it, the sale could not be considered to be such a sale of a proprietary or under-proprietary tenure or a share of such tenure within the meaning of S. 9, Oudh Laws Act, as could give rise to a right of pre-emption We do not dissent from the view laid down in these cases though we must state, as was pointed out in a subsequent decision of the same Court in *Gajadhar Prasad* v. *Maurokhan* (5), that the mere fact that a person is out of possession would not alone justify a Court in holding that the sale in dispute was a sale of a share in a law suit if unaccompanied by other circumstances It must, in our opinion, further appear that the right sold was really a doubtful right No definite rule can be laid down for determining in what cases such a right must be held to be doubtful. It must depend upon the facts of each case. If it is found that the property sold consisted merely of a doubtful right, the rule laid down in the three cases mentioned above would apply. In conclusion we would also like to refer to a recent case of this Court which is reported in *Rampher Singh* v *Sheo Saran Singh* (6) It was held in that case that before a pre-emptor can succeed in such a case he must assert title in the vendor and he must also show that the deed of conveyance is one evidencing a transaction of out-and-out sale, and not merely a promise to sell the property in future. It was also held in that case that the fact that the vendor is out of possession or in possession would not matter. It was further laid down that the price must be stated or ascertainable at the time of the execution of the deed, and therefore where a conveyance was executed in consideration of a price and also a promise to do certain things which was to cost an indefinite sum of money, the conveyance would not give rise to a right of pre-emption We are in entire agreement with the view of law laid down by this Court in that case

On the interpretation of the deed in suit and on a consideration of all the circumstances, we are driven to the conclusion that though the vendors in the present case were out of possession at the time of the execution of the sale-deed in suit, yet their claim which formed the subject of the transfer could not be considered to be a doubtful claim, nor could the sale be considered to be a sale of rights to come into existence at some future time or a mere promise to sell the same rights at some future time; nor could it be said that the sale was not for a definite sum mentioned in the deed The conclusion at which we have therefore arrived, as will appear from what we have stated above, is that the sale in the present case was an out and out sale in præsenti, that it was not a sale of a doubtful right and that a definite sum was stated in the deed as the sale-price for which the property was sold. Under these circumstances we hold that the transaction evidenced by the sale-deed dated 22nd March 1926 was one which could give rise to a right of

(2) [1906] 9 O. C. 86.
(3) [1906] 9 O. C. 331.
(4) A. I. R. 1922 Oudh 223=25 O. C. 258.
(5) A. I. R. 1922 Oudh 156.
(6) A. I. R. 1926 Oudh 296.

pre-emption and that the Courts below were right in allowing that right to prevail

We, therefore, dismiss this appeal with costs.

W.S /R K *Appeal dismissed.*

A. I. R. 1929 Oudh 25

STUART, C. J AND RAZA, J.

Imdad Ali—Plaintiff—Appellant

v

Ashiq Ali and *others*—Defendants—Respondents

First Appeal No. 158 of 1927, Decided on 11th September 1928, from decree of Addl. Sub-Judge, Sitapur, D/- 16th September 1927.

Musalman Wakf Validating Act (1913), S. 3 (a)—Family is not restricted to members living with and dependant on wakif—Son of half-brother, father's brother's son and half-sister are members of wakif's family.

The word "family" should not be restricted to include only persons residing in the house of and dependent for maintenance on the wakif. The son of wakif's half-brother, the son of wakif's father's brother, the grandson of wakif's father's brother and wakif's half-sister are all members of the wakif's family within the meaning of this section even though they live separate from the wakif 22 *Cal.* 619 (*P.C*) and *A I R.* 1925 *Oudh* 301, *Diss. from.* [P 26 C 2]

St. G Jackson, Chhail Behari Lal and *H. D Chandra*—for Appellant

Mohammad Ayub and *Sheo Shankar Nath*—for Respondents

Judgment.—This is a plaintiffs' appeal against the dismissal of his suit The plaintiff, Hafiz Imdad Ali is a resident of Khairabad in the district of Sitapur He is now a man of over eighty years of age He is a Sunni by religion and governed by the Hanafi law He has no near relations On 15th January 1924 he executed and registered what purported to be a deed of wakf by which he vested practically the whole of his property in the names of trustees who were to devote the income to charitable and religious purposes in conformity with the dictates of the Sunni faith Amongst other provisions in the deed were provisions for the maintenance of Imdad Ali and certain of his relations We have it admitted that shortly after the execution of this deed, Imdad Ali himself applied to the revenue authorities to remove his name from the revenue registers and to record the names of the trustees as the persons responsible for the payment of the revenue of these properties So the trustees took over the management and administered the property. On 15th January 1927 Imdad Ali brought the suit out of which this present appeal arises to set aside the deed in question upon the grounds that he was an illiterate man, that for five or six years he had been suffering from physical and mental debility, that his execution of the deed in question had been procured by fraud and undue influence, that he had actually executed the deed under the impression that he was to retain possession of the property in question during his life and that possession over it was only to pass to the trustees after his death He further attacked the deed on the ground that its provisions were contrary to law and that it was unenforceable in law (The judgment then discussed the evidence and holding that plaintiff was a free agent proceeded) The learned counsel has attacked the deed on the ground of vagueness and uncertainty on the following argument. The deed makes provision for the payment of maintenance to certain persons including the plaintiff-appellant himself and declares this maintenance to be non-transferable and non-heritable As each person dies or in certain other circumstances the amount saved was to go into a taufir fund. The learned counsel suggests that this allotment to the taufir fund makes the disposition void for uncertainty but we find in para 12 that the trustees are given explicit directions as to the utilization of the taufir fund and we find nothing uncertain about those directions They could use the taufir fund for propaganda in support of the Muslim religion or they could use it for relief to distressed Muslims and there is nothing uncertain about that disposition

We now come to the last point The learned counsel has attacked the deed strongly on the ground that it provides maintenance for Ashiq Ali, the son of Imdad Ali's half-brother, Sadiq Ali, the son of Imdad Ali's father's brother, Ahmad Ali, the grandson of Imdad Ali's father's brother and Mt Najuban, Imdad Ali's half-sister His argument here is that these persons were not members of Imdad Ali's family and that, therefore, the disposition is null and void under the provisions of S 3, Act 6 of 1913, the short title of which is the Musalman

Wakf Validating Act. Before we discuss the construction that the learned counsel would have us place on the words in S 3, it is necessary to refer very briefly to the circumstances in which Act 6 of 1913 came into being. As a result of the decision in what is known as *Abdul Fata* case—*Abul Fata Mahomed Ishak* v *Russomoy Dhur Chowdhary* (1) by their Lordships of the Judicial Committee, Act 6 of 1913 was passed In that decision their Lordships laid down that under Mahomedan law a perpetual family settlement made in an alleged wakf is not legal merely because there is an ultimate but illusory gift to the poor, and in that decision their Lordships refused to a great extent to recognize dispositions which were colourable wakfs on the ground that they transgressed the law relating to perpetuities Their Lordships did not discuss a wakf of the nature of the wakf before us in which there is nothing approaching creation of a perpetuity, and in which the maintenance is in every instance for the lifetime only of the maintenance-holder Act 6 of 1913 was passed to protect from attack certain wakfs based upon grounds of contravention of the law relating to perpetuities It was intended to expand the law relating to the creation of a wakf and not to restrict it and a wakf which would have been considered good wakf before the Act was passed could not possibly be considered a bad wakf owing to anything contained in the Act

As we are of opinion that the wakf before us would have been a good wakf in the light of the principles of the Hanafi law and of the directions given by their Lordships in *Abul Fata's* case, it is hardly necessary to say anything more But as the point has been raised before us and as we have been referred to a decision of the late Court of the Judicial Commissioner of Oudh we think it advisable to make some remarks to the meaning of the word "family" in S 3, Act 6 of 1913. The decision in question is not reported in any authorized edition. It is, however, reported in *Abdul Mabud Khan* v. *Nawazish Ali Khan* (2), and as it seems to have been utilized as a guide in some Courts we think it better to refer to it. In that particular case a Bench of the late Court of the Judicial Commissioner of Oudh decided that cousins in the fourth and fifth degree could not be considered members of a person's family within the meaning of S. 3, Act 6 of 1913 We do not decide whether such distinct relations should not be considered members of a family, but we are concerned with some remarks made in that decision. At p. 154 it is said :

> " We consider that the correct meaning of the word "family" in the sub-section is that it includes only those persons residing in his house for whose maintenance the author of the trust is mainly responsible."

We see no reason whatever for introducing this restriction It does not appear to us material whether the person in question resides in the house or whether the author of the trust is mainly responsible for his maintenance We have not the slightest hesitation in finding that a brother is a member of a Muslim's family within the meaning of this section even when such brother lives in a different country and supports himself He does not cease to be a member of the family thereby In the particular case before us we have not the slightest hesitation in finding that Ashiq Ali, Sadiq Ali, Ahmad Ali and Mt Najuban are members of Imdad Ali's family These findings dispose of all the pleas argued before us in appeal. We dismiss this appeal with costs

W S /R.K *Appeal dismissed.*

(1) [1895] 22 Cal. 619=22 I. A. 76=6 Sar. 572 (P.C.).

(2) A. I. R. 1925 Oudh 301.

A I. R 1929 Oudh 26

GOKARAN NATH MISRA AND NANAVUTTY, JJ

Aditya Prasad—Applicant

v

Jagdish Prasad and *others*—Opposite Party.

Application No 21 of 1928, Decided on 30th August 1928, from order of Addl Dist. Judge, Gonda, D/- 31st March 1928.

(a) Civil P C., O. 21, R. 90—Material irregularity—Property to be sold in two lots—Creditor allowed to bid not below his claim—At sale of one lot creditor offering certain price and reserving right to offer balance at sale of second lot—Sale officer refusing to accept bid—Property sold for much lower price—Material irregularity is caused resulting in substantial injury to decree-holder.

Decree-holder applied to the Court for permission to be allowed to bid for the purchase of property to be sold in two lots in execution of his own decree. The Court granted him

permission but imposed condition that he would not be permitted to bid for any amount below the amount due under the decree in his favour. When one of the lots was being sold, the decree-holder offered a certain bid, reserving his right to offer the balance of the amount due in his favour at the time when the second lot would be sold. The sale officer refused to accept the bid and knocked down the sale at a price much lower than that offered by the decree-holder.

Held, that material irregularity was caused in the conduct of the sale, and that substantial injury had been sustained by the decree-holder by reason of such irregularity. [P 29 C 1]

(b) Civil P. C., S. 115—Jurisdiction properly exercised—Mere disagreement with trial Court's conclusion is no ground for revision

If the trial Court, whose order it is intended to revise, had jurisdiction to decide the matter and has acted properly in exercise of that jurisdiction, its order should not be set aside merely on the ground that the High Court cannot agree with the conclusion arrived at by the trial Court whether the case is decided rightly or wrongly 11 *Cal.* 6 (*P.C.*), 16 *Cal.* 749 (*P.C.*), and 1 *I. R.* 1917 *P C.* 71, *Foll*

[P 29 C 1]

(c) Equity—Party to a decree cannot be allowed to act in a manner so as to nullify it —Judgment-debtor cannot purchase his own property at auction.

Where a person is party to a decree and is bound by its terms he cannot be allowed to act in a manner so as to nullify or evade the terms of that decree. [P 29 C 2]

A judgment-debtor, who was bound by the terms of the decree to make a payment and who made default in payment in consequence of which his property was sold, cannot be permitted to purchase the same property

[P 29 C 1]

Radha Kishan—for Applicant

Manohar Lal Khandelwal—for Opposite Party

Judgment.—This is an application for revision of the order setting aside a certain auction-sale passed by the learned Subordinate Judge of Gonda on 31st March 1928

The facts which have given rise to this application are as follows :

On 8th October 1925 three persons Jagdish Prasad, Gaya Prasad and Gur Prasad who are respondents 1, 2 and 3 before us, obtained a decree for sale from the Court of the Subordinate Judge of Gonda for Rs 2194-15-6 against three persons, namely, Chaudhri Hargobind Singh, Chaudhri Bala Prasad and Babu Aditya Prasad, the applicant before us. The decree clearly stated that the sum mentioned above should be paid by defendants 1, 2 and 3 upto the 8th April 1926 and in case defendants 1 and 2 or defendant 3 paid the decretal amount in Court on or before the date fixed for payment, the plaintiff shall deliver up to the defendants all documents in their possession or power relating to the mortgaged property and shall, if so required, retransfer the property to the defendants free from mortgage or other incumbrances existing in their favour The mortgaged property, we may mention consisted of a two annas share in village Dewari Khera and a three annas share in village Bodhipur, both situate in pargana Sadulahnagar, District Gonda

None of the three defendants against whom the decree was passed made the payment on the date fixed and on 29th May 1926 a decree absolute was passed in favour of the three decree-holders named above against the three judgment-debtors already named Babu Aditya Prasad, the applicant, was also a party to that decree absolute for sale and the decree clearly stated that as the sum due had not been paid into Court on the date fixed, the property against which the decree for sale was passed should be sold and the proceeds realized from the sale spent in the payment of the decree passed in favour of the decree-holders The amount for which the decree was made absolute was Rs 2204-8-6 with future interest reckoned from 29th May 1926

On 8th October 1926 the decree-holders applied for execution of the decree absolute for sale passed in their favour and on 24th February 1927 the Court ordered the mortgaged property mentioned above, against which the decree for sale had been passed, to be sold in two lots, one consisting of the share in village Dewari Khera and the other consisting of the share in village Bodhipur Two separate proclamations were therefore ordered to be issued in respect of those two properties The date fixed for the sale in both the cases was 20th April 1927 On 23rd March 1927 the decree-holders applied to the Court for permission to be allowed to offer bid for the purchase of the property to be sold in execution of their decree. The Court granted them permission on the same date but imposed a condition that they would not be permitted to bid for any amount below the amount due under the decree in their favour

On 20th April 1927 the sale officer sold the two annas share in village Dewari Khera, it having been purchased by the applicant, Aditya Prasad for Rs 700. On

the date of sale the decree-holders put in an application to the effect that the sale had wrongly been knocked down for Rs. 700 in favour of Babu Aditya Prasad although the decree-holders were willing to offer a bid of Rs 2,355-1-0 and that it was not proper for the Court to have ignored their bid They also stated in the application that the property was very much more in value than the sum of Rs 700 for which it had been sold to Babu Aditya Prasad The sale officer rejected the application on the ground that it had been made too late

On 21st April 1927 the decree-holders filed an application to the Court which had passed the decree under execution, for setting aside the sale on the ground that the Court had acted irregularly in not accepting the bid of the decree-holders and had therefore committed a material irregularity in the conduct of the sale It was also alleged by them in the said application that the result of the irregularity was that the property had been sold for much below its value and thus the decree-holders had suffered substantial loss On these grounds they asked that the sale be set aside

The learned Subordinate Judge of Gonda who tried this application for setting aside the sale came to the conclusion that there had been no material irregularity in the conduct of the sale and no substantial loss was established to have been suffered by the decree-holders. In this view of the case he dismissed the objection of the decree-holders and refused to set aside the sale

The decree-holders carried the matter further in appeal and the learned Additional District Judge of Gonda came to the conclusion that material irregularity had been established to have occurred in the conduct of the sale and it was evident from the sale proceedings that the property had been sold for much below its value On these findings he reversed the order of the Subordinate Judge and set aside the sale

Babu Aditya Prasad, the auction-purchaser, has applied to this Court in revision for setting aside the order passed by the Additional District Judge and it has been again urged by the learned advocate appearing on his behalf that the learned Additional District Judge was wrong in holding that there was material irregularity in the conduct of the sale and that the property had in consequence been sold for a low sum thus causing substantial loss to the decree-holders. We have looked into the record and we find that what happened at the time of the sale on 20th April 1926 was that at first Babu Aditya Prasad offered a bid of Rs. 500

Then one Mirza Sulaiman Shah offered the next bid for Rs 600. Babu Aditya Prasad then again raised the amount of his bid to Rs 700 One Raj Bahadur, guardian of the minor decree-holders, was present at the time and he offered a bid for Rs. 1800 The sale officer asked him to bid up to the decretal amount but he said that he would offer a bid for the balance when the other village would be sold The sale officer under the circumstances refused to accept the bid of the guardian of the decree-holders and knocked down the property in favour of Babu Aditya Prasad for Rs 700 These facts are established from the evidence of Raj Bahadur Lal, the guardian himself, who was examined as witness 1 and from the evidence of Pandit Ram Kewal, reader of the sale officer, who was examined as witness 2 This evidence therefore established clearly that it is not true that the decree-holder had not made any offer and the *fard boli* must be read in the light of the evidence of Raj Bahadur and of Pandit Ram Kewal, who was responsible for the writing of the said *fard*. We are therefore of opinion that the officer conducting the sale was clearly wrong in refusing to accept the bid offered by Raj Bahadur Lal on behalf of the decree-holders The permission granted by the Court to the decree-holders on 23rd March 1927 did not specify what amount the decree-holders were to bid when one item of the property covered by the sale-decree was to be sold The decree-holders' guardian was therefore clearly within his rights to offer a bid for Rs 1800 when the village Dewari Khera alone was being sold, reserving his right to offer the balance of the amount due in his favour at the time when the second item of property covered by the decree, namely, the share in village Bodhipur was sold We are in entire agreement with the view taken by the learned Additional District Judge The refusal on the part of the sale-officer to accept the bid of the decree-holders, in our opinion, amounts to a material irregularity committed in the conduct of the sale.

As to the substantial injury suffered by the decree-holders by reason of this irregularity the position in our opinion is so obvious that it requires no argument. The decree-holders could have realized the entire amount of their decree or at least such portion of it as they might have chosen to have offered the bid for and by not being allowed to offer bids at the time of the sale which was the action of the sale officer there has resulted a loss to them in the property being sold for a a sum of Rs. 700 only It is clear that they had offered at least Rs 1,800 and if the sale officer had accepted their bid for that sum, the decree would have become satisfied at least to that extent The substantial injury suffered by the decree-holders by reason of the irregularity committed in the conduct of the sale is, therefore, in our opinion amply established by the facts proved

We are, therefore, of opinion that the learned Additional District Judge was quite correct in holding that there was irregularity committed in the conduct of the sale and that substantial injury had been sustained by the decree-holders by reason of such irregularity and therefore no case for interference in revision has been made out on the merits. But we should like to point out that their Lordships of the Privy Council have frequently observed that the High Court in exercising its revisional powers is not justified to exercise them merely on the ground that the order passed by the Court below seems to it to be erroneous. If the Court, whose order it is intended to revise, had jurisdiction to decide the matter and has acted properly in the exercise of that jurisdiction, its order should not be set aside merely on the ground that the High Court cannot agree with the conclusion arrived at by the trial Court whether the case is decided rightly or wrongly If the Court deciding it had jurisdiction to decide the matter, it cannot be considered to have exercised its jurisdiction illegally or with material irregularity simply because the case appears to the High Court to have been decided wrongly—vide *Rajah Amir Hasan Khan* v *Sheo Bakhsh Singh* (1), *Muhammad Yusuf Khan* v *Abdul Rahman Khan* (2). In a recent case decided by their Lordships of the Privy Council and reported in *Balakrishna Udayar* v *Vasudeva Aiyar* (3) their Lordships observed at p 267 (of 44 *I A*) that S 115, Civil P. C, applies only to a case of jurisdiction alone the irregular exercise of it or non-exercise of it, or the illegal assumption of it, and that the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved It, therefore, appears to us to be clear on the authorities quoted above that even if the conclusions arrived at by the learned Additional District Judge had been erroneous we would not have been justified in interfering with them in our revisional jurisdiction.

We might also mention that we are in entire agreement with the principle of law mentioned by the learned Additional District Judge in his judgment that where a person is a party to a decree and is bound by its terms he cannot be allowed to act in a manner so as to nullify or evade the terms of that decree The learned Additional District Judge observed that the applicant Aditya Prasad was a judgment-debtor in the decree obtained by the respondents against him and others on 8th October 1925. That decree clearly specified that Babu Aditya Prasad who was impleaded as defendant 3 should make the payment as ordered by the decree within the time fixed by it and that if the money was not so paid the property mortgaged or sufficient part of it was to be sold This would not enable Babu Aditya Prasad who was bound by the decree to purchase the same property after having made a default in making the payment he was directed to make It appears to us to be clear that no judgment-debtor can be permitted to do this. Allowing such a thing to be done by the judgment-debtors would clearly enable them to nullify the effects of the decree by which they are and must be held to be bound

We, therefore, dismiss this application with costs

W S /R.K. *Application dismissed.*

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(1) [1885] 11 Cal. 6=11 I. A. 237 (P.C.).
(2) [1889] 16 Cal. 749=16 I. A. 104=5 Sar. 862 (P.C.).
(3) A. I. R. 1917 P.C. 71=40 Mad. 793=44 I. A. 261 (P C.).

A I R. 1929 Oudh 30

RAZA AND SRIVASTAVA, JJ.

Sarfaraz Singh—Plaintiff—Appellant

v

Udwat Singh and *others*—Plaintiff and Defendants—Respondents

Second Appeal No 130 of 1928, Decided on 13th September 1928, from decree of Addl Sub-Judge, Gonda, D/- 4th February 1928

(a) Transfer of Property Act, S. 60—Clog on redemption—Stipulation not to redeem for 35 years—No other advantageous provisions to mortgagee—There is no clog on redemption.

Where a term of the mortgage is thirty-five years and the deed does not contain any provisions as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagors, there is no clog on the redemption *A I R.* 1914 *P C* 36, *A I R.* 1921 *Oudh* 45, *A I R.* 1925 *Oudh* 403, and *A.I.R.* 1927 *Oudh* 237, *Foll.* [P 31 C 2]

(b) Transfer of Property Act, S 60—Clog on redemption—No undue influence—No unfair dealing—Mere stipulation of high rate of interest is no clog.

Where there is no undue influence or unfair dealing, no case of clog can be put forward merely upon the ground that a high rate of interest has been stipulated for in the mortgage deed 7 *O. L J* 389, *Foll.* [P 32 C 1]

(c) Transfer of Property Act, S. 60—Clog on redemption — Usufructuary mortgage — Usufruct not sufficient for interest on whole amount—Provision for interest on the remaining amount at stipulated rate—There is no clog on redemption.

Where the profits of mortgaged property are not enough to cover interest accruing on a portion of the mortgage money and that portion is left to carry interest at the rate provided for in the document, enforcement of such stipulation would not amount to a clog on the equity of redemption *A I. R* 1927 *Oudh* 595, *Foll.* [P 32 C 1]

Naimullah for *Hyder Husein* and *A C. Mukerji*—for Appellant

A P Sen and *Mahabir Prasad*—for Respondents

Judgment — These two appeals, Nos 129 and 130 of 1928, arise out of suits Nos 235 and 252 of 1927, decided by the learned Munsif of Tarabganj on 30th November 1927

The dispute in these suits relates to a 1 anna 4 pies share in village Inderpur in the district of Gonda. The circumstances out of which these suits have arisen, so far as they are material to this judgment, may be shortly stated :

Drigbijai Lal and Girwar Lal, son of one Raj Bahadur, were owners of the property in suit. They mortgaged the property to Gur Partab Singh for Rs 950, for a period of fifteen years, on 5th September 1911. It was a possessory mortgage.

On 14th October 1925 Drigbijai Lal and his son Gur Charan and Girwar Lal's widow, Mt Parshadi, mortgaged the property in suit to Sarfaraz Singh for Rs 1,600, out of which Rs 900 were left with the mortgagee for redemption of the prior mortgage of 5th September 1911. The term of the mortgage in favour of Sarfaraz Singh was thirty-five years and six months. The mortgagee was to appropriate the profits in lieu of interest on Rs 1,000 and interest was to be paid by the mortgagors on the remaining Rs 600 at Rs 18/12 per cent per annum, compoundable yearly

On 29th July 1926 the mortgagors (Drigbijai Lal and others) sold the property in suit to Udwat Singh, brother of Gur Pratab Singh, prior mortgagee Udwat Singh and Gur Pratab Singh are admittedly members of a joint Hindu family

Sarfaraz Singh deposited Rs 950 in Court under S. 83 of Act 4 of 1882 on 2nd April 1927 to pay off the prior mortgage of 1911. However, Gur Pratab Singh refused to accept the money and the result was that the application was dismissed on 28th May 1927 Suit No 235 was thereupon brought by Sarfaraz Singh on 11th August 1927 for redemption of the prior mortgage of 1911, against Gur Pratab Singh and Udwat Singh. The defence was that the mortgage was extinguished as Udwat Singh had already redeemed the property from his brother Gur Pratab Singh and thus nothing was left to be redeemed

Suit No 252 was then brought by Udwat Singh and the original mortgagors, against Sarfaraz Singh, on 6th September 1927 for redemption of the mortgage of 1925, on the allegation that the terms of the mortgage constituted a clog on redemption and that they were therefore entitled to redeem the mortgage at once without waiting for the term entered in the deed

The claim was resisted by Sarfaraz Singh He denied that the terms constituted a clog on redemption and contended also that Udwat Singh, being transferee

from the mortgagors, could not raise the plea of clog on redemption

Both the suits were tried together by the learned Munsif of Tarabganj. He found in Sarfaraz Singh's suit that the latter was entitled to redeem the mortgage as the alleged redemption by Udwat Singh from Gur Pratab Singh was a bogus one The suit of Sarfaraz Singh was therefore decreed by the learned Munsif He found in Udwat Singh's suit that the terms of the deed do not constitute a clog on redemption and the claim for redemption was therefore premature He therefore dismissed that suit

Udwat Singh and his transferrers then appealed. Both the appeals were allowed by the learned Additional Subordinate Judge The result was that the claim of Udwat Singh was decreed and Sarfaraz Singh's suit was dismissed with costs

Sarfaraz Singh has now come to this Court in second appeal He challenges the findings of the learned Additional Subordinate Judge on the points decided against him.

The plea that Udwat Singh could not raise the plea of clog on redemption has now been given up by the appellant's learned counsel He contends, however, that the terms of the mortgage of 1925 do not constitute a clog on redemption and the claim for redemption should therefore be rejected. The only point for determination in appeal No. 130 of 1928 is whether the terms of the deed in suit (i.e., mortgage-deed dated 14th October 1925) operate as a clog on the equity of redemption We have heard the learned counsel on both sides at some length We have also examined the deed in suit carefully We think the terms of the deed in suit do not operate as a clog on the equity of redemption

It has now definitely been settled by the case of *Bakhtawar Begam* v *Husaini Khanum* (1) that ordinarily there cannot be any redemption before the term of the mortgage expires. As pointed out in the case of *Sohan Lal* v *Kunwar* (2), a stipulation for a long period before which redemption is not to be allowed does not by itself amount to a fetter on the right of redemption, but it may when coupled with other collateral covenants in the mortgage, go to show an intention on the part of the mortgagee to render redemption extremely difficult, if not altogether impossible, so as to constitute a clog on the equity of redemption. It was of course held by the late Court of the Judicial Commissioner of Oudh in the case of *Muhammad Khan* v *Ram Lal Kalwar* (3) that a postponement of the right of redemption for a long period, when coupled with such other provisions in the mortgage-deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagor, operates as a clog on the equity of redemption and the mortgagor is entitled to be relieved of it. As pointed out in the case of *Dargahi Lal* v. *Rafiq-un-nissa* (4), decided by a Bench of this Court on 20th April 1927, if the effect of a condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a Court is justified in setting it aside, but ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the right of redemption can only arise on the expiration of the specified period

Where a mortgage contains a condition that it should not be redeemable for 75 years and the condition is not unreasonable and its effect is not at the end of that period to raise the amount payable for redemption to an unconscionable figure, the condition which prevents redemption until the period of 75 years has passed is enforceable. Each case has to be decided on its own facts and circumstances There is nothing more dangerous and misleading than to apply the inferences to be drawn from one set of facts to the facts and circumstances proved elsewhere We have examined the deed in suit carefully The term of the mortgage is of course thirty-five years and six months, but we find no other provisions in the mortgage-deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagors The mortgagors or their ancestors had already mortgaged the property in suit to Gur Pratab Singh for Rs·950 by the deed dated 5th September 1911. It was a mortgage with possession and the mortgagee was to appropriate the profits in lieu of interest.

(1) A. I. R. 1914 P. C. 36=36 All. 195=41 I A. 84 (P.C.).
(2) A. I. R. 1921 Oudh 45.
(3) A. I. R. 1925 Oudh 406.
(4) A. I. R. 1927 Oudh 237.

It appears that the profits accruing from the property were sufficient only to pay the interest due on the mortgagee for redemption of the prior mortgage The mortgagee was to appropriate the usufruct in lieu of interest on Rs 1,000 and interest was to be paid by the mortgagors on the remaining Rs 600 at Rs 18-12-0 per cent per annum with yearly rests The profits of the mortgaged property were not sufficient to cover the interest accruing on the said sum of Rs 600 and hence the mortgagors had covenanted to pay interest at the rate mentioned above. In the first place, the rate of interest is not a high rate In the second place, in the absence of undue influence or unfair dealing, no case of clog can be put forward merely upon the ground that a high rate of interest has been stipulated for in the mortgage-deed see *Saheb Bakhsh Singh* v. *Muhammad Ali* (5) As pointed out in the case of *Gokul Prasad* v *Goitri Prasad* (6), where the profits of the mortgaged property are not enough to cover interest accruing on a portion of the mortgage money and that portion is left to carry interest at the rate provided for in the document, there is no reason why the enforcement of a covenant of that nature would constitute any clog on the equity of redemption. It is true that interest, if it remains unpaid, may accumulate, but who is to blame for that. It cannot accumulate if it is paid by the mortgagors at the proper time. The mortgagors can easily stop the running of interest by making payments at the proper time. If they fail to do so they have themselves to thank for the consequences We do not find that the conditions entered in the deed are unreasonable The covenants in the mortgage in suit do not show that there was any intention on the part of the mortgagee to render redemption impossible or extremely difficult. Under these circumstances, we are not prepared to agree with the finding of the learned Additional Subordinate Judge on the point under consideration. We hold, agreeing with the learned Munsif, that the terms of the deed in suit do not constitute clog on the equity of redemption Udwat Singh's suit is therefore premature and the claim for redemption must therefore be rejected.

The result is that we allow appeal No 130 of 1928 and, setting aside the decree of the lower appellate Court, restore that of the first Court. The appellant will get his costs from Udwat Singh respondent in all the three Courts

We cannot dispose of appeal No 129 of 1928 which arises out of suit No 235 of 1927 The appeal which arises out of that suit was not disposed of by the learned Additional Subordinate Judge on the merits. Having disposed of the other appeal, he did not think it necessary to dispose of appeal No 3 of 1928, before him on the merits and made the following observations in his judgment :

"In view of the decision in the first case the second suit should be dismissed. Therefore the decree of the Court below in the other suit No. 235 of 1927, decreeing the suit for possession, is set aside and the appeal No 3 of 1928 is also allowed with costs and the suit No. 235 of 1927 is dismissed with costs "

We allow the appeal and setting aside the decree of the lower appellate Court remand the case to that Court with directions to re-admit the appeal under its original number in the register of appeals and proceed to determine it according to law Costs will abide the result.

W S./R K. *Case remanded*

(5) [1920] 7 O. L. J. 389=58 I. C. 115.
(6) A. I. R. 1927 Oudh 595.

A. I R 1929 Oudh 32

GOKARAN NATH MISRA AND SRIVASTAVA, JJ

Mt Naurozi—Plaintiff—Appellant.

v

Mohammad Noor Khan—Defendant—Respondent.

First Appeal No 32 of 1928, Decided on 10th October 1928, from decree of Sub-Judge, Mohanlalganj, D/- 28th November 1928.

Oudh Laws Act, S. 5—Reasonable amount of dower should be determined from means of husband at the time of suit.

Section 5 lays down that the dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife. In determining what amount would be reasonable considering the means of the husband, the Court has to look to the means of the husband at the present time when the contract is sought to be enforced and not to his means at the time when the contract was entered into. [P 34 C 1]

Ghulam Hasan and *Mohammad Husain* —for Appellant

Wasim Anant Prasad and *Sri Ram*— for Respondent

Judgment.—This is an appeal against the decision of the Subordinate Judge of Mohanlalganj, Lucknow. It arises out of a suit for the recovery of dower Admittedly the marriage of the plaintiff and the defendant took place on 5th May 1890. The plaintiff's case as alleged in the plaint is that the dower fixed at the time of marriage was Rs. 20,000 and that she had been divorced on 1st May 1926 and was therefore entitled to recover Rs. 20,000 on account of dower from the defendant The defendant in his defence pleaded that the dower fixed at the time of nikah amounted to Rs 111 only and that this amount had been paid up after the divorce. He also pleaded that the divorce took place about 30 years ago and so the claim was barred by time In any case, he pleaded that the amount claimed was excessive and unreasonable

The learned Subordinate Judge held that the evidence led by the plaintiff as well as by the defendant on the question as regards the time of the alleged divorce was unsatisfactory but accepted the plaintiff's case that she had not been divorced before the proceedings, which took place in the City Magistrate's Court on 21st May 1926 On the question of dower he found that the plaintiff had failed to prove that it was fixed at Rs 20,000 He further held that the evidence given by the defendant about the dower being Rs 111 was far from satisfactory However, he held that as the plaintiff had failed to establish her case the Court had no option but to accept the defendant's figure. He also disbelieved the evidence relating to the alleged payment of dower by the defendant. On these findings he gave the plaintiff a decree for Rs 111 only. It should be noted that the learned Subordinate Judge also recorded a finding to the effect that if the dower had been proved to have been Rs 20,000 he would have awarded Rs 5,000 as a reasonable amount

The plaintiff comes here in appeal She has confined her claim in this Court to the sum of Rs 5,000 The contentions raised on her behalf are that on the evidence, oral and documentry, it has been satisfactorily established that the amount of dower fixed at the time of marriage was Rs. 20,000 and that at any rate it should be found that the customary dower in her family was Rs. 20,000

Both parties are agreed that on the day when the plaintiff was married to the defendant the plaintiff's sister, Mt. Mariam Khanam, was also married to one Wali Bakhsh Both marriages took place at one and the same time The plaintiff's case was that at the time of her marriage there were executed two documents, one a nikahnama (Ex. 1) and the other an iqrarnama (Ex 2) by the defendant in favour of the plaintiff Two similar documents were executed in connexion with the marriage of the plaintiff's sister, one being nikahnama (Ex 4) and the other an iqrarnama (Ex 3) by Wali Bakhsh in favour of Mt Mariam Khanam. All these four documents were denied by the defendant In his statement as D. W. 1 he alleged that no nikahnama was written in the marriage But the genuineness of the two iqrarnamas (Exs 2 and 3) was accepted in the course of the trial of the suit and their genuineness is no longer disputed The learned Subordinate Judge did not accept the nikahnamas (Exs. 2 and 4) to be genuine We cannot see our way to agree with the learned Subordinate Judge in this matter. In the first place, when the plaintiff and her sister adopted the rather unusual course of getting deeds of agreement on stamped papers in their favour containing stipulations intended to safeguard themselves against ill-treatment and securing promise for suitable provision for their food and raiment, etc, it is in the highest degree improbable that they should not have resorted to the very common practice of getting nikahnamas executed. Realizing this fact the learned counsel for the defendant stated before us that nikahnamas were executed but they were different from Exs 1 and 4 This position is hardly available to the defendant's counsel when the defendant stated on oath that no nikahnamas were executed at all

Next, let us examine the reasons given by the learned Subordinate Judge for rejecting Exs 1 and 4. (The judgment then discussed the of genuineness of Exs 1 and 4, and concluding that they were genuine proceeded) It was pointed out by the learned counsel for the defendant-respondent that at the time of marriage the plaintiff and her mother were almost paupers and it was argued that it was therefore most improper that such a large sum should have been fixed as dower The argument

does not appeal to us, as it is a matter of common knowledge that the amounts fixed for dower are frequently out of all proportions to the means of the husband It is this practice which led the legislature to enact the provision contained in S 5, Oudh Laws Act We therefore find that the amount of dower fixed at the time of marriage was Rs 20,000 In this view, it is not necessary for us to enter into the question of customary dower but we might remark that the evidence with regard to it is very meagre inasmuch as it consists only of the uncorroborated statement of the plaintiff about the dower of her five sisters having been fixed at Rs 20,000

The next question is as regards the amount which should be considered reasonable within the meaning of S 5, Oudh Laws Act The learned Subordinate Judge was of opinion that the defendant possessed property worth Rs 20,000 or Rs 25,000 The oral evidence on the point consists of the solitary statement of Abdul Aziz Khan (P W No 1), a brother of the defendant His evidence is quite vague and we have no doubt that he has very much exaggerated the means of the defendant It is admitted by the plaintiff that the defendant and his brother, Zahid Ali (P W 2), were not on good terms As regards the defendant's statement contained in the plaint in the suit brought by him for partition he did, no doubt, claim that his share in the entire property, moveable and immovable possessed by the two brothers was Rs 20,000 But it is obvious that at that time he was interested in exaggerating the value of his share in the property which he claimed from his brother Further the learned Subordinate Judge has fixed at Rs 5,000 as a reasonable amount with reference to the means of the husband He has entirely ignored another element which also requires to be considered, namely, the status of the wife S 5, Oudh Laws Act, lays down that the dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife In this case it is admitted by the plaintiff that her father was a khansaman, who had died 10 or 12 years before the marriage and that at the time of her marriage her mother used to live by sewing clothes. The defendant himself at the time of marriage was earning only a few annas a day and his father used to earn about Rs 5 or Rs 6 a month by private tuition. However this is immaterial as we have to look to the means of the husband at the present time when the contract is sought to be enforced and not to his means at the time when the contract was entered into Making necessary allowance for the exaggeration made in the evidence referred to regarding the means of the husband and paying due consideration to the status of the wife, we are of opinion that Rupees 2,000 would be a reasonable amount We hold accordingly

It remains now to deal with the cross-objections filed by the defendant The only point urged in support of them is that the divorce took place 30 years ago Reliance has been placed on the statements of Nur Khan, defendant (D W 1), Nazir Khan (D W 2) and Aziz Muhammad Khan (D W 3) The defendant is obviously a most interested witness His story about the dower having been fixed at Rs 111 only and about that dower having also been paid has been found to be utterly false Nazir Khan is his own brother and Aziz Muhammad Khan is his sister's son As pointed out by the learned Subordinate Judge, the plaintiff's statement about the wife of D W 2 having been present at the time of the divorce is contradicted by the statement of D W 2 to the effect that he had not been married when the divorce took place The learned Subordinate Judge remarked in his judgment that the evidence of these witnesses did not impress him at all favourably We can see no reason to disagree with the estimate formed by the learned Subordinate Judge regarding the veracity of these witnesses We therefore uphold his finding about the defendant having failed to prove that the divorce took place 30 years ago

The result is that we allow the appeal and decree the plaintiff's claim for Rs 2,000 The parties will receive and pay costs according to their success and failure in both the Courts The cross-objections are dismissed with costs

S N R K. *Appeal allowed*

A I. R. 1929 Oudh 35 (1)

STUART, C. J. AND RAZA, J.

Girdhari Lal and *another* — Appellants.

v

Deputy Commissioner, Gonda — Respondent.

Misc. Appeal No. 24 of 1928, Decided on 17th October 1928, from order of Addl Sub-Judge, Gonda, D/- 24th January 1928

(a) Civil P. C., O 9, R 13 —Appeals against ex-parte decrees dismissed—They become merged into appellate Court's decrees and original Court cannot set them aside.

Where appeals against ex-parte decrees are dismissed, the decrees of the original Court cease to exist from the date of the dismissal and they become merged into the appellate Court's decrees. Thereafter the original Court has no jurisdiction to set aside its ex-parte decrees on the application of the judgment-debtors 37 *All.* 209, *A I. R* 1924 *Cal* 830, and *A. I R.* 1921 *Oudh* 141, *Foll.* [P 35 C 1]

(b) Civil P. C., O 9, R 13—Ex-parte decree against criminal in jail for non-appearance—Application to set aside such decree—No special concession should be made in favour of criminals.

A Court while considering whether it is proper to set aside an ex-parte decree passed by itself should not make special concession in favour of criminals who were in jail which would not be granted to non-criminals who were prevented from personal appearance [P 35 C 2]

S. N Roy—for Appellants.

G H Thomas—for Respondent

Judgment —These appeals fail on a preliminary point Two decrees were passed against the appellants ex-parte by the Subordinate Judge of Gonda on 31st May 1927 The appellants who were convicts in jail at the time took two separate courses They applied on 13th July 1927 to the Subordinate Judge of Gonda to set aside these ex-parte decrees and they appealed on 11th October 1927, to the Chief Court against the decrees on the merits Their appeals were dismissed on the merits by the Chief Court in First Appeals Nos 122 and 123 af 1927 on 14th November 1927 After their appeals had been dismissed the learned Subordinate Judge refused to set aside the ex-parte decrees His order is dated 24th January 1928 The appeals must fail because the learned Subordinate Judge clearly took the right course as he had no jurisdiction to set aside these decrees. After the appeals were dismissed by the Chief Court the decrees of the Subordinate Judge from that date ceased to exist and merged in the Chief Court's decrees. This principle has been laid down very clearly by a Bench of the Allahabad High Court in *Mathura Prasad* v. *Ram Charan Lal* (1). This decision was followed by the Judicial Commissioner's Court in *Mahabali Prasad* v *Balbhaddar Singh* (2) and was again followed by a Bench of the Calcutta High Court in *Kalim-ud-din Ahmad* v *Esabak-ud-din* (3) There is thus no force in the appeals But apart from that we are constrained to say that on the merits the applications for restoration rightly deserved to be dismissed The appellants interests were represented in the Court below both by their agent and by a pleader After a time the agent absented himself He stated that his absence was due to illness The trial Court has found, and has rightly found, that this story was untrue The pleader continued to appear until the end of the case when he stated that he had no further instructions and that he would do nothing more Then the trial Court passed ex-parte decrees very properly The trial Court would have acted very improperly if it had not passed ex-parte decrees at the time The argument put before us is that because the appellants were in jail special concession should be made in their favour We do not understand why special concessions should be made in favour of criminals which would not be granted to non-criminals who were prevented from personal appearance We dismiss these appeals with costs

S.N /R K *Appeals dismised.*

(1) [1915] 37 All 203=28 I.C. 261=13 A L.J. 284.
(2) A I R 1921 Oudh 141=24 O. C 232.
(3) A I. R. 1924 Cal 830=51 Cal 715.

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* A I. R 1929 Oudh 35 (2)

STUART, C J AND RAZA, J

Mohammad Ahsan Ali and *others*—Defendants—Appellants.

v

Ikram Ali and *others*—Plaintiffs—Respondents.

First Appeal No, 21 of 1928, Decided on 15th October 1928, against decree of Sub-Judge, Mohanlalganj, D/- 22nd December 1927

(a) Will — Construction — Lady devising property by will—Second son to have powers to make realization and collections from

estate and to get 12 p. c., of gross rental as haq taluqdari—Other sons in their status of subordination to be entitled to share of profits — In previous proceedings Judges while interpreting her mother's will remarking that under this lady's will other sons were entitled to guzari only—Other sons are entitled to as good a title as second son—In previous case Judges made only passing remarks which cannot throw light on this will

"A lady devised her immovable property to her four sons and the will provided After me my second son *M* shall become my successor and under his subordination his three brothers shall remain *M* alone shall have power to make realization and collections from the estate *M* shall have power to take 12 per cent as haq talukdari on the entire gross rental, my three sons in their status of subordination shall be entitled to get profits at the rate of one-fourth each" In certain previous proceedings, in which the Judges were concerned with the construction of a will by the lady's mother, they had considered that under this document *M*'s brothers had no right to anything more than a guzara or money payment. But no reasons were given in their judgment to support a suggestion that the mother and daughter had wished to dispose of their property in the same manner

Held. that on the correct interpretation of the will *M*'s brothers had as good a title as *M* in respect of their shares They were certainly not guzardars. The power of management, the dignity of the position, and the right to haq talukdari were reserved for *M*, but apart from that there was no distinction in title. [P 38 C 1]

Held further that the Judges in the previous case had only made a passing remark as regards this will, and their decision regarding the mother's will cannot throw light on the decision of the daughter's will for it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will : *A. I. R* 1922 *P C.* 63, *Foll.* [P 38 C 1]

(b) Specific Relief Act, S. 42—One co-tenant managing estate and paying profits to other co-tenants - He asserting with success before revenue authorities that they were not entitled to proprietary rights —The other co-tenants suing for declaration as to their title without joint possession —Their prayer for declaration of title was correct

A tenant-in-common, who was entitled to the management of the estate and who paid other tenants-in-common their profits out of the estate, had asserted with success before the revenue authorities that they had no proprietary rights and that they were only maintenance holders. The other tenants-in-common sued for declaration as to their title ; but not for joint possession

Held : that the prayer for declaration was a correct prayer on their part. [P 38 C 2]

(c) U. P. Land Revenue Act, Ss. 233 and 111—Person entitled to three annas share—He suing for partition—Revenue authorities recognizing his right to one anna—He asking partition of one anna and stating that he would get his title to remainder settled in Court—Other party in possession on his behalf—He could sue for declaration of his title to remainder—There was no objection under S 111 regarding two annas share so as to bar civil Courts' jurisdiction under S. 233.

A person entitled to three-annas share in a village, sued for portion of his share, but the revenue authorities recognized his title for one anna share only He applied saying that he would be satisfied if he obtained a portion of a share of one anna only for the present. But he stated very clearly that he did not withdraw his claim in respect of the remainder and that he was going to get his title settled in respect of the remainder by taking his remedy in a competent Court He then sued for declaration of his title to the remaining two annas It was argued against him that he could not obtain a decree for a declaration but he could only obtain a decree that he was in joint possession. It was also argued that his suit was barred under S. 233, Land Revenue Act

Held : that he could sue for declaration of his title to the two annas share. He need not have sued for joint possession for he did not desire to oust the other side from possession who were holding on his behalf.

Held further : that there is nothing in the Land Revenue Act, which prevents recorded cosharer from applying for a partition of only a portion of his share He asked the revenue authorities to partition the one anna in respect of which his title was admitted and to have the remaining two annas out of the case until he had obtained the decision of a competent Court It could not be said that there was in respect of the two annas any objection under S 111 raising the question of proprietary title The suit was not therefore barred by S. 233, Land Revenue Act 38 *All.* 302 (*F.B.*), *Foll.* [P 39 C 2, P 40 C 1]

Hyder Husein and *A C Mukerji*— for Appellants

M Washim and *Khaliq-Uz-Zaman*— for Respondents.

Judgment.—This is an appeal by certain defendants against a decree in which the plaintiffs have obtained a declaration that they are co-proprietors in certain property, co-under-proprietors in certain other property and co-muafidars in certain other property In order to understand the questions for decision it is necessary to state the following facts : A lady called Mukhtar-un-nisa was married to a gentleman called Ghazanfar Ali. She owned certain property in her own right He owned certain property in his own right This lady admittedly made a will on 15th October 1889, devising all the property in her possession. According to the plaintiffs she devised under this will her immovable property to her four sons The disposition was, according to the plaintiffs, that her

second son Mohsin Ali, should remain in possession of the whole of the immovable property but that he should enjoy only a portion of the income and that her three remaining sons should own the remainder with no power of management (that being left entirely to Mohsin Ali) but as proprietors with a title similar to the title of Mohsin Ali Put in the shortest manner their case would thus be that the four brothers were tenants-in-common, Mohsin Ali, however, being in complete charge of the property and being considered in a social position analogous to that of a taluqdar He was to receive as a special allowance twelve per cent of the entire gross rental, which was described as haq taluqdari The lady died on 22nd June 1890 and Mohsin Ali, as would be expected from the terms of the will, engaged with the revenue authorities for the payment of the Government revenue of the revenue paying property The names of the other sons were entered in the revenue papers but from the entries in the revenue papers it would almost appear that Mohsin Ali was the proprietor He died in 1920 and he is now represented by his sons, the appellants in this appeal His brother Tahawar Ali predeceased him and it is accepted by both sides that Mohsin Ali, succeeded to Tahwar Ali's rights The plaintiffs-respondents are Ikram Ali, another son of Ghazanfar Ali and Mukhtar-un-nisa, the two sons of another deceased son Ashiq Ali and a son of a deceased son of Ashiq Ali

There has been no contest as to the fact that the rights of the parties in the property are hereditary. But at the recent settlements of the Bara Banki and Lucknow Districts the appellants asserted that the four plaintiffs respondents had only the position of maintenance-holders and that they were not entitled to have their names entered in the proprietary registers The revenue authorities accepting this view, the plaintiffs instituted the suit out of which this appeal has arisen to obtain a declaration that they have proprietary interests Their case was not that they were out of possession They admitted that they have been paid their share of the income regularly. They were not entitled to management. Their case, however, was that they were proprietors or under-proprietors or muafidars, as the case might be with exactly the same title which Mohsin Ali had possessed, although they made no claim to the special privileges allowed to Mohsin Ali under the terms of the will. The learned trial Judge having decided in their favour the appellants have come here contesting his decision on various grounds It is sufficient to say, as far as this appeal is concerned, that a previous plea taken to the effect that the suit was barred by limitation has now been abandoned and that all other pleas have been abandoned except the following three pleas

It is argued in the first place that on a construction of Mukhtar-un-nisa's will the plaintiffs are clearly maintenance-holders and no more It has been argued that in no circumstances can a suit for declaration lie and that in particular no suit for declaration can lie with reference to any part of the village Jasmanda It is further argued that the plaintiffs are debarred under the provisions of S 233 (k), Land Revenue Act, (Local Act 3 of 1901) from asserting title to any portion of the village Jasmanda After having heard the arguments of the learned counsel for the appellants and the reply of the learned counsel for the respondents we dispose of the pleas as follows · We agree with the construction placed by the learned trial Judge on the terms of the will of Mukhtar-un-nisa to which reference has already been made This will is Ex-A-2. A correct translation of the important passages is as follows

"1 After me, my second son Mohsin Ali shall be my successor in respect of my entire immovable property specified below and under his subordination his three brothers, viz Tahawar Ali, Ashiq Ali and Ikram Ali, shall remain Mohsin Ali alone shall have power to make realization and collections from the estate make payment of revenue, other Government demands, the subscriptions of the British Indian Association and of the Canning college.

"2 My successor Mohsin Ali shall have power to take 12 per cent. as haq taluqdari on the entire gross rental in which are included the Government revenue, other Government dues, the subscription of the Association and of the Canning College. After deducting the above-mentioned items my three sons, viz., Tahwar Ali, Ashiq Ali and Ikram Ali in their status of subordination (mataht) shall be entitled to get profits, by way of samjhauta at the rate of one-fourth each, from my successor Mohsin Ali

"6 In respect of such liabilities as might be payable from me after my death, all my four sons shall be liable in equal shares. The debt of the Allahabad Bank, which is at present due from me, shall be paid according to the instal-

ments provided in the document of the said debt, and until that debt, i. e., principal and interest, be paid up in full ; the profits of the estate mean that sum which shall be surplus after paying the said debt and other liabilities. But if my successor, without any cause, neglect to pay that debt and other liabilities, then each of my other three heirs shall be competent to recover from him full share of profits due to him and pay in his own way his respective share in the debt."

The office translation in paragraph 2 "in their capacity of under-proprietors" is incorrect The correct translation is the translation which we have given "in their status of subordination" We agree with the learned trial Judge that on the correct construction of this document Tahawar Ali, Ashiq Ali and Ikram Ali had as good a title as Mohsin Ali in respect of their shares. They were certainly not guzaradars The power of management, the dignity of the position and the right to haq taluqdari were reserved for Mohsin Ali, but apart from that there was no distinction in title. It has been suggested to us that in previous proceedings a Bench of the late Judicial Commissioner's Court considered that under this document Mohsin Ali's brothers had no right to any thing more than a guzara or money payment. The reference is to an appeal *Mohammad Ahsan Ali* v *Masud Ali* (1) The portions in question will be found at p. 342 and p 344 (of 10 *O L J*) it is admitted by the learned counsel for the appellants not only that this decison can have no effect as res judicata but also that the learned Judges composing that Bench were not concerned with the construction to be placed on the will in question and that it was not necessary for the purpose of their judgment that they should even refer to it. They were concerned in that case with the coustruction of a will made by Mt Mukhtar-un-nisa's mother Their Lordships of the Judicial Committee in *Mt Sasiman Choudhurain* v. *Shib Narain Chawdhury* (2) stated in one portion of their judgment that it was always dangerous to construe the words of one will by the construction of more or less similar words in a different will No reasons were adduced in the decision in question to support a suggestion that the mother and daughter would have wished to dispose of their property in the same or a different manner and we agree with the learned trial Judge in respect to the light afforded on the decision of this appeal from the decision in the previous case that the learned Judges who decided the previous case had only made a passing remark as regards Mukhtar-un-nisa's will. We therefore find against the appellants on this point

In respect to the second point we think it necessary to add very little to what the learned trial Judge has said He said that as the plaintiffs were in joint possession and in receipt of their shares of the profits it was only open to them to ask for a declaration as to their title in order to remove the cloud cast upon it It has been argued before us that they should have sued for joint possession But on their own showing they are already in joint possession There case was that the tenant-in-common, who was entitled to the management of the estate and who paid them their profits out of the estate had asserted with success before the revenue authorities that they had neither proprietary, under-proprietary nor maufidar's title and that they were merely maintenance-holders In these circumstances we consider that a prayer for a declaration in respect of the majority of the property at any rate was clearly a correct prayer but it is argued that the case of the village Jasmanda stands on a different footing To understand this last argument, however, it is necessary to go into the question of what occurred in previous proceedings before a revenue Court

We have already stated that Ghazanfar Ali owned certain property and that Mukhtar-un-nisa owned certain other property Ghazanfar Ali owned a four annas share in Jasmanda The four annas share of Ghazanfar Ali descended in equal parts to Tahawar Ali, Mohsin Ali, Ashiq Ali and Ikram Ali. They each received one anna Under the terms of their mother's will they each received two annas Thus they had three annas each When Tahawar Ali died his share of three annas descended to Mohsin Ali Mohsin Ali then had six annas Ashiq Ali had three annas and Ikram Ali had three annas. Mohsin Ali sold six annas to a certain Gaya Prasad The transfer was not questioned at the time and no claim has been made now against Gaya Prasad or his successors-in-interest The remaining six annas stood

(1) A. I. R. 1924 Oudh 149.
(2) A. I. R. 1922 P. C. 63=1 Pat. 305=49 I. A. 25 (P.C.).

in the name of Mohsin Ali only This fact was not surprising as the whole of the property of the estate stood in the name of Mohsin Ali Ikram Ali, however, and the three plaintiffs mentioned sued in regular partition proceedings before the revenue Court each to have a three annas share divided The partition Court at first refused them any relief on the ground that their names did not appear on the registers Then followed certain proceedings and eventually the revenue authorities entered their names in respect of two annas leaving the names of the present appellant in regard to the remaining four annas Then the present plaintiffs-respondents came back to the revenue Court and they put in applications which will be found on this record as Exs 79 and 81, in which they said that their names had now been recorded in respect of one anna each and that they would be satisfied for the present if they obtained partition of a share of one anna each but they stated very clearly and very distinctly that they did not withdraw their claims in respect of the remainder and that they were going to get their title settled in respect of the remainder by taking their remedy in a competent Court The suit out of which this appeal arises has been the remedy to which they referred

The case for the appellants here is that the plaintiffs-respondents have put themselves completely out of Court in respect of that four annas share for it is argued that they cannot obtain a decree for a declaration and that at the best they could only obtain a decree that they were in joint possession We do not think that there is any force in this argument for according to their plaint the other side were naturally in possession of the share and were holding it on their behalf They clearly did not desire to oust the other side from possession and they never asked that the other side should be ousted from possession Another point is raised that under S 233 (k), Land Revenue Act, the plaintiffs-respondents are deprived of all remedy. A civil Court is not permitted under S. 233 (k) to take cognizance of a suit for partition or union of mahals except as provided in Ss 111 and 112. This takes us back to S 111 We are not concerned with S. 112. The pertinent portion of the section is as follows:

"If on or before the day so fixed, any objection is made by a recorded cosharer, involving a question of proprietary title which has not already been determined 'by Court of competent jurisdiction' the authorities can either refuse to proceed with the matter until the question has been determined by competent Court, or require the person making the objection to institute a suit within three months for the determination of the question or inquire itself into the merits of the objection."

Even if this section had application it is difficult to see how the appellant could succeed on this argument for even if it be taken that the plaintiffs-respondents had in the revenue proceedings made an objection involving this question it could well be considered that the revenue authorities had declined to grant any application for the partition of the four annas until the question in dispute had been determined by a competent Court The matter could hardly be carried further than that We have it from Exs 80 and 82 that what the revenue Court did, after hearing the statements of the plaintiffs-respondents, was to partition off the two shares of one anna recorded in their names, without any reference to the remainder of their application Although the Court did not in so many words decline to grant the applications for the partition of the four annas until the question in dispute had been determined by a competent Court it received the application of the plaintiffs-respondents that they were going to take the disputes to a competent Court and then proceeded not to grant partition over the four annas But apart from that fact we do not find that there was at the time any objection in respect to four annas involving a question of proprietary title before the revenue Courts, for these objections had clearly been withdrawn.

It was laid down by a Full Bench of the Allahabad High Court in *Kalka Prasad* v *Manmohan Lal* (3), that there is nothing in the Land Revenue Act which prevents a recorded cosharer from applying for a partition of only a portion of his share We can find nothing in the Act which will prevent a man, who has a six annas share, from obtaining a partition of two annas only and in the future obtaining a partition of two annas more. This is what the plaintiffs-respondents could have done in the matter. They said that they were now recorded in respect of two annas but that their remaining four annas was

(3) [1916] 38 All. 302=33 I. C. 86=14 A. L.J 373 (F. B.).

not accepted by the revenue authorities. They therefore asked the revenue authorities to partition the two annas in respect of which their title was admitted and to leave the remaining four annas out of the case until they had obtained the decision of a competent Court upon the subject It cannot be said that there was in respect of the four annas any objection raising the question of proprietary title. This plea therefore also fails As all the three pleas, which have been argued at the Bar, have been decided by us against the appellants we dismiss this appeal with costs.

S.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 40

GOKARAN NATH MISRA AND PULLAN, JJ

Rahmat Ali—Plaintiff—Appellant

v

Lachhman Prasad and *another*—Defendants—Respondents

Misc. Appeal No 37 of 1928, Decided on 29th October 1928, from decree of Sub-Judge, Bara Banki, D/- 16th April 1928

Deed—Construction—Mortgagor creating further charges — Mortgagee rights sold — Sale referring to rights sold by terms "Haq Murtahini" — Both mortgage and further charges pass by sale.

S executed a usufructuary mortgage in favour of *Y* and subsequently by two other deeds created further charges on the same property in favour of *Y*. The mortgagee rights of *Y* were then purchased by another man as "*Haq Murtahini*" and no reference was made at the time of sale to the further charges.

Held: that the rights which were purchased included both the mortgage and the further charges. There was no need that any specific mention should have been made of the existence of the further charges they being already included in the term "*Haq Murtahini*" *A. I. R.* 1922 *All.* 174 (*F B*), *Rel. on.* [P 41 C 1]

Radha Krishna—for Appellant

Ali Mohammad—for Respondents.

Judgment.—This is an appeal from an order of the Subordinate Judge of Bara Banki remanding a suit to the lower Court for decision of certain issue. The suit relates to the redemption of certain property which was mortgaged by one Subba on 27th April 1898 to Abdul Rahman. This was an usufructuary mortgage and Subba executed two deeds of further charge in favour of the same Abdul Rahman on 4th August 1899 and 15th October 1900. A creditor of Abdul Rahman subsequently brought a suit and had the mortgagee rights of Abdul Rahman in this property put up for sale. These mortgagee rights were purchased by the present respondent on 21st November 1905 and he obtained possession of the property Subsequently in the year 1916 Patan Din, who was the heir of Subba, sold the equity of redemption to one Karim Bakhsh and this transaction was confirmed by a subsequent transfer made by the widow of Subba Karim Bakhsh then gifted the equity of redemption to Rahmat Ali who is the plaintiff-appellant before us and who is also the heir of Abdul Rahman. Rahmat Ali brought the present suit for redemption as the representative of the original mortgagor, claiming that he should only be required to pay the five hundred rupees due on the mortgage of 27th April 1898, because that alone had been purchased by the respondents in 1905 and the two deeds of further charge not having been purchased devolved upon himself as the heir of Abdul Rahman The only question which we are called upon to decide at present is whether the respondent purchased the mortgagee rights contained in the deed of 27th April 1898 only, or whether he also purchased the rights contained in the deeds of further charge dated 4th August 1899 and 15th October 1900

On this point the two Courts below have taken diametrically opposed views The learned Munsif considered that the word "*haq murtahini*" being in the singular could refer only to the right conveyed by a single document, namely the original mortgage, and as no reference was made at the time of the sale to the two deeds of further charge it should be concluded that these deeds of further charge were not purchased The learned Subordinate Judge takes the opposite view. He points out that the word "haq" in the singular is generally used for "haquq" the plural, and he points out that both the deeds of further charge, charge the money on the property mortgaged in the original mortgage and cannot be separated from it.

We have read the two deeds of further charge and there can no question that they are both charges on the property and that they provide that the original usufructuary mortgage cannot be redeemed

unless they are also discharged We have no doubt that the view taken by the lower appellate Court is correct, because the mortgagee rights which were purchased by the respondent in 1905 must be held to include both the mortgage and the further charges which cannot be dissociated from one another. There was no need that any specific mention should be made of the existence of the further charges when they are already included in the term "*haq murtahini*" We have been referred to a decision of a Bench of the Allahabad High Court, *Har Prasad* v *Ram Chandra* (1), where purchaser from the mortgagors managed to oust the mortgagee on payment of the original mortgage money and a suit was brought by the mortgagee to recover possession relying upon certain subsequent charges on the same property In this case it was held that the effect of the deed of subsequent charge was to create a further usufructuary mortgage on the share of the executant which was already under the mortgage and the mortgagee was held to be entitled to retain possesion of his share in the property until the amounts secured by the two documents were paid to him This was a case in which emphasis is laid on the fact that such deeds of further charge cannot be dissociated from the original usufructuary mortgage where they themselves are made a charge on the same property

We find that the "*haq murtahini*" purchased in this case includes the deeds of further charges and we, therefore, agree with the lower appellate Court in remanding the suit for decision of certain other issues, and we dismiss this appeal with costs

S.N /R K. *Appeal dismissed.*

(1) A I. R. 1922 All. 174=44 All. 37 (F.B.).

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* A. I. R 1929 Oudh 41

GOKARAN NATH MISRA AND NANAVUTTY, JJ

Sant Ram—Plaintiff—Appellant.

v

Ram Manorath—Defendant—Respondent.

Second Appeal No. 375 of 1927, Decided on 26th July 1928, from decree of 1st Class Sub-Judge, Bahraich, D/- 11th August 1927.

*** (a) Civil P. C., O. 41, R. 22—Account suit—First appeals filed by both parties—That of one party dismissed—Second appeal not filed by that party from dismissal of his first appeal—His claim cannot be taken by way of cross-objections to second appeal filed by opposite party**

In a suit for accounts, after hearing objections to the Commissioner's report a certain sum was found to be due to the plaintiff and a decree was accordingly passed. Both parties appealed from it and on plaintiff's appeal an additional sum was decreed, but defendant's appeal was dismissed. Plaintiff filed a second appeal, but defendant filed only cross-objections.

Held that the cross-objections should be dismissed as the decree against defendant had become final by the defendant's failure to appeal from the dismissal of his first appeal and the defendant is not entitled to claim by way of cross-objection what he had claimed in his first appeal. [P 42 C 1]

(b) Practice—Second appeal—Evidence.

It is not open to a Court in second appeal to appraise the value of evidence on the value of which both the lower Courts had agreed. [P 42 C 2]

*** (c) Practice—Pleadings found untrue—Decision in favour of opposite party given—Party is not bound by his pleadings which were found untrue.**

If a particular fact is alleged in his pleadings by a party and an enquiry is made regarding its truth or otherwise and as a result of that enquiry it is found to be untrue and decision is given on the basis of such finding in favour of the opposite party, such opposite party is no more in a position to ignore that finding and to ask the Court to hold the party originally taking such a plea to be bound by it . *A. I. R.* 1915 *P. C.* 2, *Foll.* [P 43 C 1]

Zahur Ahmad—for Appellant

Ali Zaheer—for Respondent.

Judgment.—This is a second appeal arising out of a suit for accounts in relation to a certain partnership The plaintiff-appellant, Sant Ram, brought a suit for rendition of accounts for the years 1329 Fasli to 1332 Fasli relating to the partnership in respect of a certain theka of villages Alipur, Kalbi Parsia Alam, Kharthua, Jaisora Patti and Vaini as detailed in the plaint. The plaintiff alleged that he and the defendant were joint thekadars of these villages during the aforesaid years, and that he was, therefore, entitled to take accounts

The defendant, while admitting the theka denied his liability to account. A preliminary decree was, however, passed by the Munsif directing the accounts to be taken A local pleader was appointed a commissioner and was directed to go into the accounts and to report what sum, if any, was due to the

plaintiff on adjustment of accounts. After considering the report of the commissioner and the objections of the parties filed against the said report, the Munsif held by his decision dated the 11th February 1927, that the plaintiff was entitled to a decree for Rs 267-15-6

The matter was taken by the parties in appeal before the Subordinate Judge, and after going through the accounts he found that the plaintiff was further entitled to a sum of Rs 249 over and above what had been decreed to him by the trial Court. He, therefore, modified the decree in plaintiff's favour to that extent He, however, dismissed the defendant's appeal The plaintiff has now further appealed to this Court and has urged that he is entitled to more than what has been decreed to him by the lower appellate Court The defendant has also filed cross-objections.

We may in the very beginning state that the defendant-respondent has not chosen to appeal against the decree passed by the Subordinate Judge in his appeal to the said Court He is not, therefore, any more entitled to claim what he claimed in that appeal by way of cross-objections in this appeal His appeal having been dismissed, the decree so far as that appeal is concerned, has now become final, and it is no more open to the respondent to claim anything which he claimed in his appeal by way of cross-objections The cross-objections are, therefore, dismissed with costs

Regarding the plaintiff's appeal we may state that three points were urged by the learned counsel for the appellant in respect of that appeal. They are detailed below. Firstly, objection was taken to the two items, one of Rs. 1,070-11-9, and the other of Rs. 218-3 which are to be found in list *B* Figure (i) under the heading of " Account of collections made by the parties jointly " The first item is on account of collections for Parsia Alam for 1330 Fasli made in that year and the second item is on account of collections for the same village for 1329 Fasli made in 1330 Fasli The objection was to the effect that it was admitted in the pleadings that defendant himself had made collections in that village during the year 1330 Fasli and reference was made to paras. 10 and 11 of the written statement.

Secondly, objection was taken to the item of Rs. 658-12-3 which is to be found in the same list, under Figure (ii) as item No 20. The item relates to the collections in respect of the same village Parsia Alam for 1332 Fasli made in that year. The objection was to the effect that the evidence relied upon by the Courts below in proof of the said item having been collected by the plaintiff, was not legally admissible in evidence ; and that if that evidence were to be rejected there was no other evidence in proof of the said collection having been made by the plaintiff Thirdly, the plaintiff-appellant was not entitled to interest on the sum decreed to him by the Court below in his favour. We now proceed to deal with each of these objections in seriatim :

First objection (relating to Rs 1,070-11-9 and Rs. 218-3-0. The commissioner reported that the plaintiff had collected these sums in 1330 Falsi and he, therefore, made him liable to account for them The trial Court as well as the lower appellate Court took the same view The learned advocate for the appellant raised two objections regarding these items One was to the effect that the evidence on record in proof of these items having been collected by the plaintiff was not reliable ; and the Courts below had erred in accepting it : the other was to the effect that the Courts below had erred in holding the plaintiff liable for these items in face of the admission of the defendant himself contained in the pleadings. As pointed out above, paras. 10 and 11 of the written statement filed by the defendant on the 12th September 1925, were referred to in this connexion.

As to the first objection, we are of opinion that it is not open to us in second appeal to appraise the value of the evidence which was produced by the defendant to show that the said amount had been collected by the plaintiff. That was a matter for the lower appellate Court to decide and if the trial Court accepted that evidence ; and the lower appellate Court agreed with that Court in its view of the evidence, the matter cannot now be opened in second appeal. We, therefore, reject the first contention raised by the learned advocate for the appellant in respect of these two items.

As to the second objection, we may point out that it has also, in our opinion, no force. The allegations contained in paras. 10 and 11 of the written statement formed the subject of an inquiry in the trial Court before the preliminary decree was passed The finding of that Court was to the effect that the defendant had not succeeded in establishing his plea. It was held that the arrangement alleged by the defendant in those paragraphs, was not proved, nor had it been proved to have been acted upon

On this finding a preliminary decree for accounts was passed. We are, therefore, of opinion that it is no more open to the plaintiff-appellant to go behind the finding of the trial Court which passed the preliminary decree which has now become final, and the plaintiff cannot be allowed to urge that the defendant should now be held to be bound by that plea and that the Courts below were not justified in making an inquiry regarding the collections for Parsia Alam in view of the allegations contained in those paragraphs of the written statement. It is a setlted rule of law that if a particular fact is alleged in his pleadings by a party to a litigation and an inquiry is made regarding its truth or otherwise, and as a result of that inquiry it is found to be untrue and decision is given on the basis of such finding in favour of the opposite party, such party is no more in a position to ignore that finding and to ask the Court to hold the party originally taking such a plea to be bound by it. This would appear from a decision of their Lordships of the Privy Council reported as *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (1) where it was remarked by their Lordships that although it was permissible to accept a part and to reject a part of the witness's testimony, an admission in pleading could not be so dissected. The admission having been made subject to a condition, it must either be accepted subject to it or not accepted at all. The defendant-respondent alleged in those paragraphs that there had been an arrangement arrived at between the plaintiff and himself that they should remain in possession of certain villages and make collections in them separately and consequently no accounting should take place in respect of them. Parsia Alam was alleged to be a village subject to such an arrangement, the collections therein having been made by the defendant. We have already indicated above that this was found not to be true, aud the defendant was held liable to account We are, therefore, of opinion that it is no more open to the plaintiff-appellant to take advantage of that admission and to contend on the basis thereof that the Courts below should not have held that the plaintiff-appellant made collections in that village We are, therefore, of opinion that the plaintiff has been rightly held to have collected these two items in the year 1330 Fasli in respect of village Parsia Alam. (The judgment then dealt with the second objection relating to Rs. 658-12-3 and holding that the lists produced by Patwari were not admissible as secondary evidence as no condition for admitting secondary evidence as in Evidence Act S 65 existed and dealing with the third objection as to interest and deciding it in plaintiff's favour modified the decree accordingly)

M N./R K. *Decree modified.*

(1) A. I. R. 1915 P. C. 2=39 Bom. 399=42 I. A. 103 (P.C.).

A I. R. 1929 Oudh 43

STUART, C. J , AND RAZA, J.

Mathura Singh and *another*--Defendants—Applicants.

v.

Badri Narain Singh and *others*--Plaintiffs and Defendants — Opposite Party.

Appln. No 22 of 1928, Decided on 19th October 1928, for leave to appeal to Privy Council.

Civil P. C., S. 110—Subject-matter over ten thousand rupees—High Court affirming decree except as to costs—Substantial question of law must be shown.

Although subject-matter of a suit may be above Rs. 10,000, if the decree of the lower Court is affirmed by the High Court and there is no variation of any kind in the substantive portion of the decree except the awarding of costs in original suit, there is no right of appeal to the Privy Council unless the suit involves some substantive question of law . 10 *O. C.* 65, *Affirmed.* [P 44 C 1]

S. C. Das—for Applicants.

Nazm Ullah—for Opposite Party.

Judgment.—This is an application for leave to appeal to His Majesty-in-Council. The subject-matter is above ten thousand

rupees, but the decree of the Court below was affirmed in this Court. These was no variation of any kind in the substantive portion of the decree but this Court awarded costs in the original suit to the respondents 6 to 8 on their cross-objections We affirm the view which was taken in *Thakur Baldeo Bakhsh Singh* v. *Thakur Lalji Singh* (1), that there is no right of appeal when two Courts differ only as to costs, and thus it is necessary for the appellants to show that there is a substantial question of law involved before this application can be granted. There is no question of law of any kind involved in this appeal The questions are purely questions of fact. We therefore refuse the certificate. The applicants will pay their own costs and those of the contesting respondents.

A.L /R K *Certificate refused*

(1) [1907] 10 O. C. 65

A. I. R 1929 Oudh 44

STUART, C J., AND WAZIR HASAN, J

Satgur Prasad—Defendant—Appellant

v.

Har Narain Das and *others*—Plaintiff and Defendants—Respondents.

First Appeal No 157 of 1927, Decided on 2nd May 1928, from decree of Pullan, J D/- 28th November 1927

(a) Practice—New case—Incident not indicated in plaint but raised before recording evidence — Both parties giving evidence—Case should not be considered to be a new case.

Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues Thus, when a particular incident is not stated in the plaint but before any evidence is recorded the counsel for the plaintiff states that he is going to adduce evidence in proof of it and evidence both oral and documentary is tendered and the defendant without objecting to it even adduces evidence in rebuttal, it cannot be considered to be a new case which has taken the defendant by surprise or prejudiced him in any manner 22 *Cal.* 324, (*P.C.*), *Foll.*

[P 49 C 2]

(b) Contract Act, S. 16—Undue influence —Either fraud or coercion ought to exist.

Cases of undue influence, allowing them a fair latitude of construction, must come either under the head of fraud or under the head of coercion.

Two persons possessed a fiduciary relation with the plaintiff, the one by reason of his long and useful service and the other being the successor in title of the plaintiff. Both of them were trusted by the plaintiff and these persons used their fiduciary relation to induce the plaintiff to enter into an agreement of divesting the estate in favour of one and granting an enhanced monthly allowance to the other by putting him in fear of criminal prosecution by a third person and by representing to him that he and his estate was in great danger at the hands of a band of people of a rival sect, all which was untrue to the knowledge of those two persons.

Held that it could be said that there was such undue influence and fraud practised upon the plaintiff within the meaning of S. 16 which would vitiate the agreement entered into. *Smith* v. *Kay*, (1861) 7 *H. L. C.* 750, 36 *All.* 81 (*P. C.*), and *A. I. R.* 1924 *P.* C 60; *Foll.*

[P 59 C 1]

(c) Hindu law—Sikhs.

History of Sikh sects, Udasi and Akali, traced.

(d) Oudh Estates Act, (1 of 1869), S. 8—Entries in deceased person's names—Names already in previous lists or entries not affecting previous rights—Entries are harmless.

Entries in the names of deceased persons in the lists mentioned in S. 8 do not appear to have been contemplated by the Act but such entries have no doubt been made and they are practically harmless if the names were already in former lists made under the orders in Council or if the entries do not alter the previously acquired rights of any one: 26 *All.* 119, (*P. C.*) *Foll.* [P 45 C 2]

Bisheshwar Nath, *Ali 'Zaheer*, *H D. Chandra*, *Bisheshar Prasad Misra* and *Gobind Daya*—for Appellant.

Tej Bahadur Sapru, *Har Dayal R B. Lal*, *Mahesh Prasad*, *Ganga Dayal* and *Karta Krishna*—for Respondents.

Judgment—This is the defendant's appeal from the decree of Pullan, J., dated 28th November 1927

The property in suit is an estate within the meaning of Act 1 of 1869 and is situate in several districts of the Province of Oudh Almost the whole, if not the whole of this estate was acquired under grants from the former Kings of Oudh by one Mahant Gur Narain Das The Mahant during the long course of his possession acquired considerable other immovable property. At the annexation of the Province of Oudh by the British in the year 1856 Mahant Gur Narain Das was found to be in possession of this large estate. Accordingly the First Summary Settlement in respect of this estate was made

with Mahant Gur Narain Das Then followed the Mutiny of 1857 and on the conquest of the Province of Oudh by the British troops the famous proclamation of Lord Canning dated 15th March 1858, was promulgated with the result that with the exception of six estates specified in the proclamation, the proprietary right in the soil of the Province of Oudh was confiscated to the British Government. Accordingly within the ban of confiscation fell the estate held by Mahant Gur Narain Das on the date of the proclamation. Subsequently when the conferment of title came to be made in respect of the confiscated estates by the British authorities, the Second Summary Settlement of the estate held by Mahant Gur Narain Das was made with him. On 18th January 1860, the Chief Commissioner of Oudh issued his well-known Circular No. 7/1217 calling upon every taluqdar of Oudh to file a written declaration expressing his desire that his estate should not be sub-divided at his death or in any future generation In response to this circular Mahant Gur Narain Das, as many other talukdars, filed the declaration of 14th May 1860 (Ex 32) and subsequently another dated 25th May 1860 (Ex. A-524) By the last-mentioned declaration Mahant Gur Narain Das nominated his disciple Har Charan Das as his successor to the estate Declarations such as Mahant Gur Narain Das made on 25th May 1860, have been held by their Lordships of the Judicial Committee to operate as wills [*Hur Prasad* v *Sheo Dayal* (1)] and it is agreed in the present case that it is a valid testamentary disposition of the estate by Mahant Gur Narain Das in favour of Mahant Har Charan Das. It is also agreed that soon after a primogeniture sanad was granted by the British Government to Mahant Gur Narain Das in respect of the whole estate which is collectively known by the name of Maswasi situate in the district of Unao. Other portions of the estate are situate in .the districts of Lucknow, Gonda, Bahraich, Kheri, Hardoi and Sitapur

Mahant Gur Narain Das died on 2nd December 1862 When the Oudh Estate Act came to be passed in year 1869 and lists of taluqdars in accordance with the provisions of S. 8 of that Act were prepared the name of Mahant Gur Narain Das was entered in lists 1 and 2 of the lists prescribed by that section. As observed by their Lordships of the Judicial Committee in *Mohammad Abdulsamad* v. *Kurban Husain* (2) :

> "Entries on the names of deceased persons in the lists mentioned in S. 8 do not appear to have been contemplated by the Act, but such entries have, no doubt been made and they are practically harmless if the names were already in former lists made under the orders in Council, or if the entries do not alter the previously acquired rights of anyone."

It is not suggested that the entry of Mahant Gur Narain Das's name has in any manner affected the previously acquired rights of anyone. Mahant Gur Narain Das was, therefore, taluqdar within the meaning of the Oudh Estates Act 1869 and the immovable property held by him and now in suit is an estate within the meaning of the same Act This conclusion was agreed to by both sides during the course of the arguments before us In the trial Court, however, the plaintiff set up the case that the estate in suit was burdened with a religious trust and the succession to it was regulated by the custom of the foundation to which it was attached This foundation according to him is the Nanakshahi Sanget situated in the City of Lucknow. According to the custom, the plaintiff said the title to succession is with him and according to the same custom it is not with the defendant-appellant. The trial Court rejected this case of the plaintiff and found that the estate in suit was held by Mahant Gur Narain Das in his own right without any obligations of a religious trust and that incidents of an estate as defined in the Act 1 of 1869 are applicable to it. This finding of the learned Judge was not questioned before us by the learned counsel for the plaintiff-respondent and is therefore, agreed to by both sides.

On the death of Mahant Gur Narain Das, Mahant Har Charan Das succeeded to the estate in suit under the devise of 25th May 1860, already mentioned Mahant Har Charan Das made a will (Ex 3) on the 1st December 1898, and a codicil (Ex. 4) on 13th June 1907. By these testamentary dispositions Mahant Har Charan Das appointed Mahant Sant Rain Das as his successor. Mahant Sant Rain Das was the illegitimate son and

(1) [1875] 3 I. A. 259=26 W. R. 55=3 Suther 804=2 Sar. 611 (P. C.).

(2) [1904] 26 All. 119=31 I. A. 30=7 C. C. 254=8 Sar. 593 (P.C.).

disciple of Mahant Har Charan Das. Mahant Har Charan Das died on 17th April 1910, and was accordingly succeeded by Mahant Sant Rain Das who died intestate on 8th January 1922 On his death controversy as to the title to succession arose and three claimants appeared on the scene: 1 The plaintiff. 2, The defendant, and 3 Mt Sheoraj Kuar, mother of Sant Rain Das

The plaintiff claimed title on the ground that he was the disciple (chela) of Mahant Har Charan Das, the defendant on the ground that he was the disciple of the deceased Mahant Sant Rain Das, and Mt. Sheoraj Kuar on the ground of her natural relationship with Mahant Sant Rain Das The defendant-appellant is also the son of the illegitimate daughter of Mahant Har Charan Das and sister of Sant Rain Das.

On the intervention of several respectable citizens of Lucknow notably Rai Bahadur Pandit Sital Prasad Bajpai who was then Additional District Judge of Lucknow, the dispute as to the succession to the estate of Maswasi was amicably settled by an agreement (Ex 135) dated 20th January 1922. At the time of this agreement the defendant was only sixteen years of age and consequently his father Pandit Jadunandan Prasad acted as his guardian in the matter of the settlement. The substantial terms of the settlement were that the plaintiff, Mahant Har Narain Das, was to enter into the possession of the estate and other moveable and immovable property "for his lifetime without power of transfer in any form" The remainderman's estate in full was conferred on the defendant Satgur Prasad who was given the name of Baba Hari Saran Das. During the subsistence of the life-estate the liability for the expenses of the education and maintenance of the defendant Hari Saran Das as also for an allowance was imposed on Mahant Har Narain Das as well as on the estate. The extent of this liability was specified in para. 6 of the deed of 20th January 1922

In pursuance of the terms of the agreement the plaintiff entered into the possession of the estate. His name was entered in the revenue registers of the villages comprising the estate. In short he was installed with the necessary ceremony as the lawful successor of Mahant Sant Rain Das and the defendant at the instance of the plaintiff was admitted into the Colvin Taluqdar High School at Lucknow on 2nd February 1922. This school was founded for the purpose of educating the scions of the families of the taluqdars of Oudh. On the occasion of the admission of the defendant into the school the plaintiff wrote a letter (Ex. D W. 1) to the Principal of the School and described the defendant Hari Saran Das in this letter as his "future successor."

It would seem from what has been stated so far that peace had come to reign in the affairs of the estate of Maswasi. But it was not to be so On 31st August 1923, the defendant was removed from the Colvin School. In the letter which the plaintiff sent to the Principal of the School on this occasion he stated that he wanted "to engage him (defendant) in estate work" (Ex. 20 D. W 1). Soon after the defendant was put in charge of a large portion of the estate situate in the District of Bahraich and worked there for a period of about ten or eleven months He returned to Lucknow about September or October 1924, and lived with the plaintiff.

At the time when succession opened on the death of Sant Rain Das one of the servants of the estate was one Nand Kumar. He is now arrayed amongst the defendants in the present suit. The plaintiff at that time was at Hoshangabad in the Central Provinces. Nand Kumar at once took up the plaintiff's cause and summoned him to Lucknow by wire. Another servant of the estate at the same time was one Tirbeni Prasad. He was the treasurer.

On the 23rd November 1924, the plaintiff, the defendant and Nand Kumar left Lucknow, according to the plaintiff by motor car about sunset for Bara Banki where the party took a railway train for Gonda leaving the station of Bara Banki at about 10 o'clock in the following morning According to the defendant the party left Lucknow by railway train for Gonda in the day time and reached Gonda in the afternoon At Gonda there is an estate house then in charge of one Pyarelal. On 25th November a document (Ex. 136) purporting to be an agreement between the plaintiff and the defendant was executed at Gonda. It was registered on the same date and at the same place.

By this document the plaintiff surrendered his life-estate in favour of the defendant Hari Saran Das and in consequence thereof the remainderman's estate fell into the immediate possession of the defendant. The usual applications for mutation of names were made on 26th November at Gonda in respect of villages situate in that district

One of the conditions of the document of 25th November 1924, was that the defendant was to pay to the plaintiff

" Rs. 1,000 per month by way of pocket expenses every month at any place where the executant 1 (the plaintiff) might demand and this pocket expense shall continue for the lifetime of executant 1 plaintiff. If the payment be delayed and neglected then executant 1 (the plaintiff) shall be competent to take possession over all the ilaqas and then all rights of executant 2 (the defendant) which had accrued according to this deed as well as according to the agreement dated 20th January 1922, shall cease to exist. Executant 1 shall further be competent instead of taking possession to realize from the executant 2 the arrears of the pocket expense by auction sale of movable and immovable property "

The defendant also undertook the liability of paying Rs. 100 a month from the estate to Nand Kumar, and after the death of the latter to his widow or male issue an allowance of Rs 25 a month for her or their lifetime. The allowance was to constitute a charge on the entire estate and in case of neglect in payment the agreement shall be deemed to have been cancelled. In pursuance of the agreement the defendant admittedly entered into the possession of the entire estate of Maswasi, was regarded and accepted as the taluqdar of the same and continued to pay the appointed allowance to the plaintiff upto the end of October 1926 The allowance due for the months of November and December 1926, and January 1927, had remained in arrears according to the plaintiff when the suit out of which this appeal has arisen was instituted on 21st February 1927.

The substance of the plaintiff's claim is that the document of 25th November 1924, is liable to be set aside on two distinct but alternative grounds: (1) That the plaintiff executed it under undue influence and fraud practised by the defendant-appellant and Nand Kumar defendant 3 ; and (2) that the defendant has failed to fulfil his obligation as to the payment of the monthly allowance to the plaintiff.

On the basis of the second ground of claim it was further urged by the plaintiff that the defendant had also forfeited his remainderman's estate and other benefits which he had obtained under the dettlement of 20th January 1922 The secree which the plaintiff has obtained from the trial Court and which is now under appeal gives the following reliefs tothe plaintiff: —

(*a*) the deed of 25th November 1924, be and it is hereby set aside as void ;

(*b*) it be and is hereby declared that defendant 1 is not entitled to any benefit under the agreement of 20th January 1922;

(*c*) the plaintiff be and he is hereby granted possession in respect of the properties mentioned in schedules A, B and C attached herewith.

The decree also awarded mesne profits to the plaintiff, the amount of which was left to be determined subsequently.

Before proceeding further it is necessary to clear one important matter. The plaintiff founded his title to immediate possession exclusively on the settlement of 20th January 1922 This was clearly stated by the learned counsel for the plaintiff on the day of the opening of the trial of this case before Pullan J. This statement will be found at p. 32 of Part 1 of the record. The statement is as follows ;

" Mr. Niamutullah (counsel for the plaintiff) states that his client claims the property as the successor of Mahant Sant Rain Das but not independently of the agreement of 20th January 1922."

The question of the plaintiff's title having thus been confined to rest on the settlement of 20th January 1922, the counsel for the defendant-appellant stated in reply that

" in view of the statement just made by Mr. Niamutullah, for the plaintiff he does not now consider it necessary to set up the title of defendant 1 prior to the agreement of 20th January 1922."

In this state of pleadings it is clear that all questions relating to the titles of the plaintiff and the defendant to the property in suit under a claim of succession to the estate of Mahant Sant Rain Das outside the terms of the settlement of 20th January 1922, are beyond the scope of the present suit. It follows, and this was agreed to by the learned counsel on both sides before us, that in the event of the later agreement of 25th

November 1924, being set aside as vitiated by undue influence and fraud, the parties, in respect of their rights are relegated to the position which they occupy under the earlier agreement of 20th January 1922, and in the same event it is further agreed that the decree of the trial Court must be modified by deleting the relief in respect of the deed of 20th January 1922. It will appear from what has just now been stated that the primary question for decision in the appeal is the one which is covered by issue 8 (b) (see p. 31, Part 1 of the printed record) of the issues framed in the trial Court, and if we uphold the finding of that Court on this issue no other question need be decided We may, however, mention that on behalf of the appellant the findings of the trial Court on issues 12 and 11 and on behalf of the plaintiff-respondent on issue 10 were also challenged. After hearing prolonged arguments on both sides and after having taken time for considering our judgment we have come to the conclusion that the finding of the trial Court on issue 8 (b) must be affirmed In consequence of this conclusion we would refrain from deciding any other issue in the appeal

The case of fraud and undue influence was stated by the plaintiff in paras 15, 16, 17 and 18 of the plaint. Those paragraphs are as follows :

15. That in 1922 the plaintiff was elected president of " All India Udasi Sadhu Maha Mandal" a body formed to counter-act by constitutional means the Akali movement in the Punjab the object of which was to enable the Akalis to take forcible possession of the property held by Mahants of Udasi sect.

16. That the plaintiff who mostly spent his time in devotion entirely depended on defendant 1 who had a hand in the management of the estate on behalf of the plaintiff and on defendant 3 the naib who controlled the entire staff, and implicitly trusted the aforesaid persons.

17. That in November 1924, the aforesaid persons represented to the plaintiff that he and his estate were in a great danger at the hands of Akalis he being the mahant, and prevailed upon him to execute a deed dated 25th November 1924, purporting to release the entire estate in favour of defendant 1 for the purposes of management and to enable the plaintiff to go abroad on pilgrimage. They assured the plaintiff that management of the estate would continue through the same agency as before and that the plaintiff's rights would not be affected by the deed which was

18. The acting on the representation and importunity of defendants 1 and 3 aided by other servants of the estate the plaintiff executed the deed of release aforementioned agreeing to take Rs. 1,000 per month which was considered enough for the personal requirements of the plaintiff.

A perusal of the foregoing paragraphs will at once disclose the fact that they also involve a case that the document of 25th November 1924, was executed by the plaintiff under a misapprehension caused by the defendants as to its scope and as to its intended effect. This case of the plaintiff broke down in the trial Court and was not reiterated before us It was agreed that the true and intended effect of the document was the surrender of the life-estate by the plaintiff in favour of the defendant-appellant and the acceleration of the remainderman's estate to the latter and that the plaintiff was under no misapprehension as regards that fact on the date of the document. The issue, therefore, in dispute is the simple issue of fraud and undue influence. The finding of the trial Court on this issue in favour of the plaintiff covers larger ground than the ground specifically stated in the plaint To bring this into relief it is now necessary to state some facts which were not disputed before us though they were disputed to some extent in the trial Court

In the keeping of the plaintiff for many years past as his mistress is a woman called Sundar Dei. Out of this connexion between the two a daughter was born. She is still alive and her name is Krishna Kuar Mt. Sundar Dei and Mt. Krishna Kuar have been treated all along for all purposes as the wedded wife and lawful daughter respectively of the plaintiff Indeed they have so been described in documents In or about the year 1916 Krishna Kuar was married to one Dalip Singh, a resident of a village in the Indian State of Nabha in the Province of the Punjab. It appears that soon after, Krishna Kuar was remarried at Lucknow to one Atma Singh, a resident of Amritsar in the same Province. After his marriage with Krishna Kuar Atma Singh came to live at Lucknow and when the plaintiff succeeded to the estate of Maswasi, Atma Singh took up residence with him The plaintiff's case is that a link in the chain of events

the fact that the two defendants 1 and 2 entered into a conspiracy with Dalip Singh the former husband of Krishna Kuar and falsely represented to the plaintiff that Dalip Singh intended to take proceedings for the arrest and prosecution of the plaintiff on a charge of abetment of bigamy of the girl Krishna Kuar.

At the close of trial of the case and at the time when final arguments of counsel were heard it was contended on behalf of the defendant that the particular just now mentioned was not stated by the plaintiff in his plaint and, therefore, the Court should not address itself to the consideration of it The learned Judge of the trial Court overruled the contention ; but the arguments on behalf of the appellant before us were opened by the learned advocate Mr Bisheshwar Nath Srivastava with the reiteration of the same contention. In agreement with the trial Court we are unable to give any effect to it. There can be no question that much larger case which would also cover the ground objected to was stated in the plaint and we gather from the judgment under appeal that at the commencement of the trial and before any evidence was recorded the learned counsel for the plaintiff specifically stated that he intended to adduce evidence in proof of the facts mentioned above. Documentary evidence in relation thereto was then at once tendered and brought on the record Plaintiff then went into the witness-box and in his evidence stated those facts. All this happened in the presence of the defendant's counsel and without any objection on his behalf. Not only that but evidence in rebuttal thereof was produced by the defendant. When we come to discuss this aspect of the case in relation to the evidence in proof of it, it will appear that it is neither a new case nor so much a matter of pleading as of evidence. After the plaintiff's counsel had openly declared, to the knowledge of the defendant, his intention to produce evidence in proof of this case, and after such evidence has been produced, and after the defendant has also produced evidence in rebuttal and finally the trial Court has considered and decided it, it is futile to argue that we should shut our eyes to that case. In no manner has the defendant been taken by surprise or prejudiced. As observed by Lord Halsbury in *Sayad Muhammad* v. *Fatteh Muhammad* (3) :

> " Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues."

This object has been amply fulfilled in the present case.

Facts bearing on the question of undue influence and those bearing on the question of fraud cannot be placed in the present case in separate compartments and dealt with accordingly. They act and react on both questions, will be found interwoven in the two. In delivering the judgment of their Lordships of the Judicial Committee in the case of *Sayad Muhammad* v. *Fatteh Muhammad* (3) mentioned above, Lord Halsbury said:

> " The question of what is undue influence is sometimes a difficult one."

Lord Cranworth when giving judgment in the House of Lords in the case of *Boyse* v. *Rossborough* (4) gives this definition :

> " It is sufficient to say, that allowing a fair latitude of construction, they must arrange themselves under one or other of these heads coercion or fraud. "

To enable a complete appreciation of the case and the evidence relating to fraud and undue influence it is necessary to state a few historical events. Mahant Gur Narain Das, and his successors including the plaintiff belong to the Nanakshahi Udasi sect of the religion, Sikhism. The sect derives its name from the founder of the Sikh religion, Nanak who lived, preached and promulgated it in the middle of the 16th century mainly in the Province of the Punjab. It is not necessary to advert to the philosophic or religious aspect of the religion founded by Nanak. Nanak died in 1539 and his spiritual successor was his disciple Angad. Guru Angad's succession led to a schism amongst the followers of the new religion. While Angad became the spiritual successor, Nanak's son Sri Chand founded the sect of Udasis, a community mostly 'indifferent to the concerns of this world. The word " Udasi " etymologically means passive and recluse and thus the sect designated by that appellation remained altogether a separate sect from the active and domestic Sikhs, the separation being emphasized by the

(3) [1895] 22 Cal. 924 = 22 I. A. 4 = 6 Sar. 515 (P.C.).
(4) [1857] 6 H. L. C. 2=26 L. J. Ch. 256=5 W. R. 414=3 Jur. (n.s.) 378.

teachings of Amar Das the immediate successor of Angad. The active section of the Sikhs acquired and developed a wholly militant spirit under the guidance and preachings of the tenth and the last Guru Gobind Singh. His military exploits are well-known to history. He died in 1708.

About fifty years after the death of Guru Gobind Singh, though the seeds were sown in his lifetime, there arose :

" a body of men who threw off all subjection to earthly Governors, and who peculiarly represented the religious element of Sikhism. These were the " Akalis ", the immortals, or rather the soldiers of God, who, with their blue dress and bracelets of steel, claimed for themselves a direct institution by Gobind Singh. The Guru had called upon men to sacrifice everything for their faith, to leave homes and to follow the profession of arms ; but he and all his predecessors had likewise denounced the inert asceticism of the Hindu sects, and thus the fanatical feeling of a Sikh took a destructive turn. The Akalis formed themselves in their struggle to reconcile warlike activity with the relinquishment of the world. The meek and humble were satisfied with the assiduous performance of menial offices in temples, but the fierce enthusiasm of others prompted them to act from time to time as the armed guardians of Amritsar, or suddenly to go where blind impulse might lead them, and to win their daily bread, even single-handed, at the point of the sword. They also took upon themselves something of the authority of censors, and, although no leader appears to have fallen by their hands for defection to the Khalsa, they inspired awe as well as respect, and would sometime plunder those who had offended them or had injured the common wealth. The passions of the Akalis had full play until Ranjit Singh became supreme, and it cost that able and resolute chief much time and trouble, at once to suppress them ; and to preserve his own reputation with the people. (Cunningham's History of the Sikhs edited by Garrett, pp. 110 and 111) ".

Peace and prosperity remained with the Udasis, warlike activity and religious fervour with the Akalis. Most of the notable Gurdwaras or shrines situate in the Punjab were held, managed and controlled by the Udasi section.

We can now conveniently come to the immediate past and describe it in the words of Mr. L F Rushbrook Williams, Director, Central Bureau of Information, Government of India, in his book " India in 1921-22 " being a report prepared for presentation to Parliament in accordance with the requirements of S 26, Government of India Act (5 & 6 Geo V, Chap. 61). At p. 60 of this book occurs the following :

".The Punjab also, was in a highly inflammatory condition. To the legacy of bitterness following the occurrences of 1919, there was now added a serious dispute between two sections of the Sikh community which, from the tragic interest it aroused merits a word of elucidation. The " new " reforming party had been for some time dissatisfied with the management of the Gurdwaras, or shrines, which for long years, under arrangements sanctioned by the " old " conservative party, had been controlled by resident abbots. Many of these Mahants, although enjoying wide discretion in the management of considerable revenues, were less Sikhs than Hindus—a fact not unconnected with an inextricable admixture, in the endowment of many of the shrines, of Hindu and Sikh beneficence. The " new " Sikhs alleged malversation and abuses of every kind ; the " old " Sikhs regarded the malcontents as inspired only by a desire for plunder. Into this quarrel primarily domestic to the Sikh community, the emissaries of non-co-operation now penetrated with the result that the " new Sikhs " and particularly the Akali jathas—bands of volunteers forming the most zealous section of the reformers—became strongly anti-Government and even revolutionary in their outlook. Refusing to be appeased by the efforts of Government to enquire into, and remedy, cases of alleged mismangement, the Akalis began to " occupy " shrines, and eject the lawful incumbents. Somewhat naturally, these tactics were combated by the other party. Bloody quarrels such as will necessarily occur between opposing factions of a simple-minded and warlike people, shortly broke out. In January, there was serious affray at Tarn Taran. In February India shuddered to hear of a terrible massacre, by the Hindu abbot of Nankana Sahib, of the band of " new Sikhs " designing to eject him from his great and wealthy shrine. "

Towards the end of 1920 a body known as the " Shiromoni Gurdwara Prabandhak Committee, " or Committee for the management of sacred shrines was set up. Sikhs of various schools of thought joined the movement and the Committee shortly acquired great influence. Owing, however, to the methods which it began to employ the Committee soon became representative of extreme opinion It organized Akalis, a militant puritan sect of the Sikhs, into a regular miltia for the execution of its behests. Under the pressure of the activities of this Committee a Bill for the better management and control of the Sikh shrines was introduced in the Legislative Council of of the Punjab sometime in the year 1923. This step aroused the Udasi section of the Sikh community to fresher activities in opposition to the claim of the Akalis in the matter of the possession, and management of the shrines.

On behalf of the Udasis an institution called the "All India Udasi Maha Mandal" was founded at Hardwar in the Province of Agra and the present plaintiff became the President of it. The plaintiff took an active part in the work of the institution, gave pecuniary help to the propaganda set on foot by certain newspapers in the Province of the Punjab, allowed articles to appear in such papers above his name and took part in deputation to Lord Reading and the Governor of the Punjab. "Updeshak" was one of the papers subsidized by the plaintiff and in the issue of 26th May 1924, of that paper appeared an article under the caption "Akalis have also set their hands and feet in Lucknow." This article stated inter alia that a band of Akalis numbering about forty with lathis and kirpans had reached the Sangat of Harakh Ram Udasi. The Sangat referred to is the "Udasi Mandal" in Aliganj in the city of Lucknow. It is agreed that the statement in the paper was not true as a fact. But whether it was a fact or fiction is immaterial. What is material is that such a statement was made in a newspaper and brought home to the plaintiff.

The circumstances which we have described in the immediately preceding portion of this judgment are antecedent to and closely connected with the evidence as to the facts which according to the plaintiff's case made him susceptible to undue influence and fraud. The other set of circumstances producing the same result are as follows :

We have already stated that Nand Kumar defendant 3, was largely instrumental in the success of the plaintiff's cause when the inheritance opened on the death of Sant Rain Das. In the time of the latter Nand Kumar was drawing a salary of Rs. 8 or 10 a month As a reward for his services the plaintiff made him assistant manager of the estate on a salary of Rs. 40 a month. On the evidence it is perfectly clear that Nand Kumar occupied an influential and responsible position in the affairs of the estate and actively possessed confidence of the plaintiff. The provisions made for him in the document of 25th November 1924, strongly suggest the inference that he had rendered great service both to the plaintiff and to the defendant, and they were both prepared to compensate him generously. We agree with the learned trial Judge that :

"there can be no question that in the latter part of 1924 the plaintiff relied for the management of the estate almost entirely on Nand Kumar."

The defendant-appellant as early as the year 1923 conceived the idea of filing a suit against the plaintiff in order to obtain immediate possession of the estate. The evidence is quite clear and indeed it was admitted that while the desire of obtaining possession of the estate of Maswasi was being nursed by the defendant, the plaintiff stood in loco parentis to him. After the defendant was removed from the Colvin School early in 1924, he was put by the plaintiff in charge of the Bahraich circle of the estate yielding an income of about Rs. 62,000 a year and it is a reasonable inference from the evidence on the record that the defendant's appointment to the Bahraich circle was the fruit of the trust which plaintiff had come to repose in him At any rate all appearances pointed in that direction. The most cogent evidence supporting the conclusion is furnished by the recitals contained in the deed of 25th November 1924; and it is also clear from the same recitals that it was this trust which largely influenced the plaintiff's act of surrendering his life-estate in favour of the defendant-appellant.

The third set of circumstances which have a material bearing on the question under consideration arises out of the facts connected with the marriage of the plaintiff's illegitimate daughter Krishna Kuar first with Dalip Singh and afterwards with Atma Singh.

Having set forth all the material antecedent circumstances bearing on the precise case of fraud and undue influence alleged by the plaintiff, we are now in a position to enter immediately into the evidence produced in proof of that case. In doing so we must give full weight to the opinion of the learned trial Judge as regards the general appreciation and creditability of that evidence. The plaintiff while in the witness-box stated his case in the following words:

"I executed the deed of 1924 out of fear, and fraud also was practiced on me. I was afraid of the Akalis . . . . . In September or October Satgur Prasad (defendant 1) and Nand Kumar (defendant 3) told me that the Akalis were in Lucknow and that they were going about in gangs . . . . . In October the Akalis took possession of a house near mine

belonging to a sadhu. I did not see this myself and Nand Kumar and Satgur Prasad told me about it . . . . . In the third week of November they told me that they had heard that the Akalis were going to make a raid on me. This was two or three days before the document was executed. I quite believed them and thought it would happen. They were both with me when I went out for my drive at 3-30 and when we got to Aminabad I saw the Akalis wearing black pagris. I think there were fifty or sixty of them. Nand Kumar said: There is Dalip Singh. He is one of them; I recognized Dalip Singh. He was wearing black pagri. Satgur Prasad said "Let us go and leave Nand Kumar here." I agreed and we went back telling Nand Kumar to bring us news. He came after an hour or an hour and a half. Satgur Prasad came with him. They said they had got definite information that Dalip Singh was also an Akali and had come with a warrant from Nabha for my arrest and would probably get it issued by the Magistrate here tomorrow. I objected that it was a Native State but they explained that "the State was now under the management of Government." They were informed of this by one Bishun Das. I said that they should go to the Deputy Commissioner. They said that in their opinion I ought to run away. They said we should go to Gonda. They argued with me and told me of cases in the Punjab where the Akalis had taken possession and so I agreed to run away. We all three went in a motor as far as Nawabganj . . . . . we went by train from Nawabganj to Gonda. The train left at 8 or 8-30 in the evening . . . . . They said we should think out what was to be done when we got to Gonda. After we had gone about two stations I asked them what they advised as they said I was not to go to the Deputy Commissioner what plan had they . . . . . Nand Kumar said "the best thing for you to do is to give up the management of the estate to Satgur Prasad."

When the Akali fear has subsided you will then be able to do what you like; I agreed and said "Let us go on and decide at Gonda." We reached Gonda at about 2 a. m. and stayed at my house there. My karinda at that time was Pyare Lal Tahsildar. He was there. There was no one there except him and the sipahis. Satgur Prasad and Nand Kumar stayed with me. Pyare Lal and the two others came to me after 7 o'clock with a long paper written out and said listen to it. It was a draft of the arrangement for the management of the estate on plain paper. They read it to me . . . . . I did not consult anyone because I had no suspicion. I asked them to get Banwari Lal the estate vakil to have the matter settled so that I may not have worry and trouble. Pyare Lal and Nand Kumar came back about 3 o'clock and said they could not get a stamp; Satgur stayed with me. The stamp was obtained and the document executed on the next day . . . . . Babu Banwari Lal asked me what the document was and I said I was making arrangements for the management of the estate by the boy. He asked me what I was writing and why and I said I would tell him later . . . . . I think Pyare Lal was the writer of the deed . . . . . I signed the document. They read it to me. Pyare Lal read it to me. After I had heard it I signed it. Satgur Prasad also signed it. Banwari Lal and Kishen Prasad khazanchi were witnesses . . . . . We stayed in Gonda till the evening of the next day. We went by the night train to Lucknow. I was still afraid of the Akalis and continued to be afraid of them until about a month before I filed this suit . . . . . They told me to stay at home and no one would be allowed to come and see me and they would manage the affair and I should not be afraid. Satgur Prasad and Nand Kumar asked me to pay them Rs. 15,000 to settle the matter with Dalip Singh. They told me before I went to Gonda that the warant was on account of the marriage of Dalip Singh's wife and the Rs. 15,000 was required to appease him."

In cross-examination the plaintiff stated:

"The conversation about the Akalis began about two or three months before the document was executed. I may have met Magistrates at that time but I did not mention the matter to them. Satgur Prasad and Nand Kumar told me from the beginning to remain silent and not to make any report about it. They made me afraid of going to the Deputy Commissioner saying that I would get a worse reputation. They (Satgur Prasad and Nand Kumar) said that if I made over a deed of management in favour of Satgur Prasad the Akalis would know that I had nothing left and would not disturb me. They told me that the Akalis had enmity with me personally and through me with the estate. I supposed that they were angry because I gave money for newspapers, etc., and because I was President of the "maha mandal." I thought that once I had no property there would be no more enmity. I had two causes of fear of the Akalis and Dalip Singh. I did not think that they had any connexion with each other. The Akalis numbered fifty or sixty. It was not so much for myself that I was afraid of from the fifty Akalis but I was afraid that the old established shrine of Baba Hazara would be dishonoured by my arrest. I give in to them on account of the fear of arrest and the raid. I spoke to Babu Banwari Lal after the execution. I was at the house at Gonda . . . . . I then told him that I had made a deed of management of the estate. I told him about Dalip Singh and the warrant. I also told him to tell nobody else . . . . . He did not make any reply when I told him about Dalip Singh and the warrant was in connexion with the girl's marriage which I had arranged."

These are the main outlines of the plaintiff's case and the learned trial Judge is of opinion that they are proved. Now the probability in favour of the truth of the plaintiff's statement is furnished in a large measure by the antecedent circumstances and the corroboration of that statement in material particulars, by genuine and admitted evidence both oral and documentary is so great that we

are, after anxious consideration, persuaded to the view that the opinion of the trial Judge is correct. (The judgment discussed the evidence and proceeded) Therefore, our finding, in agreement with the trial Court, is that the two defendants Satgur Prasad and Nand Kumar stood in a fiduciary relation with the plaintiff and that they took advantage of that position by inducing through fear the belief in him that the band of Akalis including Dalip Singh had come to Lucknow with a view to get him arrested under a warrant and to take possession of his property, all of which was untrue to the knowledge of the defendants and that the agreement of 25th November 1924 was the result of this undue influence and fraud exercised by the defendants on the plaintiff. The case falls

" under the general and useful category which in the language of Lord Kingsdown in *Smith* v. *Kay* (5) applies to every case ' where influence is acquired and abused, where confidence is reposed and betrayed ' Per Lord Shaw in the case of *Kali Bakhsh Singh* v. *Ram Gopal Singh* (6)."

On the facts found the case also falls within the provisions of S 16, Contract Act 1872, as explained by their Lordships of the Privy Council in the case of *Raghunath Prasad* v *Sarju Prasad* (7) The element of fraud as defined by S 17 (1) of the same Act is also proved

In opposition to the plaintiff's right to the relief of cancellation of the agreement of 25th November 1924, two further arguments were addressed to us on behalf of the defendant-appellant. One was founded on the exception enacted in S. 19, Contract Act 1872. According to our judgment the argument is untenable on the evidence The plaintiff, in relation to the events disclosed in the evidence was so circumstanced that he had practically no volition of his own left in the matter and when he evinced a desire to approach the authorities either directly or through the two defendants, his desire was continuously thwarted In short he was not a free agent. The second argument need only be noticed and not decided by us on merits because it does not arise after our finding in favour of the plaintiff on the question of undue influence and fraud. The argument was that the plaintiff was estopped from or had waived his right of challenging the validity of the document of 25th November 1924, by reason of the fact that he had continuously received from the date of the document the allowance of Rs 1,000 a month from the defendant. On the facts involved in the argument we are in entire agreement with the learned Judge of the trial Court. It will suffice to quote the finding of the learned Judge which we adopt :

" It was only when the plaintiff came to know that he had been cheated and that there was no fear of the Akalis, that Dalip Singh was a mere tool who had no claim against him and that he had given up the estate without any real reason that he was able to challenge the document. . . . . ,he (Pyare Lal, P. W. 4) took his revenge by telling the Mahant the plaintiff) all about the fraud of which he had been the victim and by obtaining for him the invaluable evidence of the letter written by defendant to the Lat Sahib, and the letter and telegram sent by Bishun Das. The plaintiff states and I see no reason to disbelieve him, that he sent for the defendant and questioned him about his alleged marriage and his extravagant expenditure, and the defendant openly flouted him and said he was the owner of the estate and could do what he liked. This drove the Mahant to consult lawyers and when they advised him that he could have the document set aside on the ground of fraud as well as certain other grounds he filed the present suit."

On the grounds stated above we uphold the finding of the trial Court that the document of 25th November 1924, was executed by the plaintiff under undue influence and fraud and that, therefore, it should be set aside

On behalf of the plaintiff-respondent the finding of the trial Court on issue 10 was challenged but as we have already said every other issue in the case becomes immaterial after we have affirmed the finding of the trial Court on the issue of undue influence and fraud We may, however, say that we are in entire accord with the opinion of the trial Court on the said issue 10. Defendant-appellant was never married to Raj Kumari defendant 2 but he has kept her as his permanent mistress The word 'zauja' (wife) used in Ex. P W. 29 is a mere euphemism and is intended to cover the grossness of the immorality which has been perpetrated in every generation of this house since the days of Gur Narain Das As the learned Judge points out Gur Narain Das's mistress was called 'zauja,' the plaintiff's mistress Sunder Dei is called 'zauja' (Ex. A-22) and Sheoraj Kuar, the mistress of

(5) [1861] 7 H. L. C. 750=30 L. J. Ch. 45.
(6) [1914] 36 All. 81=21 I.C. 985=41 I.A. 23 (P.C.).
(7) A.I.R. 1924 P.C. 60=3 Pat. 279=51 I.A. 101 (P.C.).

Har Charan Das and mother of Sant Rain Das is similarly described.

The result is that we affirm the decree of the trial Court in so far as the relief of cancellation of the document of 25th November 1924, is concerned and also to the relief for possession in consequence thereof. As to the relief granted by that Court in respect of the forfeiture of the defendant-appellant's right under the settlement of 20th January 1922, we accept the appeal and reject that relief. As to the mesne profits the plaintiff is only entitled to them from the date of the suit till the recovery of possession by him, the reason being that the document of 25th November 1924, was only voidable at the option of the plaintiff and the plaintiff did not exercise that option earlier than the date of this suit. The amount of the mesne profits will be determined hereafter

As to costs we are of opinion that the plaintiff is not entitled to his costs in full because he obviously asked for more reliefs than he was entitled to and it was only before us that the claim to relief in respect of a declaration that the defendant 1 is not entitled to any benefit under the earlier document of 20th January 1922, that is to say, he has lost his remainderman's estate also was admitted by the plaintiff-respondent's learned counsel as a relief to which the plaintiff is not entitled if the relief as the cancellation of 25th November 1924, is granted in his favour. We, therefore, direct that the plaintiff will be entitled to half his costs from the defendant 1 Satgur Prasad in both the Courts and that the said defendant and the other two defendants will bear their own costs throughout.

M.N /R.K. *Decree modified & affirmed.*

A. I. R. 1929 Oudh 54

STUART, C. J. AND WAZIR HASAN, J

Baldeo and *others*—Defendants—Appellants

v.

Losai and *another*—Plaintiffs—Respondents.

Second Appeal No. 182 of 1928, Decided on 1st November 1928, from decree of Addl. Dist. Judge, Gonda, D/- 6th February 1928.

Transfer of Property Act, S. 60—Clog on redemption—Long term of 99 years by itself is no clog.

Ordinarily in the absence of a special condition entitling the mortgagor to redeem during the term of mortgage, the right of redemption can only arise on the expiration of the specified period; but where it is shown on merits that the effect of condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a Court is justified in setting it aside: *A. I. R.* 1927 *Oudh* 237; *A. I. R.* 1914 *P. C.* 36; and *A. I. R.* 1924 *Oudh* 193; *Foll.* [P 54 C 2]

A long term of 99 years, by itself does not constitute a clog on the equity of redemption. [P 55 C 1]

M. Wasim and *Bisheshwar Nath*—for Appellants

A. P. Sen—for Respondents 1 and 2.

Stuart, C. J.—The question for decision in this second appeal is whether a provision in a deed of usufructuary mortgage by which redemption is postponed for 99 years is a condition which can be avoided by the mortgagor. This question has frequently been before the Judicial Commissioner's Court and the Chief Court I do not wish to refer to the long series of decisions that there have been on the point as, as far as I am concerned, I arrived at a conclusion upon this point in April 1927, which I see no reason to alter. A Bench of which I was a member then decided in *Darghai Lal* v. *Rafiquinnisa* (1) that we agreed with the view taken by my learned brother Hasan, J , when he was Additional Judicial Commissioner in *Balbhaddar Prasad* v *Dhanpat Dayal* (2). We then stated the view The view taken was that where the restriction had the effect of making the mortgage practically irredeemable by imposing upon the mortgagor such a burden at the date when redemption became open to him as was impossible in practice for him to bear, it was open to the Court to permit redemption before the period came to an end. While the ordinary rule is as laid down by their Lordships of the Judicial Committee in *Bakhtawar Begam* v *Husaini Khanam* (3):

"ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the right of redemption can only arise on the expiration of the specified period."

Where it is shown on the merits that the effect of the condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a Court is justified in setting it aside.

(1) A. I. R. 1927 Oudh 237.
(2) A. I. R. 1924 Oudh. 193=27 O. C. 4.
(3) A. I. R. 1914 P. C. 36=36 All. 195=41 I. A. 84. (P.C.).

Here I am asked the same question in respect of a different deed. On the merits is the effect of the condition in this particular deed to make the mortgage practically irredeemable? It certainly has not that effect and further the terms of the mortgage were not unconscionable. It appears to me that at the time the mortgage was executed in the year 1897 the moragagee's return as interest upon the amount, which he advanced, was by no means excessive. It appears to me from the examination of the record that it could not have been much more than 12 per cent. The profits are now in the neighbourhood of 20 per cent But even if they were higher the fact that they have increased since the execution of the mortgage is immaterial. In these circumstances therefore I should give the mortgagee the right to enforce the condition postponing redemption The result of this will be that the appeal will succeed and the suit will stand dismissed The plaintiffs will then pay their own costs and those of the defendants in all Courts

Wazir Hasan, J.—My view on this subject was stated at considerable length in the case of *Balbhadddar Prasad* v *Dhanpat Dayal* (2). I have invariably followed the view taken in that case On several occasions other learned Judges, either sitting singly or in a Bench, have also accepted the view laid down in the aforementioned decision In the present case I am of opinion that there is nothing else, except the long term in the deed of mortgage in question, to which objection can be taken and the long term by itself in the present instance does not, in my opinion, constitute a clog on the equity of redemption. The contract, therefore, into which the parties entered with their eyes open must be upheld. I therefore, agree that the appeal should be allowed

W.S./R.K *Appeal allowed.*

A. I. R. 1929 Oudh 55

STUART, C. J. AND RAZA, J.

Rohan Singh and *others*—Defendants —Appellants.

v.

Durga Bakhsh Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 133 of 1927, Decided on 7th May 1928, from decree of Addl. Sub-Judge, Hardoi, D/- 28th May 1927.

Civil P. C., O. 20, R. 12—Mesne profits are in the nature of damages which may be moulded according to the justice of the case —In the case of trespassers even ordinary charges may be refused.

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case. In the case of fraudulent and dishonest trespassers while awarding mesne profits against them on rent basis it is right to refuse them charges for collecting rent of property in their possession as trespassers. 27 *Cal.* 951 (*P.C.*) & 24 *All.* 376, *Foll.* [P 56 C 1]

A. P. Sen, H. K. Ghose and *Vije Kumar Dat*—for Appellants

Bisheshar Nath—for Respondents.

Judgment—This appeal is in respect of mesne profits awarded under a previous decree In the original suit the appellants were ordered to pay mesne profits to the present respondents and the decree directed that those profits should be determined under the provisions of O 20, R 12. Against the decree determining these mesne profits the present appeal is preferred. The facts in the previous suit can be stated shortly. There it was decided that the present appellants Rohan Singh and Gajraj Singh, who is his brother, had fraudulently and dishonestly taken possession over certain property belonging to Durga Bakhsh Singh, respondent who was their relative They did this at the time that he was a minor. Gajraj Singh secured a position as Durga Bakhsh Singh's certificated guardian and abused that position in every possible way Finally Durga Bakhsh Singh recovered his property but in order to be able to do so he had to part with a considerable amount to the other two respondents who are his transferees. As Gajraj Singh was the guardian of Durga Bakhsh Singh, it was incumbent on him to keep accounts of the income and expenditure of the ward. If he had kept such accounts and if those accounts were honest and if he had also kept the accounts which he could have been expected to keep with regard to the income and expenditure of his own property, there would have been very little difficulty in ascertaining the exact amount of mesne profits, but we find that the two appellants refused to produce accounts when the mesne profits came to be determined. We draw the necessary inference against them from their omission to do so.

The learned trial Judge has owing to their failure to produce accounts calculated the profits on basis of rental demand deducting 12½ per cent. for unavoidable

failure to make collections. We consider that the learned trial Judge has very properly based his finding upon the rental demand and that, if anything, he has been too lenient to the appellants in giving them an allowance of 12½ per cent. There is, however, no cross-appeal or objections against his having given them this allowance and there the matter must stand But this is one of the most important points upon which the appellants apppeal We have no hesitation in deciding that plea against them

Two remaining pleas are these. The learned trial Judge has refused to grant the appellants rent collecting charges The appellants were not only trespassers. They were fraudulent and dishonest trespassers They had been guilty of a peculiarly mean form of fraud upon a minor In these circumstances they are entitled to no concession It was laid down by Lord Hobbouse in *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) that mesne profits are in the nature of damages which the Court may mould according to the justice of the case, and following this decision of their Lordships of the Judicial Committee a Bench of the Allahabad High Court decided in *Dungar Mal* v. *Jai Ram* (2) that in the case of trespassers, such as the appellants are, it is right to refuse them charges such as would ordinarily voluntarily be incurred by an owner in possession. We, therefore, decide the appeal against the appellants on this plea also.

One plea remains. The appellants have put forward a claim to be reimbursed amounts which they have stated they expended upon the food and clothing of Durga Bakhsh Singh. We do not know that they expended anything on the food and clothing of Durga Bakhsh Singh but they probably expended something The claim, however, which they have made in this respect is based on no reliable evidence of any kind. It is based upon statements in accounts which Gajraj Singh presented to the District Judge as guardian. We have examined those statements and are satisfied that there is every reason to suppose that they are not genuine. There is no evidence in support of these claims, and on the record as it is before us we find that the learned trial Judge rightly refused to admit them This is not a case in which it may be thought that the appellants are suffering for want of opportunity to produce evidence In the first place we have every reason to believe that if they spent anything on the food and clothing of Durga Bakhsh Singh they spent something very much less than the amount they have claimed But further it is noticeable that no moveable property, cash or jewellery held by Durga Bakhsh Singh's father has ever been traced, and considering the relationship between Durga Bakhsh Singh and the appellants, we find it safe to conclude that the appellants have not been losers, even although we refuse to make a guess as to what they may have expended on the food and clothing of Durga Bakhsh Singh and then to grant a set-off according to the guess. Accordingly we dismiss the appeal with costs.

A L /R K. *Appeal dismissed.*

(1) [1900] 27 Cal. 951=27 I. A. 110=4 C. W. N. 681=7 Sar. 687 (P.C.).
(2) [1902] 24 All. 376=(1902) A. W. N. 90.

A I. R 1929 Oudh 56

STUART, C. J , AND PULLAN, J.

Amir and *another*—Defendants—Appellants

v

Mohamed Bakhsh and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No 239 of 1928, Decided on 6th November 1928, from decree of Sub-Judge, Malihabad, D/- 10th April 1928.

Oaths Act (10 of 1873), S 9—Party includes an authorized agent.

The language of the Act shows that the word "party" can be used not only in the restricted sense but in the wider sense. A duly authorized agent of a party can make the offer contemplated in S. 9. 38 *All.* 131, *Rel. on*; 14 *Bom.* 455, *Diss. from.* [P 58 C 2]

Ram Prasad Varma—for Appellants.
Alli Raza—for Respondent 1.

Judgment.—This second appeal arises in the following circumstances. The plaintiff Mahomed Bakhsh entered into a partnership in 1925 with Abdul Subhan Khan and Noor Mahomed to manufacture soap. He advanced Rs. 1,000 which was to be used in the partnership and it was agreed that this amount should be repaid to him in any circumstances from the concern. The defendants Amir and Munir entered into an engagement as sureties to the plaintiff for the repayment of this amount. On 12th March 1927, Mahomed Bakhsh

instituted a suit in the Court of the Munsif (South) Lucknow against the four defendants on the following pleas He said that he had only been paid Rs. 475 out of Rs. 1,000 advanced. He asked that the partnership should be dissolved. He sued to recover Rs. 525 the balance of Rs. 1,000 advanced, Rs. 350 as profits and .Rs 250 as share of the stock. The four defendants were all represented by the same counsel Mr. A. C. Ghose and Mr S N Roy, to each of whom a vakalatnama was given in similar terms. We have gone through this vakalatnama and we translate the portions which have bearing on the matters in dispute as follows :

They gave authority to the counsel
" to file compromises and confessions of judgment "

on their clients' behalf They gave authority to the counsel to submit the disputes to arbitration and they ended up with the following words :

" We accept all acts done and everything executed by our pleader and approve of them. They will be considered as done by ourselves "

The matter was referred to the arbitration of a certain Bhulai carpenter Bhulai filed an award in which he stated that the defendants should pay to the plaintiff Rs 525 claimed in respect of Rs. 1,000 advanced, Rs. 250 for the share of the stock and Rs 314-10-0 for profits. He reduced the claim by Rs 35-6-0 only The four defendants filed objections against this award These objections came on for hearing on 24th September 1927 On that day the defendants had no evidence to support their objections Their objections were objections of fact complaining against the conduct of the arbitrator, and they were in no position to support them on that day. In view of the fact that there was no evidence to support these objections these objections would ordinarily have been dismissed unless an adjourned date for hearing had been fixed. There is a finding of fact that on that date the defendants Abdul Subhan Khan and Noor Mahomed were present in Court. Amir and Munir were not present in Court but they were represented by the counsel to whom we have already referred. We now quote the recorded proceeding of the learned Munsif.

" At this stage pleader for defendants states : 'If the plaintiff states on oath with the Quoran in his hand that the books of account prior to 26th November 1926, are with the defendants then the suit for Rs. 1,125 and for dissolution of partnership be decreed with costs. The award may be set aside. ' "

" Pleader for plaintiff states : 'My client is willing to take the required oath. I have no objection to the award being set aside. ' "

" Order. The award dated 12th September 1927, is hereby set aside with the consent of the parties. "

"The plaintiff on oath with Quoran in hand: 'My suit is correct. All the books of account including those prior to 26th November 1926, are with the defendants. Defendants ' pleader states . 'I pray that my clients may be allowed to pay the decretal amount by instalments. ' Plaintiff's pleader opposes the award. "

This apparently means that the plaintiff's pleader opposed the application to pay the amount in instalments. This seems clear from what happened subsequently.

" Ordered. The prayer for instalments cannot be granted as there is nothing to show that the defendants are unable to pay the decretal amounts. "

All the four defendants then appealed against this decision. The learned Judge of the lower appellate Court dismissed the appeal of Abdul Subhan Khan and Noor Mahomed but modified the decree as against Munir and Amir in the following manner. He found that it was clear that the plaintiff Mahomed Bakhsh had not claimed against Amir and Munir more than the Rs. 525 alleged to be due from them as sureties. As they were not partners in the soap business they could not be held liable for anything more So he reduced the decretal amount as against them to Rs 525. Amir and Munir appeal here against the decree as modified. Abdul Subhan and Noor Mahomed have taken no steps and Mahomed Bakhsh has not objected to the reduction of the amount as against the present appellants

The appellants here are in a difficult position. If they were not bound by their counsel's agreement to accept a decree on the basis of the oath of Mahomed Bakhsh they had to return to the arbitration award which could not be held to have been set aside as against them unless they accept the action of their own counsel, for it was their counsel who agreed to the withdrawal of the award and if he was not authorized to do so the award would still stand. The objections that they brought against the award were not supported by evidence. They were not entitled to any adjournment to obtain further evidence and their objections should have been dismissed as being baseless The result would be that they would be left liable

to satisfy Rs. 1089-10-0 instead of Rs. 525 under the present decree. Thus it is really to their interest to have this appeal dismissed. We have, however, heard the arguments of the learned counsel upon the point of law that he has advanced. He has put his case as well as it could be put and has brought out the different views of the law most satisfactorily. But before we proceed to the different views of the law we have first to decide on construction of the power-of-attorney to which we have already referred. We have no doubt whatever upon reading this power of attorney that the counsel concerned were given the fullest possible authority to do whatever they wished on behalf of their clients so long as the legal proceedings lasted. The learned counsel would have us read latter part of the power-of-attorney as being governed by the previous part, but we find that the latter part is independent of the previous part. The parties agreed to accept all acts done by their counsel. It is not said that they agreed to accept all "such acts" or "all acts as aforesaid." There are no qualifying words. The last paragraph standing alone gives as complete an authority as it is possible to conceive. Having arrived at this decision on the question of construction we proceed to look at the views prevailing in other High Courts. It is true that in a case decided by a Bench of the Bombay High Court: *Sadashiv Rayaji* v. *Maruti Vithal* (1), it was laid down at p. 458:

"Again, it may well be doubted whether under Act 10 of 1873 any person but the party himself can make such an offer as is contemplated in S. 9. The procedure there laid down is of a very special kind. Its efficacy is presumably dependent on the circumstances that the true merits of a case are better known to the parties than to any one else. Its adoption is an appeal to the conscience of the party to whom the offer is made and such an appeal can rightly be made only by a person personally interested, whose confidence in the justice of the case is based on his own knowledge of its merits. The right to make the offer cannot be properly transferred to another person whose interests are not at stake, and whose knowledge of the facts would ordinarily be derived from the instructions he might have received from the party. That, we, think, must be the right construction to put upon the Act."

The learned Judges composing that Bench, however, added words which would go far to deprive the present appellants from obtaining much benefit from this decision, for they say:

"Of course, if a party specially authorizes his pleader or an agent, to make an offer to be bound by a particular oath, he might be estopped from retracing the step he had taken if his offer were acted on."

The learned Judges here apparently considered that though the Act did not permit an agent to make an offer his principal could, by giving him special authority to make the offer, put it out of his power to object to an acceptance of the offer by being estopped from so doing. We need not discuss how far this modification should operate, for we do not accept the view taken by the learned Judges who composed that Bench. The section to be interpreted is S 9, Act 10 of 1873:

"If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation"

The question here is simple. Does the word "party" include a duly authorized representative The learned Judges of the Bombay High Court were of opinion that it did not include a duly authorized representative A different view, however, was taken in Allahabad in *Wasi-uzzaman* v. *Faiza Bibi* (2). A Bench of the Allahabad High Court considered the Bombay decision to which we have referred At p 133 it is said by Tudball, J.:

"Sections 8, 9 and 10 of Act 10 of 1873 clearly contemplate that the action mentioned therein can be taken by a party to a suit. In the Act itself there is no language which goes to show that the word "party" can be used only in its restricted sense and not in the wider sense. The considerations which are to be found at p. 458 of the ruling in *I. L. R.* 14 *Bombay* are considerations which really apply to a person who takes the oath rather than to a person who makes the offer. I can see no good reason why a duly authorized agent of a party should not make the offer contemplated in S. 9."

Walsh, J, in referring to that decision says at p. 133:

"That decision is one which I am unable to follow. Under such authority as was given in that case, which in substance resembles the authority given in the present case, if indeed it is not stronger, the agent could do any act which he deemed proper, for the purpose of the conduct of the suit. The acts of the agent are acts of the parties. Act 10 of 1873 enables a party to make the offer which was made in the case before us. That is a step in a suit which, however rare in its occurrence, may arise as an incident in a suit. I see no reason why an agent authorized to conduct a suit is not authorized to take the step provided by Act 10 of 1873. The reasons given by the Bombay

(1) [1890] 14 Bom. 455.

(2) [1916] 38 All. 131=32 I.C. 348=14 A.L.J. 88.

High Court, as my learned brother has pointed out, appear to be directed to questions relating to the person who takes the oath and not to the person who makes the offer."

We agree with the Allahabad view. For the above reasons we dismiss this appeal. The appellants will pay their own costs and the costs of Mahomed Bakhsh.

S.L./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 59

WAZIR HASAN AND GOKARAN NATH MISRA, JJ

Abdul Rashid—Judgment-debtor—Appellant.

v.

Mul Chand and *another* — Decree-holders—Respondents.

First Appeal No 80 of 1928, Decided on 9th November 1928, from decree of Addl. Sub-Judge, Hardoi, D/- 14th April 1928.

Civil P. C , O. 34, R. 6—Decree under R. 6 is a supplementary decree and no question of limitation arises if the original suit was within time for relief on personal covenants —Limitation Act, Arts. 66 and 132.

In pursuance of a mortgage decree, mortgaged property was sold, but the net proceeds of the sale were found to be insufficient to pay the amount due under the decree. Steps were taken to get a decree prepared under O. 34, R. 6, for the balance of the amount decreed to be recoverable from the judgment-debtor otherwise than out of the property sold. The suit on mortgage was within time for the relief on personal covenant.

Held . that the decree, which was being sought to be passed, must be treated to be a supplementary decree in the suit which was originally brought by the mortgagee, and no question of limitation arose : *A. I. R.* 1926 *P. C.* 56, *Dist.* : 14 *All.* 513, *Fol.* [P 60 C 1]

H. D Chandra—for Appellant

Shankar Sahai—for Respondent 1.

Judgment. — This is the judgment-debtor's appeal from the order of the Additional Subordinate Judge of Hardoi dated 14th April 1928 in proceedings which have arisen under the provisions of R. 6, O. 34, Civil P. C. The respondents obtained a decree on the foot of a mortgage for sale of certain property against the appellant. The preliminary decree was passed on 29th January 1926 and was made absolute on 30th October 1926. In pursuance of that decree the mortgaged property was sold on 30th October 1927 but the net proceeds of the sale were found to be insufficient to pay the amount due to the plaintiffs under the decree mentioned above. Steps are now being taken by them to get a decree prepared under R. 6, O. 34, Civil P. C., for the balance of the amount decreed to be now recoverable from the defendant otherwise than out of the property sold. The judgment-debtor pleads limitation as against the passing of such a decree. The Court below has overruled the plea of limitation and has given the decree prayed for. The question for decision in appeal before us is as to whether the decision of the lower Court is correct.

We have heard arguments at considerable length in this case and have come to the conclusion that the appeal fails. In support of the appeal the learned advocate for the appellant relies on a recent decision of their Lordships of the Judicial Committee in the case of *Ganesh Lal* v *Khetramohan* (1) That case, however, does not help him except in so far that it may be assumed for the purposes of the decision of this appeal only as having laid down the law that the article of the Limitation Act applicable to the making of such a decree is Art 66, Sch 1 of that Act which provides for three years' limitation from the date on which the money becomes repayable. The difficulty is from which date the three years' limitation is to be reckoned It is agreed that the cause of action arose after the expiry of two years from the date of the mortgage when the money was made repayable according to the covenant contained in that deed. The date of the mortgage was 4th June 1919. It is also clear to us, in spite of arguments advanced by the learned advocate for the appellant to the contrary, that the deed of further charge contains a clear acknowledgment of the liability of the debt under the previous mortgage and thus under S. 19, Lim. Act, the period of three years must be reckoned to have commenced from the date of the acknowledgment which is 9th December 1922.

If the date of the initiation of the present proceedings is to be regarded as the terminal point of limitation, then on the assumption that three years' limitation is applicable the present proceedings are barred by time and this is the argument of the learned advocate for the appellant. But we are of opinion that the argument is untenable. The decree which is now

(1) A.I.R. 1926 P.C. 56=5 Pat. 585=53 I.A. 184 (P.C.).

being sought to be passed must be treated to be a supplementary decree in the suit which was originally brought by the mortgagee on the foot of his mortgage for the relief of sale of the mortgaged property, and if that suit was within time, as it is agreed that it was, for the relief founded on the personal covenant, then no question of limitation arises in the present proceedings. This view seems to us to be supported by a series of decisions in the High Court of Allahabad We may refer only to one of such decisions in *Musaheb Zaman Khan* v *Inayat-ul-Lah* (2) Apart from any authority for the opinion we have formed, it seems to us that no separate suit for a decree for the recovery of the balance is contemplated under the Code of Civil Procedure. R. 6, O 34, which authorizes the passing of such a decree is a rule relating to the procedure of working out the decree which is passed in the suit for the sale of the mortgaged property It appears to us that R 6, O. 34, provides for the final step by the adoption of which the decree originally passed may wholly be satisfied. We accordingly dismiss this appeal with costs

W.S /R K. *Appeal dismissed*

(2) [1892] 14 All. 513=(1892) A.W.N 80.

A. I. R. 1929 Oudh 60

WAZIR HASAN, AG C J , AND GOKARAN NATH MISRA, J.

Sheo Sagar and *another* — Defendants —Appellants.

v

Lachhman and *others* — Plaintiff and Defendants — Respondents

Misc. Appeal No. 41 of 1928, Decided on 19th November 1928, from order of Sub-Judge, Lucknow, D/- 11th May 1928.

(a) Oudh Rent Act, S. 108 (5-A) — Decision of the revenue Court that a plot is or is not a grove is final.

The decision of the revenue Courts in resumption proceedings on the question whether a plot still retains the character of a grove or not must be deemed as final, and cannot be assailed in the civil Court : 3 *O. L. J.* 717, *Foll.* : 41 *All.* 203; *A. I. R.* 1926 *Oudh* 205 , and 5 *O. L. J.* 639 ; *Ref.* : *A. I. R.* 1926 *Oudh* 458, *Dist.* [P 61 C 2]

(b) Oudh Rent Act, S. 54—Ejectment of grove-holder by notice is illegal—Proceedings under Chap. 7-A is the proper remedy (*Obiter*).

The mere fact that a land is liable to resumption or assessment of rent on the ground that a grove had ceased to exist would not make the grove-holder a tenant liable to be ejected by notice. Such a notice must be deemed to be invalid and the ejectment illegal, and it would be open to the grove-holder to bring a suit for possession against the landlord in civil Court. The proper remedy for a landlord is to take resumption proceedings under Chap. (7-A) 5 *O. L. J.* 639 and *A. I. R.* 1926 *Oudh* 458, *Foll.* [P 62 C 2]

Radha Krishna—for Appellants.

Hakimuddin—for Respondent 1.

Gokaran Nath Misra, J.—This is an appeal arising out of an order of remand passed by the Subordinate Judge of Lucknow dated 11th May 1928. The suit in which this order of remand was passed was a suit for possession of a grove No 102 old 218 new, situate in village Terha, District Unao The allegations upon which the plaintiff-respondent brought the present suit were to the effect that he was the owner of the said grove and the revenue Court had wrongfully decreed resumption thereof on the ground that it no more retained the character of a grove The plaintiff, therefore, alleged that his dispossession was wrongful and being a grove-holder he was entitled to bring the present suit and get the question decided by the civil Court that the plot still retained the character of a grove The defendants contested the suit mainly on two grounds, namely, that the plot in suit had lost the character of a grove and that the civil Court had no jurisdiction to go behind the decision of the revenue Court.

The learned Munsif, South Unao, who tried the suit was of opinion that the decision of the question that the plot in suit had lost the character of a grove, could not be re-opened by the civil Court and that the decision of the revenue Court on the point was final. In this view of the case he did not try the question as to whether the plot in suit still retained the character of a grove. He, therefore, dismissed the suit by his decree dated 23rd December 1926 The plaintiff carried the matter further in appeal and the learned Subordinate Judge of Lucknow who heard the appeal has taken a different view. He has held that the civil Court has got the jurisdiction to decide as to whether the plot still retains the character of a grove and whether under those circumstances the plaintiff could be held to be a grover-holder or not. Taking this view of the case he set aside

the decree of the Munsif and remanded the case for decision on the merits. It is against this order that the present appeal has been brought.

The main question, therefore, for decision before us is whether in a case like the present one, the decision of the revenue Court can be considered final and whether it is open to the civil Court to go behind the said decision. We have heard the parties at considerable length and have come to the conclusion that the view of law taken by the learned Munsif is correct, and his decision must, therefore, be restored. We now proceed to give our reasons for having come to this conclusion

Proceedings for resumption in Oudh are governed by Ch. 7-A, Oudh Rent Act (22 of 1886). S 107 (*bis*) of that chapter lays down that nothing in that chapter should apply to a grove so long as it retains its character as such. S 107-A lays down that a proprietor of a mahal or part of a mahal may sue to resume possession, or to have rent assessed on any land situate in such mahal or part of a mahal purporting to be held rent-free whether by grant in writing or otherwise It is admitted in this case, as is the rule in all such similar cases, that no rent was paid by the respondent in respect of the plot in dispute which was held rent-free. Under those circumstances the remedy resorted to by the defendants-appellants by taking proceedings for resumption under Ch. 7-A against the plaintiff-respondent were fully justified by the provision of S. 107-A. The only defence which could have been raised by the plaintiff of the present suit, who was the defendant in the revenue Court, in order to oust the jurisdiction of that Court was by alleging that the grove in dispute still retained its character as such. This defence was raised but was finally rejected by the Board of Revenue by its order dated 15th May 1925 The Board of Revenue held, as was held by the Court of first appeal, that the plot in dispute had ceased to retain the character of a grove.

It appears to us that reading the resumption Ch 7-A with S. 108, Cl. 5-A, it must be held that the revenue Courts have exclusive jurisdiction to take cognizance of suits brought for resumption of, or assessment or enhancement of, rent on land held rent-free. If the revenue Courts have, therefore, exclusive jurisdiction to entertain and decide such a suit it should be clear that they must also be considered to have exclusive jurisdiction to try an issue which would be necessary for them to do, in order to take cognizance of a suit of the description mentioned in Cl. (5-A) and that their decision so arrived at cannot be impugned by an unsuccessful litigant who brings a suit for the purpose in the civil Court We are, therefore, of opinion that the decision of the revenue Courts in the present case on the question whether the plot in suit still retains the character of a grove or not must be deemed as final and cannot be assailed by the plaintiff-respondent in the civil Court. We are supported in this view by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Bhagwan Singh* v. *Jagmohan Singh* (1). Mr. Lindsay (now Sir Benjamin Lindsay) held in that case that a revenue Court had exclusive jurisdiction to resume lands granted for the purpose of planting groves which had subsequently lost their character as such and to decide the question. We are in entire agreement with that opinion

We would in this connexion refer to two other cases, one decided by the Allahabad High Court and the other decided by a Single Judge of this Court. The decision of the Allahabad High Court to which we would like to refer is the decision reported in *Baljit* v. *Mahipat* (2). It has been held by the Allahabad High Court in that case that where a matter, exclusively within the jurisdiction of a Court of revenue, has been tried and decided by that Court as between the parties, no such subsequent suit will lie in the civil Court having for its sole object the annulment of the decree passed by the Court of revenue. The Single Judge case of this Court will be found reported in *Dilawar Khan* v. *Kulsum* (3). This was a case in which it was held that where in a suit between the parties, a revenue Court decided that the plaintiff of that suit was a tenant-in-chief and not a sub-tenant, no civil suit could subsequently be maintained by a defendant of that suit for a declaration to

(1) [1916] 3 O. L. J. 717=38 I. C. 488.
(2) [1919] 41 All. 203 = 49 I. C. 118 = 17 A. L. J. 60.
(3) A. I. R. 1926 Oudh 205.

the effect that it was he who was the tenant-in-chief and that the plaintiff was his sub-tenant.

The same rule of law is laid down in Smith's Leading Cases, Vol. 2, 12th Edn. at p. 755. The rule enunciated is in the following words :

" that the judgment of a Court of exclusive jurisdiction, directly upon a particular point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. "

It was argued on behalf of the plaintiff-respondent that where a grove-holder was illegally dispossessed by the landlord whether out of Court or through the rent Court, a suit for recovery of the grove-land could be successfully brought in the civil Court. The learned advocate for the respondent relied upon the decision of one of us reported in *Jagdish Bahadur Singh* v. *Ragho Ram* (4). In that case it was no doubt held that where a grove-holder was ejected illegally by the landlord whether through the revenue Court or out of Court, a suit for possession by him would clearly lie in the civil Court and he would not be barred from pleading that he was a grove-holder and has been wrongfully ejected by the revenue Court. In our opinion this decision does not in any way help the plaintiff-respondent. If a landlord dispossesses a grove-holder, the latter's remedy is obviously to bring a suit against the landlord for recovery of possession of his grove-land in the civil Court for the purpose. Such a suit cannot obviously be brought in the revenue Court because a grove-holder has been held not to be a tenant.

We might in this connexion refer to a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Durga Prasad* v. *Ram Charan* (5), where it was clearly held that the mere fact that the land is liable to resumption or assessment of rent on the ground that a grove had ceased to exist would not make the grove-holder a tenant liable to ejectment by notice. Similarly if a landlord issues a notice of ejectment against a grove-holder and treats him as his tenant, as he must be presumed to do when he issues a notice of ejectment against him, such a notice must be considered to be invalid and the ejectment of the grove-holder in pursuance of such a notice must be deemed to be an illegal ejectment and it would be open to grove-holder to bring a suit for possession against the landlord in the civil Court. This is all that was decided in *Jagdish Bahadur Singh* v *Ragho Ram* (4), the decision not having gone further. It was also contended on behalf of the plaintiff-respondent that it had been held in some cases by the Board of Revenue that it was open to the landlord to issue a notice of ejectment if the land on which the grove previously stood had lost its character as such. Consequently if a suit to contest that notice was brought in a revenue Court, such Court must be considered to possess jurisdiction to decide the question whether the plot had lost the character of a grove or not.

The argument advanced was to the effect that if the revenue Court decided this question and if the civil Court was to be bound by it, a grove-holder had no remedy in case a notice of ejectment was issued against him through the revenue Courts. Our reply to that contention is that in our opinion the proper remedy for a landlord to adopt in such a case is not to issue a notice of ejectment against the grove-holder but to take resumption proceedings against him under Chap 7-A since a notice of ejectment could only be issued against a person who is a tenant or who could be treated as such. It appears to us to be clear that a grove-holder is neither a tenant nor can he be treated as such since he does not pay rent nor can he be considered to be liable to pay rent until rent has actually been assessed upon the said land. We are therefore of opinion that the order of remand passed by the learned Subordinate Judge cannot be maintained. We, therefore, accept this appeal, set aside the order of remand passed by the learned Subordinate Judge and dismiss the plaintiff-respondent's suit with costs in all the three Courts.

Wazir Hasan, Ag. C J.—I agree that the appeal should be allowed and the decree of the trial Court restored. It is quite clear to my mind that the Courts of revenue for the purpose of deciding cases of resumption of land under the provisions of Chap. 7-A, Oudh Rent Act, 1886, have exclusive jurisdiction in that behalf. The jurisdiction is, however, expressly withdrawn by the legislature in case where resumption is sought of a piece of land which retains the character of a grove. This is clear from S. 107. It fol-

(4) A.I.R. 1926 Oudh 458=29 O.C. 271.
(5) [1918] 5 O.L.J. 639=48 I.C. 417.

lows therefore that with a view to acquire or to divest themselves of such a jurisdiction the Courts of revenue must in the very nature of things decide the question if it is raised as to whether the subject-matter of resumption retains the character of a grove or not. It further follows that the Courts of revenue must be deemed to be possessed of jurisdiction to decide the issue just now mentioned. Therefore the finding of the Court of revenue in the present case that the land in question no longer retains the character of a grove is a finding of a Court possessed of exclusive jurisdiction in the subject-matter of this litigation and is conclusive.

W.S /R.K. *Appeal allowed.*

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* A. I. R. 1929 Oudh 63

GOKARAN NATH MISRA AND PULLAN, JJ.

Durga Prasad and *another*—Defendants—Appellants.

v.

Narain—Plaintiff—Respondent.

Second Appeal No. 135 of 1928, Decided on 30th October 1928, from decree of Sub-Judge, Rae Bareli, D/- 17th January 1928

(a) Civil P. C., S. 11—Compromise decree.

A compromise decree operates as res judicata: *South American* and *Mexican Co.*, (1895) 1 *Ch. D.* 37 and 22 *Mad.* 508 (*P.C.*), *Foll.* [P 64 C 1]

*** (b) Transfer of Property Act, S. 6 (a)—Transfer of spes successionis — Transferee suing after widow's death—Compromise entered into between transferrer and transferee—Compromise and decree are valid—Civil P. C., O. 23, R. 3.**

During the lifetime of a widow, the reversioners sold their right of succession to a third person. On widow's death the transferee sued the transferrers for possession, and a compromise decree was passed:

Held: that such a sale was in no way contrary to public policy and could very well become the subject of a compromise decree which would be binding upon both the parties: 26 *Mad.* 31 and 30 *Mad.* 255, *Dist.* [P 64 C 2]

R. B. Lal—for Appellants.

S. M. Hafiz for *Zahur Ahmad*—for Respondent.

Judgment.—The facts from which this second appeal has arisen are as follows: One Ghisa possessed certain property and died leaving two sons Kali Charan and Durga. Kali Charan died in 1897 and Durga in 1898. The former left a widow Gulaba who died in the year 1915 after gifting her property to her daughter's son and we are not concerned with this share of the property. Durga left a widow named Menda and a son Badri Prasad. The son died in the year 1899 and his widow Mt. Phulla died in the year 1910 and the property devolved on Mt. Menda. For the purposes of this appeal it is admitted that Menda was the mother of Badri Prasad and that the rights she obtained in the property were those of a Hindu female. The reversioners to the property were Narain and Biru and, on 13th December 1916, during the lifetime of Menda they sold their reversionary rights in that portion of the property to two persons Durga and Badal. When Menda died in 1918 there was a dispute between Narain and Biru on the one hand and Durga and Badal on the other in the mutation Court. It appears that Narain and Biru declined to be bound by their own sale of reversionary rights and obtained mutation in the revenue Court. In January 1919 Durga and Badal sued in the civil Court on the basis of their sale-deed. On 13th February 1919 the parties entered into a compromise and a decree was passed on 7th March 1919 by virtue of which Durga and Badal obtained possession of the property. Before, however, the passing of the decree in terms of the compromise, Biru had sold his rights to a certain Parag and Parag brought a suit against Durga and Badal in which he obtained a decree to the effect that the compromise was inoperative and he accordingly obtained possession of Biru's share in the property.

Narain took no further action until 7th April 1927, when he filed the present suit. His main contention was that the compromise and decree of 1919 had been held, in the suit brought by Parag, to be invalid and null and void, and on this ground he pleaded that he was entitled to possession of that portion of the property which he had himself sold, without bringing any suit for the cancellation of the compromise and the decree. The Courts below have accepted the view that the compromise and decree are void, and on this finding they have decreed the suit brought by Narain. In the first place it is necessary to meet the general objection which has been raised before us

that a compromise decree cannot act as res judicata under S. 11, Civil P. C., or even as an estoppel. On this point we need only refer to two rulings of the Courts in England, which show very clearly that the contrary view is taken by the highest authority. In the case of *South American and Mexican Co.* (1), Mr. Justice Vaughan Williams has made the following observations :

" Under these circumstances I have only to consider Mr. Moulton's suggestion, that a judgment by consent, upon which the Court has not exercised its mind, does not and cannot raise an estoppel inter partes. I can only say that this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter."

Again in the case of *Pranal Anne* v *Lakshmi Annee* (2), it was laid down that razinama in so far as it was submitted to and was acted upon judicially by the learned Judge was in itself a step of judicial procedure not requiring registration and any order prouounced in terms of it constituted res judicata binding upon both the parties to this appeal who gave their consent to it. It is clear, therefore, that the consent decree of 1919 was binding upon the parties and would operate as res judicata in the present suit unless there were some special reason for holding that the compromise and the decree were void. It is the finding of the Courts below that the decree is void and it is in our opinion an erroneous finding. Both the Courts appear to have found that the sale of expectant rights being contrary to public policy the decree passed as a result of a compromise in reference to that sale must, therefore, have been void.

The lower Courts believed that they were following the view taken by the Madras High Court in two cases. The first is reported in *Lakshmanaswami Naidu* v. *Rangamma* (3) and the second is reported in *Ramasami Naik* v *Ramasami Chetti* (4). In the first case the compromise was effected by two parties who wished to effect an illegal sale of an office attached to a temple which sale was against public policy and could not be recognized or enforced by the Courts, and in the second case, which is more closely akin to the one before us, it was held that a transfer of a bare expectancy being a nullity under S 6 (a), T. P Act, which is itself based on principles of public policy, the Court could not allow such transaction to be effected by a consent decree. But in the case before us there is a point which seems to have escaped the observation of both the Courts below. Although the sale was actually effected in the year 1916 during the lifetime of Menda, and so was a transfer of expectant rights, in 1919 Menda was dead and Narain and Biru were able in law to transfer the property to their vendees, as their reversionary rights had now become rights of ownership, and such a sale was in no way contrary to public policy and could very well become the subject of a compromise and a decree which would be binding upon both the parties.

The fact that the compromise and the decree were held to be a nullity in the suit brought by Parag is irrelevant Parag was not a party to that compromise or to the decree He was a transferee from Biru before the compromise was entered into, and his rights were in no way affected by any compromise entered into subsequently by his vendor. Thus although the compromise and the decree may very well have been a nullity as far as Parag was concerned they have never been declared to be nullity in the case of Narain and in our opinion they are binding upon him and have in the present case the effect of res judicata. We, therefore, allow this appeal, set aside the decrees of the Courts below and direct that the plaintiff's suit stand dismissed with costs in all Courts

W.S./R.K. *Appeal allowed.*

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(1) [1895] 1 Ch. D. 37=64 L. J. Ch. 189=43 W. R. 131=71 L. T. 594.
(2) [1899] 22 Mad. 508=26 I. A. 101=9 M. L. J. 147=7 Sar. 516 (P.C.).
(3) [1903] 26 Mad. 31.
(4) [1907] 30 Mad. 255=17 M. L. J. 201.

A. I. R. 1929 Oudh 65

SRIVASTAVA AND GOKARAN NATH MISRA, JJ.

Mohammad Wazir Khan and *others*—Plaintiffs—Appellants.

v.

Muhammad Husain—Defendant—Respondent.

Second Appeal No 326 of 1927, Decided on 23rd July 1928, from decree of Dist Judge, Fyzabad, D/- 6th September 1927.

(a) Mahomedan Law — Waqf — Appointment of disciple to mutwallishp and making over trust property can be described as "Tamlik"—Words.

The word "Tamlik" is very often popularly used in the sense of a settlement in the case of trust properties. Where a disciple is appointed as successor to the mutwallishp and trust property is made over to him, the transaction can well be described by the use of the word "Tamlik". [P 66 C 1]

(b) Mahomedan Law — Waqf — Term "Waqf" not necessary — Inference can be drawn from general nature of grant.

It is not necessary, in order to constitute a wakf, that the term "wakf" be used, if from the general nature of the grant itself, that tenure can be inferred . *A. I. R.* 1924 *P. C.* 103 and *A. I. R* 1928 *Oudh* 241, *Foll.* [P 67 C 1]

Hyder Husain—for Appellants

Ghulam Hasan—for Respondent.

Judgment —This is a second civil appeal against the decree passed by the District Judge of Fyzabad, reversing the decree of the Court of Additional Subordinate Judge of Fyzabad. The appeal arises out of a suit instituted by Wazir Khan and ten others, Muslim residents of Qasba Raunahi, on behalf of and representing the Muhammadan population of the town, for a declaration to the effect that the property in suit was a public waqf created for the mosque known as Juma mosque Qila Raunahi, Pargana Mangalsi, District Fyzabad, and that the defendant held the property merely as trustee. The plaintiffs' allegation was that the waqf had been created in the Shahi times and that Muhammad Roshan Khan was the first mutawalli, who was succeeded by Mirza Rajab Beg. Qudratullah Beg succeeded Mirza Beg and after Qudratullah Beg his son, Mirza Muhammad Hussain, defendant held the property as the present mutawalli. The defendant denied the alleged waqf and claimed to be the absolute owner of the property in suit under the decree passed at the First Regular Settlement in 1870. He raised certain other pleas with which we are not concerned in the appeal and, therefore, they do not call for any mention The learned Additional Subordinate Judge of Fyzabad, who tried the suit, held the property to be waqf and decreed the plaintiffs' claim. On appeal the learned District Judge disagreed with the view of the trial Court and reversed the decision of the Additional Subordinate Judge.

The sole question arising for determination in this appeal is regarding the nature of the property in suit, whether it should be regarded as waqf property or as the private property of the defendant. The determination of this question rests mainly on the construction to be placed upon the settlement proceeding resulting in the decree (Ex. 2) dated 17th May 1870 These proceedings were initiated by an application for settlement in respect of the property in suit made by Qudratullah Beg, father of the defendant, on 22nd June 1868 This application is Ex. 1 in the case. The relevant portions of the application are as follows :

"*Mawazi 50 bighas arozi kham . . . . . ba ahad badshah Ghayazuddin Haider ba sudur farman waste sarf masjid wa kharch ayando rawand banam Roshan Khan mutawalli masjid wale qasba Raunahi, Pargana mazkur muaf hui . . . . . Roshan Khan ne . . . . bad uske chah mazkur wa arazi wa our ashra jo kuchh ki unke qabze men tha banam mujh sael ke hiba wa tamlik kia . . . . . Ummedwar hun ki bad tahqiqat adalat bandobast arazi mazkur ka banam mere farmay jawe*"

The terms of this application make it clear that a grant had been made of the land in suit in the Shahi time, that the grant was for the upkeep of the mosque and for the feeding of travellers and that the grant had been made in favour of Roshan Khan as mutawalli of the mosque. There is not a word in this document to show that the grant was made to Roshan Khan in his personal capacity and as his private property. On the contrary the fact of the grant being made in favour of the mutawalli of the mosque and for religious and charitable objects like those mentioned above would in the absence of any evidence to the contrary, clearly make it out to be a public waqf. The learned counsel for the defendant-respondent has laid great stress on the fact that Roshan Khan had made a hiba and tamlik of the property. It should be noticed that the property referred to consisted not only of the property in suit but also of certain

other moveables. The word "hiba" may well refer to the transfer of moveables. It was also argued that the word "tamlik" would indicate transfer of the proprietary rights of the property in suit and would be consistent only with Roshan Khan having been the proprietor thereof. We are unable to accept this argument. The word "tamlik" is very often "popularly" used in the sense of a settlement in the case of trust properties Roshan Khan was a Pathan whereas Qudratullah Beg and his father, Mirsa Rajab Beg, were Moghals. The only relationship between them was that Mirza Rajab Beg was a disciple of Roshan Khan So, if Roshan Khan appointed Mirza Rajab Beg his successor to the mutwallship and made over the trust property to him the transaction could well be described by the use of the word "tamlik."

The next argument of importance is the judgment of the Settlement Court (Ex. 2) dated 17th May 1870. It is stated in this judgment that :

"Muddai qabiz arazi muafi area pachas baras se hai aur muddai ne jo sanad muafi nawishta Nazim waqt muwarrikha 27 Rajab san 1234 Hijri guzrani usmen mundarijh hai ki hasb sanad Badshah waqt ke Nazim ne yeh muafi uske bap ke pir ko waste sarf masjid ke ata kiu ki ab janashin muddai hai . . . . . digri milkiat arazi 50 bighas kham hanaq muddi di jawae.."

The above extract from the judgment shows that a sanad had been produced before the Settlement Court which showed that the land had been granted for the upkeep of the mosque. Presumably the sanad should be in the possession of the defendant. He has not produced it. It is true that he produced a certain document purporting to be a sanad but both the lower Courts have rejected it and refused to presume its genuineness. We must, thesefore, take it that the production of the original sanad which had been produced before the Settlement Court has been withheld by the defendant. This raises a presumption against him. The terms of the sanad as reproduced in the judgment of the Settlement Court are also consistent only with the view that the grant was a public waqf and not private property. The defendant-respondent placed great reliance on the fact that the Settlement Court passed a decree for proprietary rights in favour of the plaintiff and not in favour of the mosque. The argument overlooks the fact that proceedings in the early days of the First Regular Settlement, as frequently remarked, were free from technicalities and niceties of law with which we are so familiar now. The word 'milkiat' it seems to us, has been used only in contradistinction to subordinate rights to indicate the nature of interest granted in the land. On a careful consideration of the entire judgment in the light of the application (Ex 1) we have no hesitation in holding that the proper construction to be placed upon these proceedings is that the decree was passed in favour of Qudratullah Beg as mutawalli of the mosque and not in his private rights. We are further supported in this opinion by the application (Ex 3) dated 2nd February 1871, made by Qudratullah Beg for reduction of the rent, which had been assessed on a portion of the land. In this application also he said:

"Yeh arazi bila lagan qadim se waste sarf masjid ke muaf chali ati hai aur yeh kam wa sarf waste ibadat wa sarfa fuqra men kia jata hai."

It is significant that the application is signed by him as Mirza Qudratullah Beg mutawalli masjid. If he had laid claim to the property and obtained a decree therefor in his private capacity where was the need and occasion for him to subscribe to the application as mutawalli masjid ? We should be content to base our decision on the proceedings in the Settlement Court referred to above and after giving our careful consideration to the contents of the documents discussed above we have come to the conclusion that the finding arrived at by the trial Court was correct.

The learned counsel for the appellants also relied on certain proceedings taken by the defendant in the revenue Courts in the year 1926. He made an application (Ex. 5) for correction of the khewat in which he said that the mauafi in question was not his private property but was held by him as a mutawalli for the upkeep of the mosque He made similar statements in another application (Ex. 8). But we are not prepared to base our conclusions on these admissions as they were subsequently retracted and it is not possible for us in the second appeal to enter into an inquiry regarding the circumstances in which these admissions were made or withdrawn.

There is just one more fact to which we wish to make reference. It is this. The defendant in the witness-box as D. W. 1 admitted that he had two uncles

and four sisters but that the property in suit was held by his father alone and after him by the defendant. He was unable to give any satisfactory explanation of the exclusion of the uncles or the sisters These facts also support the view that the property was not considered as the private property either of the defendant or of his father.

Lastly, the learned counsel for the appellants also tried to make out a case of waqf by user. The learned District Judge has discussed the evidence relating to it and has refused to believe it The matter is, therefore, concluded by the finding of the lower appellate Court and it cannot be opened in second appeal.

The learned counsel for the respondent relied on *Mahomed Raza* v. *Yadgar Hussain* (1) and *Jagatjit Singh* v. *Birj Mohan Das* (2) These cases are distinguishable. On the particular facts of the case before them their Lordships of the Judicial Committee came to the conclusion that it was a case of a grant sub-condition and not a case of waqf. It is important to note that in this case also their Lordships reiterate the proposition that according to Mahomedan Law it is not necessary in order to constitute a waqf that the term waqf be used if from the general nature of the grant itself that tenure can be inferred. The case in *Jagatjit Singh* v *Birj Mohan Das* (2) is similar to the case in *Mahomed Raza* v. *Yadgar Hussain* (1) and follows it. No help can be derived from these cases in construing the documents which form the subject of consideration in the present case.

The learned District Judge has also laid stress on the fact that by the Proclamation of Land Canning of 1858 all proprietary rights in the soil were wiped out and fresh proprietary rights were conferred by the British Government either by means of sanads or by Settlement Court decrees. He argues that as no sanad was granted and no decree was passed in favour of the mosque it must be taken that the waqf, if any, of the pre-annexation period no longer existed. This argument is sufficiently answered by the opinion expressed by us above, namely, that the decree of the Settlement Court must be construed as a decree in favour of the mosque, our finding being that the defendant or his predecessors had no beneficial interest in the property in suit either under the original grant or under the decree of the Settlement Court and that the decree obtained by Qudratullah Beg was only as a mutawalli representing the mosque. The argument has no force We, therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

S L./R.K. *Appeal allowed.*

(1) A. I. R. 1924 P. C. 103=51 Cal. 446=51 I. A. 192 (P.C.).

(2) A. I. R. 1928 Oudh 241=3 Luck. 892.

A. I. R. 1929 Oudh 67

GOKARAN NATH MISRA, J.

Ram Sumran and *another*—Plaintiffs—Appellants.

v.

Sarjoo Pershad and *others*—Defendants—Respondents.

Second Appeal No. 318 of 1928, Decided on 15th November 1928, from decree of Sub-Judge, Gonda, D/- 21st May 1928.

(a) Contract Act, S. 16—Pleader appearing in one or two cases of his client—Pleader's father purchasing property from the client—Pleader and father constituting joint Hindu family—Pleader cannot be said to be parmanent pleader and does not stand in a position of active confidence so as to justify the throwing on the pleader burden of proving good faith of the transaction—Father is not bound to prove bona fides of the transaction.

If a pleader appears in one or two cases as counsel on behalf of his client, it cannot be said that he is his permanent pleader and as such stands, in regard to him, in a position of active confidence so as to justify the throwing of the burden of proving the good faith of the sale transaction in favour of pleader's father by his client on the pleader, the pleader and his father constituting a Hindu joint family. The case would be quite different if that pleader happens to be the permanent counsel of the other side. Father is not, therefore, bound to prove the bona fides of his sale deed. [P 69 C 1, 2]

(b) United Provinces Land Revenue Act (3 of 1901), S. 111—Partition—Date fixed in proclamation for filing objections—Proclamation duly served upon parties—If case is taken up on the fixed date but no objection is filed, no party can raise any objection in future—If, however, the parties are not served or the case is not taken up and proceeded with but adjourned to a next date, objections can be entertained on such a date—What is proper time must be determined according to facts of each case.

Where a statute confers jurisdiction upon a tribunal of limited authority the conditions and qualifications under which that jurisdiction is to be exercised must be directly com-

plied with. Hence if a date is fixed in the proclamation for filing objections and proclamation is duly served upon a party to the partition proceedings and the case is taken up on the date fixed in the proclamation, and no objection is filed on that date and the case proceeds, it would not be open to any party to file objections raising a question of proprietary title at any future time. If, however, the proclamation has not been served upon a party to the partition proceedings or the case is not taken upon the date fixed in the proclamation and the proceedings are adjourned to another date, on which date the objections are filed, it cannot be held that they have not been filed at the proper time and should not be entertained by the revenue Court. A revenue Court is not, therefore, entitled to entertain an objection raising a question of proprietary title if not filed at the proper time. What is proper time must, however, be determined according to the facts and circumstances of each case; 17 *O. C.* 224, *Rel on*, 18 *All.* 210 and *A. I. R.* 1926 *Oudh* 309, *Ref.* [P 70 C 1]

(c) Limitation Act, Art. 91—Suit for cancellation of a sale-deed on ground of fraud and undue influence—Limitation runs from the date of execution of the deed.

Where a suit is brought to get a deed cancelled on the ground of fraud and undue influence, the fact must be considered to have been known to the executant from the date of the deed and if brought more than three years from that date the suit cannot be maintained: 15 *Cal.* 58 (*P.C.*), *Foll.* [P 71 C 1]

K. N. Chak, *Radha Krishna* and *S. N. Srivastava*—for Appellants

S.N. Roy—for Respondents

Judgment —This appeal arises out of a suit brought by the plaintiff in pursuance of an order of the revenue Court passed in the partition proceedings.

The facts of the case are that one Sita Ram was the owner of 5-pies 2 kirants 50 decimal share in village Dobai, District Gonda. He sold the share to one Babu Sarju Prasad, resident of Gonda City, who is respondent 1 in the present appeal, on 17th October 1924. The sale-deed was for a consideration of Rs 2,000 and was registered on 22nd October 1924. Sita Ram did not contest the validity of this sale during his lifetime, nor did his widow who succeeded him after his death. The appellants Ram Sumran and Raghubar Dayal are the nephews of Sita Ram and his next heirs. Babu Ram Shankar Tandon and Babu Gour Prasad Tandon who are respondents 2 and 3 in the present case are the sons of Babu Sarju Prasad, respondent 1. They have been joined in the case since all the three constitute a a joint Hindu family. In 1927 Babu Sarju Prasad applied to the revenue Court for partition of the aforesaid 5-pies odd share purchased by him from Sita Ram The proclamation was thereupon issued by the revenue Court under S. 110, Land Revenue Act, fixing the 13th July 1927 as the date for filing the objections. The case was not taken up on that date, since the notice had not been received back and it was adjourned to 30th July 1927. It could not be taken up on that date also and it was again adjourned to 10th August 1927, and on that date the objector Raghubar Dayal filed an objection to the effect that the sale-deed dated 17th October 1924, under which Babu Sarju Prasad had purchased the share, which he wanted to get partitioned from the revenue Court, was invalid, being without consideration and having been obtained by undue influence The case was not heard on that date and was adjourned to 24th August 1927 On that date the revenue Court passed an order to the effect that the objectors, who are now the plaintiffs of the present suit, should file a suit in the civil Court in order to get this question relating to the sale-deed settled and gave them three months' time for the purpose The plaintiffs filed the present suit on 22nd November 1927 within the time fixed. They have impleaded Babu Sarju Prasad as defendant 1 and his two sons, Babu Ram Shankar and Babu Gur Prasad as defendants 2 and 3 The plaintiffs also claim possession of the share in dispute alleging themselves to be the heirs of Sita Ram

The defence raised by the respondents consists of three pleas, firstly that the civil Court had no jurisdiction to entertain the suit, since the order passed by the revenue Court under which it had referred the plaintiffs-appellants to the civil Court had no jurisdiction to do so, the objections having been filed by the appellants in the revenue Court beyond time; secondly that the sale-deed dated 17th October 1924 was a good and valid deed having been executed by Sita Ram for consideration and of his free will; and thirdly that the suit was barred by limitation. The Munsif of Tarabganj, District Gonda, who tried the suit, held that the deed was for consideration and the allegation of the plaintiffs to the effect that the consideration received under the deed had been returned to the purchaser Babu Sarju Prasad was not established.

On the question of undue influence he decided the point against the plaintiffs On the question of limitation his finding was in plaintiff's favour, but he did not decide the question of jurisdiction. In view of the findings stated above he, however, dismissed the plaintiffs' suit by his decree dated 25th February 1928 On appeal the learned Subordinate Judge of Gonda came to the conclusion that the plaintiffs-appellants had failed to establish the invalidity of the sale-deed on the ground of want of consideration and of undue influence On the question of jurisdiction he was of opinion that the suit was not cognizable by the civil Court. On the question of limitation he agreed with the learned Munsif that the suit was not time barred but in view of his findings on the 1st two points he dismissed the appeal by his decree dated 21st May 1928 The plaintiffs-appellants have now come up to this Court in second appeal, and the same three points have now been urged by their learned advocate in second appeal I now proceed to deal with each of these three points

Undue Influence and want of consideration.—On the question of undue influence I am fully satisfied that the findings of the two Courts below cannot be disturbed It is clear from the evidence on the record that the relations between Sita Ram, the vendor, and the plaintiffs-appellants, who were his next heirs, were not good, and that he was anxious during his lifetime, to sell the property. He approached several persons and ultimately sold it to respondent 1. Under these circumstances it is clear that the sale-deed was executed with his free will and consent and that the charge of undue influence laid by the appellants at the door of respondent 1, cannot be considered to have been established It was argued on behalf of the plaintiffs-appellants that respondents 2 and 3 (sons of respondent 1), who are pleaders practising at Gonda, have in several cases appeared on behalf of Sita Ram, and it was argued that under those circumstances, respondent 1 who took the sale-deed should be considered to be in the position of active confidence. I am unable to take this view In my opinion if a pleader appears in one or two cases as counsel on behalf of his client, it cannot be said that he is his permanent pleader and as such stands, in regard to him, in a position of active confidence so as to justify the throwing of the burden of proving the good faith of the transaction on the particular pleader The case would be quite different if that pleader happens to be the permanent counsel of the other side The argument, therefore, that under S 111, Evidence Act, 1872, Babu Sarju Prasad was bound to prove the bona fides of his sale-deed, cannot be accepted

On the question of consideration both the Courts below have disbelieved the evidence produced on behalf of the plaintiffs, and have come to the conclusion that the plea of the plaintiff-appellants as to return of consideration is not established This is a pure finding of fact and nothing has been urged before me to hold that it is vitiated by any error of law or of procedure It was argued that in the judgment the learned Subordinate Judge himself has given expression to his idea that probably no consideration for the deed had been paid I may point out that the learned Subordinate Judge in the very next sentence states that though he suspected it there is no good evidence on the record to prove it. I therefore, hold that the sale-deed in dispute is a valid deed for consideration. My finding, therefore, is that the sale-deed dated 17th October 1924 is a deed for consideration and one executed by Sita Ram with his free will and consent, and therefore valid and operative in law.

Jurisdiction —On this point the learned Subordinate Judge has held that because the plaintiffs-appellants filed their objections on 10th August 1927, and not on 13th July 1927, the date fixed in the proclamation for filing objections, they were beyond time and the revenue Court had no jurisdiction to entertain the objections and to refer the plaintiffs-appellants on the grounds of those objections to get the question of title decided by the civil Court. I have heard the arguments at length on this point and have come to the conclusion that the decision of the learned Subordinate Judge on this point cannot be maintained.

The learned Subordinate Judge has relied upon a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Mukhtar Ahmad* v. *Barati Lal* (1) for the proposition that where a

(1) [1914] 17 O. C. 224=25 I. C. 316=1 O. L. J. 395.

statute confers jurisdiction upon a tribunal of limited authority the conditions and qualifications under which that jurisdiction has to be exercised must be directly complied with. There is no doubt that the principle laid down in that case is true, and on the basis of this authority I would be prepared to hold that a revenue Court is not entitled to entertain an objection raising a question of proprietary title if not filed at the proper time. What is proper time must, however, be determined according to the facts and circumstances of each case. The general rule which had been laid down by the Allahabad High Court as well as by this Court in regard to objections filed under S 111, United Provinces Land Revenue Act, 1901, is to the effect that if a date is fixed in the proclamation for filing objections and proclamation is duly served upon a party to the partition proceedings and the case is taken up on the date fixed in the proclamation and no objection is filed on that date and the case proceeds, it would not be open to any party to file objections raising a question of proprietary title at any future time If, however, the proclamation has not been served upon a party to the partition proceedings and the case is not taken up on the date fixed in the proclamation and the proceedings are adjourned to another date, on which date the objections are filed, it cannot be held that they have not been filed at the proper time and should not be entertained by the revenue Court.

In *Tulsi Prasad* v. *Matru Mal* (2) objections were filed not on the day specified in the proclamation for filing of such objections, but on the next day before the revenue Court took any action in the case and it was held that the law as laid down did not cover a case in which objections were filed after the date fixed in the proclamation for filing objections but before the Court took any proceedings in the partition case.

In *Rudan Singh* v. *Kala Singh* (3) my brother Raza, J. has taken the same view. In that case he has held that where an objection is raised after the appointed time but before the revenue Court has taken any steps under S. 111, United Provinces Land Revenue Act, the revenue Court is not precluded from dealing with such an objection and if it does deal with it, its decision will be considered to be one under S. 111, Land Revenue Act. From the facts of this case it appears that the case could not be taken up on 13th July 1927, but had been adjourned once to 30th July 1927, and then to 10th August 1927, when the objections were actually filed It is also admitted before me that the revenue Court had not taken any action in the case. Under these circumstances I do not agree with the opinion of the learned Subordinate Judge that the revenue Court had no jurisdiction in the present case to entertain the objections filed by the plaintiffs-appellants and that the order of the revenue Court referring them to the civil Court was an order passed without jurisdiction.

Limitation. — On the question of limitation also I regret I cannot agree with the view of the Courts below. It is admitted that the article laying down limitation for a suit like the present is that laid down in Art. 91, Limitation Act That article provides that for getting a deed cancelled or set aside on the ground of undue influence or fraud the limitation should be three years running from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The learned Subordinate Judge has taken the view that although Sita Ram must be considered to possess the knowledge of the facts entitling him to get the deed cancelled from the date of the execution of the sale-deed and although the limitation would run against him from that very date, yet it would be a different case so far as the plaintiffs-appellants were concerned, since they had no knowlege of the facts under which the deed was executed. I regret I cannot agree with this view. The word "plaintiff" has been defined in S 2, Cl. (8), Limitation Act, 1908, as including any person from or through whom a plaintiff derives his right to sue. It is clear that the plaintiffs-appellants are the next heirs of Sita Ram and if Sita Ram possessed knowledge of particular facts which would entitle him to bring the suit, that knowledge must be considered as one attributable to the plaintiffs of the present case as well. It is admitted that so far as Sita Ram was concerned limitation against him ran from the date of the

(2) [1896] 18 All. 210=(1896) A. W. N. 90.
(3) A. I. R. 1926 Oudh 309.

execution of the sale deed, since he must be presumed to possess knowledge of all the facts and circumstances, which would enable him to bring the present suit. It is provided in S. 9, Limitation Act, 1908, that where once time has begun to run no subsequent disability or inability to sue stops it. It, therefore, appears to me that if Sita Ram had remained alive and if he had brought the present suit on 22nd November 1927, his suit would have been time barred, since the sale-deed in dispute had been executed on 17th October 1924. If Sita Ram's suit would have been barred I fail to see that the suit of the plaintiffs who claim this property as heirs of Sita Ram should not be held also to be barred.

In *Janki Kunwar* v. *Ajit Singh* (4) a case which went up to their Lordships of the Privy Council from the province of Oudh, their Lordships held that where a suit had been brought to get a deed cancelled on the ground of fraud and undue influence, the fact must be considered to have been known to the executant from the date of the deed and if brought more than three years from that the suit could not be considered to be maintainable. Their Lordships observed that if all the facts were known to a particular plaintiff and if he was a man not incapable of having that knowledge and of allowing it to operate on his mind, the case would clearly come within the provisions of Art. 91 and if brought after more than three years that would be sufficient to decide the suit. I would, therefore, hold that the plaintiffs-appellants' suit was rightly dismissed by the Courts below.

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

R K. *Appeal dismissed.*

(4) [1888] 15 Cal. 58=14 I. A. 148=5 Sar. 92 (P.C.).

A. I. R. 1929 Oudh 71

WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Siri Ram Kuar—Plaintiff—Appellant.

v.

Ram Prasad Ghosh and *others*—Defendants—Respondents.

Execution of Decree Appeal No. 53 of 1928, Decided on 9th November 1928, from order of Dist., Judge, Fyzabad, D/- 30th April 1928.

Prov. Insolvency Act, (1920) S. 28 (6)—Holder of rent-decree — Judgment-debtor adjudicated insolvent before decree — Insolvency proceedings do not save limitation —Limitation Act, Art. 182.

The holder of a rent-decree is always a secured creditor. The mere fact that the judgment-debtor was declared insolvent prior to the passing of decree does not save limitation and the application for execution made after 3 years is time barred. [P 72 C 1]

P. N. Chaudhri—for Appellant.

Gopal Chandra Sinha — for Respondent 2.

Judgment.—These two appeals arise out of the two orders of the District Judge of Fyzabad both dated 30th April 1928, holding that the applications for execution of decree filed by the appellant are time barred. The facts of the case are that the appellant Thakurain Sri Ram Kuar holds two decrees against the respondent Gur Prasad and Lachhmi Nath for arrears of rent. One of these decrees was passed on 23rd May 1921 and the other was passed on 4th August 1921. The respondents Gur Prasad and Lachhmi Nath were adjudged insolvents in 1917 prior to the date when the two aforesaid decrees were obtained by the appellant against them. The first application for execution was filed by the appellant on 21st March 1927, but it was dismissed for want of prosecution on 7th September 1927. Subsequently on 1st October 1927 the appellant filed the present applications for execution from which the present appeals arise. Both Courts below have held that the two execution applications filed by the appellant are time barred since they were made more than three years after the date of the passing of the decree.

In appeal it is contended on behalf of the appellant that the decision of the Courts below is wrong and the execution applications now filed by the appellant are within limitation inasmuch as the execution of these decrees must be considered to have been stopped, since the respondents were insolvent. We regret we cannot accept this contention It is admitted on behalf of the appellant that she is a secured creditor. Under S. 28 sub-S (6) the insolvency proceedings are not to affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if no order of adjudication had been made. It is, therefore, clear

that the fact the respondents were adjudged insolvents could not have prevented the appellant from obtaining the decree or putting it into execution and under these circumstances no question of exclusion of any period of limitation at all arises The learned advocate for the appellant admits that the applications for execution which have given rise to the present appeals were made more than three years from the date of the passing of those decrees

We are, therefore, of opinion that the execution of the decrees is time-barred and the Courts below were correct in dismissing those applications on the ground of limitation The appeals, therefore, fail and are dismissed with costs

W.S /R K. *Appeal dismissed.*

A I. R. 1929 Oudh 72

WAZIR HASAN, AG C J. AND GOKARAN NATH MISRA, J.

Ajodhia Prasad and *another*—Plaintiffs—Appellants.

v,

Lakhpat and *others*—Defendants—Respondents.

Second Appeal No. 163 of 1928, Decided on 19th November 1928, from decree of Addl Sub-Judge, Gonda, D/- 25th February 1928

(a) United Provinces Land Revenue Act, S. 108—No difference is made between perfect and imperfect partition.

Under the provisions of the U. P. Land Revenue Act there is no difference between the case of a perfect partition and imperfect partition. 13 *A. L. J.* 548 and *A. I. R.* 1926 *Oudh* 101, *Foll.* [P 74 C 2]

(b) United Provinces Land Revenue Act, S. 233 (k)—Partition perfect or imperfect is equally binding and cannot be challenged in civil Court.

All questions of title whether expressly or impliedly decided during the course of partition proceedings are binding upon all co-sharers who are parties to it whether the partition relates to several mahals or one single mahal or the portion of one mahal. Such a partition cannot be challenged in civil Court: *A. I. R.* 1921 *Oudh* 144, *Rel. on*, 81 *All.* 73 (*P.C.*), *Dist.* [P 75 C 1]

Aditya Prasad—for Appellants.

Hyder Husein — for Respondents 1 and 2.

Gokaran Nath Misra, J.—This is a second appeal arising out of a suit brought by the plaintiffs-appellants to tain property which had been redeemed by one of their co-mortgagors and the dispute in appeal relates merely to the amount of the share which they are entitled to recover. The facts of the case are that on 5th June 1915 a mortgage was executed by three persons, namely, Padarath, father of plaintiff 1, Mt. Bariari plaintiff 2 and one Ram Sukh, in favour of one Rampath for a consideration of Rs 225 The mortgage was one with possession. Ram Sukh died and his heir-at-law Sita Ram who was defendant 1 in the present case redeemed the entire mortgage Although Sita Ram was the heir-at-law of Ram Sukh yet it appears that the mutation of names in respect of the property left by Ram Sukh was not exclusively made in favour of Sita Ram but a portion of the property went to the plaintiffs as well in whose favour mutation was granted to that extent. The plaintiffs now claim redemption of the share to the extent that is to be found entered in their name in the khewat. We may also state that the share entered in the khewat was subsequently maintained in an imperfect partition of mahal Lalai, village Purai, Brahmachari, hamlet of Wazirganj, District Gonda, effected in the revenue Courts in the year 1923-1924 The main defence put forward by the defendants-respondents who are the heirs of Sita Ram is to the effect that the entry in the khewat was erroneous since Sita Ram being the nearest heir of Ram Sukh was entitled to his entire property and that the plaintiffs-appellants were not entitled to any share therein The reply urged by the plaintiffs-appellants to this contention raised on behalf of the defendants-respondents was to the effect that this defence was not open to the defendants-respondents inasmuch as the share entered in the khewat had been confirmed by the aforesaid partition which must be deemed to have settled finally the title of the parties in respect of the share so entered.

The learned Munsif of Tarabganj who tried the case held that after the partition of 1923-1924, by virtue of which the plaintiffs had been allotted the share of which they claimed redemption in the present suit, it was not open to the defendants-respondents who were parties to those partition proceedings through their predecessor-in-title Sita Ram to deny

perty. In that view of the case he gave a decree for the entire share claimed by the plaintiffs as will appear from his decree dated 20th November 1927.

On appeal the learned Additional Subordinate Judge of Gonda has taken a different view and has given the plaintiff a decree only in respect of that share which was their personal property and has dismissed their suit in respect of the additional share which has been allotted to their name after the death of Ram Sukh and in respect of which their claim had been confirmed at the time of partition The result was that he decreed redemption to the plaintiffs of only a portion of the property claimed subject to the payment of a proportionate sum of money This was the order embodied in his decree dated 25th February 1928 The plaintiffs have now appealed to this Court and originally the case came on for hearing before a single Judge of this Court who has referred it for decision to a Bench of two Judges. The case has now been laid before us The case has been argued at great length and we have come to the conclusion that this appeal must be allowed and the decree passed by the learned Munsif must be restored We now proceed to give our reasons for our decision.

It appears that on 20th March 1923 the plaintiffs-appellants filed an application in the revenue Court for an imperfect partition of mahal Lalai named above and prayed that a 7-annas odd share which was entered opposite their name in the khewat should be separated from the rest of the mahal (vide Ex 15) On receipt of this application for partition the revenue Court issued a proclamation calling upon all the recorded cosharers including Sita Ram, who was one of them, to appear and to file any objections which they might deem necessary to make. The date fixed in the proclamation for making objections was the 21st May 1923 (vide Ex. 20). On the date fixed, namely, the 21st May 1923 Sita Ram filed an objection but never raised any question of title which he seems to have subsequently raised. In the objections then filed he admitted the title of the plaintiffs to the extent of the share entered in the khewat but prayed that pattis should be formed on partition in a particular way (vide Ex. 16). On 22nd May 1923 an order was passed by the revenue Court that the pattis should be prepared in accordance with the khewat as desired by the applicant (vide Ex. 17). It appears that subsequently on the 27th and 28th June 1923 Sita Ram filed another objection in which one cosharer also joined with him. In that objection he challenged the accuracy of the entry in the khewat (vide Ex. 19) The revenue Court rejected the second objection on 3rd August 1923 on the ground that it had been filed too late The partition then proceeded and three pattis were formed two of which are owned by the plaintiffs and a third was owned by Sita Ram. On 23rd June 1924 Thakur Sardar Singh, Deputy Commissioner confirmed the partition which awarded to the plaintiffs the share equivalent in extent to what was entered opposite their names in the mutation proceedings

It is urged in appeal before us on behalf of the plaintiffs-appellants that the defendants-respondents cannot now be allowed to urge an objection which would reduce the share allotted to them at the time of partition and S. 233 (k), U. P. Land Revenue Act, 1901, was relied upon for the purpose. Several decisions of this Court as well as of the late Court of the Judicial Commissioner of Oudh and also of the Allahabad High Court have been relied upon by the plaintiffs-appellants in support of the proposition that once a particular share is allotted to a party during the course of partition proceedings it is not open to any person who was a party to those partition proceedings to challenge the accuracy of such an award since such objections would alter the distribution effected at the time of partition On behalf of the respondents it is contended that since the partition was only an imperfect one and since one single mahal had been partitioned into several pattis the provisions of S 233 (k) could not apply. We regret we cannot accept either of the contentions of the respondents and must hold that the objection raised on behalf of the plaintiffs-appellants must prevail.

As to the first objection we must point out that the contention embodied therein receives no support whatever when we refer to S 106, U. P. Land Revenue Act (3 of 1901). When we refer to that section we find that partition has been defined to mean a division of a mahal or of a part of mahal into two or more por-

tions each consisting of one or more shares It is laid down in the case of "imperfect partition," the several portions remain jointly responsible for the revenue assessed on the whole mahal whereas in the case of a "perfect partition" the whole mahal is divided and the several portions became separate mahals each severally responsible for the revenue distributed thereon It is laid down in the same section that the procedure prescribed in Ch 7 in which the section finds its place shall be followed in all partitions whether imperfect or perfect unless it is otherwise expressly declared Referring to S. 111 which is a section of the same chapter laying down the procedure which is to be followed by the revenue Court when any objection is raised before it by a recorded cosharer which involves a question of proprietary title which has not been already determined by a Court of competent jurisdiction, we find that the procedure prescribed is that the revenue Court may either decline to grant the application for partition until the question raised has been determined by a competent Court or may require any party to the case to institute within three months of the date of its order a suit in the civil Court for the determination of such question or may itself proceed to inquire into the merits of this objection. S. 112 further provides that all decrees passed by the revenue Court when it chooses to decide itself the question of proprietary title raised in the objection shall be held to be equivalent to a decree of a civil Court and shall be final between the parties unless appealed to the higher authorities.

It would, therefore, clearly appear that all the orders which relate to the question of title and are passed by a revenue Court if it chooses to pass such an order must be considered to be binding upon the parties whether in the course of the said partition proceedings the partition effected is imperfect or perfect It was urged on behalf of the respondents that no such decision has been arrived at in this case by the revenue Court. This argument cannot be accepted inasmuch as a party to a partition proceeding if he does not choose to file any objection raising the question of proprietary title at the proper time and his objection is consequently dismissed must be deemed to have raised the question and got an adjudication thereof adversely to himself.

It, therefore, appears to us to be clear that under the provisions of the United Provinces Land Revenue Act (3 of 1901) there is no difference so far as the point before us is concerned, between the case of a perfect and imperfect partition. We are supported in this view by a decision of the Allahabad High Court reported in *Raghubir* v *Tulshi Ram* (1). It was held by Chamier, J., in that case that the provisions of Ss. 110, 111 and 112, United Provinces Land Revenue Act (3 of 1901), applied to imperfect partitions as well and the rule laid down by the various authorities that where a decision relating to a question of title has been either expressly or impliedly arrived at during the course of partition proceedings, it is no more open to any party thereto to challenge that decision subsequently, applies to cases both of perfect partition as well as imperfect partition. The law relating to the effect of partition proceedings has been very clearly laid down in a recent decision of the late Court of the Judicial Commissioner of Oudh reported in *Baijnath Singh* v. *Rajju Singh* (2) to which one of us was a party, where the whole law is discussed and it is sufficient for us to state that we are in full agreement with the view expressed in that case.

As to the second objection we are of opinion that it is equally untenable and that the question is concluded by a recent authority In this connexion we may refer to a decision of the late Court of the Judicial Commissioner of Oudh reported in *Shiam Kunwar* v *Fateh Singh* (3), to which one of us was also a party. The question now urged before us on behalf of the defendants-respondents that the restriction laid down in S 233 (k), United Provinces Land Revenue Act, applies only where several mahals are partitioned and not where one single mahal is partitioned, was raised in that very case and we need only quote a portion of the judgment which deals with this point:

'We must therefore proceed to examine that language. The prohibition is in the following words: "No person shall institute any suit or other proceedings in the civil Court with respect to partition or union of mahal.' The difficulty in interpretation is stated to be

(1) [1915] 13 A. L. J. 548=29 I. C. 222.
(2) A. I. R. 1926 Oudh 101.
(3) A. I. R. 1921 Oudh 144=24 O. C. 268.

the absence of the words "part of a mahal" in the above clause. In our opinion the difficulty is only apparent and not real. It will be noticed that in Cl. (k), S. 233, the heading of Chap. 7, Land Revenue Act is quoted with the change of "or" for "and." A reference to Chap. 7, will show that the words "of mahals" govern only the word "union" and not the word "partition."

"Partition is given a special meaning and standing by itself means the division of a mahal or of a part of mahal into two or more portions (S. 106) The heading therefore if written in an explanatory manner would convey the meaning that Ch. 7 deals with the division of a mahal or of a part of a mahal and with union of mahals. It will be noticed if we read through Ch. 7 that the word partition has been given throughout the chapter this special meaning and that nowhere the words "partition of mahal" are used. The word "union" has no special meaning assigned to it in the Act. Similarly in Cl. (k) S. 233, the words "of mahals" qualify the word "union" only and not the word "partition" which has the special meaning of S. 106 of a division as mahal or of part of a mahal into two or more portions."

"If the jurisdiction of the civil Court is not barred in the case of the partition of a portion of a mahal, parties may get a whole mahal partitioned by a civil Court in two suits covering two portions thereof. The exclusion of the jurisdiction of the civil Court is necessary for the partition of a mahal to enforce the important provision of S. 103, Land Revenue Act, that Collector can stop a partition independently of the wishes of the cosharers of a mahal to the contrary. The power of a Collector, which it is desirable to maintain to facilitate the collection of revenue will disappear if partition of a portion of a mahal by the civil Court is permitted."

We are in full agreement with the remarks quoted above, and are of opinion that all questions of title whether expressly or impliedly decided during the course of partition proceedings are binding upon all cosharers who are parties to the partition proceedings whether the partition relates to several mahals or one single mahal or the portion of one mahal

The learned counsel for the defendants-respondents relied very much upon a case decided by their Lordships of the Privy Council which will be found reported in *Chokhey Singh* v. *Jote Singh* (4). We have examined that case carefully and it appears to us that it does not in any way help the respondents. In that case it is true that their Lordships observed on p 292 that the effect of the partition was that the village had been divided into two thoks, one of which was divided between the parties to that suit in almost equal proportions and that the shares of no other persons were affected by the partition order. But this does not in any way warrant the inference that where the effect of a suit was to deal only with the entity of an entire mahal the restriction laid down in S. 233 (k) could not be applied. It appears to us to be quite clear that the defence raised by the respondents clearly purports to affect the share which has been allotted to the plaintiffs-appellants. It is no doubt true that the shares of the plaintiffs as well as of the defendants are situate within one entire mahal but that would be no ground for saying that the shares allotted to each of them are not to be disturbed if the objection of the defendants-appellants is held to prevail.

We may further point out that in the case quoted above their Lordships of the Privy Council allowed the civil suit to prevail because it had been agreed upon between the parties during the course of partition proceedings that the partition was to be effected for the present according to possession and that it was to remain open to the parties to get the question of title decided by means of a separate suit filed in a competent Court. It is obvious that no such agreement was arrived at in the present case and consequently the ruling quoted above cannot apply to the facts of the present case. We are, therefore, of opinion that the judgment of the Additional Subordinate Judge of Gonda cannot be maintained. We accordingly accept the appeal, set aside the decree of the lower appellate Court and restore that of the Munsif with costs in all the three Courts.

Wazir Hasan, Ag. C J.—I agree that the appeal should be allowed and the decree of the trial Court restored. My views on the question of finality of partition proceedings arising under Ch. 7. U. P. Land Revenue Act, 1901, have been expressed twice before, once in the case of *Shiam Kunwar* v. *Fateh Singh* (3) and on the second occasion in the case of *Baij Nath Singh* v *Rajju Singh* (2)

W S /R K. *Appeal allowed.*

(4) [1903] 31 All. 73=12 O. C. 289=1 I. C. 166=30 I. A. 38 (P.C.).

* A. I. R. 1929 Oudh 76

GOKARAN NATH MISRA AND PULLAN, JJ.

Mt. Jilai — Opposite Party — Appellant

v

Abdul Rahman and *others* — Objectors —Respondents

Execution of Decree Appeal No 39 of 1928, Decided on 2nd November 1928, from order of Sub-Judge, Gonda D/- 2nd May 1928

*** (a) Civil P C , S. 41—Even after issue of certificate under S. 41, transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings.**

The Court to which a decree has been transferred for execution under S. 39, though ceases after the issue of certificate under S. 41 to have jurisdiction for the purpose of issuing a fresh process for execution, has jurisdiction to decide an objection lodged before it in respect of anything done in the course of execution proceedings taken by it *A. I. R.* 1925 *All.* 179, *Dist.* [P 77 C 2]

*** (b) Civil P. C., S. 47—Applications as objections by the parties to suit are governed by Lim. Act Art. 181 and not by Art. 165—Limitation Act, Arts 165 and 181.**

Article 165, Limitation Act, does not govern the cases of those applications which are filed by the parties to the suit as objections to the execution proceedings under S. 47, Civil P. C The only article applicable in those cases is Art. 181 . 38 *All.* 339 , 42 *Mad.* 753 (*F.B*) ; *A. I. R.* 1922 *Bom.* 271 and 1 *L. L. J.* 230 , *Foll.* 17 *O. C.* 94 , 6 *O. C.* 44 ; 21 *Mad.* 494 ; and 25 *All.* 343 , *Diss from.* [P 79 C 1]

S. N Srivastava—for Appellant

Radha Krishna—for Respondents.

Judgment —These two sets of appeals arise out of execution proceedings in one and the same case The first four appeals, namely, appeals Nos. 40, 41, 44 and 45 arise out of four applications filed by the objectors respondents under S 47, Civil P C , and disposed of by the learned Subordinate Judge of Gonda by his order, dated 2nd March 1928. The second four appeals, namely appeals Nos. 39, 42, 43 and 46 arise out of a similar set of four objections filed by the objectors respondents under Ss 47 and 144, Civil P. C,, and disposed of by the same learned Judge by his order dated 2nd May 1928 It is admitted by the parties that our decision in the first four appeals will govern the decision of the second set of four appeals. The facts are that one Bismillah Khan owned certain properties some of which were situate in the district of Gonda in Oudh and others in the district of Basti in the province of Agra He died leaving one son Mohammad Khan and four daughters After the death of Bismillah Khan his son Mohammad Khan entered into possession of the entire property to the exclusion of the other heirs On 16th February 1915 he mortgaged some of the properties to the respondents or their ancestors This was a mortgage with possession. The objectors respondents are the mortgagees in possession under the said mortgage On the 13th July 1915 the three daughters of Bismillah Khan and the heirs of the fourth daughter who had died in the meanwhile brought four separate suits in the Court of of the Additional Subordinate Judge of Basti against Mohammad Khan for recovery of their share in the property left by Bismillah Khan and the respondents to whom some of the property had been mortgaged under the deed of 16th February 1925 Mohammad Khan confessed judgment in that case and a compromise was arrived at between the plaintiffs in that case and one of the transferees. The suits were, however, dismissed against the other transferees on the ground that the plaintiffs were excluded from inheritance On 11th July 1925 possession was obtained in execution proceedings in respect of the properties decreed to plaintiffs of the four suits against Mohammad Khan So far there is no dispute

The plaintiff's also, however, obtained in execution proceedings possession over the properties which had been transferred by Mohammad Khan and in respect of which the suit of the four plaintiffs had been dismissed against the transferees The transferees then instituted four different suits in the Court of the Munsif of Utraula, District Gonda, for recovery of possession of the properties of which the appellant had taken possession unlawfully. The suits were dismissed by the learned Munsif on 12th August 1926 on the ground that they were not maintainable in view of the provisions of S 47, Civil P. C., 1908. This decision was affirmed in appeal by the learned Additional Subordinate Judge of Gonda on 28th March 1927. The matter was carried further in appeal to this Court and the decision of this Court will be found to be reported in *Taluqdar*

Khan v. *Mt. Khairunnissa* (1) This Court agreed with the decision of the Courts below that separate suits filed by the respondents in the Court of the Munsif of Utraula were not maintainable but it held that the suits should not have been dismissed but treated as objections under S. 47, Civil P C, and directed that the plaints in those suits should be treated as proceedings under S. 47, Civil P. C, and as such they directed that the objections should be filed in the Court of the Subordinate Judge of Gonda to whose Court the decrees had been transferred for execution by the Court at Basti

The four suits have now been treated by the learned Subordinate Judge of Gonda as application under S 47. Civil P C, and have been disposed of as such. Two objections were taken by the appellant in the Court below regarding the said objections, they being to the effect that the Court of the Subordinate Judge of Gonda had no jurisdiction to entertain objections under S 47, Civil P C, and that the objections were barred by limitation. The Subordinate Judge of Gonda overruled both the contentions of the appellants and has allowed the objections of the respondents and the present appeals are against the said order We might also state that besides the four objections which have been decided by the learned Subordinate Judge of Gonda by his order dated 2nd March 1928 and which related to the property situate in village Baondihar, perganna Utraula, district Gonda, four other objections were filed under Ss 47 and 144, Civil P C, relating to the property situate in village Sikhoia Kalan, perganna Utraula, district Gonda These objections have also been allowed by the learned Subordinate Judge of Gonda by his order dated 2nd May 1928 which has given rise to the four appeals Nos 39, 42, 43 and 46. In both sets of appeals the same contentions have again now been urged on behalf of the appellants We now proceed to deal with each of those contentions.

The first contention as stated above relates to the question of jurisdiction The contention put forward on behalf of the appellants is to the effect that the Gonda Court had no jurisdiction to deal with these objections since the said Court had sent back the execution file to the Court at Basti after certifying under S. 41, Civil P C., that the decree had been completely executed. The argument was that the Gonda Court must be deemed to have been left with no jurisdiction in the execution matter after it had sent back the decree to the Court at Basti. In support of this contention reliance was placed on a ruling of the Allahabad High Court reported in *Shiam Lal* v *Koerpal* (2) In our opinion this contention has no force. Although the Court at Gonda had ceased to have jurisdiction to further execute the decree it had not ceased to have jurisdiction to decide an objection relating to the execution proceedings taken in that Court In the Allahabad case quoted above the point decided was that the proper Court to which an application for execution should be made is the Court to which a decree is transferred for execution under S 39, Civil P C, until the Court to which the decree is transferred issues a certificate under S. 41 of the Code and returns the copy of the decree to the original Court, and that after the issue of a certificate the Court to which the decree was transferred ceases to have jurisdiction We are in entire agreement with the proposition enunciated in the said ruling. In our opinion, however, the case cannot be considered to be an authority for the proposition which is now for decision before us. The Court at Gonda may have ceased to have jurisdiction for the purpose of issuing a fresh process for execution but that cannot mean that the said Court has also ceased to have jurisdiction to decide an objection lodged before it in respect of anything done in the course of the execution proceedings taken by it. Indeed we have no hesitation in holding that that would be the only proper Court to decide the objection in regard to such a matter. We therefore hold that the Court of the Subordinate Judge of Gonda has got jurisdiction to decide the two sets of objections lodged by the respondents in that Court.

The second contention is to the effect that these two sets of objections are barred by time It is admitted that possession was wrongly delivered to the appellants on 11th July 1925 and one set of objections was filed on 7th November

(1) A. I. R. 1928 Oudh 98.

(2) A. I. R. 1925 All. 179.

1927 and the other set of objections was filed on 3rd December 1927. The contention raised on behalf of the appellants is to the effect that Art. 165, Sch. 1, Lim. Act, 1908, applies to both these sets of objections and they are time barred, having been filed after one month of the date of the delivery of possession The reply on behalf of the respondents is to the effect that Art 165 does not apply to the present sets of objections and that the article applicable is Art. 181 under which three years' period is allowed. The sole point, therefore, for decision is whether Art 165 is applicable or Art. 181. On behalf of the appellants reliance is placed on two rulings of the late Court of the Judicial Commissioner of Oudh, one reported in *Jagan Nath* v. *Datta* (3) and the other in *Raja Ram* v. *Itraj Kunwar* (4). On behalf of the respondents reliance is placed upon the decisions reported in *Abdul Karim* v. *Islamunnissa* (5); *Vachali Rohini* v. *Kandi Kombi Aliassan* (6); *Rasul* v. *Amina* (7) and *Sharfu* v. *Mir Khan* (8). We have heard the counsel of the parties at great length on this question and have come to the conclusion that in view of the recent decisions of the various High Courts in India, the view of law taken by the late Court of the Judicial Commissioner of Oudh in the two cases quoted above must be deemed as incorrect. Art. 165 runs as follows:

Description of application	Period of limitation.	Time from which period begins to run
Under the Code of Civil Procdure, 1908, by a person dispossessed of immovable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days.	The date of the dispossession.

From the wordings of the said article it is clear that it is only applicable to the case of an application which is filed under the Code of Civil Procedure, 1908, by a person dispossessed of immovable property and disputing the right of the decree-holder to be put into possession thereof

(3) [1903] 6 O. C. 44.
(4) [1914] 17 O. C. 94=24 I. C. 137.
(5) [1916] 38 All. 339=34 I. C. 231=14 A. L. J. 401.
(6) [1919] 42 Mad. 753=37 M. L. J. 340=10 M. L. W. 410= 53 I. C. 437=(1919) M. W. N. 732 (F.B.).
(7) A. I. R. 1924 Bom. 271=46 Bom. 1031.
(8) [1919] 1 L. L. J. 220.

Turning back to the Code of Civil Procedure we find that provision is only made in the Code for such an application under O. 21, R 100. It is admitted that an application under that rule is to be made by a person other than the judgment-debtor as is clear from the wordings of the rule itself If therefore the application contemplated by Art 165 is the one mentioned in O. 21, R 100, it is clear that the applicant must be one other than the judgment-debtor If the judgment-debtor wishes to file an objection his remedy is clearly to apply under S. 47, Civil P C., and the limitation applicable in such a case would be one provided for by Art. 181 Lim. Act This is the view taken by their Lordships of the Allahabad High Court in *Abdul Karim* v. *Islamunnissa* (5), and we are in full agreement with the following observation of their Lordships in the said case to be found at pp. 344 and 345 :

"Now that is a precise and compendious description of the right given and the application allowed to person other than the judgment-debtor by O. 21, Rr. 100 and 101. It certainly applies to such an application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the legislature enacted Art. 165, it had the provisions now contained O. 21, R. 100 in mind. That is to say, it intended Art. 165 to apply to such an application. The argument for the view adopted in the reported cases, and followed by the District Judge in the case is that the words are wide enough to include a judgment-debtor. Separated from their context this is true. A judgment-debtor is a 'person' in such a case as this. Moreover, the judgment-debtor in his application under S. 47 is complaining of the same sort of act as an applicant under O. 21, R. 100 would have to complain of. But the moment it is realized that what the schedule to the Limitation Act consists of is an enumeration of suits, appeals and applications of various kinds, and that the language of Art. 165 is merely a definition or description, all difficulty as to the use of the word 'person' disappears. In our opinion the word 'person' in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by O. 21, R. 100 to make an application of that description. To hold otherwise would result

in this, that if a judgment-debtor applied to the Court under O. 21, R. 100 and adopted the language of Art. 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying under S. 47 for more than thirty days the language of the article is to be applied to him. If anything were required outside the context in which the article is used, to assist us to an interpretation of it, we should be entitled, indeed in our opinion we should be bound, to recognize, that to hold as has been held by the District Judge in this case involves depriving the judgment-debtors for ever of all title to a considerable portion of immovable property because they did not make a summary application with regard to its seizure within thirty days. Such a result in the case of a person already in straitened circumstances appears to us to be something which it is safe to assume that the legislature never intended and which it certainly never enacted in direct terms."

The view taken in the Allahabad case has also been adopted by a Full Bench of the Madras High Court in the decision reported in *Vachali Rohini* v. *Kandi Kombi Aliassan* (6) and by their Lordships of the Bombay High Court in *Rasul* v *Amina* (7) and by their Lordships of the Lahore High Court in *Sharfu* v *Mir Khan* (8) We are in entire agreement with the view of law taken in those cases It is not necessary for us to criticize in detail the view taken in the two decisions of the late Court of the Judicial Commissioner of Oudh which we have quoted above The case reported in *Raja Ram* v *Rani Itraj Kunwar* (4) was considered in the case reported in *Abdul Karim* v *Islam-un-nissa* (5) The view followed in the former case was based upon two decisions one of the Madras High Court reported in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (9) and the other reported in *Har Din Singh* v. *Lachman Singh* (10). The former case has been overruled in *Vechali Rohini* v. *Pathalathum Kandi Kombi Aliassan* (6) quoted above and the latter case has been dissented from in *Abdul Karim* v *Islam-unnissa* (5). We are therefore of opinion that the limitation provided in Art. 165, Lim. Act, does not govern the cases of those applications which were filed by the parties to the suit as objections to the execution proceedings under S. 47, Civil P. C It has already been decided by this Court that the appellants being parties to the suit were not competent to bring fresh suits and that the suits brought by them must be treated as objections filed under S. 47, Civil P. C. In these circumstances Art. 165 cannot be held to be applicable in their case and the only article which could be applied is Art. 181. That article prescribes a period of three years for an application from the date when the right to apply accrues. It is clear that the right to apply must be deemed to have accrued to the respondents in the present case on 11th July 1925 when possession was wrongly delivered to the appellants. The present objections were filed in 1927 and are therefore amply within limitation. We are therefore of opinion that the contentions raised by the appellants as to limitation must also be overruled. Having decided the two contentions against the appellants the order of the learned Subordinate Judge in both sets of objections must be affirmed. The appeals, therefore, fail and are dismissed with costs.

W.S./R.K. *Appeal dismissed.*

(9) [1898] 21 Mad. 494=8 M. L. J. 75.
(10) [1903] 25 All. 343=(1903) A. W. N. 59.

A I R. 1929 Oudh 79

STUART, C. J. AND PULLAN, J.

Ram Bahadur Singh—Plaintiff—Appellant.

v.

Dharam Raj Singh—Defendant—Respondent.

Second Rent Appeal No 22 of 1928, Decided on 7th November 1928, from decree of Addl. Dist. Judge, Gonda, D/- 9th February 1928

Oudh Rent Act, S. 127 (2)—Order of ejectment passed without rent decree is not separately appealable.

Where a decree for ejectment passed along with a rent decree under S. 127 (2) is against a person who is not a tenant but who is treated as such for the purposes of S. 127 (1) the decree is one under S. 108 (2) and is appealable to civil Courts. No separate appeal lies against the order of ejectment. [P 80 C 1]

Moti Lal Saksena—for Appellant.

S N. Roy—for Respondent

Judgment.—This appeal has been referred to a Bench by a Single Judge of this Court on the ground that it raises a point which has not yet been decided, namely, whether an appeal purporting to be under S 127, Oudh Rent Act, and raising the question of ejectment lies to a civil or to a revenue Court. S. 127, Oudh Rent Act deals with the case of a person who retains possession of land without a title and who may be treated by the land-

lord as a tenant and sued for rent. The second clause of the section shows that the decree for rent passed in such a case will be under S. 108, Cl. (2) of the Act and will be followed, on the application of the plaintiff, by a decree for ejectment It has been argued that a decree for ejectment is not appealable to a civil Court, but we are unable to find that an order of ejectment passed under S 127, Cl. (2) is in any way appealable. It is merely a consequential relief following upon a decree for arrears of rent passed in the case of a person who is not a tenant but has been treated as a tenant for the purposes of S 127, Cl (1) The decree in such a case is one under S 108 (2) which is appealable to the civil Courts, and there is no separate appeal against the order of ejectment.

The only other question raised in this appeal is whether the plaintiff is the zamindar of the land in suit and entitled to sue the defendants for arrears of rent On this point there is a clear finding of fact by the Courts below that one Pirthi Singh, another cosharer, is the landlord of these defendants and that the plaintiff has failed to prove that the land in question came into his share by partition. As there has been a partition the fact that he is a lambardar does not help him In our opinion this suit has been rightly decided by the Courts below, and we dismiss the appeal with costs.

W.S /R K. *Appeal dismissed.*

A I R 1929 Oudh 80

STUART, C. J. AND RAZA, J.

Deputy Commissioner — Defendant — Appellant.

v.

Mt. Munni and *another*—Plaintiffs—Respondents.

First Appeal No 63 of 1927, Decided on 18th January 1928, against decree D/- 21st March 1927, of Sub-Judge, Sitapur.

(a) Oudh Estates Act (1 of 1861), S. 24—Allowance received out of income of certain lands with the acquiescence of successive holders for many years — Allowance is a charge on these lands.

The fact that allowance has been enjoyed for more than three-quarters of a century and had been received during all that time out of the income of certain lands with the acquiescence of successive holders is a fact which goes to justify the conclusion that there is valid grant of maintenance which is a charge on those lands : 30 *Mad.* 203 and *A. I. R.* 1918 *P. C.* 156, *Foll.* : *A. I. R.* 1920 *P. C.* 16, *not Foll.* [P 83 C 2]

(b) Oudh Estates Act (1 of 1861), Schedule—Confiscation by Lord Canning's proclamation — Restoration of full proprietary rights involved restoration of under-proprietary rights also.

The effect of Lord Canning's proclamation is that the whole of the rights in the soil of Oudh, with the exception of the estates specially exempted, passed from the former owners and became the property of the Crown. The confiscation did not vest the rights in any one It vested the rights in the Crown. The Crown becoming the absolute owner, all subordinate rights ceased to exist. But when the Crown restored full proprietary rights, the restoration of full proprietary rights involved automatically the restoration of the rights of subordinate proprietors which had originally been held by them against the former proprietor. *A I. R* 1927 *Oudh* 74, *Foll.* [P 83 C 2]

G H. Thomas, *Bisheshwar Nath* and *Bhagwati Nath*—for Appellant

Niamat Ullah and *Mohammad Ayub*—for Respondents

Judgment — This is a defendant's appeal against a decree of the learned Subordinate Judge of Sitapur dated 21st March 1927, by which he awarded a sum of over seven thousand rupees with future interest and proportionate costs to the plaintiffs He further declared that the amount decreed should be a charge upon certain villages. The facts are as follows: Raja Ratan Singh was the holder of the Katesar estate in the Sitapur and Kheri districts He died in 1850 and was succeeded by his son Sheo Bakhsh Singh Sheo Bakhsh Singh was recognized in 1858 as the proprietor of the estate and his name was entered as taluqdar in respect of the estate in the lists prepared under Act 1 of 1869 His name appears as the 83rd name in List 1 and 31st name in List 2 Raja Sheo Bakhsh Singh died in 1882. He was succeeded by his widow Pirthipal Kaur, who is still in possession of the Katesar estate. The Court of Wards assumed management of the estate, it is said, about 1896. The allegation on behalf of the plaintiffs was that Raja Ratan Singh had in addition to his legitimate son Sheo Bakhsh Singh who succeeded him, an illegitimate son called Jang Bahadur. The mother of the latter is said to have been a Mohammadan and the descendants of Jang Bahadur are Mohammadans. According to the plain-

tiffs' allegation Raja Ratan Singh executed on a date corresponding to 20th August 1830, a sanad (Ex 27) by which he assigned to Jang Bahadur the village of Aguapur in the Sitapur District and a monthly stipend of Rs. 200 for his household expenses. (After discussing evidence the judgment proceeded) We therefore arrive at a preliminary finding that this sanad is proved to have been executed by Ratan Singh on a date corresponding to 20th August 1830. The next question to be determined is whether under this sanad these particular plaintiffs are entitled to the share allowed to them by Mahomedan law in the monthly allowance. The portion of the sanad affecting this question is translated by us in the following words We have varied the translation in the paper book as that translation is, in our opinion, misleading

"Ratan Singh grants "on account of the maintenance of my beloved" (barkhurdar equivalent to son) "Jang Bahadur the village of Aguapur and Rs. 200 a month for household expenses including those of his descendants and dependants. The grant to be from generation to generation. All the village expenses, land revenue and cesses of the aforesaid village shall be borne by the estate, and when the necessity arises the grantee shall continue to take other expenses from the estate."

We can only construe this as a grant of a monthly maintenance of Rs. 200 to be paid out of the profits of the Taluqa property, and to be paid to Jang Bahadur during his lifetime and to his heirs after his death We are asked to consider it as an undertaking on behalf of Ratan Singh, which could not affect any one except Ratan Singh personally; but according to our view, such a construction is impossible in view of the fact that the grant was to be from generation to generation Ratan Singh could not be in a position personally to continue the grant from generation to generation and, as it was his clear intention that the grant should be continued, the grant could only be paid out of the profits of the property. It is true that there is no direct condition that the Rs. 200 a month are to be paid out of the profits of the property. But it is noticeable that, whereas Rs 200 a month are to be paid for ordinary household expenses, the grantor continues that the grantee and descendants are also to be paid extraordinary expenses and it is stated explicitly that these extraordinary expenses are to be paid out of the profits of the estate. The condition permitting the grantee to recover extraordinary expenses from the profits of the estate leads us to the conclusion that the grantor intended that the ordinary expenses were also to be met from the profits of the estate to an extent of Rs. 200 a month over and above the profits of Aguapur. In construing this document, we are keeping in mind the fact that the sanad was executed during the Shahi period and that no high standard of draftsmanship can be expected reasonably. It appears to us that it would be wholly incorrect to take the view that, while Ratan Singh directed that the land revenue, cesses and the village expenses of Aguapur and the extraordinary expenses incurred by the grantee should be met out of the profits of the estate, the Rs. 200 a month, which were being paid to supplement the income from Aguapur for the support of his natural son and his natural son's descendants, should not be met out of the profits of the estate but should be a personal liability of himself and of his successors A direction to his heirs to continue the maintenance after his death could not bind them personally and could only bind them in respect of the property which they had received from him. This circumstance affords an additional reason for the view which we adopt We may mention here in passing that it was evidently the intention of Ratan Singh, as is shown by the later part of the sanad, that on his death his son Sheo Bakhsh Singh and Jang Bahadur should succeed jointly to the estate. This intention was never fulfilled as we have already stated. There is some evidence that Jang Bahadur did not wish to press any claim in the presence of Sheo Bakhsh Singh. But apart from that the matter of succession to the estate is concluded, as far as we are concerned, by the action of the British Government in awarding the estate to Sheo Bakhsh Singh. But the circumstance that the desire of Ratan Singh that his son born in wedlock and his natural son should succeed jointly to the estate was not satisfied, in no way affects the validity of the grant Taking this view we consider that the arrears of this monthly allowance are a money charge upon immovable property. In *Mana Vikrama Zamorin of Calicut* v. *Karnavan Gopalan Nair* (1), a Bench of the

(1) [1907] 30 Mad. 203.

Madras High Court arrived at the conclusion that the fact that allowance had been enjoyed for more than three-quarters of a century and had been received during all that time out of the income of certain lands with the acquiescence of successive holders was a fact which went to justify the conclusion that there was valid grant of maintenance which was a charge on those lands. Further their Lordships of the Judicial Committee found in *Raja of Ramnad* v *Sundara Pandiyasami Tevar* (2), that a person, who, having relinquished claim to title to zamindari property, received in lieu of his relinquishment an undertaking from the other side that he should receive Rs 700 a month, had a right to charge the payment of that amount, to either the whole property or a portion of the property. We do not find that in the decision of their Lordships of the Judicial Committee in *Sunder Lal* v. *Ramji Lal* (3), which has been cited to us at the Bar, there is anything to support a view contrary to the view which we take.

There a certain person had obtained a specific village in lieu of maintenance and endeavoured to show that he was further entitled to a charge which their Lordships found did not exist. But the decision in *Raja of Ramnad* v. *Sundara Pandiyasami Tevar* (2), is an authority in support of the view which we take that, even in absence of words directing that the payment of a certain maintenance should be a charge upon the property, the fact that it is a charge upon the property may be implied from the circumstances of the case and from other portions of the document. Having decided the above points in favour of the plaintiffs-respondents, we have now to consider a further argument. The learned counsel for the appellant has pressed before us an argument that as the whole of the property in Oudh was confiscated to the British Crown under the terms of Lord Canning's proclamation of 15th March 1858, any charge, which was obtained by Jang Bahadur upon the property in question, became extinguished on that date and has never been revived. Upon this point we have little to say, as a similar question was discussed at great length by a Bench of this Court in *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (4). There this Court adoptedhe view, which, we follow here, that the effect of Lord Canning's proclamation was that the whole of the rights in the soil of Oudh, with the exception of the estates specially exempted, passed from the formerow ners and became the property of the Crown The confiscation did not vest the rights in no one It vested the rights in the Crown The Crown becoming the absolute owner, all subordinate rights ceased to exist. But when the Crown restored full proprietary rights, as it did on the present occasion in respect of the estate of Katesar, the restoration of full proprietary rights involved automatically the restoration of the rights of subordinate proprietors which had originally been held by them against the former proprietor In other words, where proprietary rights were restored the rights of the subordinate proprietors, which had been held against the proprietors before the confiscation, were revived This being the view of the effect of the proclamation taken previously by this Court, it is necessary to apply the principle to the present case. It is true that Jang Bahadur was not a subordinate proprietor; but we are unable to distinguish, on the principle laid down in the former decision, the case of a charge-holder from the case of a subordinate proprietor. It having been found by us that Jang Bahadur would have had a right to enforce the charge against Sheo Bakhsh Singh between the death of Ratan Singh and the date of the proclamation of 1858 and the estate of Katesar having been confiscated in 1858 from Sheo Bakhsh Singh and then restored to Sheo Bakhsh Singh with full proprietary rights, the right of Jang Bahadur to the charge against Sheo Bakhsh Singh revived as soon as the restoration took place. For the above reasons we dismiss this appeal with costs.

N.K /R.K. *Appeal dismissed.*

(2) A. I. R. 1918 P. C. 156=42 Mad. 581=465 I. A. 64 (P.C.).

(3) A. I. R. 1920 P. C. 16=47 Cal. 932=47 I. A. 140 (P.C.)

(4) A. I. R. 1927 Oudh 74=2 Luck 4.

A. I. R. 1929 Oudh 82

PULLAN, J.

Balbhaddar Singh and *another*—Applicant

v.

Aditya Prasad—Opposite Party.

Criminal Reference No. 40 of 1928, Decided on 29th November 1928.

(a) Criminal P. C., S. 145—Joint possession before dispute—After dispute property kept under attachment till production of partition chitthi—One party producing such chitthi while other giving no evidence as to possession—Former put in possession—Order should not be set aside.

In proceedings under S. 145 the first thing to be decided is whether there is a dispute likely to lead to a breach of peace, and secondly which party of the disputants is in actual possession.

Previously both parties were in joint possession. But after the dispute the property was kept under attachment by order of Court till the parties established their exclusive right to it. Afterwards one of the parties produced the partition chitthi which allotted the disputed property to him, while the other offered no evidence as to possession. The Magistrate put the former in possession.

Held: that the order should not be set aside.
[P 83 C 1]

(b) Criminal P. C., S. 145—Unless order putting person in possession is illegal or irregular it should not be interfered with.

In order to interfere with the order under S. 145 putting one party in possession of certain property, the Magistrate must have acted illegally or in an irregular manner.
[P 83 C 1]

A. P. Sen and *Radha Krishna*—for Applicants

St. G. Jackson—for Opposite Party.

Judgment.—This is a reference by the learned Sessions Judge of Rae Bareli, requesting this Court to interfere with the order of a Magistrate passed under S. 145, Criminal P. C. I am inclined to think that the learned Judge who is in these proceedings described as District Judge, as Sessions Judge and District Registrar has slightly confused his respective functions. In order to interfere with the order under S 145 putting one party into possession of certain property I must find that the Magistrate has acted illegally or in an irregular manner. The Magistrate, as a matter of fact has written a long judgment which reads like the judgment of the civil Court. He went into facts which were irrelevant, and made equally irrelevant observations What he had to decide was first whether there was a dispute likely to lead to a breach of the peace and secondly which party of the disputants was in actual possession of the property. First of all as it was a matter of some urgency he passed an order under S. 145, Cl. 4, placing the property under attachment, and he stated in an order of 12th May which was allowed to go unchallenged that the property was to remain attached until the chitthi, by which he means the allotment of property by partition was registered, and the parties established their exclusive right of making collections. It must be presumed that he thought that the party who established the exclusive right of collection was ipso facto the party in possession. In due course the partition chitthi was registered and the parties came back to Court.

The applicant Balbhaddar Singh offered no evidence of possession and the opposite party Aditya Prasad also offered no evidence, considering no doubt that on the Magistrate's own order of 12th May the registration of chitthi would be held to be proof of possession. The Magistrate undoubtedly took this view and he put Aditya Prasad in possession on the basis of this registered Chitthi The learned Sessions Judge appears to be afraid that this order will affect the rights of the parties in the civil Court, and he also appears to think that it should be set aside because it is a wrong interpretation of his own order as District Registrar; but in reality the order has no such effect. It merely places one of the contesting parties in possession and the party who has been put in possession is the one who alone has any proof of possession. Previously both the parties were in joint possession and as no evidence was offered on behalf of the applicant Balbhaddar Singh to show that the possession rested with him, and there is at least the evidence of the registration of the partition chitthi to show that the possession rests with Aditya Prasad, I am unable to see that the order is one which, however badly expressed, should be set aside. The papers may be returned.

W S./R.K. *Order maintained.*

A. I. R 1929 Oudh 83

WAZIR HASAN AND PULLAN, JJ.

Suraj Narain Singh and *another*—Defendants—Appellants.

v.

Narbada Prasad—Plff—Respondent.

Second Appeal No, 105 of 1928, Decided on 15th November 1928.

(a) Civil P. C., S. 100—Finding of fact.

The question of benami is purely a finding of fact and cannot be challenged in second appeal. [P 84 C 2]

(b) Limitation Act, Art. 120—No division between tenants—Suit by one against another for money received in excess of his share—Art. 120 applies and not Limitation Act, Art. 62.

Where there has been no division of shares between tenants, they must be regarded as tenants-in-common and where one tenant-in-common sues another tenant-in-common for the recovery of money received by him in excess of his share, the suit is governed by Art. 120 and not by Art. 62 : *S. C. No.* 246 and 15 *O. C.* 397, *Dist.* ; 37 *A l.* 318, *Ref.* ; 40 *Mad.* 291 ; *A. I. R.* 1922 *Mad.* 150 (*F.B.*), *Foll.* [P 85 C 1]

Ghulam Hasan and *D. K. Seth*—for Appellants.

Radha Krishna—for Respondent.

Judgment.—The suit to which this second appeal relates was brought by one B. Hanuman Prasad against his brother B. Manna Lal and the latter's son B. uraj Narain asking for an account to be taken and his share of profits awarded to him which had accrued from the theka of two villages obtained in the name of himself and B. Suraj Narain from the Court of Wards The suit was defended first on the ground that the leases were benami and were really executed in favour of B. Manna Lal, his son and brother being merely benamidars, and the second principal ground of defence was a plea of limitation as against some of the money collected in respect of these leases. The suit was decreed by the Court of first instance for a sum of Rs. 1296-15-9 and the appeal was dismissed by the learned Additional District Judge. In second appeal although the question of limitation is put first, two arguments which have been addressed to us are, first that we should hold that the leases were benami ; secondly, that in any case the defendants had not even collected the share of defendant 1 and that there was nothing due from them to the plaintiff and thirdly, that no decree should be passed against Babu Manna Lal who was not one of the lessees. It will be observed that the third ground is in direct contradiction to the first. In our opinion no second appeal lies on the question of benami. The Courts below have found as a fact that these leases were executed in the names of the two persons, who are the lesses, and that they were not in favour of Babu Manna Lal. This is a pure finding of fact and cannot be challenged in second appeal. The second question as to whether the defendants have or have not collected sufficient to pay the share of defendant 1 may be disposed of as briefly It was never raised in the Court below and it is not raised in the grounds of appeal. We find that the question of collection was gone into by the first Court and it held after consideration of all the evidence first that defendants 1 and 2 were running the business of the leases and secondly that they had collected a certain amount showing a balance to be divided between them and the plaintiff, and for this balance the decree has been passed. Such a finding cannot be challenged in this Court. As to the liability of B. Manna Lal, that also is covered by the finding that B. Manna Lal and his son have been doing the whole business of the leases including naturally the collection of rents. The plea also comes ill from the mouth of the appellant in view of his own defence that he is the real lessee and that the names of his brother and son were entered fictitiously in the leases.

There remains only the question of limitation. It is argued before us that the article of the Limitation Act, applicable to a case of this nature is No. 62. If this were so the period of limitation would be one of three years in respect of each collection and a certain portion of the amount claimed would be no longer recoverable. Art 62 deals with suits

" for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use "

Counsel has been unable to show us any ruling reported in a recognized publication which would make Art. 62 applicable to the present case He has referred us to Select Decision of the Court of the Judicial Commissioner of Oudh *Lala Bal Makund* v. *Lala Chandika Pershad* (1), which is a case in which there had been a partition in a Hindu family and it was understood at the time of the partition that the member or members of the family to whom a particular village was allotted should be entitled to the arrears which might be due from the tenants at the time of partition. In spite of this agreement the lambardar took bonds from

(1) S. C. No. 246.

the tenants for the arrears and thereby obtained money which was not due to him but to the individual cosharers who under the terms of the partition were entitled to collect the rents of those tenants. We have also been referred to another Oudh case reported in *Gajraj Singh* v. *Sadho Singh* (2), which also refers to a joint Hindu family where there has been a partition and the individual members were managing their own shares separately. Neither of these cases is applicable to the case of tenants-in-common and where there has been no division of shares between tenants they must be regarded as tenants-in-common As pointed out by the Allahabad High Court in *Pursotam Rao Tantia* v *Radha Bai* 3), Art 62 does not apply where the property is managed by one member of a family. But the strongest rulings on the side of the respondents are those of the Madras High Court reported in *J Subba Rao* v *J Rama Rao* (4) and *Yerukola* v *Yerukola* (5) In the former case the parties were cosharers in a jagir and it was held that a suit brought by one of them was a suit for an account and governed by Art. 120 and not Art 62, Lim Act, and the ratio decidendi is given at p. 295

"The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference . . . The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The article of limitation governing the suit is not therefore Art. 62 "

The second of these rulings being the decision of a Full Bench is of even greater authority. On p 659 the learned Chief Justice points out :

"Article 62 relates to suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. There are technical terms of the law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff. There is, however ,one case in which that form of action would not lie in England and that is by one tenant-in-common against another who has received more than his share.

And in the concluding portion of his judgment at p. 664 he follows the same line of argument as that which found favour in the earlier ruling of the same Court and applied Art. 120 to the case of tenants-in-common. In our opinion there is no distinction of principle between those cases decided by the Madras High Court and that before us and we consider that this question of limitation is conclusively decided by authority We find that the suit has been rightly decided by the Courts below and we dismiss this appeal with costs.

W S /R K. *Appeal dismissed.*

(2) [1912] 15 O C. 307=16 I. C. 882.
(3) [1915] 37 All. 318=28 I. C. 953=13 A. L. J. 407
(4) [1917] 40 Mad. 291=13 M. L. J. 341=3 M. L. W. 192=32 I. C. 800=(1916) 1 M.W. N. 188.
(5) A. I. R. 1922 Mad. 150=45 Mad. 648 (F.B.).

A I R. 1929 Oudh 85

STUART, C J.

Ram Chetan Dass —Applicant.

v

Jasbir Singh—Opposite Party

Criminal Ref. No 36 of 1928, Decided on 18th October 1928, made by Sess. Judge, Gonda, on 10th September 1928.

Criminal P C., S 139-A—Existence of evidence to support plea of private road—Magistrate dismissing application and referring complainant to civil Court—Magistrate's course is correct.

Where in proceedings under S. 133 there is evidence to support the plea that the road is a private road, the most that the Magistrate can do is to stay proceedings under the provisions of S. 139-A of the Code and, if the Magistrate dismisses the application and refers the complainant to civil Court, the course taken by the Magistrate would be correct : 42 *Cal.* 158, *Rel. on.* [P 86 C 1]

M Ayub—for Applicant.

G H. Thomas—for Opposite Party.

Judgment — The learned Sessions Judge, has laid great stress on a passage in the Magistrate's judgment to the effect that the Balrampur estate had admitted that the road in question was a public road. After examination of the record and hearing the arguments of the learned counsel in support of the reference I find that there was nothing approaching to an admission that the road was a public road. In fact the estate adhered from the commencement to the position that the road was not a public road. As there was evidence on both sides as to the road being public or private and there was certainly evidence to support the plea that the road was a private road the

most that the Magistrate could have done would have been to stay proceedings under the provisions of S. 139A, Criminal P. C. The law on the subject was discussed by a Bench of the Calcutta High Court in *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1). The course which the Magistrate did take was to dismiss the application and refer the complainant to a civil Court. I consider that he took the correct course. Should the civil Court decide that the road is a public road and should the Balrampur estate then offer obstruction to its use proceedings will then be open under S. 133, Criminal P. C. I do not accept this reference and return the record.

W.S /R.K *Reference not accepted.*

(1) [1915] 42 Cal. 158=26 I. C. 146=18 C. W. N. 1086.

A. I. R. 1929 Oudh 86

STUART, C. J. AND PULLAN, J.

Emperor—Complainant.

v.

Behari—Accused.

Jury Case No. 4 of 1927, Decided on 20th January 1928, on a reference by the Asst. Sess. Judge, Fyzabad.

Criminal P. C., S. 307—High Court will interfere only when verdict of jury is patently bad and perverse.

It is the practice of Oudh Chief Court not to interfere in case of acquittal by a jury unless the acquittal stands out as patently bad. Where the verdict of the jury is patently bad and perverse the Chief Court will interfere.

[P 87 C 1]

H. K. Ghose—for the Crown

Moti Lal Saksena—for Accused.

Judgment—This is a reference by the learned Assistant Sessions Judge of Fyzabad under the provisions of S. 307, Criminal P. C, in a case in which he has disagreed with the verdict of the jury who have found Maharaj Bihari not guilty in a case in which he was tried for forging three money orders. The facts are these. Three money orders were issued as follows: One was issued on 3rd September 1920 from Purnea by a certain Ashutosh Mukerji remitting Rs. 25 to Dharnidhar Ganguly of Ajudhya in the Bankora District. One was issued on 20th October 1920 from Itarsi by Hari Ram directing payment of Rs. 50 to Nana Bapaji of Wai in the Satara District and one was issued on 22nd October 1920 from Pegu by Bhagwati Din remitting Rs. 40 to Ram Suchit Bhuji of Sultanpur. These three money orders were sent by error to the Ajodhya post office of the Fyzabad District, and it is perfectly clear that the lower half of each money order was cut off and that there was pasted to each money order an instruction making each one payable to a certain Nageshwar Tamboli of Raiganj Ajodhya, district Fyzabad. These instructions were admittedly in the handwriting of Maharaj Bihari. In each one the amount payable was correctly recorded. On different dates these money orders were paid to Nageshar Tamboli. He has already been convicted in respect of the receipt of them He has since died It is established beyond possibility of doubt that, on each occasion that the money was paid, Maharaj Bihari was present with Nageshwar Tamboli and witnessed the latter's thumb impression Maharaj Bihari was at the time a young man living in Ajodhya who was continually frequenting the local post office He was permitted, although he was not a member of the department, to work in the post office as an upaid hand, and the prosecution suggest that he took advantage of his position to cut the genuine halves of these money orders, to paste the false instructions on to each and thus to obtain payment to his accomplice Nageshwar Tamboli of the amounts in question. We have been through the evidence on the record and we find that the prosecution have established their case by overwhelming evidence The defence of Maharaj Bihari is that he filled up these instructions, because he was practising filling up instructions to fit himself for possible employment in the postal department, and that he happened accidentally to be with Nageshwar Tamboli when Nageshwar received the amounts, and saw nothing surprising in the fact that the payments were being made upon the dummy instructions which he had been filling in, to perfect himself in the art of making entries on a money order form, the entries being entries which are never made by the post office officials but are made by the remitter. The jury refused to convict upon the evidence.

It is the practice of this Court not to interfere in cases of acquittal by a jury unless the acquittal stands out as patent-

ly bad. We have no hesitation in deciding that in this particular case the verdict of the jury is patently bad and perverse. It is more than perverse. It is amazingly perverse. It is hard to understand the mentality of people who could have overlooked such evidence as there was for the prosecution and accepted such defence as was propounded on behalf of Maharaj Bihari There can be no doubt to our minds that on a proper view of the evidence, Mahraj Bihari is guilty. We find him guilty accordingly of the charge under S 467, I. P. C. The fraud was a very serious one. It should be made clear that attempts to tamper with the business of the post office in receiving and paying money orders in order to obtain illicit gain thereby should be dealt with strictly. We sentence Maharaj Bihari to 5 years' rigorous imprisonment.

N.K./R.K. *Accused convicted.*

A. I. R. 1929 Oudh 87

PULLAN, J.

Lachhmi Narain and *another*—Accused—Applicant.

v,

Emperor—Opposite Party.

Criminal Ref. No. 42 of 1928, Decided on 30th November 1928, made by the Sess. Judge, Rae Bareli

Criminal P. C., S. 190 (c) — Magistrate making enquiry and reporting the case—Magistrate takes cognizance of the case—Proceedings by the same Magistrate are illegal.

A District Magistrate sent a matter to Sub-Divisional Magistrate for enquiry and report, and, after the report was made, ordered him to try the case himself. No opportunity was given to the accused to be tried by a different Magistrate and he was convicted.

Held : that it was the Magistrate who took cognizance of the case and the proceedings should be quashed as the case should have been tried in another Court. [P 87 C 2]

J. Jackson—for Applicants.

H. K. Ghosh—for the Crown.

Judgment.—This is a reference made by the Sessions Judge of Rae Bareli for setting aside the conviction in a case of petty theft. The learned Sessions Judge has expressed at length his opinion that the proceedings were illegal. The matter was brought to the notice of the District Magistrate by the Settlement Officer who, as such, was not using magisterial powers. The District Magistrate then sent the matter to the Sub-Divisional Magistrate for an inquiry and report. The latter made an inquiry and report that a certain tree had been cut by one Jadunath and that a case should be instituted. Thereupon the District Magistrate ordered the Sub-Divisional Magistrate to try the case himself. The view taken by the Sessions Judge is that, as the Sub-Divisional Magistrate took cognizance of the case uhder S. 190 (c), Criminal P. C, he should have given the accused an opportunity to be tried by a different Magistrate. Not only the Sub-Divisional Magistrate not do this, but he refused the application of the accused to have the matter transferred to another Court and the District Magistrate confirmed this view on the erroneous finding that he himself had taken cognizance of the case and not the Sub-Divisional Magistrate. I cannot understand what case it was of which the District Magistrate took cognizance. It cannot have been any case set up by the letter of the Settlement Officer because, if it be held that that letter was a complaint at all, it was a complaint against another person, not Judunath whose trial was ordered

It appears to me that when the matter was given over to the Sub-Divisional Officer for inquiry and he after inquiry decided that the case should proceed, it was he, and nobody else who took cognizance of the case That being so I agree with the learned Sessions Judge that the case should have been tried in another Court and I cannot hold, as I have been requested to hold by the Crown, that the accused were not prejudiced by the fact that the case was tried by the Magistrate who had made an inquiry into it. Apart from this there were several other irregularities, in particular the failure of the Magistrate to summon the Settlement Officer as a witness for the defence If, as he said, the complainant told him that the tree was cut by one Lachmi Narain it would be a strong point in the defence of Jadunath who has now been accused of this offence The reasons given by the Magistrate for not calling the Settlement Officer are quite inadequate and his suggestion that the Settlement Officer did not understand Hindi is gratuitous In any case it was a matter which the Settlement Officer should have been able to depose to himself The learned Sessions Judge has suggested a retrial, but considering that the

subject of the dispute is a single babul tree I am of opinion that the matter has gone far enough, and that no good object would be served by having this petty case tried again by another Magistrate. I therefore accept the reference and order that the conviction be quashed and the sentence set aside.

W.S./R.K. *Conviction quashed.*

A. I. R. 1929 Oudh 88

WAZIR HASAN AND PULLAN, JJ.

Bansi Dhar — Decree-holder—Appellant.

v

Jagmohan Das and *another*—Judgments-debtors—Respondents.

Execution of Decree Appeal No 58 of 1927, Decided on 3rd February 1928, against order of the Addl Dist. Judge, Lucknow, D/- 22nd August 1927.

Civil P. C., O. 21, R. 66—Suit by a subsequent mortgagee—Prior mortgagee made a party—Abandonment of the issue as regards prior mortgage is no bar to prior mortgage being shown in the sale proclamation in execution of subsequent mortgagee's decree.

According to the rules of procedure the prior mortgagee is not a necessary party to the suit brought by the subsequent mortgagee and an issue directed towards the inquiry into the existence or validity of a claim on a prior mortgage cannot be treated as an issue directly and substantially arising in the suit. Consequently its abandonment does not amount to abandonment of the rights of the party under the prior mortgage and is no bar to the prior incumbrance being shown in the sale proclamation in executing the decree of the subsequent mortgagee. *A. I. R.* 1920 *P.C.* 81; *Foll.*; 27 *Mad.* 259 (*F B*), *Ref* [P 89 C 1]

Niamatullah, *Bhawani Shankar* and *Hakimud-din*—for Appellant.

Ali Zaheer, *Dayi Kishan Seth* and *S. M. Ahmad*—for Respondents 1 and 2

Judgment—This is an appeal from the order of 3rd Additional District Judge of Lucknow dated 22nd August 1927 in proceedings relating to the execution of a decree. By the order under appeal the order of the Court of first instance was affirmed.

The facts are as follows:

The village of Aqilpur, pargana Lucknow, was owned by one Lala Behari Lal. On 3rd January 1913 Lala Behari Lal transferred the village just now mentioned by way of a usufructuary mortgage to Lala Jagmohan Das, respondent for a consideration of Rs. 20,000. In pursuance of the morrtgage, it is agreed, the mortgagee entered into the possession of the village of Aqilpur On 12th October 1914 Lala Behari Lal borrowed a sum of Rs 2,000 from Bansidhar appellant and hypothecated the village of Aqilpur by way of security for payment of the loan. On 17th April 1915 Lala Behari Lal sold the village of Aqilpur to one Lala Inder Prasad. The bulk of the purchase money was directed to be paid by the vendee to Lala Jagmohan Das in satisfaction of the mortgage of 3rd January 1913 but was not so paid Lala Jagmohan Das and Lala Indar Prasad are brothers On a partition of the family property in the year 1916 the interest which Lala Indar Prasad had acquired in the village of Aqilpur under the sale of 17th April 1915, was allotted to the share of Lala Jagmohan Das and from that period of time the mortgagee's interest under the mortgage of 3rd January 1913, and the equity of redemption came to be vested in Lala Jagmohan Das.

In the year 1922 Lala Bansidhar brought a suit for the recovery of the mortgage money due to him under the bond of 12th October 1914, and the relief for which prayer was made in that suit was the sale of the village of Aqilpur Lala Jagmohan Das and Lala Behari Lal were impleaded as defendants. In the plaint Lala Bansidhar altogether omitted to make any reference to the mortgage of 3rd January 1913. Lala Jagmohan Das in his written statement disclosed the mortgage. In this state of pleading an issue was framed by the Court for the purpose of making an inquiry as to the existence of the mortgage of 3rd January 1913. At a subsequent stage of the proceedings the issue was struck off on the ground that Lala Jagmohan Das did not desire to press for an inquiry in respect of his mortgage just now mentioned. The result was that a decree for sale of the village of Aqilpur was passed in favour of Lala Bansidhar.

Naturally in the circumstances mentioned above the decree directed the sale of the property without mentioning either that the sale was to be free from incumbrance or that it was to be subject to an incumbrance. When in execution proceedings of this decree a sale proclamation came to be prepared as required by R. 66, O. 21, Civil P. C., Lala Jagmohan Das applied to the Court seised

of those proceedings for an entry of the mortgage of 3rd January 1913 to be made in the sale proclamation. The decree-holder, Lala Bansidhar, resisted this application but the Courts below have passed an order in favour of Lala Jagmohan Das directing that the mortgage of 3rd January 1913 be entered in the sale proclamation. It is against this order that the present appeal has been preferred by Lala Bansidhar. At the hearing of the appeal a preliminary objection was raised by the learned counsel for the respondent to the effect that no appeal lay and in support of the objection reliance was placed upon a Full Bench decision of the High Court at Madras in the case of *Sivagami Achi* v. *Subrahmania Ayyar* (1). But having regard to the fact that we have heard the appeal on its merits and come to the conclusion that it fails we refrain to express any opinion on the question raised in the preliminary objection.

In support of the appeal two points were urged. (1) That the inquiry into the claim of Lala Jagmohan Das to have the mortgage of 3rd January 1913 entered in the sale proclamation as a prior incumbrance was barred by the rule of res judicata having regard to what had transpired before the passing of the decree, and (2) that the mortgage of 3rd January 1913 was extinguished by reason of the allotment of the village of Aqilpur to the share of Lala Jagmohan Das at the partition of the family property in the year 1916. We are of opinion that there is no substance in either of the two grounds. It appears to us that the conduct of Lala Jagmohan Das in withdrawing the issue which was raised in the suit amounted to no more than an abandonment of a plea which was wholly foreign to the substance of the suit. We cannot construe that act of Lala Jagmohan Das as an abandonment of his rights if he had any under the mortgage of 3rd January 1913. That the plea bearing on that mortgage was wholly unnecessary for the proper decision of that suit is clear from the fact that the suit was brought by the subsequent mortgagee. According to the rules of procedure the prior mortgagee was not a necessary party to the suit and an issue directed towards the inquiry into the existence or validity of a claim on a prior mortgage cannot in the circumstances be treated as an issue directly and substantially arising in the suit. The latest pronouncement of their Lordships of the Judicial Committee on the point of view which we have just now expressed is to be found in *Radha Kishun* v. *Khurshed Hosein* (2).

In support of the second ground three circumstances are relied upon for the purpose of showing that Lala Jagmohan Das did not intend to keep alive the incumbrance of 3rd January 1913. Those circumstances are: (1) The act of Lala Jagmohan Das in withdrawing the issue, to which reference has been made in the preceding portion of this judgment; (2) The entry of his name as a proprietor and not as mortgagee also in the khewat of the village for the year 1923-1924, and (3) his statement contained in a security bond which he executed in 1923 to the effect that he was the proprietor of the village of Aqilpur. As to the precise proposition of law bearing on the subject of merger, it is not necessary for us to enter into any elaborate discussion. We have had to state it on previous occasions. It will suffice to refer to two cases, *Darshan Singh* v *Arjun Singh* (3) and *Hanwant Ram* v. *Ram Harakh* (4). The last mentioned case was decided by this Bench. According to the view of law expressed in the above cases the question must be decided in favour of Lala Jagmohan Das unless the appellant succeeds in showing that it was not for the benefit of Lala Jagmohan Das to keep the mortgage of 3rd January 1913 alive. Now the three circumstances referred to above do not lead to any such conclusion. As to the first, it is enough to say that in no manner it indicates Lala Jagmohan Das's intention to abandon his rights under the mortgage of 3rd January 1913. The abandonment of the issue which had arisen in the suit does not in our opinion as we have already said, amount to an abandonment of rights. As to the second circumstance, the entry in the khewat does not show any intention of Lala Jagmohan Das in respect of the mortgage of 3rd January 1913. The entry is correct so far as it goes but the absence of an entry in the same register to the effect

(1) [1904] 27 Mad. 250=14 M. L. J. 57 (F.B).

(2) A. I. R. 1920 P.C. 81=47 Cal. 662=47 I. A. 11 (P. C.).

(3) A. I. R. 1926 Oudh. 603.

(4) A. I. R. 1927 Oudh. 341.

that Lala Jagmohan Das was also a mortgagee in possession cannot by any stretch of imagination lead to an inference of Jagmohan Das's intention to extinguish his rights under the mortgage in question. The third circumstance is equally of no consequence whatsoever. The security bond merely describes the proprietary interest of Lala Jagmohan Das in the village of Aqilpur. It does not disclose one way or the other as to what his intentions were in respect of his mortgagee's interest in the same village.

Before we take leave of this case we may mention that the question which has at present arisen relates merely to the preparation of the sale proclamation and is as to whether in that proclamation the mortgage of 3rd January 1913 should or should not be shown as a prior incumbrance. We think that it has rightly been held by the Court below that there is no bar to its being so shown and that it should be shown. This is the only effect of the order under appeal and of our order.

The appeal fails and is dismissed with costs.

N.K./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 90

STUART, C. J.

Ram Het Shukul—Defendant—Applicant.

v.

Ram Ratan — Plaintiff — Opposite Party.

Application 32 of 1928, Decided on 8th November 1928, for revision of order of Munsif, Gonda, D/- 17th August 1928.

Provncial Sm. C. C. Act, Art. 35 (2)—Plaintiff depositing money with defendant as bailee—Defendant refusing to return—No allegation in the plaint charging defendant with dishonest conversion etc.—Suit only for damages—Art. 35 (2) does not apply.

Where the only allegation of the plaintiff is that he deposited certain money with the defendant as the bailee but the defendant refused to return the same and there is nothing in the plaint charging the defendant with dishonest misappropriation, dishonest conversion, dishonest use or dishonest disposal, and the suit is only for damages for breach of contract Art. 35 (2) has no application. [P 90 C 2]

S. N. Roy—for Applicant.

Rameshari Dayal—for Opposite Party.

Judgment.—The facts are simple. The allegation of the plaintiff was that he deposited certain money and certain papers with the defendant as a bailee and that the defendant refused to return them. He would have no relief for specific performance, but he was entitled to relief for damages for breach of contract on his plaint. The learned Small Cause Court Judge has given him a decree partly for money compensation and partly for the return of papers. In so far as the decree is a decree for the return of the papers I doubt whether he had jurisdiction to pass it but as the defendant has refused to return the papers the only portion of the decree which is now affected in respect of the non-return of the papers is a portion which has awarded Rs. 160 damages for failure to return them. The case as it stood was a case for damages for breach of contract and the effective portion of the decree is a decree for damages for breach of contract. Such a suit could be brought in a Small Cause Court. The learned counsel for applicant argues, however, that the allegations imply that the defendant had committed criminal breach of trust or criminal misappropriation and that in these circumstances the jurisdiction of the Small Cause Court is barred either under the provisions of Art. 35 (ii), Provincial Small Cause Courts Act (Act 9 of 1887) or under the provisions of Art 43 (A). Art. 43 (A) has of course no application as this suit was a suit for damages I do not consider that Art. 35 (ii) has any application either, for there is nothing in the plaint charging the defendant with dishonest misappropriation, dishonest conversion, dishonest use or dishonest disposal.

There is no suggestion anywhere in the plaint that the defendant has been dishonest. The only suggestion was that he has broken his contract as bailee The application fails on this point also. At the learned counsel's request I have gone into the matter on the merits I cannot disturb the finding which appears to me to be a very sensible finding of fact. I therefore dismiss this application.

W.S./R.K. *Application dismissed.*

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* A. I. R. 1929 Oudh 91

WAZIR HASAN, AG. C. J. AND PULLAN, J.

Manohar Lal—Plaintiff—Applicant.

v.

Mohre Lal and *others*—Opposite Party.

Application No. 14 of 1928, Decided on 22nd November 1928.

*** (a) Civil P. C., S 115—Return of plaint for want of jurisdiction affirmed in appeal—Order could be revised.**

The Court of first instance returned the plaint on the ground that that Court had no jurisdiction to entertain it. This order was affirmed on appeal by the District Judge.

Held : that the order could be revised . *A. I. R.* 1917 *P. C.* 71, *Foll.* , 16 *A. L. J.* 535, *Dist.* [P 92 C 1]

*** (b) Civil P. C., S. 20 (c)—Primary transaction of sale and purchase at one place—Execution of promissory notes in respect of unpaid price at another place—Cause of action to recover price accrues at place of primary transaction.**

Prima facie the question of jurisdiction must be decided on the averments contained in the plaint. [P 92 C 1]

Where the plaint alleges that the primary transaction of the sale and purchase of articles took place at one place, the liability of the purchaser for the price of the articles naturally arises out of that transaction. The cause of action, therefore, for a suit to recover the price accrues at that place, and is not extinguished by the execution of promissory notes in respect of the same debt at a subsequent date and at another place. [P 92 C 2]

A P. Sen and *S C Das*—for Appellant

H. D. Chandra—for Respondent 4.

Judgment.—This is an application in revision under S 115, Civil P. C., by a plaintiff whose plaint has been returned by the Court of the Subordinate Judge of Sitapur for presentation to another Court on the ground that the former Court had no jurisdiction to entertain it. The order of the Subordinate Judge has been affirmed on appeal by the District Judge of Sitapur. At the hearing of the application a preliminary objection was taken by the opposite party that no revision lay in a case of this nature. In support of this objection reliance was placed upon a decision of a Bench of the High Court of Allahabad in the case of *Jawala Prasad* v. *E. I. Ry. Co.* (1) In that case it was admitted that the District Judge, who had affirmed the decision of the Court of first instance on appeal had jurisdiction to entertain the appeal before him. This being so, the learned Judges proceeded to say :

"If in the exercise of his jurisdiction he committed an error (we do not hold that he did so) that does not give the applicants a right to apply in revision under S. 115, Civil P. C."

It will be seen from what we have quoted just now that the ratio decidendi of the decision was that the District Judge had no jurisdiction to entertain the appeal. It does not appear that the learned Judges were invited to entertain the application in revision as against the order of the Court of first instance. What would have been their decision had they been so invited we need not pause to conjecture. The fact that the law allows a first and only appeal in a case of this nature to a Court which is not a High Court and that appeal has been preferred and decided is clearly not a ground for ousting the High Court from jurisdiction with which it is invested under the provisions of S. 115, Civil P C., of calling for the record of any case which has been decided by any Court subordinate to the High Court. An appeal is a bar only in a case in which it lies to the High Court, the words being "and in which no appeal lies thereto" (that is the High Court). Every Court must be deemed to be possessed of jurisdiction to decide the question whether it has jurisdiction to entertain a certain suit or appeal or not and to that extent it may be conceded that the District Judge had jurisdiction. The question of jurisdiction is primarily a question of law but if a Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity then it becomes a question of law in which the question of jurisdiction is involved and falls within the purview of S. 115, Civil P. C. "The section is", to use the words of Lord Atkinson in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (2),

"not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In the preceding sentence his Lordship said :

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it."

(1) [1918] 16 A. L. J. 535=40 I. C. 90.

(2) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261 (P. C.).

In the present case the learned District Judge has affirmed the order of the Court of first instance which Court had arrived at a conclusion of law which involves the question of jurisdiction. We are therefore of opinion that the application before us is maintainable and we overrule the preliminary objection.

The circumstances bearing on the merits of the case are as follows : There were four defendants to the suit out of which only one appeared in the Court of first instance and raised a plea of absence of jurisdiction in the Court of the Subordinate Judge of Sitapur. The plea has been upheld by both the lower Courts, as we have already stated Prima facie the question of jurisdiction must be decided on the averments contained in the plaint and in the present case nothing has appeared in the evidence so far as it was admitted on this question to displace that view. In para 1 of the plaint the plaintiffs stated that they were the owners of a firm in Biswan in the District of Sitapur carrying on a business of brokerage in grain and molasses In para. 2 it was said that the defendants were the owners of a firm in the cantonments of Nimach within the territory of Gwalior. In para. 3 it was alleged that the defendants' firm purchased molasses from the plaintiffs' firm of the value of Rs 11,578 odd between 13th December 1923 and 27th January 1924 ; that the price of other purchases made by the defendants amounted to Rs 93 and that the defendants' firm paid in from time to time the sum of Rs. 7,699 to the plaintiffs' firm In para. 4 it was stated that accounts were adjusted between the parties on 24th March 1924 and a sum of Rs 4,000 was found due to the plaintiffs from the defendants which the defendants' firm promised to pay in four equal instalments viz , 16th October 1924, 14th April 1925, 11th October 1925 and 9th May 1926 In para. 8 the cause of action for the present suit laid for the recovery of the above-mentioned instalments together with interest was stated to have accrued on 24th March 1924, the date on which the accounts were adjusted, and also on the four dates on which the instalments became due. It further appears that the defendants executed four promissory-notes every one of the value of Rs. 1,000 corresponding to the instalments mentioned above in favour of the plaintiffs. These notes were produced by the plaintiffs They also produced two letters written by the defendants of dates subsequent to the dates of the instalments whereby they promised to send the money due to the plaintiffs to their firm at Biswan. These letters have been duly proved and accepted in evidence. In the above stated circumstances and on those facts we are of opinion that the learned Subordinate Judge by returning the plaint has failed to exercise the jurisdiction vested in him by law. It was agreed in the Court of first instance that the accounts which were adjusted on 24th March 1924 were adjusted at Nimach. It was not argued before us that that fact alone divested the Sitapur Court of the jurisdiction which it has otherwise possessed. The plaintiffs had further pleaded that there was an oral agreement subsequent to the execution of the prommissory-notes under which the defendants had undertaken to repay the money at Biswan. This plea has failed on evidence and was not re-opened before us

The primary transaction of the sale and purchase of molasses must be assumed on the allegations made in the plaint to have taken place at Biswan and the defendants' liability for the price of the articles purchased by them naturally arose out of that transaction This being so it is clear that the cause of action for the present suit arose at Biswan. The execution of the promissory notes at a subsequent date and at Nimach cannot in our opinion extinguish the cause of action just now mentioned. There was no fresh contract between the parties, the evidence for which might have been intended to be created by the execution of the promissory-notes The old liability for the price of the articles was the real and indeed the sole consideration supporting the promissory notes. In this view of the case it is not necessary to enter into the discussion as to whether the English rule that it is the duty of a debtor to find and pay his creditor would be applicable or not, had this suit been founded on the promissory notes alone and not on any antecedent, independent and completed transaction We accordingly allow this application, set aside the orders passed by the lower Courts and remand this case to the Court of first instance with directions that the suit be reinstated in its original number in the register of suits in that Court and tried according to law. Having

regard to the fact that the plaint was not carefully worded we make no order as to costs in favour of the plaintiffs. The parties will bear their own costs in all the three Courts up to this stage.

W.S./R.K. *Case remanded.*

A. I. R. 1929 Oudh 93

GOKARANNATH MISRA AND SRIVASTAVA, JJ.

Rajindra Bahadur Singh—Defendant—Appellant.

v.

Malhoo Khan and *others*—Plaintiffs—Respondents

First Appeal No. 7 of 1928, Decided on 31st July 1928.

(a) Registration Act, S. 2, Cl. (6)—Trees sold to be cut and removed—Sale-deed does not create interest in immovable property and is admissible in evidence even if unregistered—Registration Act, S. 49.

Where the object of the sale of trees is to convert them into moveables by getting them cut and removed, and the parties to the transaction do not contemplate that the trees should continue to stand and be enjoyed as such, the documents relating to the transaction do not create any interest in immovable property and are admissible in evidence even though unregistered 20 *Mad.* 58, *Dist.*, 6 *Mad. H. C. R.* 71, *Foll.* [P 94 C 2]

(b) Hindu Law — Alienation — Widow — Permission granted to cut and remove trees of spontaneous growth and subject to periodical cutting for cash consideration—Transaction is for benefit of estate and done in ordinary course of management and is binding on reversioners.

Within the limits imposed upon her a female holder has the most absolute power of enjoyment: *A. I. R.* 1915 *P. C.* 18, *Foll.* She is forbidden to commit waste or to endanger the property in possession. [P 95 C 1]

A widow gave permission to cut and remove within four years trees of a specified class from the jungle in certain villages for a cash consideration. The transaction related to a class of trees of spontaneous growth which was subject to periodical cutting.

Held: that the transactions were for the benefit of the estate and done in the ordinary course of management of the estate, and hence binding on reversioners. [P 95 C 1, 2]

Raj Narain Shukla—for Appellant.

Khaliquzzaman—for Respondents.

Judgment.—Thakurain Jairaj Kuar was the widow of a talukdar and as such in possession of the Deotaha estate in the Gonda District. The plaintiffs' case was that on 2nd December 1925, 30th January 1926, and 27th February 1926, she executed three documents granting the plaintiff 1 permission to cut and remove within a period of four years trees of a specified class from the jungle in certain villages forming part of her estate in consideration of sums of money paid to her by the plaintiff 1. Thakurain Jairaj Kuar died on 8th October 1926, leaving the defendant as the nearest reversioner of her husband. The plaintiffs further alleged that the defendant, shortly after his succeeding to the possession of the estate on 11th November 1926, took unlawful possession of the jungle, and dispossessed them. They, therefore, sued for damages and in the alternative for possession of the jungle in question. Plaintiffs 2 and 3 were joined in the suit as persons who, subsequent to the transaction mentioned above, had become partners with plaintiff 1. The defendant denied the transactions set up by the plaintiffs and pleaded that Thakurain Jairaj Kuar was an illiterate pardanashin lady and even if it were proved that the plaintiffs had deceitfully obtained her signatures on any papers the defendant could not be bound by them. The defendant also denied the receipt of consideration and pleaded that in any case the transactions were not within her competence as a Hindu widow and could not be binding upon him after her death.

The learned Subordinate Judge of Gonda rejected the contentions raised in defence and gave plaintiff 1 a decree for possession of the jungle lands in suit and dismissed the claim for damages. The defendant has come here in appeal and his learned counsel has impugned practically all the findings of the trial Court.

The first question requiring determination is regarding the due execution of the three permits which are Exs 2, 4, and 6 and of receipt of consideration by the lady. Simultaneously with the execution of these permits three receipts were also executed in respect of the consideration paid by plaintiff 1 to the deceased Jairaj Kuar. These receipts are Exs 1, 3 and 5. The learned Subordinate Judge has relied on the evidence of P. W. 1, who is plaintiff 1, Haji Mulhu Khan P. W. 4 (Ram Sewak) and P. W. 5 (Kazim Husain). We have carefully read the statements of all these witnesses and can see no reason for disagreeing with the estimate made by the trial Court of the value of their evidence. P. W's. 4 and 5 were admittedly in the service of Jairaj Kuar and would in the ordinary course of things be expected to be present when the tran-

sactions took place. The fact that the defendant when he succeeded to the estate on Jairaj Kuar's death dispensed with the services of these old servants is no reason for discrediting them. It is contended that the lady did not use to appear before these witnesses. The evidence shows that the lady was sitting behind a screen which was raised a little bit at the time of her making the signatures in the presence of the witnesses referred to As regards the consideration, the witnesses deposed that the money was counted in their presence and handed over to the Thakurain behind the screen The evidence further shows that the lady was an intelligent woman possessed of considerable experience. She used to manage the estate for herself and to pass necessary orders Agreeing with the trial Court we have no hesitation in holding the due and intelligent execution of the documents and payment of the consideration fully proved.

The next point urged in support of the appeal was that the documents (Exs 2, 4 and 6) created an interest in immovable property and as such could not be admissible in evidence for want of registration The definition of immovable property in S. 2, sub-Cl. (6), Registration Act (16 of 1908) expressly excludes standing timber from the category of immovable property. The appellant has relied upon the decision of the Madras High Court in *Seeni Chettiar* v. *Santhanathan Chettiar* (1). We think that that case is distinguishable from the present case. In that case in the words of Shephard, J. :

"The interest acquired by the defendant under the instrument consisted in the right to enjoy the produce of all the trees in the tank bed as also the grass and the reeds, and further to cut and remove the trees for a period exceeding four years."

The terms of Exs 2, 4 and 6 are substantially different from the terms of the instrument which formed the subject of consideration in the *Madras* case It is perfectly clear in the present case that the trees were sold merely with the object of their being cut and removed There was no intention that the purchaser should have any right of enjoyment of the produce either of the trees or of the land As regards the period of four years, it was allowed simply to enable the plaintiffs to cut and remove the trees. The fact that the period appears to be fairly extensive would not render the transaction a transfer of an interest in immovable property In the case of *Sukry Kurdeppa* v. *Goondakull Nagireddi* (2), Holloway, Acting C J , remarked as follows :

"Moveability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immovability incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable. Certain things, such as a piece of land, are in all circumstances immovable. Others, such as trees attached to the ground, are, so long as they are so attached, immovable : when the severance has been effected they become moveable. A document, therefore, evidencing an interest in land, must always require registration One with respect to trees may or may not require it, according to the character of the transaction. If the parties contemplate the interest passing after the conversion of the immovable to a moveable, it will not ; if the interest passed contemplates the continuance of the quality of immovability, it will."

We entirely agree with the observations quoted above The question has to be determined upon the circumstances of each case We are satisfied that in the present case the parties to the transactions did not contemplate that the trees should continue to stand and be enjoyed as such but that the object of the sale was to convert them into moveable by getting them cut and removed Accordingly we hold that the documents in question do not create any interest in immovable property and are, therefore, admissible in evidence even though unregistered.

The next contention urged by the learned counsel for the appellant is that the transactions were not within the competence of Thakurain Jairaj Kuar, who held only a widow's estate. It was contended that the plaintiffs have failed to prove that the transactions were either for the benefit of the estate or for legal necessity and, therefore, they could not bind the reversioners The argument has left us unimpressed It seems to be based on a misconception of the true nature of the transactions. They are all couched almost in identical terms and it would, therefore, be sufficient to reproduce the relevant portion from one of them. Ex. 2 runs as follows :

"Permit for the sale of tim jamun, with the exception of pipal, barged, mangom mahuabel, tandu hasna, sal and nib trees, that is the remaining jungle in villages Lachmanpur, Lalnagar and Bareti, taluqa Deotaha ..... for four years from 2nd December 1925, to 1st December 1929, on payment of Rs. 4,100

(1) [1897] 20 Mad. 58=6 M.L.J. 281 (F.B.).

(2) 6 M.H.C.R, 71.

to Mulhu Khan Haji, resident of Balrampur, so that he may get tim jamun cut and sell it, he having paid the entire amount in a lump sum and having obtained a formal receipt will have a right to get the timber cut and remove it. The condition is that the said tim jamun will have to be cut from one side; he will not have a right to cut tender shoots of those trees for a second time the trunk of which was once cut and from which profit has been enjoyed once, within the period the wood will be cut and sold; after the lapse of the period, the timber which will remain uncut and unremoved, will be the property of the estate, he will see that no loss is done to the small shoots, if within the period there will be a breach of conditions the plots will be taken under direct management and the money deposited will not be refunded "

It will appear from the above that the transactions relate to a class of trees of spontaneous growth which are subject to periodical cutting It is in the interest of the estate and the proper growth of the jungle that such trees should be periodically cut We agree with the learned Subordinate Judge that these transactions must be regarded as acts done in the ordinary course of management of the estate. Mr. Mayne in his Treatise on Hindu law, 9th Edition, p 907, discussing the extent of a Hindu widow's estate remarks as follows :

"It is not a life-estate, because under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for reversioners. Within the limits imposed upon her, the female holder has the most absolute power of enjoyment."

These remarks were quoted with approval by their Lordships of the Judicial Committee in the case of *Thakur Vasonji Morarji* v. *Chanda Bibi* (3). Again at p 909 Mr. Mayne remarks :

"A woman is in no sense a trustee for those who may come after her. She is not bound to save the income She is not bound to invest the principal. If she chooses to invest it, she is not bound to prefer one form of investment to another as being more likely to protect the interests of the reversioners. She is forbidden to commit waste, or to endanger the property in her possession, but, short of that, she may spend the income and manage the principal as she thinks proper."

We are of opinion that the widow, Thakurain Jairaj Kuar, was lawfully entitled to enter into transactions of this nature and that they cannot be questioned by the reversioner unless he could show that they amounted to a spoliation or destruction of the estate. Far from it we are satisfied that the acts were for the benefit of the estate. In this view of the matter the transactions would also satisfy the test laid down in the case of transfers by Hindu widows. In this connexion it was also contended that the period of four years was excessive and unreasonable and that evidence showed that the trees were not sufficiently mature for being cut. We are of opinion that in matters like this the widow must be allowed reasonable latitude for the exercise of her discretion The conditions imposed by her upon the plaintiffs as reproduced above show that she acted with care. The plaintiffs are not allowed to cut a tree more than once and any timber remaining uncut or unremoved within the time allowed is to be treated as the property of the estate without refund of any part of the consideration We have no evidence regarding the extent of the jungle which forms the subject of these transactions. The evidence as regards the age of the trees is also of the vaguest description The defendant relies on the statements of two witnesses, D. W. No 1 and D. W. No. 3. Their evidence is worthless. It has not been accepted by the Court below. We are not prepared to rely on it We, therefore, hold that the transactions in question are valid and binding upon the reversioner

It was also contended that the right given to the plaintiffs of going into the jungle and cutting and removing the trees during the period of four years, constitutes a license and it must be deemed to have terminated with the death of the licensor. It should be noted that the alleged license is coupled with a transfer of property. Such a license is not revokable under S 60, Easements Act and, in our opinion, must subsist while the transfer is in force. In any case the defendant has by his high-handed interference with the plaintiffs' right succeeded in keeping them out of the jungle since November 1926, for a period of about one year and nine months. The balance of the period which is now left to the plaintiffs is by no means unreasonable and, if necessary, we should be prepared to allow them that period independent of the terms of the permits for the purpose of enabling them to have the full benefit of the purchase of the timber made by them. We, therefore, reject this contention.

Lastly, an objection has been taken to the form of the decree passed by the lower Court. The lower Court has granted the plaintiff No. 1 a decree for possession of

(3) A. I. R. 1915 P. C. 18=37 All. 369 (P.C.).

the jungle lands in suit. As we have said before, in our opinion, the rights acquired by the plaintiffs are limited to the cutting and removal of trees of certain specified classes. They have no right to other trees growing in the jungle or to the grass or any other produce thereof; nor have they any right to the land except in so far as it is necessary to give them access to the trees purchased by them for the purpose of their cutting and removal. We are, therefore, of opinion that the decree of the lower Court should be modified accordingly.

We allow the appeal only to this extent that we direct that instead of the plaintiff 1 being given a decree for possession of the jungle lands he should be given a decree for possession of the trees purchased by him. He and his workmen and staff will have the full right of access to the trees during the unexpired period of the permits for the purpose of getting them cut and removed. As regards costs we direct that in the circumstances the defendant should bear his own costs and pay half the costs of the plaintiff 1 in both the Courts.

W.S./R.K. *Appeal allowed in part.*

A. I. R. 1929 Oudh 96

SRIVASTAVA, J.

Naunihal Singh — Plaintiff—Appellant.

v.

Sardar Bux Singh and *another* — Defendants—Respondents.

Second Rent Appeal No 54 of 1928, Decided on 26th September 1928, from an order of 2nd Addl Dist. Judge, Lucknow, at Unao, D/- 21st May 1928.

Oudh Rent Act (22 of 1886), Ss. 119, 108 Cl. (4) and 61—Appeals from orders under S. 108, Cl. (4) lie to Commissioner or Board of Revenue.

If a suit is one under S. 108, Cl. (4) based on the provisions of S. 61, appeals from orders in such suits lie to the Commissioner and the Board of Revenue and not to the District Judge or the Chief Court. [P 96 C 2]

Hukimuddin—for Appellant.

Ghulam Hussain—for Respondents.

Judgment. — The plaintiff-appellant instituted a suit in the Court of the Sub-Divisional Officer of Purwa, District Unao, under S. 108, Cl. (4), read with S. 61, Oudh Rent Act. The plaintiff's case was that the defendants had failed to pay the rent for the years 1331 to kharif 1334 fasli and that they are, therefore, liable to ejectment under S. 61, Oudh Rent Act. The Assistant Collector held that the plaintiff was not competent to maintain the suit and on this ground dismissed the suit. The plaintiff appealed to the Court of the Second Additional District Judge of Lucknow at Unao The Additional District Judge has agreed with the opinion of the Assistant Collector and dismissed the appeal. The plaintiff comes here in second appeal. A preliminary objection has been raised by the learned counsel for the defendants-respondents that the appeal before the Additional District Judge was incompetent and no second appeal lies to this Court.

I think the objection must succeed It is clear from a reference to the plaint that the suit was one under S 108, Cl. (4), Oudh Rent Act, based on the provisions of S. 61 of the Act. Appeals from such suits lie to the Commissioner and the Board of revenue and not to the District Judge or the Chief Court The provisions of S. 119, Oudh Rent Act, are perfectly clear It specifies the class of suits in which appeals lie to the District Judge and the Chief Court Suits under S 108, Cl (4), are not included within the class of suits in which appeals lie to the District Judge and the Chief Court. I, therefore, hold that the appeal against the order of the Assistant Collector did not lie to the District Judge and no second appeal lies to this Court. If the attention of the Additional District Judge had been drawn to this the proper course for him would have been to return the memorandum of appeal filed in his Court for presentation to the proper Court. I can see no reason why I should not adopt the same course now

For the reasons given above, I set aside the decision of the learned Additional District Judge, which was wholly without jurisdiction, and order that the memorandum of appeal filed by the plaintiff in his Court be returned to the appellant for presentation to the proper Court. The appellant will pay the costs of the respondents in this Court and in the Court of the Additional District Judge.

A.L./R.K. *Order accordingly.*

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* A. I. R. 1929 Oudh 97

STUART, C. J., AND RAZA, J.

Mirza Mohammad Sadiq Ali Khan—Defendant—Appellant.

v.

Fakhr Jahan Begam and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 16 of 1926, Decided on 29th February 1928, from decree of Sub-Judge, Lucknow, D/- 4th July 1925.

(a) Mahomedan Law—Gift—Hiba-bil-ewaz is not effective unless accepted by the donee.

Though in the case of a hiba-bil-ewaz it is not necessary to take possession of the property, still it will not be effective unless it is accepted by the donee, or, if he is a minor, by the guardian on his behalf. [P 102 C 2]

(b) Oudh Estates Act (1 of 1869), Ss. 1 and 3—Taluqdar's name recorded in lists 1 and 2—Taluqdari sanad granted to him—Taluq is an "estate."

Where a taluqa is held by a person as taluqdar, his name is entered in lists 1 and 2 and a taluqdari sanad is granted to him, the taluqa is an "estate" within Ss. 1 and 3 of the Act [P 103 C 2]

(c) Oudh Estates Act (1 of 1869), S. 22—Person having equitable rights in estate—Taluqdar dying intestate—Person can enforce his rights against taluqdar but succession to taluq is governed by S. 22.

Although a holder of an equity giving him right to interests in the estate against the taluqdar could proceed against the taluqdar in possession in order to establish his rights, still the succession to the estate is to be governed by S. 22 of the Act if the taluqdar died intestate. [P 103 C 2]

(d) Oudh Talukdar—Non-taluqdari estate of taluqdar, entered in list 2, dying intestate will ordinarily descend to single heir by family custom—But if such custom is disproved by other side, the other side need not affirmatively prove that succession in past was governed by personal law or that a different custom exists.

Where a taluqdar whose property is entered in list 2 dies intestate, there arises a rebuttable presumption that the succession to his property not forming part of the taluqdari estate devolves under a family custom of descent to a single heir. But if the other side disproves the existence of such a custom it is not necessary for the other side to prove affirmatively either that succession in the past has been regulated by strict adherence to the personal law or that a different custom exists: *A.I.R.* 1916 *P.C.* 89, *Expl.* [P 104 C 2; P 105 C 1]

*** (e) Practice — Plea not taken in trial Court can be raised in appeal to show fundamental flaw in opponent's case if latter does not suffer thereby.**

Even where a plea is not explicitly taken by the trial Court or discussed by it, the party has a right to raise the plea in appeal to show a fundamental flaw in the case of the other side, provided that the other side does not suffer by the raising of the plea at that stage. [P 105 C 1]

(f) Oudh Estates Act (1 of 1869), S. 32-A—Acquisitions made to "estate" after passing of Act—Holder of "estate" cannot cause such acquisitions to become part of "estate" unless by registered declaration.

Where the holder of an "estate" within the meaning of the Act makes acquisitions to such "estate" subsequent to the passing of the Act, he is not competent, otherwise than by a declaration made under S. 32-A to make the acquisitions also descend along with the "estate" under S. 22 of the Act: 27 *All.* 634 (*P.C.*); *A. I. R.* 1918 *P. C.* 25, *Rel. on.*; 29 *Cal.* 433 (*P.C.*) 35 *All.* 391 (*P.C.*) and *A. I. R.* 1916 (*P. C.*) 89, *Dist.* [P 107 C 1]

(g) Oudh Taluqdar — House not part of taluq property can rightly be called appurtenance to it, if it is considered as taluq house and is used for taluq office.

Where a house which has been consistently considered as a taluq house, though it is not actually part of the taluq property, and is also used as an office for the taluq, the house is appurtenance to the taluq. *A. I. R.* 1918 *P. C.* 25, *Foll.* [P 108 C 1]

*** (h) Mahomedan Law—Wakf of Government promissory notes is valid.**

Government promissory notes can be validly dedicated by way of wakf under the Imamia Law. [P 112 C 1, 2]

(i) Benami—Advancement.

Principles and distinction between benami and advancement pointed out. [P 108 C 2]

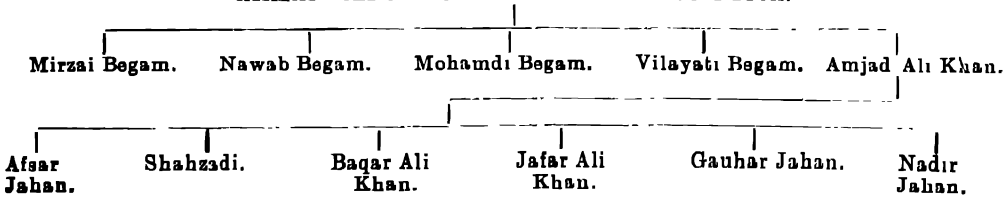
Sultan Ahmad, Bisheshwar Nath Srivastava and *Bishambhar Nath Srivastava*—for Appellant.

A. P. Sen, Ali Zaheer, Kedar Nath, Niamatullah, Habib Ali Khan and *Zahur Ahmad*—for Respondents.

Judgment.—These appeals arise out of a suit for partition brought by certain heirs of the deceased Nawab Baqar Ali Khan, a nobleman of the Shia faith, against other heirs under the Imamia law. Nawab Baqar Ali Khan was a gentleman of wealth and position, who resided for the most part in Lucknow in a place known as the Shish Mahal. He was created a hereditary Nawab in 1877. This is the history of his family. A certain Khwaja Safi Sahib, a Mughal from Persia, who was originally a resident of Shiraz, arrived at the Court at Lucknow at some time during the reign of Nawab Asaf-ud-daula (1775—1797). He appears to have attained some position, but not an important position, in the Court. He had four children: Hadi Ali Khan, Khudaija Khanam, Farzana Khanam and Mehdi Ali Khan. Mehdi Ali Khan, his younger son, acquired great wealth and influence during the reigns of Nawab Saadat Ali Khan, King Ghazi-ud-din

Haider and King Nasir-ud-din Haider (1799—1837). During the first part of his career he held the post of Nazim of Mohammadi and Khairabad. He subsequently left Oudh for a period, but was eventually recalled and became Prime Minister to King Nasir-ud-din Haider. He was honoured with the title of Muntazim-ud-daula (Manager of the State). He died on 25th December 1837, leaving no issue. His nephew Ahmad Ali Khan, the son of Hadi Ali Khan, secured a position as great as the position of his uncle. He became the Prime Minister of King Amjad Ali Khan in 1842 and received the title of Munawwar-ud-daula (Light of the State). After he became Prime Minister he acquired landed property in the Sitapur District and other districts in Oudh. After the annexation of 1856, the first Summary Settlement of the properties in these districts was made with him. In the events of 1857-1858 Ahmad Ali Khan was imprisoned by the insurgents. He obtained his liberty after the restoration of the British power. The second Summary Settlement of the above-mentioned properties was made with him in the name of a negro ex-slave of his, called Abdul Ali. The fact is clear from Ex 502. Ahmad Ali Khan died on 12th October 1858. The following were his descendants :

AHMAD ALI KHAN married IFTIKAR-UN-NISSA.



The landed property in Oudh belonging to Ahmad Ali Khan consisted in the main of two estates, the Kanwa Khera estate in the Sitapur District and the Behta estate in the Lucknow District. As far as can be gathered, the British authorities were ready to recognize Amjad Ali Khan, the only son of Ahmad Ali Khan, as proprietor of both estates ; but, apparently at Ahmad Ali Khan's desire, only Kanwa Khera was assigned to him, Behta being assigned to his younger son Jafar Ali Khan. Sanads were granted accordingly. A primogeniture sanad (Ex. B-1 and Ex B-2) was granted to Amjad Ali Khan in respect of the Kanwa Khera estate.

When lists were prepared under the provisions of Act 1 of 1869, the name of Amjad Ali Khan was recorded as No. 81 in list 1 and No. 29 in list 2 in respect of Kanwa Khera, and the name of his younger son Jafar Ali Khan was recorded as No 15 in list 1 and No 1 in list 4 in respect of Behta. Amjad Ali Khan died on 7th March 1875. He was succeeded in respect of the estate of Kanwa Khera by his elder son Nawab Baqar Ali Khan, who died on 17th January 1921 Nawab Baqar Ali Khan married first Nawab Sharaf Jahan Begam and subsequently Nawab Fakhr Jahan Begam Both ladies have survived him. He left the following issues surviving him.

From Nawab Sharaf Jahan Begam · Nawab Sadiq Ali Khan, the eldest son, Nawab Ali Khan and Nawab Naqi Ali Khan, younger sons. From Nawab Fakhr Jahan Begam : Nawab Abid Jahan Begam, daughter, and Nawab Taqi Ali Khan, youngest son In May 1921, Nawab Fakhr Jahan Begam with her son Taqi Ali Khan and her daughter Nawab Abid Jahan Begam instituted a suit in the Sitapur district claiming their shares under the Imamia law applicable to Shias in the whole of the property alleged by them to have been left by Nawab Baqar Ali Khan. This included the taluqa of Kanwa Khera They impleaded Nawab Sharaf Jahan Begam, her sons and others This claim was met by a variety of pleas disclosing in places conflict of interests between various defendants. Nawab Sadiq Ali Khan took the position that the Imamia law had no application to the case, that he succeeded to the Kanwa Khera taluqa according to the provisions of S. 22, Act 1 of 1869, or, in event of those provisions having no application, under the terms of the primogeniture sanad as being the eldest son of his father He took the plea that he succeeded to the remainder of the property according to the provisions of a family custom under which all property devolved on a single heir. Nawab Sharaf

Jahan Begam and her other sons accepted the position that the whole of the property of the deceased Nawab was subject to the provisions of the Imamia law. All contesting defendants took the position that the plaintiffs had omitted to include in the suit property which, although it was entered fictitiously in their names, was actually the property of the deceased Nawab.

The learned Subordinate Judge decided the suit in an elaborate judgment, dated the 25th June 1925. His main conclusions were these :

(1) The succession to the estate of Kanwa Khera devolved under S. 22, Act 1 of 1869, on Nawab Sadiq Ali Khan. (2) Most of the remaining property, with the exception of a certain accretion to the Kanwa Khera estate, which went with the estate, was the non-taluqdari property of the deceased Nawab which when not transferred by valid transfers during his lifetime, was property divisible under the Imamia law amongst all heirs, there being no family custom under which it descended to a single heir (3) Certain properties standing in the names of individual parties had been duly transferred to them by valid transfers. These properties were excluded from the property divisible (4) Certain properties standing in the names of individual parties had not been duly transferred to them by valid transfers. These properties were included in the property divisible (5) Certain Government promissary notes from the income of which what was known as the radd-i-mazalim —(atonement for crimes of violence) fund was met, were the property of a valid waqf under the Imamia law and as such could not be included in the property divisible.

He passed a decree accordingly

This decree did not accept the pleas of any contesting party in their entirety. The following parties have appealed against it. Nawab Fakhr Jahan Begam and Nawab Abid Jahan Begam appeal in appeal No. 20 of 1926, asking in the main that the Kanwa Khera property should be divided amongst all the heirs, and that certain properties which the judgment declared part of the estate should be taken out of it, as being their private property, and that the radd-i-mazalim notes should be included in the divisible estate. Nawab Sadiq Ali Khan appeals in appeal No. 16 of 1926, asking that the whole of the property should be given to him. Nawab Taqi Ali Khan has filed cross-objections to this appeal. Nawab Sharaf Jahan and Nawab Kazim Ali Khan appeal in appeal No. 24 of 1926, asking in the main that the Kanwa Khera property should be divided amongst all heirs, and that the property awarded to other parties and the radd-i-mazalim notes should be included in the divisible estate

We here state our appreciation of the exceptional care which the learned Subordinate Judge has devoted to the trial of the suit and to the preparation of his judgment. The suit was far from easy. He has applied his mind very closely to the complicated facts and to the points of law which arose, some of which were of no ordinary difficulty. Where we have not found ourselves in complete agreement with his views, that fact in no way detracts from our recognition of the manner in which he has dealt with the case. We decide these appeals on the following points :

(1) Has the estate of Kanwa Khera been rightly held to be the sole property of Nawab Sadiq Ali Khan ? (2) Has the learned trial Judge rightly held that there is no family custom under which intestate succession to all property devolves on a single heir and that succession to such property is according to the provision of the Imamia law ? (3) Has the learned trial Judge rightly decided that certain acquisitions of landed property made by Nawab Baqar Ali Khan in his lifetime were not made by him with the intention that they should form part of the taluqa of Kanwa Khera, and as such should be considered legally to go with the estate ? (4) Has the so-called Khairabad House been rightly declared an appurtenance of the Kanwa Khera taluqa ? (5) Has the property, which the learned trial Judge has excluded as the property of Nawab Fakhr Jahan Begam, Nawab Taqi Ali Khan and Nawab Abid Jahan Begam, been rightly excluded from the divisible estate ? (6) Has the remaining property, standing in the names of Nawab Fakhr Jahan Begam, Nawab Taqi Ali Khan and Nawab Abid Jahan Begam, been wrongly included in the divisible estate ? (7) Have the radd-imazalim promissory notes been rightly excluded from the estate ? (8) Has the

decree been rightly drafted under the provisions of O. 20, R. 18 ?

(9) Has the decree wrongly omitted to include Kothi Asfi ?

We wish to express our appreciation of the manner in which these complicated cross-appeals have been argued at the bar by the learned counsel concerned They presented their cases with admirable lucidity and compressed their arguments as closely as was possible. While doing full justice to the cases of their clients they have not strayed in any instance into immaterial or irrelevant matter. We note that all pleas not decided in our judgment were abandoned in argument by the learned counsel for the parties concerned.

(1) Has the estate of Kanwa Khera been rightly held to be the sole property of Nawab Sadiq Ali Khan ?

This plea has been raised against Nawab Sadiq Ali Khan by all parties other than himself. Certain facts may be recapitulated here. The villages forming this taluqa were admittedly not acquired by Nawab Ahmad Ali Khan until a few years before the British annexation of Oudh. They were settled with Nawab Ahmad Ali Khan in the first Summary Settlement of 1856. The preliminary argument against the learned trial Judge's decision here is that these villages were transferred on the evidence by Nawab Ahmad Ali Khan to his grandson, the late Nawab Baqar Ali Khan by a deed of gift dated 1st June 1857, and that they should never have passed to Amjad Ali Khan, the father of Nawab Baqar Ali Khan. The learned trial Judge has found that on the evidence no such gift is established.

It is necessary here to state the circumstances of a litigation to which Amjad Ali Khan was a party. This litigation commenced about the year 1860 We have derived much of our information in respect of this litigation from the report in *Nawab Umjad Ally Khan* v. *Mt. Mohammadee Begam* (1). Mohammadee Begam and Nawab Begam were daughters of Ahmad Ali Khan, and sisters of Amjad Ali Khan. Amjad Ali Khan had obtained administration to the whole of his father's estate. These two ladies instituted in 1860 a suit against him to obtain their shares under the Imamia law in what they asserted to be their father's estate. We here give some facts as to what happened in this litigation, although we shall have to return at a later stage to aspects of the litigation other than the aspects with which we are dealing here. The suit was filed before Mr. Fraser, the Civil Judge of Lucknow. We have before us a copy of a part of the judgment which he passed on 31st October 1861. It is Ex. 530. The copy, however, does not give the judgment in full. This judgment shows that Amjad Ali Khan pleaded that the Kanwa Khera estate, which his sisters had claimed as part of the divisible property of their father, had been transferred under a deed which is called in the judgment Ex. B to his son by Ahmad Ali Khan, but he also claimed this property under what Mr. Fraser called two firmans. By firmans he is clearly referring here to primogeniture sanads, for he notes that one firman was granted by Mr. Wingfield, Chief Commissioner on 12th March 1861, and the primogeniture sanad of Kanwa Khera to which we have already referred is of that date. Mr. Fraser in his judgment arrived at the conclusion that the two ladies had made out no case in respect of the Kanwa Khera property as well as other property. He says referring to the Kanwa Khera property which he calls the villages ;

> " Those held by the son Amjad Ali Khan under the deed '*B*' situated in Khairabad, Zila Sitapur, are confirmed by the grant on Amjad Ali Khan himself. The titles conferred by the previous deeds were in fact wholly set aside, and new ones conferred."

Mr. Fraser thus cut out of the divisible estate the Kanwa Khera taluqa, and he cut this out for the main reason that that property was conferred on Amjad Ali Khan by the sanad. He found that a valuable garden called Wazir Bagh, Gulab Bari Bagh and a large amount of money was divisible property, and he gave Amjad Ali Khan's sister their share in that property according to the Imamia law. This decree awarded to the ladies considerably less than the property claimed, and they appealed to Mr. Campbell, the Judicial Commissioner, against the dismissal of the remainder of their claim. Before Mr. Fraser, great stress had been laid on a will alleged to have been made by Nawab Ahmad Ali Khan, while he was in captivity in the hands of the insurgents. This will is alleged to have been

(1) [1867] 11 M. I. A. 517 = 10 W. R. 25 = 2 Sar. 815 = 2 Suther. 98 (P.C.).

made on 2nd September 1857. It will be remembered that on that date the British Garrison was closely invested in the Residency, and that the first relief did not reach Lucknow till the end of September 1857. This will has been proved in two portions by witnesses in the suit out of which the present appeal arises. The first portion of the will is printed at p. 74, Book C, and the second at p. 71, Book C. We shall refer to the will in future as "Ahmad Ali Khan's will."

Mr. Campbell considered this will invalid in law and for this and other reasons, which will be found in his judgment, dated 19th April 1862 (Ex. 2), he increased the amount of divisible property by Rs. 7,35,300. He did not vary the decree otherwise. Nawab Amjad Ali Khan appealed against Mr. Campbell's decision to their Lordships of the Judicial Committee. Their decision, which is dated 29th and 30th November 1867, is reported in *Amjad Ali Khan* v. *Mohammadee Begam* (1), the report to which we have previously referred. No one else appealed in respect of this administration suit, although Nawab Iftikhar-un-nissa, Ahmad Ali Khan's wife, appealed against Mr. Campbell's dismissal in appeal of her claim for dower, which was contained in the same judgment. We shall refer to that claim for dower in another appeal the arguments in which were heard at the close of the arguments in the present appeals.

We have to look to the exact matters determined by their Lordships of the Judicial Committee in appeal. These matters will be found set out at p. 543 of the report We quote this portion of the decision:

"The matters to be determined on this appeal are three in number, and are.—First, the validity of the gift to the appellant of the Company's Paper, amounting to Rs. 7,35,300; secondly, the appointment of a stranger to be and act as co-trustee with the appellant in the trust as to the family, religious, or charitable fund called radd-i-mazalim, and the direction to settle a scheme for the administration of that fund; and thirdly, the reservation of his judgment, indefinitely, by the Judicial Commissioner, on the right of the appellant, as declared by Mr. Fraser in his decree, in respect of the landed property adjusted to the appellant by that last-mentioned decision."

Their Lordships decided at p. 548 that the transfer of Rs. 7,35,300 to Amjad Ali Khan was a good and valid transfer, that the appointment of the Mujtahid-ul-asar with Nawab Amjad Ali Khan as a co-trustee to the radd-i-mazalim fund (we shall have to refer to this portion of the judgment again) was a good appointment, and that the reservation of the decision as to the taluqdari property was justified inter alia by the following facts:

"Mr. Fraser forbore to question the appellant's title under the firman, because that firman, could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the firman had its origin. The Proclamation was necessarily impeached by impeaching the firman, and it was undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted to which the Government must be made a party. The forfeited estates were not assets at the time of the Nawab's death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the parties in unnecessary expense, and subject them to unnecessary delay, since it must be accompanied with a declaration that in the suit between those parties, and on those pleadings, the legality of the title grantors of the firman could not be questioned."

Nawab Fakhr Jahan Begam's advisers have obtained from the office of their Lordships of the Judicial Committee a copy, which is printed as part of Ex. 530 of something which is on the record of the case in England. This something is clearly what is called Ex. B in Mr. Fraser's judgment the so-called deed of gift in favour of Baqar Ali Khan. It is a translation of what is called the sulehnama As we shall point out later, the document is not what would ordinarily be called a sulehnama or compromise, but is a hiba-bil-ewaz. It is dated the 8th Shawwal Hijri, 1273, which is equivalent to 1st June 1857. It is as follows :

Sulehnama.

" This is to certify, that being in a sound state of health, and in the enjoyment of all my senses, uninfluenced by any one and with cheerfulness, I agree to a sulah or negotiation with Mirza Mohammad Baqar Ali Khan, Bahadur the son of Nawab Amjad Ali Khan, Bahadur, my son under the Muhammadan law, by the transfer of my estates in zila Khairabad, which have been purchased by me and stand in my own name and of the money advanced by me for the villages which are mortgaged to me and the kabuliat of which is (ismfarsee) in the name of Abdul Ali Chela, a detailed list of which is with Aga Meer, tahsildar of the above-mentioned

estates. The treaty has been intentionally made by me with full understanding of all the circumstances in consideration of a ring set with a diamond. The terms of this treaty have been accepted and settled between me and Amjad Ali Khan, guardian of the party negotiated with, in Arabic, Persian and Hindi, before witnesses, as follows :

" That the profits of the above-mentioned estates shall be enjoyed by me during my lifetime, and after my death their revenues shall revert to the party negotiated with, without any one participating in them. Dated 8th Shawwal A. H. 1273."

There is a reference to this Ex B in the editor's note at p 520 of the decision of their Lordships of the Judicial Committee :

"Two other similar deeds, and also called soolehnamas, were executed by him on 1st June 1857, in favour of Mahomed Baker Ally Khan and Mahomed Jafer Ally Khan, two of the sons of the appellant, and by which the Nawab granted to them respectively other real or immovable estates in Zillah Khyrabad and Zillah Lucknow, and reserving to himself the usufruct thereof during his lifetime."

It is argued that the transfer by Ahmad Ali Khan to Baqar Ali Khan is sufficiently proved by this editor's note and by production of the translation filed. The first question that arises then is whether the transfer has been proved by sufficient legal proof. Beyond admissions so-called, which according to the argument in favour of the plea are contained in the reply of Nawab Sadiq Ali Khan in para. 8 of his written statement to para. 8 of the plaint, there is no other evidence except what we have already stated. We shall first deal with the question of the so-called admissions of Nawab Sadiq Ali Khan. Nawab Fakhr Jahan Begam and her son and daughter undoubtedly alleged that this transfer had taken place, and they went on to argue that this estate was divisible. In para. 8 of their plaint they said :

"That on 1st June 1857, Nawab Munaw-war-ud-daula Bahadur gifted his taluqa in Sitapur district to his elder grandson, Nawab Mirza Muhammad Baqar Ali Khan, and the taluqas of other districts to his younger grandson, Nawab Mirza Mohammad Jafer Ali Khan, defendant 5."

The reply of Nawab Sadiq Ali Khan is in para 8 of his written statement It is as follows :

"Paragraph 8 is admitted in this way that on 1st June 1857, Nawab Munawwar-ud-daula executed two deeds, called compromise, in favour of Nawab Baqar Ali Khan and Nawab Jafar Ali Khan and the contents thereof shall transpire from a perusal of the deeds themselves. The said deeds were never acted upon."

We do not consider that Nawab Sadiq Ali Khan in this reply in any way admitted that Nawab Ahmad Ali Khan had transferred validly this property to Baqar Ali Khan The editor's note is not evidence in any sense of the word. The production of what purports to be a translation of the deed certainly inclines to the conclusion that such a deed was executed. The learned counsel for Nawab Sadiq Ali Khan has put his case on this point very fairly He admits that Amjad Ali Khan filed in this litigation a document which professed to show that the property in Sitapur had been transferred by his father to Amjad Ali Khan's son, Baqar Ali Khan, so that it could not be a portion of the divisible estate, but Nawab Amjad Ali Khan further claimed that the property was his under the sanad While admitting that this translation before us is probably a faithful reproduction of the document that was actually filed by Nawab Amjad Ali Khan he maintains that he has a perfect right to ask the Court to find that its production does not constitute legal proof

We consider that the view taken by the learned trial Judge which he supports is a correct view. There is no legal proof of the contents of this document There are no admissions of an effective nature that such a document as is set up against the decision was executed Those who propounded the document might deserve sympathy for having been deprived of an opportunity of proving what is probably a genuine document, had it not been for the fact that the deed, even if proved, would not, in our opinion, establish that any such transfer was made We examine the terms of the document as it stands It purports to transfer the Kanwa Khara estate by a hiba-bil-ewaz It was executed on 1st June 1857 As we read the deed as a deed of hiba-bil-ewaz it was not necessary for Baqar Ali Khan to take possession of the property in order to make the deed effective, but it was certainly necessary that the transfer should be accepted by him. As he was a boy of about eight years old at the time, he could not legally accept on his own behalf. His guardian was Nawab Amjad Ali Khan. There is no evidence that Nawab Amjad Ali Khan accepted the transfer on his behalf. In fact as soon as Nawab Amjad Ali Khan according to the evidence, ex-

pressed an opinion on the matter we find that he repudiated the title of his son and claimed the property for himself. There is further a very important statement in Nawab Ahmad Ali Khan's will which was executed on 2nd September 1857:

"The two wills, recorded by the Hakim's Diwan and several deeds of gift in favour of various persons, bearing my seal are with the Hakim, which should be considered as not reliable and false."

This we read as a direct repudiation by Ahmad Ali Khan himself of the validity of any such deed of hiba-bil-ewaz. In the decision in the subsequent litigation, nothing turned upon the validity of this deed As we have already noted Mr. Fraser excluded the Kanwa Khera estate on the ground, that full title to it had passed to Nawab Amjad Ali Khan under the primogeniture sanad. Mr. Campbell refused to discuss the question and their Lordships of the Judical Committee considered that he was right. We have devoted more attention to this alleged deed of hiba-bil-ewaz than perhaps it deserves in consideration of the fact that the learned counsel against Nawab Sadiq Ali Khan requested us to give our full attention to the point.

It is to be noted that the learned counsel against Nawab Sadiq Ali Khan agreed that in any circumstances a transfer by Nawab Ahmad Ali Khan to Baqar Ali Khan of 1st June 1857, would have been of no avail, as the property was confiscated under Lord Canning's Proclamation of 15th March 1858, and vested in the British Crown. He admits that the British Crown settled this property with Nawab Ahmad Ali Khan himself in the name of Abdul Ali in the Second Summary Settlement and that the sanad in respect of this property was given to Nawab Amjad Ali Khan He has, however, put forward this alleged transfer by gift to justify the contention that the taluqa of Kanwa Khera passed from the British Government to Nawab Amjad Ali Khan, not in his own right, but as a trustee for his son Nawab Baqar Ali Khan. He did not put forward this contention on the ground that Nawab Baqar Ali Khan was in the end wronged by the transfer of Kanwa Khera to his father, for admittedly Nawab Baqar Ali Khan succeeded to that estate on his father's death. He put it forward in support of a contention that succession to the estate was never governed by the provisions of S. 22, Act 1 of 1869. His argument under this head appears to us to confuse the question of succession with the question of equities due to a third party by a taluqdar in possession of an estate.

The principle that where the Crown has granted, either in Oudh or elsewhere, property to an individual under an equity to administer it on behalf of another whether under a constructive trust or otherwise, the fact of the grant cannot defeat the equity, is a well-known principle, and is clearly laid down in a long series of decisions of their Lordships of the Judicial Committee. We do not think that any useful purpose will be served by referring to these decisions as the principle is too well established to require citation of authority.

But nowhere has it been laid down that the provisions of S. 22, Act 1 of 1869 would not apply to such an estate, should they be ordinarily applicable, because such equities exist The Kanwa Khera estate was a taluqa held by Nawab Amjad Khan, taluqdar, whose name was recorded in lists 1 and 2 A talukdari sanad had been granted to him It was thus an estate within the meaning of Ss. 1 and 3, Act 1 of 1869, and thus succession to it would be governed by S. 22, Act 1 of 1869, if Amjad Ali Khan died intestate The holder of an equity giving him right to interests in the estate against the taluqdar could proceed against the taluqdar in possession, in order to establish his rights, but the succession was under S. 22 of the Act if the taluqdar died intestate.

It is admitted by the learned counsel against Nawab Sadiq Ali Khan that Nawab Amjad Ali Khan died intestate. It is true that he executed what purported to be a will (Ex. Z-1) on 16th March 1874, but the learned counsel agreed that this will was invalid for want of registration in so far as it affected the taluqdari property, and that under the Imamia law it was also invalid in respect of the non-taluqdari property. Thus Amjad Ali Khan died intestate. As soon as he died the Kanwa Khera estate vested in Nawab Baqar Ali Khan as his eldest son under the provisions of S. 22 (1), Act 1 of 1869

It is, however, urged that succession to the estate ceased to be affected by the provisions of that section, because after the death of Nawab Amjad Ali Khan, his

sons Baqar Ali Khan, Jafar Ali Khan and the ladies of the family arrived at an amicable agreement evidenced by Exs. 14, 15 and 16, under which Nawab Baqar Ali Khan took the whole of the Kanwa Khera estate, and the remainder of Nawab Amjad Ali Khan's property was divided in the manner indicated in those deeds. It is urged that this arrangement operated as a family settlement, under which the succession to the estate was taken outside the provisions of the Act by agreement amongst the whole of the heirs, and the estate was subsequently divided by various alienations and transfers. We consider it unnecessary to pursue what would have been the consequences of such alienations had the property been subsequently acquired by the person entitled to it under the Act in view of the amendment of S. 14, Act 1 of 1869 as we find at the beginning, that there was no such family settlement, that there were no alienations, and no transfers. On the death of Nawab Amjad Ali Khan intestate, the Kanwa Khera estate devolved on Nawab Baqar Ali Khan, and he obtained possession. His relatives attempted to dispute his title on the basis of a will which is now admitted to be invalid. They withdraw their opposition on receipt of certain consideration. Thus according to our view, the succession to the Kanwa Khera Taluqa remained under S. 22 of the Act when Nawab Baqar Ali Khan died intestate, and the Kanwa Khera estate has passed under the provisions of S. 22 (1), Act 1 of 1869, to his eldest son Nawab Sadiq Ali Khan.

We should have rejected this portion of the appeal even had we held otherwise. If it had been found that the provisions of S. 22, Act 1 of 1869 had no application, the appeal would fail equally on the facts We have it in evidence that a primogeniture sanad was granted to Nawab Amjad Ali Khan in respect of the Kanwa Khera estate. Under the terms of this primogeniture sanad he should have been succeeded (as he was succeeded) by his eldest son Nawab Baqar Ali Khan, and on Nawab Baqar Ali Khan's death intestate he would be succeeded by Nawab Sadiq Ali Khan. If the case against Nawab Sadiq Ali Khan was put as its highest it would be held that the estate was conferred really upon Nawab Baqar Ali Khan, although in the name of his father. Nevertheless the primogeniture sanad would have effect; only it would have to be considered that the primogeniture sanad was granted in reality to Nawab Baqar Ali Khan. Nawab Baqar Ali Khan would then be considered to be holding the estate under the terms of the primogeniture sanad, and as he has died intestate the property would descend to his eldest son Nawab Sadiq Ali Khan. For the obove reasons we uphold the decision of the learned trial Judge on the first question.

The second question is whether the learned trial Judge has rightly held that there is no family custom under which intestate succession to all property devolves on a single heir and that the succession to such property is governed by the Imamia law. Nawab Sadiq Ali Khan disputes the decision of the Court below. All others oppose him.

Sir Sultan Ahmad on behalf of Nawab Sadiq Ali Khan lays great stress on what he urges is the principle laid down in the decision of their Lordships of the Judicial Committee in *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (2). He argues that according to the principles of that decision the non-taluqdari property of a taluqdar whose name is entered in list 2 dying intestate must descend to a single heir, unless it is proved affirmatively that intestate succession to such property is governed by the personal law of the deceased, or unless it is proved affirmatively that there is a custom applicable to such property under which it descends otherwise than to a single heir. We are of opinion that the decision in question lays down no such rule. It undoubtedly lays down that where a taluqdar whose property is entered in list 2 dies intestate there arises a rebuttable presumption that the succession to his property not forming part of the taluqdari estate devolves under a family custom of descent to a single heir. In such a case the Court commences with the presumption that the non-taluqdari property will descend to a single heir: but in our opinion if the other side disproves the existence of such a custom it is not necessary for it to prove affirmatively either that succession in the past has been regulated by strict adherence to the personal law, or that a custom inconsistent exists. With

(2) A. I. R. 1916 P. C. 89=38 All. 552=19 O. C. 290=43 I. A. 269 (P.C.).

this preface we come to the facts. (Here the judgment discussing evidence proceeds) Considering the facts as a whole, we are of opinion that the evidence rightly considered rebuts absolutely the presumption that non-taluqdari property in this family descends to a single heir. This evidence disproves the existence of such a custom. We accordingly find that the learned trial Judge arrived at a correct decision upon this part of the case.

(3) Has the learned trial Judge rightly decided that certain acquisitions of landed property made by Nawab Baqar Ali Khan were made by him with the intention that they should form part of the taluqa Kanwa Khera, and, as such, be considered to go with the taluqa ?

This plea is taken by Nawab Sadiq Ali Khan, and is opposed by all the other parties. Mr. A. P. Sen on behalf of Nawab Fakhr Jehan Begam has argued, that no evidence to the effect that Nawab Baqar Ali Khan declared his intention to incorporate subsequent acquisitions into the taluqa of Kanwa Khera can cause such portion to become part of the "estate" within the meaning of Act 1 of 1869, unless a registered declaration had been made by him according to the provisions of S. 32-A of his intention so to incorporate. S 32-A was added to Act 1 of 1869 by amending legislation in 1910 It is admitted by Sir Sultan Ahmad on behalf of Nawab Sadiq Ali Khan that no such declaration has been made We cannot find that this plea was taken explicitly before the learned trial Judge or discussed by him, but we consider that Mr. A. P. Sen has a right in appeal to show a fundamental flaw in the case for the other side, provided that the other side does not suffer by the raising of the plea at this stage The other side has not suffered by the raising of this plea as the learned counsel for Nawab Sadiq Ali Khan has considered it carefully and after due preparation has replied to it at some length.

Mr. Sen based his preliminary objection in the main on the authority of the decisions of their Lordships of the Judicial Committee, which will be found in what are known as the *Mehawa* cases, The first decision is reported in *Sheo Singh* v. *Raghubans Kunwar* (3) and the second in *Rajendra Bahadur Singh* v *Raghubans Kunwar* (4). In these appeals it was contended that villages purchased by the holder of the Mahewa taluqa should be held to be incorporated in that taluqa as it had been proved that the owner intended to incorporate them. Their Lordships decided in the latter decision that they could not be so incorporated whatever was the intention of the owner of the taluqa who had purchased the villages The words are :

"What was suggested was that Balbhaddar Singh had acquired property by purchase and had added it to the estate which had been granted by the sanad of 1861 to Girwar Singh. The facts were not before their Lordships in 1905 which would have enabled them to decide whether any lands had accreted to taluqa Mahewa as it was constituted at the date of that sanad. The Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case. Sir Edward Chamier, then Mr. Chamier, Judicial Commissioner of Oudh, in his judgment on some objections taken to the second report of the Court of the Subordinate Judge correctly stated the law in this respect as to the power of a subject, thus . 'I take it that it is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh.' With that statement as to the law, their Lordships agree."

Sir Sultan Ahmad on behalf of Nawab Sadiq Ali Khan argued that that decision was in respect of a case in which the provisions of S 22, Act 1 of 1869 did not govern the succession. That statement is perfectly correct. Mr. A. P. Sen's reply was that the principle had application, as the property in that case was the Mahewa taluqa which had been granted under a sanad of 1861 and which was entered as a taluqa in the lists prepared under Act 1 of 1869, the name of Thakur Gajraj Singh being entered at No. 118 in list 1 and No. 49 in list 2. He argued that the estate was thus an "estate" within the meaning of Act 1 of

(3) [1905] 27 All. 634=32 I. A. 203=8 O. C. 317 (P.C.).

(4) A. I. R. 1918 P.C. 25=40 All. 470=21 O. C. 106=45 I. A. 194 (P.C.).

1869. We find that the property in dispute in that case, that is the Mahewa estate was certainly an "estate" within the meaning of Act 1 of 1869. Our view to the effect that it was an estate within the meaning of S. 2 and S. 3, Act 1 of 1869 is supported by the decision of their Lordships of the Judicial Committee in *Thakur Sheo Singh* v. *Rani Raghubans Kunwar* (3)

The finding in the two appeals was to the effect that the Mahewa taluqa was an "estate" as defined in Act 1 of 1869, but that on the facts the descent was not governed on the death of Balbhaddar Singh in 1898 by the provisions of S 22, Act 1 of 1869, but by the provisions of the primogeniture sanad of 1861 The fact that the descent was not governed by S. 22 in no way disturbs the conclusion that the Mahewa taluqa was an "estate" within the meaning of Act 1 of 1869, and on the authority of these decisions, unless they are distinguished or explained away, we should be unable to hold that it is open to the holder of an estate as defined in Act 1 of 1869 to subject property acquired by him subsequent to the passing of the Act to the rule of descent contained in the Act otherwise than by compliance with the provisions of S 32-A of Act 1 of 1869. Sir Sultan Ahmad argued that there is authority in certain pronouncements of their Lordships of the Judicial Committee to the contrary. We proceed to consider the authorities which he has cited. In *Parbati Kumari Debi* v. *Jagdish Chunder Dhabal* (5), it was held that property purchased on behalf of a Hindu governed by the Mitakshara law out of the savings of the zamindari was his self-acquired property, there being no evidence that he intended to incorporate it in his ancestral zamindari property. This decision is no authority for the proposition that the holder of an estate to which succession is governed by a rule superseding the personal law governing his other property can, at his own will, incorporate that rule of succession to govern property other than that estate.

In *Janki Pershad Singh* v *Dwarka Pershad Singh* (6), their Lordships of Judicial Committee decided the question of succession to an estate within the meaning of Act 1 of 1869. They decided that the estate consisted of certain properties acquired before Act 1 of 1869 was passed The question then arose whether properties acquired after that date became part of that estate. They say at p. 181 :

"The only other point that remains to be considered is whether the lands subsequently acquired were, as a matter of fact, incorporated with the taluqa. As has been pointed out by this Board in the case of *Parbati Kumari Debi* v. *Jagdish Chunder Dhabal* (5), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of succession" depends on his intention to incorporate the acquisitions with the original estate. The Courts in India have concurrently found against the defendant on this point, and their Lordships see no reason to differ from their conclusion. Both Courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half-share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the regular settlement proceedings The decree of the lower Court must, therefore, be varied by the elimination of Kamrauli."

Their Lordships decided in that case that before those who contested that such property formed part of the taluqa could succeed it was necessary for them to establish as a preliminary that there was an intention to incorporate. Their Lordships' finding that there was no intention to incorporate, the plea failed in limine, and it was not decided whether, if there had been such an intention, the effect would have been to apply a special rule of descent.

Sir Sultan Ahmad relied on the decision in *Murtaza Husain Khan* v. *Mahomed Yasin Khan* (2) We are unable to find anything in that decision to support his contention. Their Lordships in that decision were dealing with the question of succession to the non-taluqdari property of a Mahomedan This is the decision to which we have already referred in another connexion As the original taluqdar's name was entered in list 2, it was held that the presumption was that the non-taluqdari property would descend to a single heir, but this decision laid down nothing as to the power of a holder of an "estate" within the meaning of Act 1 of 1869 to apply the special rules of succession contained in the Act or sanad to property subsequently acquired by him whether he had or had not expressed his intention so to incorporate the property.

(5) [1901] 29 Cal. 433=29 I. A. 82=8 Sar. 205 (P.C.).

(6) [1918] 35 All. 391=40 I. A. 170=20 I. C. 73=16 O. C. 216 (P.C.).

Their Lordships' decision here was that succession to this non-taluqdari property would descend to a single heir unless the presumption was displaced, and the presumed custom by which property of that nature was inherited by a single heir in intestate succession was disproved. They decided that the plaintiff who denied the custom was met affirmatively by the presumption that the custom existed. The plaintiff had argued that the defendant was under the obligation to establish the custom affirmatively and relied in support of that view on the decision in *Janki Pershad Singh* v. *Dwarka Pershad Singh* (6), to which we have already referred Their Lordships in repelling this contention observed, that while the question of onus may arise in disputes between persons whose personal law was the Mitakshara law, owing to the distinction between the rule of succession to obstructed inheritance and the rule of succession to unobstructed inheritance known to that law, and owing to the fact that considerations may arise in such disputes in respect of evidence as to incorporation of self-acquired property in the ancestral estates, such considerations could not affect the question of onus in the case before them which related to the intestate succession to a person governed by the Muhammadan law

All these pronouncements are of a date prior to the date of the decision in *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (4) So far as we can ascertain, their Lordships did not decide the question in dispute before us until they decided that last appeal We find the effect of their decision to be that no person can by his own declaration (otherwise than by a declaration under S. 32A of Act 1 of 1869) or by his own volition apply a rule of succession, varying the rule provided by his personal law, to properties not part of the estate granted to him under special conditions which vary the rule of succession under the personal law in respect of that estate when such properties have been acquired by him at a date subsequent to the passing of the Act.

This conclusion is sufficient to repel the plea raised on behalf of Nawab Sadiq Ali Khan. We consider it, however, necessary to state briefly our findings of fact. We might, had we so desired, have decided this plea on the findings of fact alone, but the question raised by Mr. Sen being one of considerable importance and one which we consider deserves decision, we have ventured to state our findings upon it.

Even if it had been permissible to Nawab Baqar Ali Khan to incorporate subsequent acquisitions in the Kanwa Khera estate, we find that on a proper view of the evidence, no intention to incorporate such properties is established. The findings of the learned trial Judge upon this point are based on an exhaustive analysis of evidence. We have been through the evidence. We are in complete accord with those findings of fact, and we do not consider it necessary to state our reasons in detail as they are similar to the reasons which guided the learned trial Judge We, therefore, find against Nawab Sadiq Ali Khan on this ground

(4) Has the so-called Khairabad house been rightly declared an appurtenance to the Kanwa Khera taluqa?

This finding in favour of Nawab Sadiq Ali Khan is attacked by all other parties The house in question is not situated on land forming part of the taluqdari property, and although it is called the Khairabad house it is not actually within the town of Khairabad but is situated on land situated in the village of Arjanpur which adjoins Khairabad Its description as the "Khairabad house" is not really incorrect as it is within the municipal limits of Khairabad town It is not known how long this house has been in the possession of the holder of the Kanwa Khera estate It has probably been in his possession for a long time. Under the Nawabi rule Khairabad was the head-quarters of a Nizamat, and Nawab Mehdi Ali Khan, as we have already stated, was at one time Nazim of Khairabad. This house is used as a residence and office for the members of the staff of the Kanwa Khera taluqa. The taluqdar visits it periodically, usually at the time of collection of rents and there can be no doubt as to the fact that in the past it has been used for estate purposes. The learned trial Judge in support of his decision awarding this house to Nawab Sadiq Ali Khan relied upon a principle enunciated by their Lordships of the Judicial Committee in *Rajendra Bahadur Singh* v. *Rani Raghubans Kunwar* (4). Their Lordships there awarded a house which had been consis-

tently considered a taluqa house to the holder of the taluqa, though that house was not actually part of the taluqa property. The case here is stronger, for this Khariabad house is used as an office for the taluqa We note in connexion with this plea, that in a subsequent portion of our judgment we shall uphold a gift made by Nawab Baqar Ali Khan of a portion of the premises to Nawab Fakhr Jahan Begam, but this fact in no way affects our decision Nor does it affect the usefulness of the house for the work of the taluqa for there is still sufficient accommodation in the portion left to Nawab Sadiq Ali Khan, both for residential and office purposes. We accepted the view of the learned trial Judge upon this point.

(5) Has the property which the learned trial Judge has excluded as the property of Nawab Fakhr Jahan Begam, Nawab Taqi Ali Khan and Nawab Abid Jahan Begam, been rightly excluded from the divisible estate ?

(6) Has the remaining property standing in the name of Nawab Fakhr Jahan Begam, Nawab Taqi Ali Khan and Nawab Abid Jahan Begam been wrongly included in the divisible estate ? (After giving some facts for deciding the questions their Lordships proceeded.) We have selected from the large number of decisions cited at the Bar those which appear to us to have laid down the law applicable to these questions most fully. These decisions are decisions of their Lordships of the Judicial Committee. They are as follows : *Syyud Ushur Ali* v. *Mt. Bebee Ultaf Fatima* (7), *Uman Prasad* v *Gandhar Singh* (8), *Ram Narain* v. *Muhammad Hadi* (9), *Bilas Kunwar* v *Desraj Ranjit Singh* (10) and *Sura Lakhshmiah Chetty* v *Kothandarama Pillai* (11). There are further two important decisions of their Lordships which have not been so far reported in the Indian Appeals, both are of 1926 : *Maung Po Kin* v *Maung Po Shein* (12) and *Mami* v. *Kallandar Ammal* (13).

These decisions according to our view lay down the following principles :

When property is discovered to be standing in the name and in the possession, actual or constructive of any person, the burden of proof is on the party who contests that person's title to establish that the ownership is benami or ism farzi. The circumstance that the consideration of the transaction has been paid by a person other than the ostensible owner may afford, and frequently affords, sufficient reason for a decision in favour of the plea that the transaction is benami or ism farzi. The ostensible owner, if a wife or child, cannot assert against this a presumption of advancement A presumption of advancement can arise in England in the case of a resulting trust in which there is a disposition of the legal and not of the equitable interest The presumption would only arise where upon a conveyance, devise or bequest it appears that the grantee, devisee or legatee was intended to take the legal estate only, the equitable interest being with the settlor.

In such cases in England, if the conveyance is to a wife or child it will be presumed an advancement There is no such presumption in India. The question is not concluded by the proof that the consideration has has been paid by a person other than the ostensible owner. The fact that the consideration has been paid by a person other than the ostensible owner, is not necessarily in itself sufficient to establish that such a transaction is benami or ism farzi. The party attacking the ostensible owner's title can invoke in his assistance in India the general principle that the practice of taking transfers in the name of a third party, when such transfer is not intended to benefit the third party, is exceedingly common, both amongst Hindus and Muhammadans in this country. Where property is taken in the name of a member of a Hindu joint family and the consideration has been paid out of funds belonging to that joint family and the property is held for the benefit of the family, the conclusion that the property belongs to the family and not to the individual

(7) [1869] 13 M. I. A. 232=13 W.R. 1 (P.C.).
(8) [1887] 15 Cal. 20=14 I. A. 127=5 Sar. 71 (P.C.).
(9) [1898] 26 Cal. 227=26 I. A. 38=7 Sar. 425 (P.C.).
(10) A. I. R. 1915 P. C. 96=37 All. 557=42 I. A. 202 (P.C.).
(11) A. I. R. 1925 P. C. 181=48 Mad. 605=52 I. A. 286 (P.C.)
(12) A. I. R. 1926 P.C. 77=4 Rang. 518 (P.C.).
(13) A. I. R. 1927 P. C. 22=5 Rang. 7=54 I. A. 23 (P.C.).

member in whose name it has been taken is almost irresistible. Where a person other than the ostensible owner has supplied the consideration, and it is established that that person had reason to conceal the fact that he was the real owner, either because he desired to save the property from the claims of actual or potential creditors, or because the knowledge that he was the owner of the property would impair his reputation or position, the conclusion that the person who provided the consideration is the real owner, is appreciably strengthened. The fact that the person who supplied the consideration in a particular transaction has supplied the consideration in prior transfers, which were clearly benami would strengthen the conclusion that that particular transaction was benami

But with these facts must be considered such circumstances as, whether the ostensible owner has been in enjoyment of the income, whether it is established that the person who supplied the consideration had no conceivable motive for carrying out the transaction otherwise than in his own name, or whether he had a particular reason for wishing to benefit the ostensible owner Although there is no presumption of advancement in favour of a wife or child, there can be proof of special love and affection. The decision must be arrived at after placing the burden of proof carefully. We have endeavoured to do this and to consider the evidence as a whole We find it established to our satisfaction that Nawab Baqar Ali Khan lavished money on Fakhr Jahan Begam, and treated both her and her children with the utmost affection. We have no reason to distrust Nawab Fakhr Jahan Begam's statement to the effect that during her twenty-six years of married life she received a very handsome allowance from her husband in addition to having all her personal expense met by him. She may have overstated the amount of his generosity, but after making full deductions for overstatement we consider that she could have well accumulated, even had she not (as she did) invested the proceeds as they came in a capital of between two to three lakhs. (The judgment then discussed evidence relating to specific items of properties, and proceeded to decide the 7th question). Have the promissory notes the income of which is devoted to the expenditure on the radd-i-mazalim fund been rightly excluded from the divisible estate?

We have mentioned the radd-i-mazalim fund previously. Although its origin is obscure, there is no question as to its nature The property of the fund consists of Government promissory notes. The income is devoted to charitable and religious purposes. The income is large. Very many Shias in reduced circumstances benefit from its charity Very many religious observances are met from its income It is not denied that ever since the re-occupation of Lucknow by the British power the radd-i-mazalim fund has been administered for charitable and religious purposes We have no evidence how the fund obtained its unusual name—a fund for the atonement of deeds or crimes of violence. It may be that in the history of Nawab Mehdi Ali Khan and Nawab Ahmad Ali Khan there were incidents which did not leave pleasant memories, and that both were desirous that there should be left in perpetuity a fund from the income of which should be derived benefits to religion and humanity. The first piece of evidence which we have as to the origin of the fund is contained in the will of Ahmad Ali Khan, which we have already referred. The translation of the Persian in which the will is written, that is on the printed book, is not accurate After consultation with the learned counsel, we have arrived at the following translation The following is the translation of the relevant portions which is accepted as accurate :

"I should not be rendered liable to pay the penalty for any non-observance of my own prayers or fasts. Nor should I be rendered liable to pay the penalty for any non-observance of the duties enjoined in the will of the late Nawab Muntazim-ud-daula Bahadur for atonement of sins of omission, nor for having failed to visit Khorasan, nor for not having had regard to the rights of the people. My executors should endeavour to purify and atone for my defects by inquiry and their own efforts."

He assigns out of promissory notes to the total value of Rs. 16,31,000 one third which he estimates at Rs 5,43,303-10-6, so that the income should be devoted to the maintenance of the fund of radd-i-mazalim created under the will of Nawab Muntazim-ud-daula Bahadur, in the objects of which he includes a pilgrimage to Khorasan. We read this document to mean that the radd-i-mazalim fund was not a fund which came into existence as

the act of Nawab Ahmad Ali Khan. This document shows to us that the fund came into existence as the act of Nawab Mehdi Ali Khan, and that Nawab Ahmad Ali Khan had continued to administer it In what we have called his will, he deplores his unworthiness and his neglect of his observances in religious matters, and he asks his executors to repair those defects and to save him from the penalties in the next world caused by his sins and his omissions by faithfully carrying out their duties as administrators of this fund and devoting its income to charitable and religious purposes amongst which he enumerates, the expenses of pilgrims going to Khorasan and the succouring of kinsmen, companions and good Saiyeds. This is the first piece of evidence Much can be deduced as to the nature of the fund from the evidence which we have as to the litigation which commenced in 1860 The copy of Mr Fraser's judgment (Ex. 530) throws very little light on the question It would almost appear that his findings in this respect have been omitted from this copy Mr. Campbell's judgment (Ex 2) gives valuable information as to what the attitude of the members of the family was with regard to this fund at the time of that litigation. While refusing to recognize the validity of Nawab Ahmad Ali Khan's will, he makes the following remarks in respect to it :

"In fact the document itself does not as between them profess to be a will at all. It merely recites certain distribution said to have been already made, and assigns a third of the remainder to the religious and charitable fund called the radd-i-mazalim. The plaintiffs admit that there was an assignment to this of at least as large amount and of older date. They would only fix the assignment in another part of the property which is claimed by Amjad Ali, but that the fund is to come out of the estate is admitted on all hands, and that need not be put in issue. I, therefore, declare that so much as has been admitted by the administrator not exceeding one-third of the whole net estate 'as eventually settled' belongs to the radd-i-mazalim fund, and I strike out of the case the issue respecting the case because nothing really turns upon that alone. I will only allow the papers to stand as found to be more probably true than false so far as it may to some extent come in as incidental evidence on the other issue. With respect to the radd-i-mazalim fund I think it must be understood that Amjad Ali Khan cannot take any beneficial interest in it to the exclusion of the other heirs But it must be managed by an individual or individuals strictly as trustees. The eldest male descendant of the founder is clearly a proper person to hold the office of the trustee. I therefore, declare that Amjad Ali, and after him the eldest of line of the descendants in the main line from Munawar-ud-daula if sane, fit and of age, shall be a trustee and that confirmed with him in that office shall be Syed Mahomad Majtahid-ul-asar and after him some other fit person of religious character to be nominated by the Court and that if the trustees accept the office they shall within a month submit for the approval of the Court a scheme for the governance of the fund."

It will thus be seen that Mr Campbell decided that the radd-i-mazalim fund was in effect a waqf While throwing two-thirds of the promissory notes of Rs. 16,31,000 into the divisible estate he retained one-third as the property of the fund, and appointed Nawab Amjad Ali Khan as a trustee joining with him as a co-trustee the Mujtahid-ul-asar Their Lordships of the Judicial Committee on appeal in the decision in *Amjad Ali Khan* v. *Mohammadee Begam* (1) considered the question of the radd-i-mazalim fund. We have already stated that one of the points which they had to decide was whether Mr Campbell had rightly appointed a stranger to be and act as co-trustee with Nawab Amjad Ali Khan in the trust as to the family, religious or charitable fund called radd-i-mazalim, and the direction to settle a scheme for the administration of that fund Nawab Amjad Ali Khan had objected to this portion of the order of Mr. Campbell, but it is noticeable that he has nowhere suggested that the five lakhs odd of promissory notes reserved as the property of the fund by the Courts below were his private property. His only objection was to the effect that he should be sole mutwalli Their Lordships upheld Mr Campbell's order upon this point They say at page 548 :

"The second matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an association with the status and dignity of the appellant, and with family usage, seems to their Lordships to be displaced by one of the documents which the appellant propounded and used before the Court, which does associate a co-trustee with him. As against the appellant, the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His direction as to the scheme

for the administration of this trust seems to their Lordships reasonable."

We find from B-28 the judgment of Mr. Currie, Judicial Commissioner of Oudh, passed on the 3rd September 1877, that the existence of the radd-i-mazalim as a charitable fund was recognized. It is certainly open to any party to this suit, who wishes to introduce the question of the radd-i-mazalim fund. We have had some difficulty in understanding the exact objection taken by those of the appellants who have raised the point to the decision of the learned trial Judge to the effect that the radd-i-mazalim fund formed no portion of Nawab Baqar Ali Khan's estate He has excluded the promissory notes, which he finds to be the property of the fund, from the estate He has also added a remark that Nawab Sadiq Ali Khan should be considered entitled to manage the fund We shall refer to that remark later At present we are concerned with that portion of his decision which declares that these promissory notes are no portion of the estate, and here we are asked to consider alternative pleas The first plea is that as these notes are not only something which does not exist, but as they further ha[illegible] the disadvantage of involving the [illegible]son taking the income from them in the sin of receiving interest, they cannot possibly be the property of a waqf. The objectors suggest that in these circumstances they should be transferred back to the divisible estate That is the first plea The second plea is that if the radd-i-mazalim is a good wapf, Nawab Sadiq Ali Khan's brothers should be joined as trustees. We decide the second plea first If the waqf is a good waqf, no question can arise in this suit as to who should be the trustees The property is not part of the estate, and in the present proceedings the only order should be that it should be excluded from the estate, and nothing should be said as to who are or who are not to be the trustees. We consider that the learned trial Judge should not have expressed an opinion to the effect that Nawab Sadiq Ali Khan should be the manager We do not say that he should not be the manager. We do not say who should be the manager. Our view is that we are not concerned with the question

We now proceed to decide the major plea. Although it seems at first sight somewhat surprising that the validity of a trust, which was recognized by their Lordships of the Judicial Committee more than sixty years ago, which has been recognized ever since, and which has been in operation for the benefit of religion and humanity for over sixty years should be questioned now, we do not say that the objectors have no right to ask for a decision on the subject They base this plea in the main on three arguments. The first is that on the proper construction of the will of Ahmad Ali Khan there was no waqf, and that the promissory notes in question were handed over to the heirs as their personal property subject to the obligation of carrying out certain religious and charitable duties. They argued, therfore, that the income from these notes should be enjoyed by the heirs as a whole subject to the obligation of carrying out the duties.

We very briefly decide here that on our construction of Nawab Ahmad Ali Khan's will the radd-i-mazalim is a waqf, and the promissory notes in question were assigned expressly to it by Nawab Ahmad Ali Khan We find that he did not create the waqf in the year 1857, and that it had been in existence long before that date He, however, assigned specific property to it The second argument is based upon the evidence of Nawab Jafar Ali Khan Nawab Jafar Ali Khan was one of the trustees of the waqf, and has expressed an opinion that, although the income of these notes had to be devoted to religious and charitable purposes, and although the income invariably had been devoted to religious and charitable purposes, the notes in question were, in his opinion, the property of the family We have already in a previous portion of the judgment noted that the opinion of Nawab Jafar Ali Khan is of no value whatever upon points connected with the law, and it is certainly of no value in connexion with the decision as to whether this is or is not a waqf The final plea taken is the plea that the assignment of property such as this is, under the Imamia law, invalid and that no such property can belong to a legally constituted waqf. Although decision of the question is governed by the Imamia law, it will be of advantage to examine first the provisions of the Hanafi law upon the subject There has been a considerable difference of opinion in High

Courts in India as to whether under the Hanafi law the waqf of shares in companies is or is not valid. There is, as far as we know, no authority as to whether Government promissory notes can be legally assigned under the Hanafi law as the property of a waqf; but the principles to be applied in respect of shares in companies will assist in decision of the question before us The view in favour of the appellants upon this point was stated in the decision of the Honourable Madras High Court of 1909 in *Kadir Ibrahim Rowther* v. *Mahomed Rahumadulla Rowther* (14). That decision states the authorities both for and against the view. We need not refer further to those authorities. We wish to refer explicitly to the discussion of the principle in respect to the Hanafi law, which is contained in Ameer Ali's "Muhammadan Law," Edn 4, at pps. 257—264 We are convinced that on a proper consideration of the principles, the waqf of shares in companies is valid under the Hanafi law; but in any circumstances the Imamia law would appear to permit the assignment of shares in companies as the property of a waqf. We refer here again to Ameer Ali's "Muhammadan Law," Edn. 4 at pp. 503—505 We are here dealing with a waqf under the Imamia Law

It is argued, however, that even if the principle be accepted, that shares in the companies can be assigned validly as the property of a waqf under Imamia law, Government promissory notes cannot be so assigned inasmuch as the income from them is in the shape of interest on a debt and is such an income which cannot be received legally by orthodox Shias We consider this argument too subtle for acceptance Investment of money in Government promissory notes cannot, in our opinion, be distinguished from the investment of money in the shares in companies. Under the original conditions of Islam neither form of investment existed. Although investment in Government securities may be considered as a loan to the State on which interest was paid, it can also be considered not unreasonably as an investment in State property and the income arising therefrom can be considered as a portion of the income of the State, which is enjoyed by the investors. In support of the plea that Government promissory notes can be assigned legally as the property of a waqf, we refer to a passage in Amir Ali's "Muhammadan Law," Edn. 4, at p. 264 .

"The validity of the waqf of moveables including money is accepted without question among the Sharfes, Malikis, the Hanbails, and the Shiaha. "And Shafei has held," says the Hedaya, "that the waqf of everything from which benefit can be derived consistently with the retention of the corpus is valid, and whatever can be lawfully sold (this gives an indication to the sense in which the word ta'amul is used in this connexion) may be lawfully dedicated, for what is capable for yielding profit (from changes of form) resembles lands, horses and arms.' The waqf of money is now common everywhere among Muhammadans from Algeria to India and Burmah. The Shrine at Mecca and at Kerbala, the endowments at Ajmere, Hossainabad (Lucknow) and many of the mosques and religious institutions all over the country, are largely supported by the income of moneys invested in Government securities, which people have come to regard as safer and more permanent than even land. In Egypt, the income of many important endowments created in modern times, is, for the most part, derived from shares in commercial companies.

Money invested in Government or municipal stock is employed by the State or local authorities, as the case may be, generally in productive work, and a share of the profits derived therefrom is received by the investors under the name of dividends or interest. The income derived from money invested in commercial companies stands in the same category. And the waqf of money invested in trade or commerce baza'at has been recognized as lawful for centuries."

We, therefore, decide against the appellants and confirm the decision of the learned trial Judge upon this question.

(8) Has the decree been rightly drafted under the provisions of O. 20, R. 18?

(9) Has the kothi asfi been wrongly excluded from the divisible estate?

On the first question we find in favour of the objection All parties agree that their rights in the divisible property should be declared in the decree, and the decree should have been prepared in this manner under the provisions of O 20, R 18 The alteration is simple In the divisible property, Nawab Sharaf Jahan Begam is entitled to 1/16th; Nawab Fakhr Jahan Begam is entitled to 1/16th; Nawab Sadiq Ali Khan is entitled to to 7/36th; Nawab Kazim Ali Khan is entitled to 7/36th; the heir or heirs of Nawab Naqi Ali Khan are entitled to 7/36ths; Nawab Taqi Ali Khan is enti-

(14) [1910] 33 Mad. 118=4 I. C. 136=6 M.L.T. 307.

tled to 7/36ths and Nawab Abid Jahan Begam is entitled to 7/72nd

On the second point the learned trial Judge found at o p. 647 that kothi asfi was a portion of the divisible estate. By what was apparently a clerical error that kothi was excluded from the divisible estate in the decree. That error will now be corrected.

This concludes all questions raised in these appeals No other questions were raised. The result will be that Nawab Sadiq Ali Khan's appeal No 16 of 1926, will stand dismissed completely. The cross-objections of Nawab Taqi Ali Khan in that appeal will also stand dismissed completely. Nawab Fakhr Jahan Begam and Nawab Abid Jahan Began's appeal No 20 of 1926, will succeed partially. The Jiamau property will be excluded from the divisible estate and a portion of the so-called Khairabad house will be excluded from the taluqdari estate and will remain in the name of Nawab Fakhr Jahan Begam Nawab Abid Jahan Begam's appeal succeeds partially. The sher darwaza property will be excluded from the divisible estate and remain in her name The appeal of Nawab Sharuf Jahan Begam and the appeal of Nawab Mirza Muhammad Kazim Ali Khan fail and are dismissed There will in addition be a correction of the decree in which the shares of all parties in the divisible estate will be detailed and the kothi asfi will be included in the divisible property

We now come to the question of costs and have to consider here the grouping of the parties Nawab Sadiq Ali stands alone Nawab Fakhr Jahan Begam and Nawab Abid Jahan Begam stand together Nawab Sharf Jahan Began and Nawab Kazim Ali Khan stand together Nawab Taqi Ali Khan stands alone Mt Jaddo, widow of Nawab Naqi Ali Khan, and her assignee Dilawar Ali stand together The remaining respondents were absent and unrepresented In appeal No 16 of 1926 Nawab Sadiq Ali Khan will pay his own costs and the costs of the other side, which will include one set of costs to each party or group In appeal No. 20 of 1926, as the appeal has partially succeeded and partially failed, the parties will all pay their own costs. In appeal No. 24 of 1926, Nawab Sharaf Jahan Begam and Nawab Kazim Ali Khan will pay their own costs and the costs of the other side; one set of costs being allowed to each party or group Nawab Taqi Ali Khan will pay his own costs of his cross-objections and also the costs of Nawab Sadiq Ali Khan, no other party being interested in the cross-objections.

S N /R K *Order accordingly.*

A. I R. 1929 Oudh 113

GOKARAN NATH MISRA AND PULLAN, JJ.

Munna Lal and *another*—Defendants—Appellants.

v.

Kameshari Dat and *another*—Plaintiff and Defendant—Respondents

Second Appeal No. 117 of 1928, Decided on 30th October 1928, from decree of Addl Dist Judge, Gonda, D/- 25th January 1928

(a) Evidence Act, S 101—Allegation of minority at the time of executing a deed—Burden of proof lies on alleger.

The burden of proving that a particular deed is bad on the ground that its executant was a minor at the time of its execution, lies upon the person who makes this allegation. [P 114 C 2]

(b) Evidence Act. S. 32—Statements of living persons not examined as witnesses being inadmissible under S. 32 cannot be made relevant under S. 11.

Before a fact can be considered to be relevant under S. 11, it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S. 11. If a particular deposition could not be admitted under S. 32, it could not be admissible under S. 11 34 *All.* 341, *Foll.* [P 115 C 1]

Statements of living persons not examined as witnesses are inadmissible in evidence to prove the allegation that the executant was a major at the time when he executed the document [P 115 C 1]

(c) Evidence Act, S. 32 (5)—Entry as to date of birth in a school register based upon statement of deceased father is admissible to prove age—Evidence Act, S. 35.

Where the question is as to the age of a person, the entry of his date of birth in the school register based upon the statements of his deceased father is admissible under S. 32 (5) and also under S. 35, the entry being in a public register stating a fact in issue and made by a public servant in discharge of his official duty. [P 115 C 2].

M Wasim—for Appellants

Niamatullah—for Respondent 1.

Judgment.—This is an appeal arising out of a suit brought by the plaintiff respondent for a declaration that the deed dated 23rd July 1925 executed by defendant 3, the father of the plaintiff respondent, in favour of Munna Lal, the defendant appellant is invalid and inoperative.

The two grounds on which the validity of the deed was impugned were· Firstly, that the deed had been executed by defendant 3 at the time when he was a minor ; and secondly, that the deed related to joint ancestral property and was not justified by legal necessity. The defendant appellant, Munna Lal, who is the mortgagee, in his defence contended that defendant 3 was a major at the time of the execution of the deed and that its execution was justified by legal necessity The learned Additional Subordinate Judge of Gonda who tried the case came to the conclusion that the defendant 3 was a major on the date of the execution of the deed As to the legal necessity he held that the necessity had only been proved to the extent of Rs. 1,181-12 and he therefore, declared the deed to be binding on the plaintiff-respondent to that extent. On appeal the learned Additional District Judge of Gonda came to the conclusion that the deed was bad and inoperative because according to his finding defendant 3 was a minor at the time of the execution of the deed and also that the consideration of the deed had not been proved to have been one justified by legal necessity In second appeal before us those findings are assailed. As to the finding that the defendant-respondent was a minor at the time of the execution of the deed it is urged that the finding, though a finding of fact, should not be considered to be binding upon this Court since it was vitiated by several errors of law.

The first error of law which was relied upon in support of this contention was to the effect that the learned Additional District Judge had placed the burden of proof on the defendant mortgagee to prove that the deed was executed at a time when the defendant· 3 was a major. There is no doubt that it cannot be contested now in view of the several decisions of their Lordships of the Privy Council that the burden of proving that a particular deed is bad on the ground that its executant was a minor at the time of its execution lies upon the person who makes this allegation. We are, however, of opinion that although the learned Additional District Judge has in the earlier portion of his judgment observed to the effect that the defendants have not produced any evidence to show that defendant 3, the father of the plaintiff-respondent was a major at the time when the mortgage-deed in suit was executed, yet in the end where he gives his finding on the point, he states clearly that on the evidence of the two doctors produced in the case on behalf of the plaintiff and of the entry in a school register also produced by the plaintiff, his finding was that defendant 3, the father of the plaintiff-respondent, was a minor on the date of the execution of the deed in suit We are, therefore, of opinion that the contention of the learned counsel for the appellant on this point cannot be sustained.

The next contention urged on behalf of the appellant was to the effect that certain evidence which was admissible had been rejected and that certain evidence which was not admissible had been admitted We now proceed to see how far this contention can be considered to be made out It was contended that two documents which are Exs. A-10 and A-11 are admissible in evidence and should not have been rejected by the learned Additional District Judge as irrelevant and inadmissible in evidence Ex A-10 is a certified copy of a statement made by defendant 3, the father of the plaintiff-respondent, in the revenue Court on 16th February 1925. Ex. A-11 is the statement of the mother of defendant 3 also made in the revenue Court on the same date, i. e , 16th February 1925. In both these statements the age of defendant 3 is stated to have been at the time of the statements 21 years. We do not see how any of these statements can be admitted in evidence since we are of opinion that they are statements of living persons who have not been examined as witnesses in the case If they had been examined as such the statements might have been admissible under the Evidence Act either in corroboration of the statement made by them in Court as witnesses or in contradiction of the statements so made. We, however, find that neither defendant 3 was put into the witness-box, nor was the mother of de-

fendant 3 examined as a witness in the case. It was also admitted that both the persons being living persons their statements could not have been considered to have been admissible under S 32, Cl (5), Evidence Act. It was, however, contended by the learned counsel for the appellant that these statements were admissible under S. 11, Evidence Act. We are of opinion that before a fact can be considered to be relevant under S 11 of the Act it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S. 11. We are supported in this view by the observations of their Lordships of the Allahabad High Court in *Bala Ram* v *Mahabir Singh* (1). An attempt was made in that case, as has been done in this case, to admit in evidence the deposition made by a person who though deceased, did not fall within the provisions of S. 32, Evidence Act, on the ground that the provisions of S 11 of the Act would make such evidence admissible It was observed by their Lordships that this argument could not be accepted because if a particular deposition could not be admitted under the provisions of S. 32, Evidence Act, it could not be held to be admissible under S. 11 of the said Act We are therefore of opinion that the learned Additional District Judge was correct in holding that Exs. A-10 and A-11 which are statements of living persons who have not been examined as witnesses in this case are inadmissible in evidence and cannot be relied upon in proof of the allegations of the defendants appellants that defendant 3 was a major at the time when he executed the deed

It was next contended that the entry in the school register upon which the learned Additional District Judge mainly relied for his finding was inadmissible in evidence. Two reasons were urged for holding that the said document was inadmissible in evidence One was to the effect that the entry upon which the learned Additional District Judge relied was suspicious and the second reason was that it was not definitely proved that the entry was based upon the statement of one Rajeshri Dat who is said to have been the father of defendant 3 We think that there is no substance in both these arguments As to the first argument it is enough for us to state that the learned Additional District Judge looked at the entry in dispute and with the help of the evidence of plaintiff's witness 8, Kali Charan, he held that the entry was really to the effect that the date of the birth of defendant 3 was shown therein as 1st January 1909. If the entry was doubtful and the learned Additional District Judge relied upon the oral evidence of the very person who was responsible for that entry and with the help of that evidence came to the conclusion that the entry really showed the date of birth of defendant 3 as 1st January 1909 we do not see what error of law there can be in such a finding We, therefore, reject this argument.

As to the next contention it appears to us that plaintiff's witness 8, Kali Charan, has distinctly stated in his evidence that the information on the basis of which the entry was made was given to him by Rajeshri Dat, father of defendant 3 It is true that the witness admitted that he did not know Rajeshri Dat from beforehand but he stated clearly that he was addressed by defendant 3 at that time as bappa (father) and that the said Rajeshri Dat used to come frequently to the school with the boy and so the witness could say that the information supplied to him was given by that very same Rajeshri Dat who happened to be the father of defendant 3. This witness therefore leaves no room for doubt that the information upon the basis of which the entry was made was supplied by Rajeshri Dat, the father of defendant 3 It is now admitted that Rajeshri Dat is dead and that his statement as to the age of defendant 3 would be admissible in evidence under S 32, Cl (5) of the said Act, since it would be a statement relating to the existence of relationship made by a person who must be presumed to have special means of knowledge and which was made before the question in dispute was raised. It therefore appears to us to be clear that the entry in the scholars' register is admissible in evidence under S 32, Cl. (5), Evidence Act Apart from that we are also of opinion that the entry would be admissible in evidence under S. 35 of the Act. It is clearly an entry in a public register stating a fact in issue and made by a public servant in the discharge of his

(1) [1912] 34 All. 341=14 I.C. 116=9 A.L.J. 351.

official duty and as such admissible in evidence We are therefore of opinion that the learned Additional District Judge was right in holding that the entry in the school register was admissible in evidence and his finding having been based on that evidence, cannot be considered to be in any way vitiated by any error of law or procedure

It was then contended that the oral evidence of the two doctors upon which the finding of the learned Additional District Judge was based was inconclusive and did not justify the finding We have read that evidence and we do not agree with the contention raised by the learned counsel on behalf of the appellant Mr H N Bose who was examined as P W 9 and who is the Assistant Civil Surgeon of Gonda clearly states that the age of defendant 3 was at the time of his evidence, which was 15th March 1927, between 18 and 19 and that there was no margin of two or three years in the age estimated by him though there may be one of some months. The learned Additional District Judge is in our opinion right when he states in his judgment that the medical evidence goes more in support of the story told on behalf of the plaintiff as to the age of defendant 3 than that of the defendants appellants We are therefore of opinion that the finding of fact relating to the minority of defendant 3 arrived at in this case by the Court below is not in any way vitiated by any error either of law or of procedure and is not one which can be impugned in second appeal It is clear from the said finding that defendant 3 was minor on the date of the execution of the mortgage deed in suit. The deed is therefore void and inoperative We do not see any necessity of deciding the second point The appeal therefore fails and is dismissed with costs.

W.S /R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 116

RAZA, J

Ram Ratan Singh and *another* — Defendants—Appellants.

v.

Bipen Chandra Chaterji—Plaintiff—Respondent.

Rent Appeal No. 3 of 1928, Decided on 4th October 1928, from decree of Dist Judge, Fyzabad, D/- 8th November 1927.

(a) Landlord and Tenant—Suit for arrears of rent—Mortgagees of holding not impleaded — Suit need not be dismissed for mortgagees are not necessary parties.

Suit by a landlord or his thekadar for arrears of rent against the occupancy tenants is not bad even if it did not implead persons in whose favour the holdings were mortgaged by the tenants or their ancestors. [P 117 C 1]

(b) Agra Tenancy Act, S. 34—Mortgage —Occupancy holding.

Mortgages by occupancy tenants of their holdings are invalid as against the landlord. [P 117 C 1]

Zafar Husain, Hayder Husain and *A C. Mukerji*—for Appellants

S N Roy—for Respondent

Judgment.—These two rent appeals Nos 3 and 4 of 1928 arise out of suits Nos. 46 and 44 of 1927, respectively The plaintiff, B Bipin Chandra Chatterji, had brought these suits to recover arrears of rent for the years 1331 to 1334 Fasli in respect of certain holding in village Mahulara in the District of Fyzabad Ram Ratan Singh and Ram Prasad Singh were defendants in suit No. 46 Sher Bahadur Singh and three others were defendants in suit No. 44 Both the suits were dismissed by the learned Assistant Collector. The plaintiff appealed and his appeals were allowed by the learned District Judge of Fyzabad The plaintiff was given a decree for Rs 239-9-9 in suit No 44 and a decree for Rs 51-13-6 in suit No 46. The defendants then came to this Court in second appeal. Both the suits were remanded by this Court under O 41, R 25, Sch 1, Civil P C The learned District Judge has submitted his findings on the additional issues framed by this Court. No objection has been filed against these findings I have gone through the findings In my opinion they are not open to any objection and must be accepted by this Court

So far as I see there is no substance in these appeals The plaintiff is the thekadar of village Mahulara from Thakurain Sri Ram Kuer of the Sihipur estate The defendants are occupancy tenants of the lands in suits They had claimed under-proprietary rights in the holdings in suits, but it has been found that they have no such right and that they are simply occupancy tenants of the lands in suits

The learned Assistant Collector had dismissed both the suits principally on the ground that the plaintiff had not ime pleaded certain persons who held the

lands as mortgagees from the defendants. The learned District Judge held that the mortgagees were not necessary parties to the suits and that the plaintiff's suits could not be dismissed merely on the ground that he had not impleaded the mortgagees. The learned District Judge fixed the rent which the defendants were liable to pay to the plaintiff and decreed the plaintiff's claim accordingly

In my opinion, the learned District Judge was perfectly right in holding that the plaintiff's suits could not be dismissed merely on the ground that he had not impleaded the mortgagees It is true that the defendant's mortgagees are in possession of the holding but the mere fact that the defendants or their ancestors have made the mortgages in question in respect of the lands in suit does not absolve them from the liability to pay rent to the landlord or his thekadar. The defendants or their ancestors being occupancy tenants had no transferable rights of occupancy in the lands in suits The mortgages in question are invalid as against the landlord or his thekadar. The plaintiff is not estopped from challenging the mortgages as alleged by the defendants. It is not shown that it was ever decided in any case between the parties that the mortgagees alone were liable to pay rent to the plaintiff and the defendants were not liable to pay the same. The defendants are occupancy tenants of the lands in suits and they are liable to pay rent to the plaintiff. I accept the finding of the learned District Judge on this point No other point was urged in these appeals before me The result is that both the appeals fail and must be dismissed. Hence I dismiss both the appeals with costs.

The plaintiff has filed cross-objections, but I find there is no substance in the cross-objections also The plaintiff refused to receive rent from the mortgagees of the defendants and returned their money orders It was, therefore, held by the learned District Judge that the plaintiff was not entitled to recover interest from the defendants from the time the arrears of rent became due In the circumstances of the case, I see no sufficient reason to disagree with the finding of the learned District Judge on this point also. Hence I dismiss the cross-objection also with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1929 Oudh 117

MISRA AND RAZA, JJ

Bisheshwar Gir Goshain—Defendant—Appellant.

v

Satish Chandra Chatterji—Plaintiff—Respondent

Misc Civil Appeal No 29 of 1928, Decided on 30th August 1928, from judgment of Dist Judge, Fyzabad, D/- 5th April 1928.

(a) Civil P. C., O. 20, R. 18—Joint possession

A decree for joint possession cannot be construed as a preliminary decree for partition. [P 119 C 2]

(b) Limitation Act, Art. 181—Scope

The application for making absolute a preliminary decree for partition is governed by Art. 181. [P 120 C 1]

L S Misra—for Appellant

S N Roy—for Respondent.

Judgment—This is an appeal arising out of proceedings taken by the respondent in the Court of the Munsif, Havali, Fyzabad, for making absolute a decree passed in his favour on 26th July 1911. The facts of the case are rather complicated and we proceed to give them below.

On 24th February 1911, the plaintiff-respondent, Satish Chandra Chatterjee, filed a suit for possession in respect of certain property situate in village Sahulara, District Fyzabad This property belonged to a math known by the name of math Moghispur, District Fyzabad. The mahant of the math at that time was one Shankar Gir The defendant-appellant, Bisheshar Gir, professing to be the mahant of that math transferred a half-share of 51 bighas 13 biswas land situate in village Sahulara mentioned above. The sale-deed was executed on 29th June 1910, in favour of the respondent and the suit above referred to was brought by him for possession of his half-share in the said land On 26th July 1911, a decree was passed in favour of the plaintiff based on a compromise executed between him and Bisheshar Gir The plaintiff discharged Shankar Gir, whom he had originally impleaded in the case, from the array of the defendants The decree obtained by him was not, therefore, in any way binding upon Shankar Gir The plaintiff in that suit had claimed possession of the half share in

those lands by partition but the decree had given him merely joint possession of those lands, and it would be proper for us to state that no preliminary decree for partition of the said lands, as is now contended on behalf of the plaintiff-respondent, was passed in the case. After the decree had been passed in favour of the plaintiff-respondent he applied for delivery of possession of the property decreed to him under O 21, R 35 (vide Ex 1) on 20th December 1911. A warrant for delivery of possession was issued by the Court in favour of the plaintiff-respondent (vide Ex. A-16) On 10th January 1912, possession was delivered to the plaintiff-respondent under the terms of his decree by the said warrant (vide Ex A-17). On 16th January 1912, Shankar Gir filed an objection under O 21, R. 100 contending that the decree obtained by the plaintiff-respondent was not binding upon him and that the plaintiff could not, therefore, obtain possession of the property which was actually in his (Shankar Gir's) possession (vide Ex A-2). Shankar Gir's objection was allowed by the execution Court on 1st March 1912 (vide Ex A-3).

Subsequently Shankar Gir filed a declaratory suit in respect of the entire property appertaining to the math Moghispur including the property in suit on the allegation that the whole property was the property belonging to the math, that he was the properly constituted mahant of the math and that no other person had a right to call himself the mahant of the math or to transfer the property appertaining to it Both Bisheshar Gir, the appellant before us, and his transferee Satish Chandra Chatterji, the respondent before us, were impleaded as defendants in the case The respondent Satish Chandra Chatterji did not defend that suit and the proceedings were held ex parte against him Later on a compromise was arrived at between Bisheshar Gir and Shankar Gir, the result of which was that the entire suit of the plaintiff was decreed subject to certain reservations in favour of another person who was defendant 2 in that case The case was tried ex parte against the plaintiff-respondent and the Court passed a decree against him also. The result of this was that Shankar Gir obtained a decree in 1913 to the effect that the property situate in village Sahulara which had been transferred by Bisheshar Gir in favour of Satish Chandra Chatterji was held to be waqf property and as one which Bisheshar Gir had no right to transfer in favour of the respondent. The judgment of the case is Ex. 4 and the decree is Ex A-5

In 1918 the respondent, Satish Chandra Chatterji, applied to the Court under O 9, R 13, Civil P C., for setting aside the ex-parte decree mentioned above. On 13th May 1918, his application was dismissed (vide Ex A-7) It is stated in the order of the Court that the decree-holder agreed to give up his claim for costs and the applicant Satish Chandra Chatterji accepted the decree The effect of this, in our opinion, was to make the decree passed in 1913 against the respondent to be fully operative and binding against him. Its further effect was that the decree dated 26th July 1911, which had been previously obtained by the respondent against the appellant Bisheshar Gir had become inoperative and of no effect

In 1925 it appears that Shankar Gir was criminally prosecuted in connexion with a dacoity case and persons who belonged to the order of the math appointed in his place the appellant Bisheshar Gir as a mahant of the math This was on 30th September 1925 (vide Ex A-15). On 25th February 1926, the zemindars of the village Moghispur also agreed to his appointment as mahant On 20th April 1926, Bisheshar Gir brought a declaratory suit against Shankar Gir that he was now the properly appointed mahant of the math This suit was decreed on 2nd June 1926 (vide Ex A-8) which is the judgment, passed in that case On 3rd September 1926, this decree was confirmed in appeal (vide Ex. A-9) We might mention here that Mr Bipin Chandra Chatterji the brother of Mr. Satish Chandra Chatterji, who is a pleader practising at Fyzabad appeared in that appeal on behalf of Bisheshar Gir The result of this litigation was that Shankar Gir remained no more the mahant of the math and that Bisheshar Gir was declared to be the duly appointed mahant of the math and in charge of the properties appertaining to the said math

On 27th October 1926, a suit was brought by Mr. Bipin Chandra Chatterji against Shankar Gir and Bisheshar Gir for possession of those very lands probably on

the ground that he was the thekedar of this village on behalf of the taluqdar of Sihipur to which estate the village Sahulara belonged, and as such was entitled to possession. This suit was not tried but a decree was obtained by means of a compromise (vide Ex. 4 and Ex. A-12). Subsequently in 1927 Bisheshar Gir filed a suit for setting aside the compromise. This suit was again compromised on 27th July 1927, under which the lands in suit which really appertained to the math of Moghispur were declared to belong to the taluqa Sihipur and the plaintiff Mr. Bipin Chandra Chatterji was said to be entitled to its possession. Bisheshar Gir was, however, given possession for his lifetime in respect of 29 bighas of land out of the entire 51 bighas 13 biswas of land which were in suit.

The respondent Satish Chandra Chatterji has now put in an application in the Court of the Munsif, Havali, Fyzabad, on 12th September 1927, asking the Court to appoint a commissioner to partition the property awarded to him under the decree dated 26th July 1911, and to pass a final decree for partition. In this application he treats the decree passed on 26th July 1911, as a preliminary decree for partition passed in his favour The appellant Bisheshar Gir lodged his objections against the making of the decree absolute on 12th November 1927. The objections were (1) That the decree passed on 26th July 1911, was not a preliminary decree for partition and no decree absolute could, therefore, be passed in favour of the plaintiff, and (2) that the application of the plaintiff-respondent was barred by limitation

The plaintiff-respondent contested the objections and in support of his application urged that he had a right to file the present petition by virtue of S. 43, T P Act (Act 4 of 1882) The help of this provision of law is invoked on the ground that the decree passed in favour of Bipin Chandra Chatterji on 27th July 1927, by virtue of which Bisheshar Gir had obtained possession over 29 bighas of land, entitled the plaintiff now to seek possession of the land transferred to him under the sale-deed, dated 29th June 1910 The plaintiff-respondent contended that as Bisheshar Gir had now become personally entitled to 29 bighas of the said land the decree passed in 1910 could be made absolute against him by partition, since he was entitled only to a half-share out of 51 bighas 13 biswas which share came to 25 bighas 16 biswas odd. The learned Munsif held that the application for making the decree absolute was not maintainable and on that ground he dismissed the plaintiff's application.

On appeal the learned District Judge of Fyzabad has taken a contrary view and has held that the application is maintainable and in that view of the case allowed the appeal and remanded the case with directions that a final decree should be prepared in the case It is against this order of the District Judge which is dated 5th April 1928, that the defendant Bisheshar Gir has come up to this Court in second appeal and the same objections which were urged on his behalf in the Court of the Munsif have now been urged before us We have heard the parties in this case at great length and have come to the conclusion that the appeal must be allowed and that the plaintiff-respondent's application for making the decree absolute must be dismissed. We now proceed to give our reason for coming to this conclusion.

Ground 1 on which it appears to us that the present application filed by the plaintiff-respondent cannot be maintained is that the decree passed in his favour on 26th July 1911, cannot be treated as a preliminary decree for partition The plaintiff, it is true, claimed a decree for possession of half-share in the entire lands by partition, but the decree which was passed in his favour was only an ordinary decree for possession which we understand to be one for joint possession of a half-share in the entire lands We are unable to construe that decree as a preliminary decree for partition One has only to look at the decree and he is satisfied that this interpretation is the only interpretation which can be placed on the said decree. It also appears to us that the plaintiff-respondent himself treated it not as a preliminary decree for partition but as a final decree giving him joint possession over half the share in the entire lands in suit This seems to be the only conclusion which one can derive from the application for delivery of possession filed by the respondent in 1911 and under which the possession was actually delivered to him in 1912 (vide Ex. 1, Ex A-16 and Ex.A-17) It is admitted that a preliminary decree for partition

cannot be executed until it has been made final The fact that the plaintiff applied for delivery of possession under the decree obtained by him on 26th July 1911, therefore, shows clearly that he himself did not treat the decree obtained by him in 1911 as a preliminary decree, but one which according to him was final decree for joint possession and, therefore, capable of being executed That being our view of the case it is clear that the present application for making the decree obtained on 26th July 1911, absolute cannot be maintained and must be rejected

The second ground on which we are of opinion that the application cannot be maintained is the ground of limitation In our opinion Art 181, Lim Act provides for limitation in such cases Art 181 provides that the limitation for applications for which no period of limitation is provided elsewhere in Sch 1 attached to the Limitation Act or by S 48, Civil P C, is three years from the date when the right to apply accrues If the plaintiff's contention be accepted that the decree obtained by him on 26th July 1911, was a preliminary decree for partition, the right to get it made absolute accrued to him on the date when such decree was obtained by him, and if he wanted to make that decree absolute he was bound in law to apply for getting it made absolute within three years from that date The present application has been filed more than 16 years after the date of the passing of the original decree which is now sought to be made absolute This clearly cannot be permitted. It was argued on behalf of the respondent that in view of the decree obtained by Shankar Gir in 1913 it was not possible for him to execute the present decree We do not understand how this contention can help the plaintiff-respondent. If the effect of the decree obtained by Shankar Gir in 1913 was to stop the plaintiff-respondent from taking further action that decree still stands so far as the plaintiff-respondent is concerned To meet this difficulty it was urged on behalf of the plaintiff-respondent that the effect of the decree passed in 1913 in favour of Shankar Gir was wiped out by the decree that was subsequently obtained by Mr Bipin Chandra Chatterji against the appellant We have not been able to follow this contention Mr Bipin Chandra Chatterji is no representative of the respondent and when he brought a suit against the appellant for possession alleging himself to be the thekedar on behalf of the Sihipur estate he cannot by any stretch of imagination be said to have brought that suit for the benefit of the respondent

We are, therefore, of opinion that any litigation which took place between Mr. Bipin Chandra Chatterji and Bisheshar Gir cannot affect the validity or otherwise of the decree obtained by Shankar Gir against the plaintiff-respondent in 1913 In 1918 the plaintiff-respondent tried to get that decree set aside, but when the decree-holder agreed to give up his claim for costs he in his own turn agreed to abide by the said decree. We are, therefore, clearly of opinion that the decree obtained by Shankar Gir against the plaintiff-respondent in 1913 is still binding upon him and in face of that decree the plaintiff-respondent cannot now take any further action in respect of the decree dated 25th July 1911 We might mention also that the contention advanced on behalf of the plaintiff-respondent as based on S 43, T P Act (Act 4 of 1882) is wholly irrelevant and foreign to the scope of the application for making a certain preliminary decree absolute In seeing whether that decree can be made absolute or not the consideration of such an argument would not be permissible

The result is that the plaintiff-respondent's application for execution must be considered to be time barred and if his contention that, in view of the decree obtained by Shankar Gir it was not possible for him to get the decree obtained in 1911 made absolute is accepted then that bar still exists and is not removed. On these grounds we are of opinion that the present application of the plaintiff-respondent must be rejected and we accordingly allow this appeal and dismiss the said application with costs in all the three Courts.

W S /R K. *Appeal allowed.*

* A. I. R. 1929 Oudh 121

GOKARAN NATH MISRA, J.

Mt. Chilha and *others*—Defendants—Appellants.

v.

Chedi—Plaintiff—Respondent.

Second Appeal No 363 of 1928, Decided on 5th December 1928, from decree of Sub-Judge, Barabanki, D/- 28th August 1928.

*** Hindu Law—Marriage—Restitution of conjugal rights—Husband living in adultery—Covenant by him to give up but not giving up the illicit company—Wife obtaining decree for maintenance—Restitution was not granted—Husband and wife.**

Under the Indian Law cruelty in the legal sense need not necessarily be physical violence A course of conduct which if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. [P 123 C 1]

A woman was married when she was 10 years of age After consummation of marriage at the age of 15 years she came to her husband's place but found him living in adultery with her elder sister from whom he had two children She protested against this conduct of her husband, who subsequently executed an agreement in her favour covenanting to give up his illicit connexion, but he had not kept his agreement The wife obtained a decree for maintenance Subsequently the husband sued for restitution of conjugal rights.

Held that decree for conjugal rights should not be passed *Russel* v *Russel*, (1897) *A. C.* 393 and *Swatman* v *Swatman*, 164 *E. R.* 1467 ; 8 *All.* 78 , 34 *Cal.* 971 , *A. I. R* 1924 *Mad* 49 and 11 *M. I. A.* 551, *Rel. on.* [P 123 C 2]

Ram Prasad Varma—for Appellants

S. M. Ahmed and *Harnarayan Das*—for Respondent.

Judgment—This is a second appeal in a suit for restitution of conjugal rights The suit was dismissed by the Munsif of Ramsanehighat, District Bara Banki by his decree dated 5th May 1928, but it has been reversed by the decree of the Subordinate Judge, Bara Banki, dated 28th August 1928.

The facts of the case stated briefly are that the appellant Mt. Chilha is a married wife of the plaintiff-respondent Chhedi. The parties belong to the caste of the gararyas They were married some 11 years ago and the gauna ceremony (consummation of marriage) was performed some five years ago. The case of the plaintiff respondent is that the defendant-appellant Mt Chilha left his house some two years ago and has not since then returned. A decree for restitution of conjugal rights is, therefore, prayed for in the plaint.

The defence put forward is to the effect that the defendant-appellant was married to the plaintiff-respondent, when she was very young and when she came to her husband's house after the gauna ceremony, she found the plaintiff living in open adultery with her elder sister Mt Gobindi, from whom he has also two children ; that she protested against this action of the plaintiff-respondent, upon which the plaintiff-respondent and Mt. Gobindi both beat her and that thereupon she left the house of the plaintiff and has since then been living with her parents She further stated in her defence that on the advice of certain relations the plaintiff executed an agreement in favour of the appellant on 21st February 1927, in which he agreed to give up his connexion with Mt. Gobindi and to keep the appellant with him, promising in case of breach of this arrangement to pay her a maintenance of Rs. 8 per month. It was further alleged that the plaintiff had not kept the terms of the said agreement and consequently was not entitled to claim restitution of conjugal rights, and that the appellant was entitled to maintenance as agreed upon

The learned Munsif of Ramsanehighat who tried the case did not believe the story of an actual assault deposed to by the defendant, but he came to the conclusion that there could be no doubt regarding the fact that plaintiff had ill-treated the appellant. He, however, found that the plaintiff had been living in open adultery with Mt. Gobindi for a long time and from her he had two children, and that it was impossible under the circumstances for the appellant to live peacefully with the plaintiff without any apprehension as to her own safety. He also found that the plaintiff had not given up his connexion with Mt Gobindi even after the execution of the agreement referred to above. In this view of the case he dismissed the plaintiff's suit. I may also mention here that after this decree of the learned Munsif the appellant brought a suit for her maintenance against the respondent and obtained a decree in respect thereof on 9th August 1928.

On appeal the learned Subordinate Judge agreed with the finding of the Munsif so far that it was proved,

that the plaintiff-respondent had illicit connexion with Mt. Gobindi and that that connexion still continued. He also disbelieved the story of the actual assault deposed to by the appellant. But he held that the marriage tie was indissoluble under the Hindu Law and could not be broken notwithstanding that the husband may have a number of wives or concubines and that the defendant-appellant could not legally refuse to go back to her husband. He also held that there might have been some ill-treatment, but that could not be considered to be sufficient for the Court to dismiss the suit for restitution of conjugal rights He observed in his judgment that in the case of the parties who were gararyas beating of the wives was not uncommon amongt them and even though the plaintiff may have on some occasions slapped the appellant, it could not be regarded as cruelty. In his opinion as long as there was no danger to the appellant as to her personal safety, legal cruelty must not be considered to have been established. Regarding the agreement he found that it was void under S 26, Contract Act In this view of the case he passed a decree for restitution of conjugal rights in favour of the plaintiff-respondent

The defendant-appellant has now appealed against the said decree of the Subordinate Judge and the main point which has now been argued before me on her behalf is that legal cruelty has been established, and that in any case the facts of the case are such as should not justify the Court in passing a decree for restitution of conjugal rights in this case After hearing the parties at great length I have come to the conclusion that the appeal must be allowed and that the suit of the plaintiff-respondent must be dismissed I now proceed to give my reasons for arriving at this conclusion

Under the Hindu Law, there can be no doubt, that it has been enjoined as a duty on a Hindu wife that she must be obedient to the husband and have veneration for his person and that it directs that the husband and the wife should be entitled to the society of each other : vide Dr Gurudas Banerji's Tagore Law Lecture, 1878, pages 114 and 120 We also find that in the laws of Manu and other books it is definitely laid down that married women must be honoured and adorned by their fathers and brethren, by their husbands and by the brethren of their husbands, if they seek abundant prosperity and that kind treatment should be extended to wives : vide Manu, Chap 3, v 55 to 62 It is no doubt also true that no express provision in Hindu Law is to be found for a suit for restitution of conjugal rights nor is any particular reference to be found as to what would constitute a valid defence in such suits.

Their Lordships of the Privy Council, however, have laid down in a case decided so far back as 1877 and reported in *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1) as to what is to be the rule of law which the Indian Courts should follow in such suits Although that was a case dealing with Mohammedans, the principle enunciated by their Lordships has been recognised as the general principle to be followed in all cases whether of Mohammedans or of Hindus. On page 615 of the report their Lordships have laid down the rule in the following terms :

" It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back *It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court.* And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband "

I have underlined (italicized) a portion of the passage quoted above in order to indicate the principle that although legal cruelty may not be establised in a case, yet it would be perfectly open to a Court to refuse to pass a decree in that case if the circumstances proved are such that it would be against the principle of justice, equity and good conscience, to award such a relief

It has now after a series of decisions become a settled rule of law in England that legal cruelty should not he considered as synonymous with acts of physical violence. It was pointed out by the House of Lords in the case of *Russel* v *Russel* (2) that it was not necessary to prove cruelty in the proper sense of the term as generally understood, but it was enough to show that the conduct complained of was such as to cause a reasonable

(1) [1877] 11 M. I. A. 551=8 W. R. 3 (P.C.).
(2) [1897] A. C. 393.

apprehension in the mind of the wife of danger to life, limb, or health, which is obviously far more comprehensive than mere physical violence. It has also been pointed out in some cases that where the general conduct of a husband towards his wife was of a character which tended to degrade the wife and to subject her to a course of annoyance and indignity injurious to her health, legal cruelty should be considered to have been established : vide *Swatman* v *Swatman* (3)

In *Paigi* v *Sheo Narain* (4) decided by Straight and Tyrrell, JJ., it was held that where a husband came to the Court as plaintiff seeking its assistance for compelling his wife to return to him the Court could not disregard any reasonable objection, which she might raise to such a relief being granted to him on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she had any fear of one or the other or that the husband was actually living in adultery with another woman In *Dulai Koer* v *Dwarka Nath Misser* (5) the question was discussed by Mookerjee, J , at great length The learned Judge arrived at the conclusion after discussing the various authorities that there may be a case in which legal cruelty may not have been strictly established, but circumstances short of that will also bar a suit for restitution I am in entire agreement with this view In *Kondal Rayal Reddiar* v. *Ranganayaki Ammal* (6), the same rule of law has been laid down It has been held in that case that under the Indian law, cruelty in the legal sense need not necessarily be physical violence. A course of conduct which if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights

I have, therefore, to see whether the rule of law enunciated in the cases quoted by me above and which rule of law is in accordance with the principle enunciated by their Lordships of the Privy Council in 11 *Moore's Indian Appeals*, 551, would justify me to pass a decree in favour of the plaintiff-respondent in the present case. It has been found in this case that the defendant-appellant was married to the plaintiff while very young, being at the time about 10 years old, that gauna ceremony was performed five years after when she became of 15 years of age, that when she came to her husband's place, she found him living in open adultery with her elder sister from whom he has now two children, that she protested against this conduct of her husband, but to no avail, that the husband subsequently executed an agreement in her favour covenanting to give up his connexion with the appellant's sister, and that he has not been able to keep up the agreement, which has compelled the wife to sue for maintenance and for which a decree has been passed in her favour. On these facts it appears to me that it is impossible to believe that the defendant-appellant would be able to live peacefully with the respondent Any woman living in such an atmosphere is bound to suffer in health and it would be a reasonable apprehension on her part that she is not likely to receive proper treatment from her husband I regret I am unable to follow the reasoning of the learned Subordinate Judge that in the case of a woman belonging to a gararya caste any other rule than the one which has been laid down in the cases quoted above would be applicable, nor am I prepared to hold that it would be open to a gararya husband to beat his wife and that she should not be justified in making a complaint if such a treatment is accorded to her I may observe that whether belonging to a high caste or low caste the principles which should ordinarily be observed by all men to whatever caste they may belong must be the same I am, therefore, of opinion that legal cruelty has been established in the present case and that apart from that taking all the circumstances into consideration I would not be justified in passing a decree for restitution of conjugal rights in favour of the plaintiff-respondent

The appeal is, therefore, allowed, the decree of the learned Subordinate Judge is set aside, and that of the learned Munsif restored with costs in all the three Courts.

W.S./R K. *Appeal allowed*

(3) 164 E. R. 1467.
(4) [1886] 8 All. 78.
(5) [1907] 34 Cal. 971.
(6) A. I. R. 1924 Mad. 49=46 Mad. 791.

*A. I. R. 1929 Oudh 124

SRIVASTAVA, J

Mahabir and *another* — Defendants—Appellants.

v

Sheo Shankar and *others*—Plaintiffs—Respondents

Second Appeal No 187 of 1928, Decided on 23rd August 1928, from decree of Addl Sub-Judge, Fyzabad, D/- 9th March 1928

*** Transfer of Property Act, S 76—Mortgagee causing loss—Mortgagor can recover damages by separate suit and need not cut same when redemption accounts take place.**

Where mortgagee causes loss to the mortgaged property in his possession, the mortgagor can recover damages from him by a separate suit, and need not necessarily cut the same in the accounts which take place at the time of redemption because the word "may" as used in the last clause to S 76 has not the force of "must": 33 *Mad.* 71 and 6 O *L. J* 519, *Dist* [P 125 C 1]

H Hussain and *A C. Mukerjee*—for Appellants

Niamatullah—for Respondents.

Judgment—This is a second appeal arising out of a suit for the recovery of Rs 50 as damages for the cutting away of certain bamboo clumps by the defendants. The bamboo clumps in question lay in two mahals, mahal Bakhshish Husain and mahal Abbas Husain The plaintiffs were originally mortgagees of these two mahals and have now acquired the equity of redemption also by purchase but before the plaintiffs purchased the equity of redemption in mahal Abbas Hussain a puisne mortgage of it was made in favour of the defendants The plaintiffs' case was that the bamboo clumps in question had been planted by them and that the defendants had cut them wrongfully The main defence raised was that the bamboo clumps had been planted by the defendants' ancestors. It was also mentioned that the defendants were the mortgagees in possession of mahal Abbas Husain. Though the plea does not seem to have been distinctly raised in the written statement, yet it appears that in the arguments before the two Courts below the defendants in the alternative, relied on their title as mortgagees of mahal Abbas Husain. Both the lower Courts have rejected the defendants' pleas and decreed the plaintiffs' claim.

The learned counsel for the plaintiffs-respondents raised a preliminary objection about the suit being one of a Small Cause Court nature and the second appeal not being maintainable for that reason but subsequently he conceded that the case at any rate so far as it related to the bamboo clumps in mahal Abbas Husain would fall within Art (2), Sch. 2, Provincial Small Cause Courts Act and for that reason he withdrew the objection.

On the merits, the learned counsel for the defendants has urged (1) that on the correct construction of the mortgage-deed in the defendants' favour they are entitled as mortgagees with possession to cut the bamboo clumps situated in mahal Abbas Husain and (2) that in any case the question regarding damages was one to be determined when accounts are taken between the mortgagor and the mortgagee at the time of redemption and the present suit was not maintainable

As regards the first point, the mortgagee-deed (Ex A-1) allows the mortgagee to appropriate the entire profits towards interest and also provides that the entire mahal with all right and interest therein together with *sir* and share without exception of any right or thing was included in the mortgage It has been urged that bamboos are not in the same position as timber trees. They require for their proper growth to be cut periodically and their cutting does not constitute any waste. But in this case there is no evidence to show whether the bamboos at the time when they were cut were of a mature age and ripe for cutting It may be conceded that the cutting of bamboos of a particular class may amount to sayer produce just like the cutting of jungle which requires to be cut periodically, but the defendants not only did not set up any such case in their written pleadings but have also failed to lay the foundation for it in the evidence Their entire energy in the trial Court seems to have been directed to proving that the trees had been planted by their ancestors. Under the circumstances, I must hold that the defendants have failed to show that the bamboos in question were of such a class that their cutting could be regarded as sayer produce to which they are entitled under the terms of the mortgage-deed. This contention must, therefore, fail for want of necessary evidence. As regards the second point, so

far as the bamboo clumps situate in mahal Abbas Husain are concerned, it might be possible for the mortgagors to debit the mortgagees with the loss occasioned to them by their having been cut in the accounts which take place at the time of redemption but I am not prepared to hold that the plaintiffs are in any way debarred from claiming the damages in the present suit The last clause of S. 76, T P Act which has been relied upon uses the word "may" The learned counsel for the defendants contends that this word should be considered as having the force of "must" I am not prepared to accept the contention The cases of *Sivachidambara Mudaley* v *Kamakshi Ammal* (1) and *Angad Singh* v *Kashi Prasad* (2) which have been referred to on this point are quite distinguishable and cannot afford any help in determining the question under consideration

For the above reasons the appeal fails and is dismissed with costs

S.N./R K *Appeal dismissed.*

(1) [1909] 33 Mad. 71=3 I. C. 433=19 M L J 498.
(2) [1920] 6 O. L J 519=54 I. C. 319

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* A. I R. 1929 Oudh 125

STUART, C. J., AND SRIVASTAVA, J

Commissioner of Income-tax, U P — Appellant

v

Jagmohan Das Rastogi — Respondent

Civil Reference No. 7 of 1928, Decided on 27th August 1928, made by appellant

*** Income-tax Act (1922), S. 4 (3) (7)— Judgment-debtor giving security for certain sum to stay execution of partition decree— Interest on security paid to decree-holder— Receipt of interest is income—Exception to S 4 (3) (7) does not apply.**

On an application to stay the execution proceedings in a partition suit, the debtor was asked to give security for a certain sum and to pay interest thereon Subsequently the interest was handed over to the decree-holder.

Held that the receipt of interest was "income" within the meaning of S 4, the income not being of a casual and non-recurring nature, the exception contained in S. 4 (3 (7) did not apply. [P 126 C 1]

G H Thomas—for Appellant

K. D. Seth and *Mahabir Prasad Srivastava*—for Respondent

Judgment.—This is a reference to the Chief Court from the Commissioner of Income-tax under the provisions of S 66, Act 11 of 1922 We are asked to answer the following four questions

(i) In the circumstances stated, were the sums of Rs 10,968 and Rs 5,621, income, to which the Income-tax Act applies, within the meaning of S 4, Income Tax Act, 1922?

(ii) Did the income received in 1925-26, which had escaped assessment to income-tax, come within the scope of S 34 of the said Act?

(iii) Is the claim tenable that the expenditure on the litigation, between the assessee and his brother, should be allowed, under the provisions of S 12 (3) of the said Act, as expenditure incurred solely for the purpose of earning the items of interest in dispute?

(iv) Were the proceedings of the Income-tax Officer bad in law, because he wrote one order under S 23 (3) of the said Act explaining the assessments made separately?

The facts are as follows Jagmohan Das assessee was a member of a joint Hindu family with his brother Indar Prasad Indar Prasad instituted a suit for partition On 25th July 1922 the Subordinate Judge granted a decree for partition One condition of this decree was that Jagmohan Das was to receive certain property Indar Prasad considered that the decree gave Jagmohan Das more than he was entitled to and he appealed to the Court of the Judicial Commissioner The Judicial Commissioner's Court dismissed his appeal on 10th March 1924 Indar Prasad was not satisfied He applied for leave to appeal to their Lordships of the Judicial Committee That leave was granted him The fact that the leave was granted him did not prevent Jagmohan Das from executing the decree and Jagmohan Das proceeded to execute the decree Indar Prasad applied for stay of execution On 17th November 1924, Mr Dalal, the Judicial Commissioner, ordered the execution to be stayed on conditions that Indar Prasad gave security for Rs 95,000 and further paid interest at 6 per cent per annum on Rs 95,000 at certain intervals into the Court The interest was so paid It was received by Jagmohan Das. As their Lordships of the Judicial Committee dismissed the appeal there has been no question of recovering it from Jagmohan Das We are asked in the

first place as to whether this interest is income to which the Income-tax Act applies

We have no doubt as to the fact that it is 'income' to which the Income-tax Act applies within the meaning of S 4 The position was this If Indar Prasad had at once complied with the terms of the decree Jagmohan Das would have obtained this property From this property he could have obtained an income Owing to Indar Prasad taking the case to their Lordships of the Judicial Committee the enjoyment of Jagmohan Das over the property was postponed, but in lieu of this enjoyment he obtained interest at 6 per cent on the amount calculated as security This was clearly his income. The learned counsel for Jagmohan Das had argued that although it was his income-tax is not assessable thereon because it consisted of receipts which were not receipts arising from business or the exercise of a profession, vocation or occupation and which were not by way of addition to the remuneration of an employee and which were of a casual and non-recurring nature He asks us to apply the provisions of S 4, Cl (3) (vii) The receipts in question were certainly not receipts arising from business or the exercise of a profession, vocation or occupation, nor were they by way of addition to the remuneration of an employee But they were not of a casual and non-recurring nature In these circumstances the exception does not apply and they are assessable to income-tax

We, therefore, answer the first question in the affirmative In respect to the second question we find that the income received in 1925-26 which had escaped assessment to income-tax came within the scope of S 34 of the Act We, therefore, answer the second question in the affirmative The third question is based upon a plea by the assessee that he should be allowed in reduction of his assessment the expenses of the litigation incurred in the suit with Indar Prasad. He is not entitled, in our opinion, to any reduction of assessment for this reason The Income-tax Officer has not in any way taken into account the capital which he gained out of that litigation. He has only taken into account the income which he derived on the capital which he obtained through that litigation. We, therefore, answer the third question in the negative The fourth question is a simple one. We are asked to set aside the proceedings on account of an irregularity We do not find that there was any irregularity and we answer the fourth question in the negative The assessee must pay the costs of this case. We fix the fee of the Government Advocate at Rs 250; Rs 100 has been received already There will further be the costs of printing as certified by the Government Advocate, and costs incurred in process, etc

W S/R K *Questions answered.*

A I. R. 1929 Oudh 126

STUART, C J AND WAZIR HASAN, J.

Abdul Halim Khan—Plaintiff—Appellant.

v.

Saadat Ali Khan and *others*—Defendants—Respondents.

First Appeal No. 133 of 1927, Decided on 2nd April 1928, from decree of Misra, J, D/- 16th September 1927, reported in *A. I. R.* 1928 *Oudh* 155.

(a) Marriage—Presumption—Woman continuously living with certain man—Children begotten and treated as their issues—Man having absolute power of disposal over her income—Both jointly assessed with taxes by municipality—Presumption is that they are married—Evidence Act, S. 114.

A Mahomedan lady lived continuously with another man and had children who were treated by her, her relatives and friends as issues of that man. The latter had absolute power of disposal over her money. The incomes both of the man and the woman were jointly assessed with taxes by the municipality.

Held, that the reasonable conclusion was that the woman was married to the man. *A. I. R.* 1916 *P. C.* 27, *Rel. on.*

(b) Evidence Act, S 114—Party abstaining from giving evidence — Presumption is adverse to him.

Where a party abstains from giving evidence in his own case, the presumption should be that truth lay on the other side.

[P 128 C 1]

(c) Mahomedan Law — Will — Power to adopt given to widow with proviso depriving her of benefits from will on her remarriage—Widow remarrying—Adoption after remarriage is invalid.

Where a power to adopt was given to a Mahomedan widow by a will of her husband which stated that in case of remarriage the widow would not be entitled to avail herself of any of the provisions of the will, the widow

forfeited such right of adoption on her remarriage, and any adoption after her remarriage is invalid. [P C]

John Jackson, Waheed-ud-Din Haider, Azizuddin Haider and *Ali Raza*—for Appellant.

M. A. Jinna, M Wasim, K P. Misra, C. S. Zuran, Zafarul Hasan, Rauf Ahmad, Mahabir Prosad Srivastava and *Abul Hasan*—for Respondents

Judgment.—(After stating facts as given in the judgment of Gokaran Nath Misra, J., reported in *A. I R* 1928 *Oudh* 155, and after holding that as the evidence was equally balanced the case should be decided on the probabilities of the case, the judgment discussed the evidence and proceeded) The case of both sides covers a well-defined common ground. This ground is that Sher Muhammad Khan was married to one of the two sisters only, Champa or Ketki. We are of opinion that when the facts now admitted are considered in the perspective just now mentioned, the only reasonable conclusion is that Champa and not Ketki was married to Sher Muhammad Khan Indeed the evidential force of the admitted facts which we shall presently state is so great that Mr. Jackson, the learned counsel for the appellant, had to take up the position that the children of Sher Muhammad Khan had the reputation of being and treated by all concerned as the children of Champa. The learned counsel suggested the theory which we regard as wholly untenable that these children or at least some of them were children born of the womb of Champa through illicit intercourse with Sher Muhammad Khan while Champa lived in his house together with her sister, Ketki, who was the lawfully wedded wife of Sher Muhammad Khan This theory is not only opposed to legal presumption of legitimacy and lawful connexion: *Sadik Hussain Khan* v *Hashim Ali Khan* (1), but is, it appears to us, fantastic. The facts to which we allude are as follows.

(1) Champa has continuously lived in the house of Sher Muhammad Khan. Considering her status in contrast with the status of her sister Ketki, it is highly improbable that Champa chose for herself one for all the life of a parasite on Sher Muhammad Khan and Ketki.

(1) A. I. R. 1916 P. C. 27=38 All. 627=43 I. A. 212 (P.C.).

(2) The children, Ibqal Jahan Begam and Unis Jahan Begam, daughters and Baqar Ali Khan son have since their respective births been treated by Champa and other members and friends of the family as the children of Champa. Indeed to explain this the plaintiff's evidence goes so far as to say that the boy Baqar Ali Khan was positively affiliated by Champa from the moment of his birth as her own son. Champa spent between Rs 6,000 to 7,000 on the marriage of Iqbal Jahan Begam and arranged for a dowry of the value of Rs. 10,000 to Rs 11,000. On the occasion of the marriage of Tahira Begam, Sher Muhammad Khan's daughter by another wife, Champa spent about Rs. 5,000

(3) Champa received a large sum of money from the Court of Wards by virtue of the compromise of 16th March 1918 Sher Muhammad Khan gives an account of the expenditure of this sum of money in his evidence to be found at p 721 of the printed record. It is as follows

"Out of this sum Rs. 37,500 were spent by Rani Champa in purchasing the share in village Saiyapur, District Hardoi, along with me, Rs. 5,500 or thereabouts were spent by her in building the imambara at Nanpara, Rs 20,000 or thereabouts were given by her to my mother Nawab Mehdi Begam, and Rs. 20,000 or thereabouts were given by her to me for being deposited in the Bank. This almost makes up the total of Rs. 48,000. A portion of money, say about Rs. 1,000 may have been spent by her on various objects, but I cannot give any detail of the said expenditure"

This statement is significant Champa and Sher Muhammad jointly purchased a village for a very large sum of money Champa makes a gift of Rs. 20,000 to Sher Muhammad Khan's mother and the imambara in its final form of construction bears the inscription of the names of Champa and Sher Muhammad Khan both. We do not say that these facts are conclusive but they certainly tend to establish a reasonable probability in support of the defendant's case

(4) Sher Muhammad Khan had an absolute and free power of disposal over Champa's money and frequently exercised that power.

(5) Champa purchased house property with her money in the name and for the benefit of Baqar Ali Khan, the boy, and acted as his guardian in that transaction.

(6) Finally we may refer to the fact that the incomes of Sher Muhammad

Khan and Champa were jointly assessed with taxes by the Notified Area Committee of Nanpara in the year 1920-1921 Indeed in the second column of the certified copy of the assessment register (Ex. A-85) the entry as to the description of the assessees is as follows:

"Nawab Sher Muhammad Khan, son of Nawab Sher Jahan Khan, together with Champa Begam wife of Sher Muhammad Khan."

The entry is clearly admissible in evidence under S 35, Evidence Act 1872, and is according to our judgment of very great importance It was suggested in the trial Court as well as before us that the entry just now quoted may be a forgery. It seems to us that the suggestion is prompted by the fact that the original register has been in due course and according to the rules of the department destroyed We are unable to give any weight to this suggestion

We have more than once referred to the compromise of 16th March 1918, which was intended to settle all claims of Champa and of Nawab Abdul Karim Khan as against the estate of Nanpara. There is one aspect of this compromise which now falls to be considered. For the maintenance of Champa in future an allowance of Rs 1,000 a month was fixed by this compromise as payable by the estate of Nanpara. This allowance has, of course, been received by her since and admittedly uniformally through the hands of Sher Muhammad Khan Now in this compromise a provision was entered as follows·

"The right of the second party (that is Champa) to get the allowance of Rs 1,000 per month, shall not cease in case of her remarriage."

In agreement with the learned Judge of the trial Court we are of opinion that this provision was made to safeguard against the consequences of an already accomplished fact and not of a prospective remarriage of Champa. It is the plaintiff's case that Champa has never remarried.

The defendant has examined a large number of witnesses and the plaintiff has also examined a number of them. Besides several witnesses were examined as Court witnesses and yet Champa has not given evidence in the case The presumption is that she has abstained from giving evidence by reason of the fact that truth lay on the side of the defendant. (The judgment after upholding the finding of the trial Court as to Champa's marriage with Sher Mohammad proceeded to consider the effect of this finding on the adoption of the plaintiff). The last provision in the will of Raja Mohammad Siddiq Khan

"If any of the Ranis contracted a second marriage after me she shall not be entitled to avail herself of any of the provisions of this will"

This is a slightly different translation from the translation in the printed record but having regard to the knowledge of the Urdu language possessed by one of us we are of opinion that the translation rendered by us is more accurate. According to our construction of this provision of the will we are of opinion that Champa on her remarriage with Sher Muhammad Khan forfeited her power of adoption and consequently the plaintiff's adoption made by her on 25th July 1914, is invalid The language of this provision is so clear that in our judgment there is no room for any argument. We may, however, notice the argument It is contended on the side of the plaintiff that the provision under consideration does not apply to the power to adopt because adoption brings no benefit to the adopter and on the contrary it deprives her of her right of possession and enjoyment of the estate till adoption. We think that there is no substance in this argument In the first place the language employed excludes it In the second place, the power is a benefit possessed by all the four widows of Raja Muhammad Siddiq Khan under a gift from him

It follows from what we have found above that the plaintiff's title on which his claim to the estate of Nanpara rests fails on the merits and consequently the decree under appeal must be affirmed.

Owing to the conclusion at which we have arrived on the question of the plaintiff's title we do not find it necessary, indeed it will not be proper, to give our judgment on other points affecting the plaintiff's and the defendant's title raised in the case So far as the defendant's title is concerned the case against it rests mainly on questions of law and the facts involved therein are not in controversy. As to some of the other defences than the defence which we have upheld against the plaintiff's title it will suffice for us to point out that all of them, that is bar

of limitation and bar of res judicata, are pure questions of law and the facts in relation to them are not in dispute and are stated exhaustively in the judgment of the trial Court. One of the defences raises the question as to whether the plaintiff's adoption was made with sinister intentions. In our judgment the only reliable evidence on this part of the case is the evidence which has come out of the mouth of Sher Muhammad Khan and is accepted as true for the purpose of this part of the case by both sides We are unwilling to place reliance on any other evidence in this behalf. Sher Muhammad Khan's evidence has fully been noticed in the judgment of the trial Court

We accordingly dismiss this appeal with separate costs to the three respondents.

W S./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Oudh 129

MISRA AND NANAVUTTY, JJ.

Sarfaraz Khan and *others* — Appellants

v.

Mt. Rajana and *others*—Respondents.

First Appeal No. 87 of 1927, Decided on 14th August 1928, from an order of Sub-Judge, Mohanlalgunj, Lucknow, D/-28th March 1927.

*** (a) Evidence Act S. 35 — Pedigree—Settlement pedigree amounting to statement of deceased with special knowledge before controversy or prepared in discharge of public duty is admissible under evidence Act S. 32 (5) or S. 35.**

A settlement pedigree is admissible in evidence either under S. 32, Cl. (5) if it be shown that it amounts to the statements of deceased persons, who were the members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the point, which it sought to be established by the said pedigree, or under S. 35 if it is proved that it was prepared by Settlement Officer in the discharge of public duty. 3 *O. L. J.* 327 ; 1 *O. L. J.* 447 ; 19 *O. C.* 321 and *A. I. R.* 1926 *Oudh* 101, *Appl.* [P 132 C 1]

(b) Hindu Law — Reversioner—Proof of title — Reversioner must prove that he is nearest.

A person claiming as nearest reversioner to a deceased person must establish that there was no intermediate heir in existence with a better claim to succeed to the property of the deceased than he asserts: *A. I. R.* 1921 *Oudh* 104 ; 21 *I. C.* 274 ; 1 *O. L. J.* 447 ; 2 *O. L. J.* 246, *Foll.*, 15 *O. C.* 364 and 29 *All.* 72 (*P. C.*), *Ref.* [P 133 C 2]

Zafar Husain, *Hyder Husain* and *A. C. Mukerji*—for Appellants.

K. P. Misra and *Daya Kishen Seth*—for Respondents.

Judgment.—This is an appeal arising out of a suit for possession and mesne profits. The facts of the case are that the property in suit which consists of a nine-pies and odd zamindari share in village Mandhauli, District Lucknow, and some under-preprietary plots, groves, and a residential house all situate in village Kankaha, District Lucknow, was owned and possessed by one Ghulam Dastgir Khan, who died on 14th April 1921, leaving behind him his widow Mt. Sundar, and a daughter Mt. Rajana, who was defendant 1 in the Court below and is now respondent 1 before us Mt. Sundar died on 4th December 1923, and the plaintiffs claim that they being the next reversioners of her husband Ghulam Dastgir Khan, according to the pedigree appended to this judgment,* are entitled to the said property. They also allege a family custom under which the widows in the family of Ghulam Dastgir Khan get only a life-estate and the daughters are excluded altogether from inheritance. Defendants 2 to 4, who are now respondents 2 to 4, were impleaded as defendants in the case since they are transferees of different portions of the property in suit from Mt. Sundar, the widow of Ghulam Dastgir Khan. The plaintiffs alleged that they (Sarfaraz Khan and Najaf Khan) together with defendant 5 Shamsher Khan are nearest reversioners and thus entitled to the property in suit. They further alleged that defendant 5 had made an oral gift of a share in the property in suit to the plaintiff 2, Najaf Khan It is in this way that the plaintiffs claim the entire property in suit. The defendants denied the pedigree set up by the plaintiffs and contended that neither plaintiffs 1 and 2 (Sarfaraz Khan and Najaf Khan, nor defendant 5, were the nearest reversioners of Ghulam Dastgir Khan. They also denied the custom of exclusion of the daughters as set up by the plaintiffs. They further contended that the widow of Ghulam Dastgir Khan was full owner of the property in suit and as such competent to make the alienations in favour of the defendants. In any case they alleged that the transfers in their favour

[* *See page* 131—*Ed.*]

were justified by legal necessity. They denied the alleged oral gift by defendant 5 in favour of plaintiff 2 and contended that even if made it must be deemed to be invalid

The learned Subordinate Judge of Mohanlalganj who tried the suit, came to the finding that the plaintiffs had failed to prove the pedigree set up by them and also the custom of the exclusion of the daughters, which they alleged to have prevailed in the family of Ghulam Dastgir Khan. He found that the widow was not in possession of the property in suit as absolute owner but was in possession of merely a life-estate He further found that the transfers in favour of defendants except in the case of one transfer in favour of defendant 3, were made for legal necessity. He also found that the oral gift alleged to have been made by defendant 5, in favour of plaintiff 2, was not proved, and even if proved such a gift must be held invalid in law On these findings the learned Subordinate Judge dismissed the plaintiff's suit.

The plaintiffs have now appealed to this Court against the decision of the Subordinate Judge and have sold a portion of their claim to one Ghulam Moinud-din Hyder, who has also been impleaded as an appellant in the case

In appeal it is contended before us on behalf of the plaintiffs that the findings of the learned Subordinate Judge regarding the pedigree and custom of the exclusion of daughters are incorrect. It was contended that the pedigree set up by the plaintiffs had been fully established from the evidence on the record and that similarly the custom of the exclusion of daughters was also proved.

After hearing arguments on behalf of the appellants at great length we came to the conclusion that although the plaintiffs had established their pedigree, yet they had failed to prove that they were the next reversioners of Ghulam Dastgir Khan at the time of the death of Mt. Sundar which happened in December, 1923. The evidence which the plaintiffs gave in proof of their pedigree consists of both documentary and oral evidence. The documentary evidence consists of Exs. 1, 2, 6, 7, 9 and 10 and the oral evidence consists of three witnesses two of whom are the plaintiffs themselves and one of them happens to be their relation. Plaintiff 1 Sarfaraz Khan was examined as P. W. No. 6 and plaintiff 2 Najaf Khan as P W. No. 1, and Sikandar Khan, the relation of the plaintiffs, was examined as P. W. No 2 The learned Subordinate Judge disbelieved the oral evidence and on the strength of the documentary evidence found that the pedigree set up by the plaintiffs had been established except this fact that it was not proved that Imam Khan and Wazir Khan were brothers, and sons of one Kesri Singh, who had become a Muhammadan in his lifetime. The Subordinate Judge came to this conclusion because in his opinion Ex 9 which was a settlement pedigree and which was the only evidence to prove this fact was inadmissible in evidence We have to see how far this view of the learned Subordinate Judge is correct.

On the question of settlement pedigree the law which has prevailed in the Province of Oudh for a number of years, being based on several decisions of the late Court of the Judicial Commissioner of Oudh, is to the effect that a settlement pedigree can be admitted in evidence either under S. 32, Cl. (5), Evidence Act 1 of 1872 or under S 35 of the said Act If the settlement pedigree is one signed by the members of the family, it would be admissible under S 32, Cl. (5) as statements of deceased persons as to relationship since such statements would be considered to be of those persons having special means of knowledge It must, however, be proved that statements were made by them at a time when there was no dispute as to the pedigree set up If, however, the pedigree is not signed by the members of the family but is prepared by the Settlement Officer himself after proper enquiry and bears his signatures it can be admitted under S 35, Evidence Act, as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties

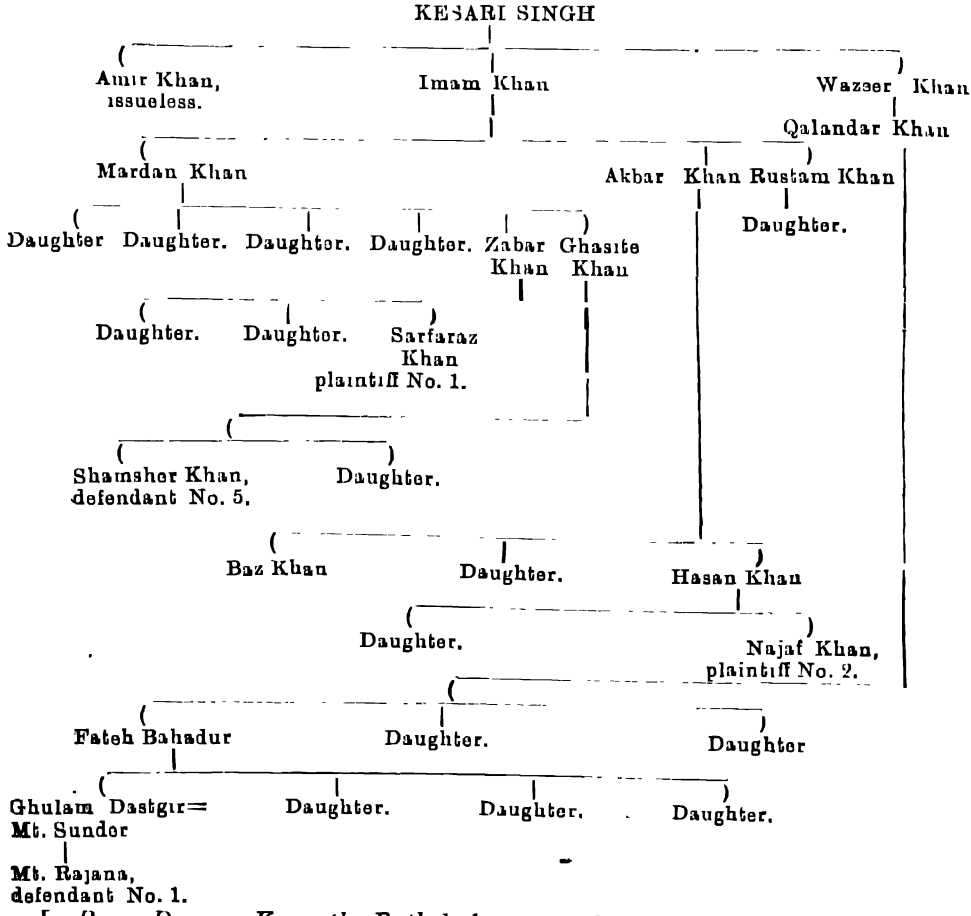
In *Kashi Singh* v. *Balraj Singh* (1) Mr. Evans, A J. C., held that a pedigree produced before a Settlement Court was admissible in evidence under S. 32, Cl (5), Evidence Act, if it was proved that the persons making the statement contained in the pedigree were dead and had special means of knowledge.

(1) [1911] 10 I. C. 199.

In *Suraj Bali* v. *Tilok Chand* (2) Mr Lindsay (Sir Benjamin Lindsay) held that the pedigrees filed in the Settlement Courts would be admissible under the provisions of S. 32, Cl (5), Evidence Act, to prove the statement of deceased persons relating to the family connexions, provided it is shown that the persons who made the statements had some special means of knowledge with regard to the relationship, which is deposed to, and that such knowledge should be presumed in the case of the members of the family or in the case of those persons, who are closely related to the family.

In *Kashi Singh* v. *Ram Narain* (4) Mr. Stuart, J C. (now Sir Louis Stuart) held that where in order to establish a pedigree reliance was placed upon a

APPENDIX.



In *Ram Din* v. *Kayasth Pathshala, Allahabad* (3) [a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Mr Stuart, J. C. (now Sir Louis Stuart) and Mr Kendall, A. J C] a pedigree put forward in the settlement proceedings was produced in evidence and it was found that although it had not been signed by any member of the family, yet it was established that the contents were adopted by the members of the family, who were privy to its preparation and that upon its basis the entries in the khewat were made at the time of the settlement, and it was, therefore, held that the pedigree was relevant and admissible under S. 32, Cl (5), Evidence Act.

genealogical table put in at the time of the settlement in order to make the document admissible in evidence it must be established that the document was prepared by a member of the family or an official, whose duty was to prepare it in discharge of his official duty

(2) [1916] 3 O. L. J. 327=36 I. C. 66.
(3) [1914] 1 O. L. J. 447=25 I. C. 829.
(4) [1917] 19 O. C. 921=37 I.C. 138=3 O.L.J. 560.

In *Baij Nath Singh* v *Bahadur Singh* (5) decided by a Bench consisting of Mr. Dalal, A J C (now Mr Justice Dalal) and Mr Wazir Hasan, A J. C (now Mr Justice Wazir Hasan) a pedigree, which was filed before a settlement Court, was produced as evidence in proof of the pedigree set up The document did not bear the signatures either of any of the co-sharers of the village or of the Settlement Officer The file of the Settlement case, however, showed that the pedigree was expressly referred to in the report of the Sadar Munsarim, which was addressed to the Settlement Officer and the khewat of the village, which was attested by all the village cosharers had been prepared on the basis of that pedigree It was held that the pedigree in question had been prepared for the settlement purposes and was the basis of the entries in the khewat and, therefore, it should be treated as a document prepared by a public officer in the discharge of his official duty and that, therefore, it was admissible under S 35, Evidence Act

These cases therefore, in our opinion, leave no room for doubt that the settlement pedigree can be held to be admissible in evidence either under S 32, Cl. (5), Evidence Act, if it be shown that it amounts to the statements of deceased persons, who were the members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the point, which it is sought to be established by the said pedigree of his or under S 35, Evidence Act, if it is proved that it was prepared by Settlement Officer in the discharge of public duty

The learned Subordinate Judge has rejected Ex 9 which is the settlement pedigree on the ground that it does not contain the signatures of any of the zemindars of the village, nor does it contain the signatures of any Settlement Officer He has, therefore, held that the document is not admissible in evidence either under S 32, Cl. 5, Evidence Act, or under S 35 of the said Act. The certified copy of the settlement pedigree, it is true, does not bear the signatures of any person. We, therefore, thought it advisable to send for the original settlement record in which this pedgree is to be found and to see for ourselves whether the original document does or does not bear the signatures of any person. The original file was sent for and on an inspection we found that it bore the signatures of the Sadar Munsarim Babu Gajrat Singh. On an inspection of the file we found that on 24th January 1865, Mr. G B. Maconachie, Settlement Officer had entrusted the Sadar Munsarim with the task of preparing the khewat. On 1st February 1865, he prepared the said pedigree and the khewat on its basis The pedigree bears his signatures as well as the date and is to be found in the file as paper No. 4. On 30th April 1865, the Sadar Munsarim finished his enquiry and submitted his report to the Settlement Officer On 24th July 1865, the Settlement Officer summoned the zemindars of the village to appear before him on 27th July 1865. We further find that all the zemindars of the village appeared and verified the accuracy of the khewat which had been prepared on the basis of the pedigree The khewat was finally accepted and brought on the settlement record on 28th April 1868. There is, therefore, no doubt left in our mind that the original of Ex. 9 is clearly admissible in evidence under S. 35, Evidence Act, as a record prepared by a Settlement Officer in the discharge of his official duty The document shows clearly that Kesari Singh had two sons Imam Khan and Wazir Khan as alleged in the pedigree filed by the plaintiffs. We are, therefore, of opinion that the pedigree, set up by the plaintiffs, a copy of which as stated above, has been attached to this judgment has been fully established and that we are, therefore, unable to accept the finding of the learned Subordinate Judge on this point

There is, however, another difficulty in the way of the plaintiffs, which we have already indicated and which in our opinion goes to the root of their whole case

In *Mathura Prasad Singh* v. *Bhulan Singh* (6) Mr Piggott (now Sir Theodore Piggott) held that where person claimed as the next reversioner to a deceased Hindu he had not merely to prove his descent from the same common ancestor as the person, whose estate he was claiming, but also to adduce some evidence that there was no intermediate heir in existence with a better claim than his.

(5) A. I. R. 1926 Oudh 101.

(6) [1912] 15 O. C. 364=14 I. C. 339.

In *Bhabuti Singh* v. *Khetal Singh* (7) Mr. Piggott (now Theodore Piggott) and Mr. Lindsay (now Sir Benjamin Lindsay) followed the above case and held that it was incumbent on the plaintiffs who claimed as reversionary heirs to lead some evidence to show that all other lines of descent from the alleged common ancestor were exhausted down to a point, which excluded the possibility of the existence of nearer reversionary heirs than the plaintiffs.

In *Ram Din* v. *Kayastha Pathasala, Allahabad* (3) decided by Mr Stuart, C.J, (now Sir Louis Stuart) and Mr. Kendall, A. J. C., the same view of law was again followed and it was held that where plaintiffs claimed as reversionary heirs of a deceased person in order to establish their right they must prove their relationship to the deceased and also that they were the nearest reversioners to him.

In a subsequent case reported as *Chandan Singh* v. *Bhabhuti Singh* (8) the case of *Mathura Prasad* v. *Bhulan Singh* (6) was again followed by Mr Stuart, A.J.C., (now Sir Lous Stuart) and it was held that a person claiming as nearest reversioner to a deceased person must establish that there was no intermediate heir in existence with a better claim to succeed to the property of the deceased than he asserts.

In *Jashodha* v. *Murlidhar* (9) Mr. Wazir Hasan, A. J. C, (now Mr. Justice Wazir Hasan) laid down the same rule following *Mathura Prasad's* case (6). He held that where a pedigree on which the plaintiff came into Court on the face of it showed a number of persons higher in degree than the plaintiff, he was not entitled to succeed unless he established that those who were higher in degree than him, were extinguished on the date when the succession opened. If he failed to prove this his suit must fail.

We might also mention a case decided by their Lordships of the Privy Council and reported as *Surjan Singh* v. *Sardar Singh* (10). That was a case which went up in appeal to the Privy Council from a decision by the late Court of the Judicial Commissioner of Oudh, in which that Court had held that plaintiff before he can be entitled to succeed in a case like this must adduce some evidence to show that there was no intermediate heir in existence who could have a better claim than him. This will appear from p. 74 of the report, where the judgment of the learned Judicial Commissioner of Oudh is quoted. The decision of the appeal Court was confirmed by their Lordships.

We are, therefore, of opinion that before the plaintiffs can be held to be entitled to a decree in the present case they must establish that on the date of the death of Mt. Sundar in December 1923, no other person higher in degree was in existence. We have examined the record carefully and spent a great deal of time in going through the evidence of all the witnesses in the case but we are driven to the conclusion that at least so far as Ghasite Khan, father of Shamsher Khan, defendant 5 is concerned it is not established that he was dead at the time of the death of Mt. Sundar. He is admittedly a reversioner nearer in degree than either of the plaintiffs. Najaf Khan, P W. 1, deposed only to the effect that all male members in the family except himself, Sarfaraz Khan and Shamsher Khan were dead and that those three persons were the nearest reversioners alive. The value of his statement as to the plaintiffs being the nearest reversioners is, in our opinion, of no value whatever, when we find from the pedigree that although he is a degree lower than Sarfaraz Khan yet he states that both of them are the nearest reversioners. Similarly Sarfaraz Khan, P W 6, deposed to the effect that amongst the male members only he, Shamsher Khan, and Najaf Khan were alive. On the strength of this evidence it was contended that it ought to be held that on the date of the death of Mt Sundar these three persons were the nearest reversionary heirs. We, however, regret to observe that we cannot come to that conclusion, as the mere evidence to the effect that certain persons were now dead and that the persons who were alive were the nearest reversioners, does not prove that they were the nearest reversioners, at the time of the death of Mt. Sundar. She died in the year 1923 and the evidence of these witnesses was recorded in 1926. It may have been that when these

(7) [1913] 21 I. C. 274.
(8) [1915] 2 O. L. J. 246=30 I. C. 220.
(9) A. I. R. 1921 Oudh. 104=24 O. C. 1.
(10) [1901] 23 All. 72=27 I.A. 183=7 Sar. 752 (P.C.).

witnesses gave their evidence they were the nearest reversioners, but this is not enough They have to establish further that they and they alone were the persons alive at the time of the death of Mt Sundar. If the plaintiffs had given even a slight evidence to that effect, we would have held that they had discharged the burden of proof which rested upon them, but we are painfully driven to the conclusion stated above since the evidence, as it stands, is not sufficient to discharge the burden of proof, which is required of them in law The case appears to us to have been very badly conducted but for this the plaintiffs must be held entirely responsible We were asked to remand the case for further evidence, but there are no grounds for our acceding to this request

After arguments had been concluded in the case the learned counsel for the plaintiffs drew our attention to one more document, namely, Ex 6 which according to his contention proved that Ghasite Khan, father of Shamsher Khan, defendant 5, who could be the only person nearer in degree than the plaintiffs, was dead in 1923 We have examined that document It is a khewat prepared at the last settlement of the District Lucknow by Pandit Raghubar Daval, the Settlement Deputy Collector The khewat mentions the name of Shamsher Khan (defendant 5) son of Ghasite Khan as one of the cosharers in the village It was on the strength of this entry that it was argued that Ghasite Khan must be considered to be dead. We regret we are unable to take that view The mere fact that the name of a particular person is to be found entered in the khewat of a particular village as having a certain share does not show that his father is dead, unless it is proved that the share, which is recorded in his name was so recorded by virtue of inheritance It is quite possible that the father may have gifted his share to his son or that the son may have obtained that share by purchase or other means Unless it be established that the share which stands recorded in his name is the same share which was owned by his father and that it came to be recorded in his name on his death by right of inheritance, no conclusion like the one which the plaintiffs asked us to draw in this case, can be drawn.

We are, therefore, of opinion that the requirements of law which have been consistently followed in Oudh as shown by the cases, which we have quoted above have not been fulfilled in this case. The plaintiffs have, in our opinion, failed to establish that Ghasite Khan, father of defendant 5, was dead at the time of the death of Mt Sundar It is admitted that if he had been alive on the date, he would be one degree nearer than the plaintiffs

We, therefore, hold that the plaintiffs have failed to establish that they are the nearest reversioners of Mt Sundar's husband In view of these findings it is not necessary that we should discuss the question of custom involved in the case

We, therefore, dismiss this appeal with costs

M N /R.K. *Appeal dismissed.*

** A. I. R. 1929 Oudh 134

MISRA AND SRIVASTAVA, JJ.

Ameer Hasan — Defendant — Appellant.

v.

Muhammad Ejaz Husain and *others*— Plaintiffs and Defendants—Respondents.

First Appeal No. 50 of 1928, Decided on 18th October 1928, against decree of Sub-Judge, Lucknow, D/- 17th January 1928

(a) Mahomedan Law—De facto guardian—Agreement to refer to arbitration by mother for her minor children is not binding —But award if not unfair or corrupt and recognized for over 14 years should be recognized as family arrangement and should not be disturbed.

No doubt agreement to refer to arbitration executed by a Mahomedan mother on behalf of her minor children cannot be considered to be binding on them and the award is an inoperative document as an award, but if the scheme of distribution promulgated in the award is in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators and has been followed without any objection whatever for a long period extending over 14 years can well be recognized as a family settlement and should not be disturbed. Even if the agreement and the award based thereon are both legally inoperative documents, the settlement relating to the family property laid down in the award should be considered to be a valid family settlement : 35 *All.* 337 (*P.C.*), *Rel. on.*; *A.I.R.* 1918 *P.C.* 11, 47 *Cal.* 713 and *A. I. R.* 1928 *Oudh* 449, *Expl.*

[P 139 C 2 ; P 141 C 1]

**** (b) Family Settlement — Mahomedan Law — Minors' interests fully safeguard-**

ed—Adult members accepting arrangement —It is binding also on minors.

Even in the case of a Mahomedan family if the family arrangement is a fair and equitable one it should not be rejected simply on the ground that the minors were not represented by a properly constituted guardian of theirs at the time when the arrangement was arrived at. If the interests of the minor children are fully safeguarded and if all the adult members of the family accept the arrangement it should be held binding on the minors. 33 *All.* 356 (*P.C.*), 3 *Agra H. C. R.* 82 and *A. I. R.* 1922 *P. C.* 356, *Appl.* [P 140 C 2]

(c) Family Settlement—Although persons relinquish their claim on property allotted to others it is not transfer but family arrangement.

Where several members of a family arrive at a settlement each one relinquishing his claim in respect of the property not falling to his share and recognizing the rights of the others as they had previously asserted ft to the portions allotted to them respectively, the transaction should be looked upon as a family arrangement and not as a transfer from one member to the other member 33 *All.* 356 (*P.C.*), *A. I R.* 1922 *P C.* 356, 17 *O. C.* 108 and *A. I. R.* 1928 *Oudh* 307, *Foll.* [P 142 C 1]

(d) Family Settlement—Existing dispute is not necessary—Avoiding possible or anticipated dispute is sufficient consideration.

In order to have a valid family settlement it is not necessary that there must be a dispute in existence at the time when such settlement is arrived at. It may be that the members of the family may anticipate disputes likely to arise thereafter and if in order to prevent the arising of such disputes and to secure peace and happiness in the family they arrive at a settlement among themselves, the settlement arrived at must be deemed to be valid : 22 *O. C.* 300, *Foll.* [P 143 C 2]

(e) Practice—Pleadings—Oral gift.

A party relying upon an oral gift is bound to prove with the utmost precision the words on which he relies with other circumstances of time and place 12 *M. I. A.* 1 (*P.C.*), *Rel. on.* [P 144 C 2]

(f) Advancement — No presumption in India—Each case should be decided on its merits.

There is no presumption in India as to the advancement and the decision whether a transaction is benami or not has to be given according to merits in each case. [P 146 C 1]

(g) Evidence Act, S. 35 — Guardianship certificate in Oudh by District Judge is admissible under S. 35.

In the province of Oudh a certificate of guardian ship issued by a District Judge to a guardian appointed by him of a particular minor is a record made by a public servant in the discharge of his official duties and an entry in such record is therefore admissible under S. 35 : *A. I. R.* 1926 *Oudh* 88, *Foll.*; 17 *Cal.* 849; 18 *All.* 478 and 5 *P.L. J.* 460. *Expl.* and *not Foll.* [P 147 C 1]

(h) Trusts Act, S. 88—Person entitled to profits—Difficulty in tracing them—Fixed rate of interest should be allowed in Court's discretion—Rate need not be the current rate—Mesne profits—Damages.

Where a person is entitled to profits and a serious difficulty arises in tracing and apportioning the mesne profits, a fixed rate of interest should be awarded in that case on the value of the property, it will be in the option of the Court either to decree the profits or to decree such interest, which it may deem proper in the circumstances. It need not necessarily be the current rate of interest. [P 145 C 1, 2]

Niamatullah, Mohammad Ayub and *Nazirudd n*—for Appellant.

Pearay Lal Banerji and *Ghulam Hasan*—for Respondents

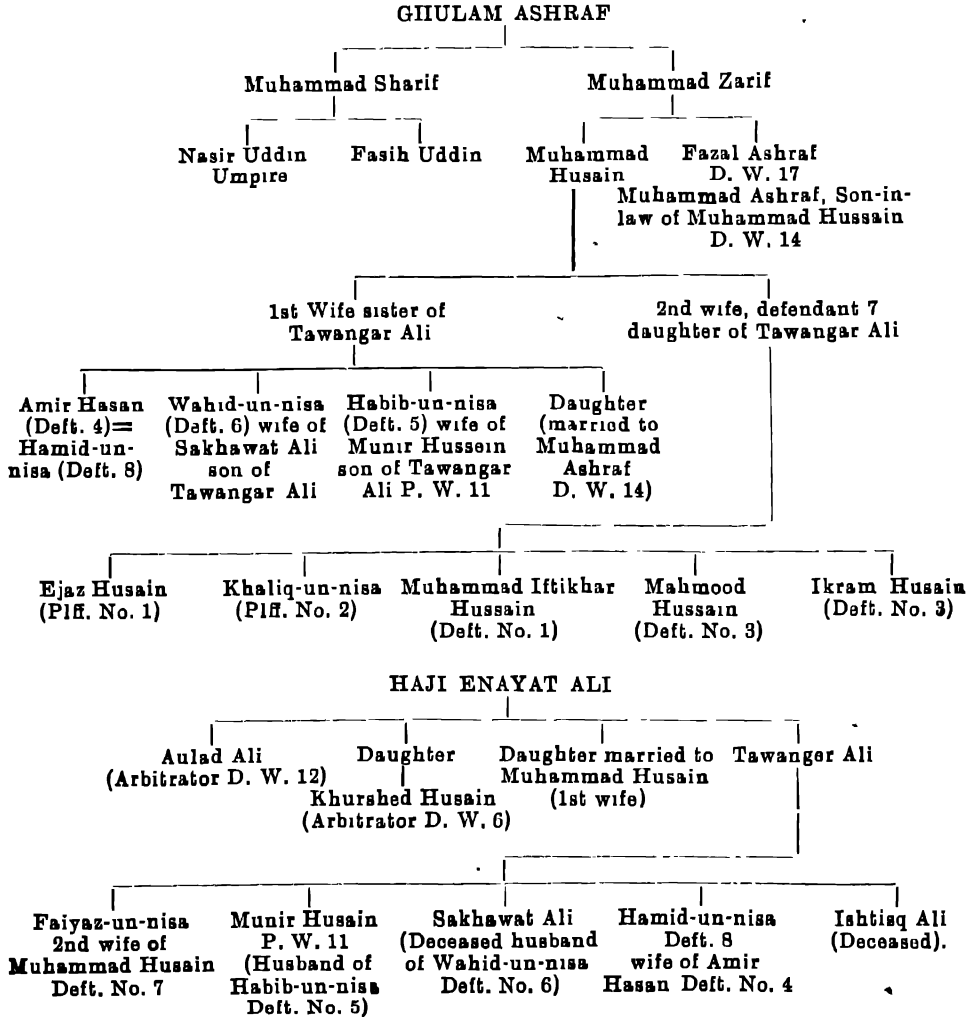
Judgment—These are two connected appeals arising out of a suit brought in the Court of the Subordiuate Judges of Lucknow by one Mohammad Ejaz Husain and his sister Mt. Khaliqunnisa principally against defendant 4, Sheikh Amir, Hasan, Mt Faiyazunnissa defendant 7 and defendant 8, Mt. Hamidunnissa, the wife of defendant 4.

The relationship between the parties to this suit will appear from a pedigree which we attach to this judgment [*see p.* 136—*Ed*] and which will also facilitate the appreciation of many points raised in the case

The allegations upon which the plaintiffs came into Court are to the effect that one Sheikh Mohammad Husain was possessed of large properties situate in Lucknow and other places He had married twice From the first wife were born one, Sheikh Amir Hasan, defendant 4, and three daughters one of whom died during the lifetime of Sheikh Mohammad Husain and the other two are Habibunnissa and Wahidunnissa, defendants 5 and 6 in the case. Defendant 7 was his second wife From her were born four sons, Mohammad Iftikhar Husain, defendant 1, Mohammad Ejaz Husain who is plaintiff 1, Mahmud Husain who is defendant 2, and Ekram Husain, defendant 3. From this second wife Mohammad Husain had also a daughter named Khaliqunnissa whe is plaintiff 2 in this case It will thus appear that the plaintiffs and defendants 1 to 6 are the issues of Sheikh Mohammad Husain, defendant 7, Mt. Faiyazunnissa is his second wife and defendant 8 is Mt. Hamidunnissa wife of Amir Hasan defendant 4.

The properties left by Mohammad Husain are entered in lists (A), (B) and (C) attached to the plaint. The properties mentioned in list (D) attached to the plaint are alleged by the plaintiffs to be

properties acquired from the profits of the property left by Sheikh Mohammad Husain and therefore to constitue a portion of his assets. List (E) attached to the plaint contains the mesne profits in respect of those properties which the plaintiffs claim in this suit.



The plaintiffs alleged that Mohammad Husain died on 4th March 1912 leaving the plaintiffs and defendants 1 to 7 as his heirs at the time of his death of whom the plaintiffs and defendants 1 to 3 were minors at that time, the remaining heirs being majors; that defendant 7 the mother of the plaintiffs and of defendants 1 to 3, was a pardanashin and illiterate lady and was not fully aware of the assets and the nature of the property left by Sheikh Mohammad Husain; that defendant 4, Sheikh Amir Hasan, had the management of the entire property during the lifetime of Sheikh Mohammad Husain and continued to do so after his father's death; that defendant 4 got defendant 7 to execute an agreement of reference to arbitration on 25th March 1912 which resulted in an award which was delivered by the arbitrators on 2nd April 1912 and that under that award several items of the property were declared to be the properties belonging to Sheikh Amir Hasan, defendant 4 and Mt. Faiyazunnissa, defendant 7 having been acquired by the deceased for them or having bean gifted to defendant 4 by the deceased in his lifetime, and the rest of the property was declared as one in which all the heirs of Mohammad Husain were to get their shares due to them under the Mahomedan law.

The plaintiffs further alleged tha they are not bound by the agreement o

by the award since Mt. Faiyazunnissa, their mother. did not execute the agreement out of her free will nor was she competent in law to execute it on their behalf; in short they challenged the validity of the arbitration proceedings They also contended that they were entitled to their share in the property entered in list (D) since it had been acquired out of the profits of the estate left by Sheikh Mohammad Husain and constituted a portion of his assets. They also claimed mesne profits in respect of that property which they entered in list (E) attached to the plaint. They further alleged that plaintiff 1 attained his majority on 21st October 1923, and plaintiff 2 did so on 8th October 1925, and that they came to know of the facts mentioned in the plaint in the beginning of October 1926 and consequently their suit which was brought on 20th October 1926 was within limitation. The plaintiffs claimed a decree for possession by actual partition in respect of 21/104th share in the property mentioned in lists (A) to (D) attached to the plaint and claimed mesne profits to the extent of Rs. 6,633-7-6 together with interest at 6%. They also claimed future mesne profits.

Defendant 7 did not put in appearance in the Court below. Defendants 1 to 3 who are the real brothers of the plaintiffs supported the plaintiffs' case. The suit was mainly contested by defendant 4 and defendants 5 and 6 who are his real sisters supported him in his defence. Defendant 8 said that she was the owner of the property which was entered in her name and that she had purchased it out of her own money and that the plaintiffs could not claim any share therein.

Defendant 4 contended that the agreement and the award were binding on the plaintiffs. Even if the agreement and the award be not considered to be valid the scheme and the division of the property embodied therein had been accepted by all the members of the family of Sheikh Mohammad Husain and thus constituted a valid family arrangement which the plaintiffs could not be allowed to challenge. Regarding the properties which were purchased by Sheikh Mohammad Husain during his lifetime either in his name or in the name of his stepmother Mt. Faiyazunnissa he maintained that those transactions could be considered to be benami but the properties dealt with in them should not be considered to be the exclusive properties of the persons in whose name they had been acquired, since the idea of Sheikh Mohammad Husain was to provide for him and his stepmother Mt. Faiyazunnissa, defendant 7. Regarding one principal item of the property in suit, namely, the factory with building and land known as Victor Ice and Flour Mill situate in Bhagh Sherjang in the City of Lucknow which is item 9 of list A, he contended that the plaintiffs could not claim any share in that factory since it had been given to him by Sheikh Mohammad Husain by means of an oral gift about two months before his death and it was therefore his own property. Regarding the two ice factories, one at Aishbagh and the other at Gorakhpore which had been recently started by the defendant and which were to be found as items 1 and 2 of list (D), the defence was that these factories had been built and started by himself with his own funds and could not be in way considered to be a portion of the assets of his father Sheikh Mohammad Husain, deceased, and that consequently the plaintiffs were not entitled to claim any share therein. As to items 3 and 4 entered in the same list (D) which consisted of a new residential house built close to the factory at Bagh Sherjang and of mortgagee rights in respect of Chak Dugawan situate in Lucknow under a deed executed in his own favour, he alleged that these were his own exclusive properties and the plaintiffs could not claim a share therein. He also denied the plaintiffs' right to claim any profits in respect of the three items of property mentioned in list (E) attached to the plaint. Those profits were in respect of the Aishbagh factory, the factory at Gorakhpore, the Chak Dugawan property and the property in Amethi which had been acquired by defendant 8. He further pleaded that the claim of the plaintiffs was barred by limitation. His contention was that plaintiff 1 was born in August 1900 and the suit was brought in 1926, more than three years after the attainment of majority and was thus barred by limitation

The main points therefore for decision in this case were as follows: 1. Whether the award dated 2nd April 1912, could be considered to be valid as such or at any rate as a family settlement ?

2. Whether the Victor Ice and Flour Factory situate in Bagh Sherjang Mohalla Rakabganj, City Lucknow had been gifted orally by Sheikh Mohammad Husain to Amir Husain, defendant 4 during his lifetime some two months before his death ? 3. Whether the plaintiffs are entitled to any share in the ice factories at Aishbagh, City Lucknow and at Gorakhpore, and in the profits thereof or whether they are entitled only to their share in the old Victor Ice and Flour Factory situate at Bagh Sherjang at Lucknow in case the family settlement and oral gift set up by defendant 4 are held not to be established? 4 If the plaintiffs be found to be entitled only to their share in the old Victor Ice and Flour Factory what is the proper valuation of that factory as it stood at the date of the death of Mohammad Husain and should the plaintiffs be allowed any interest on the sum representing their share and if so, at what rate ? 5 Whether the items Nos 1 to 8 mentioned in list (A) attached to the plaint were acquired by Mohammad Husain as benami in the names of his son Amir Hasan (defendant 4) and his wife Faiyazunnissa (defendant 7) or whether they are their own proprietors having been acquired by him for their use and benefit? 6. Whether the residential house built by defendant 4 close to the site of the old Victor Ice and Flour Factory at Bagh Sherjang and the mortgagee rights in Chak Dugawan could be treated as assets of Mohammad Husain ? 7. Whether the muafi property situate in village Amethi District Lucknow acquired by defendant 8 is her own property or should that also be treated as assets of Mohammad Hussain ? (8) Is the claim of plaintiff 1 barred by limitation ?

The learned Subordinate Judge of Lucknow who tried the case with care and attention decided by his judgment dated 17th January 1928 that the award could not be considered to be a binding document inasmuch as Mt. Faiyazunnissa, defendant 7 the mother of the plaintiffs had no right in law to agree to an arbitration on behalf of the plaintiffs who were minors at the time. The case of a family settlement though taken in the pleadings does not seem to have been pressed before him in the course of arguments and the learned Subordinate Judge has not therefore given any finding on the point. He held that the oral gift set up by defendant 4 in respect of the Victor Ice and Flour Factory at Bagh Sherjang, Lucknow, had not been established. He also held that the plaintiffs were not entitled to any share in the new factories started by defendant 4 at Aishbagh and at Gorakhpore nor in the profits thereof but they were entitled to their share in the Victor Ice and Flour Factory as it stood at the time of the death of Mohammad Husain He held that the plaintiffs were entitled on this account to their share in the sum of Rs. 25,526 which he found to be the value of the factory at that time. He awarded the plaintiffs interest on their share in the said sum at the rate of 1 per cent. per mensem As to items 1 to 8, mentioned in list (A) attached to the plaint, which had been acquired by Mohammad Husain in the names of his son Amir Hasan, defendant 4 and his wife Faiyazunnissa, defendant 7 he held that they had not been acquired by him as benami but had been acquired by him for the use and benefit of defendant 4 and defendant 7 and were therefore their exclusive property As to the residential house built by Amir Hasan defendant 4 adjacent to the site of the old factory in Bagh Sherjang and the mortgagee rights in Chak Dugawan his finding was to the effect that these properties were the properties which had been acquired by defendant 4 after the death of Mohammad Husain and could not be considered to be the assets of Mohammad Husain As to the muafi land situate in village Amethi, District Lucknow, he held that that was the exclusive property of defendant 8 acquired from her own funds and could not under any circumstances be treated as the assets of Mohammad Husain

On the question of limitation he decided in favour of plaintiff 1 and held that his suit was within limitation.

As a result of these findings he decreed the plaintiffs' suit by giving them a decree of 21/104th share out of the items which he held to be the property left by Mohammad Husain at the time of his death and also out of the sum of Rs 25,526 the value of the Victor Ice and Flour Factory As stated above he awarded to them interest on their share in this sum at the rate of 12 per cent. per annum from 4th March 1912 the date of the death of Sheikh Mohammad Husain to the date of realization. A preliminary

decree for partition was directed by him to be prepared in the case. Both the plaintiffs as well as defendant 4 have filed appeals against the decree of the learned Subordinate Judge. The appeal of defendant 4 is No 50 of 1928 and that filed by the plaintiffs is No. 61 of 1928

Defendant 8, Mt Hamidunnissa, wife of the defendant 4, has filed cross-objections to the effect that she should have been allowed her costs of the suit. The result of the two appeals is that the whole case has been argued before us in regard to every point involved therein

We have heard arguments in this case at great length and are indebted to the counsel for the parties for having argued their respective cases in an able and exhaustive manner. We now proceed to give our findings on each of these points which we have stated above and need not repeat them again

First point.—The question relating to the validity of the award was presented by defendant 4 from two points of view. Firstly that the award was valid, Mt. Faiyazunnissa being fully competent to refer the matter to arbitration since she was a testamentary guardian of her minor children having been appointed as such by her husband Sheikh Mohammad Husain Secondly, that the scheme of distribution of the property as detailed in the award constituted a valid family settlement binding on the plaintiffs and on all the members of the family of the deceased Shoikh Mohammad Husain. It was only the first aspect which was argued before the learned Subordinate Judge and it is unfortunate that the second aspect was not argued before him on behalf of defendant 4 Under the circumstances we have not had the benefit of the views of the learned Subordinate Judge on that point. In our opinion the matter was so important that we allowed the learned counsel for the defendant-appellant to argue it at full length and we shall state our conclusion presently.

As to the validity of the award the learned Subordinate Judge held that it was invalid since Mt Faiyazunnissa defendant 7 who was the mother of the plaintiffs had not been proved to have been the testamentary guardian of the plaintiffs. She was, in his opinion, a person who was not entitled to enter into such an agreement on behalf of the plaintiffs since she could not be considered to be their guardian. We think that on this point the view of the learned Subordinate Judge is right In *Imambandi* v. *Mutsaddi* (1) their Lordships of the Privy Council held that the mother of a Mohammedan minor had no higher powers to deal with his property than any outsider or non-relative who happened to have charge of the minor for the time being. The facts that she was his de facto guardian could not invest her with any power to deal with the infant's property. This is now the settled rule of law in this country and on the basis of that rule it was held by the Calcutta High Court in *Mohsiuddin Ahmed* v *Kabiruddin Ahmed* (2) that an agreement executed by the mother of a Muhammadan minor to refer to arbitration any dispute on behalf of the minor will not be binding since such agreement would necessarily, if acted upon, involve dealings with the immovable property of the minor In a recant case decided by a Bench of this Court to which one of us was a party and which will be found reported in *Mohammad Jamil* v. *Mohammad Hafiz* (3), the same view was taken : vide p. 867 (*of* 5 *O. W. N.*).

We are, therefore, in entire agreement with the finding of the learned Subordinate Judge that the agreement to refer to arbitration executed by Mt. Faiyazunnissa, defendant 7, on behalf of her minor children cannot be considered to be binding on them and the award if looked at from that point of view must be held to be an inoperative document

We are, however, of opinion that the scheme of distribution promulgated in the award, and which the learned Subordinate Judge has found to be in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators and which has been followed without any objection whatever for a long period extending over fourteen years can well be recognized as a family settlement and we are extremely reluctant to disturb the arrangement arrived at so far back as April 1912.

There were several objections raised by the learned counsel for the respondent to our considering the scheme of the distribution of the property laid down by

(1) A.I.R. 1918 P.C. 11=45 Cal. 878=45 I.A. 79 (P.C).
(2) [1920] 47 Cal. 713=57 I. C. 945.
(3) A. I. R. 1928 Oudh 449=5 O.W.N. 847.

the award as a family settlement and we propose to deal with each of those objections

The first objection raised by the learned counsel for the respondents was to the effect that Mohammad Husain had died on 4th March 1912, the agreement to refer to arbitration had been executed on 25th March 1912 and the award was delivered by the arbitrators on 2nd April 1912. The close proximity of these dates was according to him significant. He said that the time selected for arbitration was inopportune and that Mt Faiyazunnissa was not in a proper position to look after the interests of the minors. He contended that according to law she could not be considered to be the guardian of the plaintiffs who were minors at the time. We have considered this objection but have come to the conclusion that there is not much substance in it. Mt Faiyazunnissa, defendant 7, has not entered into the witness-box to depose to the effect that at the time that the arbitration was taking place she was in such grief that she did not understand what was being done She is a competent lady and we find from the documentary evidence on the record that she was appointed a guardian of her minor children including the plaintiffs from the Court of the District Judge of Lucknow : vide Ex. A 111 P. R. 87 and Ex. A 112 P. R 91 of Part. III The persons who were appointed arbitrators were Sheikh Aulad Ali and Sheikh Khurshed Husain both residents of the City of Lucknow, and one Maulvi Nasiruddin resident of District Bara Banki but residing at that time in the same mohalla in which all the children of Mohammad Husain were living at the time. The award was attested by two persons named Mohammad Tawangar Ali and Mohammad Ghiasuddin. Of these Tawangar Ali was the father of Mt Faiyazunnissa and the maternal grandfather of the plaintiffs. It is in evidence that he was present while the arbitration proceedings were going on and had also attested the agreement to refer to arbitration (Ex A 110 P R. 70). Mohammad Tawangar Ali was present at the time of the registration of the agreement executed by Mt. Faiyazunnissa. Indeed she was identified by him before the Sub-Registrar. When the award was presented for registration Tawangar Ali again identified the umpire Mohammad Nasiruddin. There is therefore no doubt left in our minds that Tawangar Ali knew what was going on and he could well have protected the interests of the minors.

The parties who had referred the matter to arbitration were Amir Hasan, his two sisters and Mt Faiyazunnissa, the mother of these minor children. If the settlement which was arrived at was a fair and equitable arrangement and was accepted by all the adult members of the family we do not see why it should not be held binding on the minor members of the family even if they were no parties to such a settlement. The chief point which we have to see is whether the arrangement to be found in the award was a proper and equitable arrangement. If that condition is not fulfilled the settlement can by no means be considered to be binding on the minors. If, however, it is a fair and proper arrangement, we do not see why the plaintiffs should now be allowed to challenge it after it has been acted upon by every body for a long number of years The justification for the principle of representation of the minors is to be found in the fact that their interests are properly safeguarded and that the arrangement arrived at is an equitable one If we find that there were persons present at the time who could look after the interest of the minors and if we further find that the arrangement was a fair and equitable one we do not feel that we should be justified in rejecting that arrangement simply on the ground that the minors were not represented by a properly constituted guardian of theirs at the time when the arrangement was arrived at In the case of Hindu families such arrangements are of usual occurrence and if found to be just and equitable they are upheld in spite of the fact that some members of the family are found to be minors. We do not see any reason why a different principle should be applied in the case of a Muhammadan family. Indeed we feel that if this principle were not held to apply to the case of a Muhamedan family it would be impossible to get a family settlement if one of the members of that family happens to be a minor with no legally constituted guardian. In view of the facts which we have stated above we hold that the interests of the minor children of Mohammad Husain should be considered to have been fully safeguarded and if all

the adult members of his family accepted the arrangement laid down in the award there is no reason why it should not be held binding on the plaintiffs.

The next objection which was taken by the learned counsel on behalf of the plaintiffs was that if the agreement and the award based thereon are both legally inoperative documents, the settlement relating to the family property laid down in the award should not be considered to be a valid family settlement. We do not agree with that view. It may be that the agreement and the award as such may not be binding on the plaintiffs but there is no reason why the scheme of division of the property among the various members of the family laid down in the award should not be considered to be valid if it is found to be just and equitable and one that has been followed and acted upon by the various members of the family for a long period of time. We are fortified in this view by a decision of their Lordships of the Privy Council in *Brijraj Singh* v. *Sheodan Singh* (4) That was a suit brought by the plaintiffs for partition of joint family property which consisted of ancestral family properties. The head of the family to which the property belonged was one Rae Balwant Singh who had executed a will in respect of the said property and by virtue of that will had made a partition of the said property It was clear that a will executed by a member of a joint Hindu family even though he may be the head thereof is invalid in law and it was therefore contended by the defendants in that case that the partition effected by the will could not be held to be valid since it could not be treated as a deed of partition but was intended to operate only as a will which it purported to be.

The trial Judge took the view that the arrangement laid down in the will ought to be considered to be a valid family settlement since it had been accepted and acted upon by all the members of the family for a long series of years and the plaintiffs could not therefore impeach its validity. The High Court at Allahabad in appeal, however, took a different view and held that the will could not be treated as evidence of a family settlement and since it purported to deal with the joint ancestral property it could have no operation. On behalf of the defendant it was argued before their Lordships of the Privy Council that the partition exhibited by the will had been acted upon for a long number of years and that it could not now be impeached as invalid under Hindu law. Their Lordships accepted this view and took the same view of the case as was taken by the trial Judge

Their Lordships observed that the document was much more than a will since it could well be described as a family arrangement contemporaneously made and acted upon by all the parties. Their Lordships remarked that it was treated as such at the time, that mutation of names had been effected accordingly and that the scheme laid down therein had been acted upon by all parties for a series of years without any dispute or misunderstanding as to their respective rights under it and the arrangement exhibited by it could not now be upset. The circumstances similar to those which existed in that case are present in the case before us The award may be an invalid document but the scheme of partition exhibited by it was accepted as a family settlement by every member of the family of Mohammad Husain. It has been found to be a just and equitable arrangement and has been acted upon by all the members of the family without any dispute or objection having been raised against it for a period of over fourteen years. It would therefore be obviously unjust to set aside this arrangement now merely on the ground that the award could not be held operative in law.

The next objection raised by the learned counsel for the plaintiffs was that if the effect of the award was that the minors lost a portion of the property to which they were entitled it ought to be treated as an alienation of their property and since there was no legally constituted guardian of theirs the settlement could not be upheld. We regret we are unable to take this view of the family settlement. In a case which went to their Lordships of the Privy Council and which will be found reported in *Khunni Lal* v *Gobind Krishna Narain* (5), Mr. Ameer Ali delivering the judgment of their Lordships accepted

(4) [1913] 35 All. 337=19 I. C. 826=40 I. A. 161 (P.C.).

(5) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P.C.).

the principle laid down in a case decided by the High Court N. W. P. and reported in *Lala Oudh Beharee Lal* v. *Mewa Koonwer* (6) which was to the effect that the true character of such a transaction appeared to be a settlement between the several members of the family of their disputes each one relinquishing all claim in respect of all property in dispute other than that falling to his share and each recognizing the the right of the others as they had previously asserted it to the portion allotted to them respectively, and it was in this light rather than as conferring a new distinct title on each other that the transaction should be regarded. The same principle was affirmed by their Lordships in a subsequent case reported in *Ramsumran Prasad* v. *Syam Kumari* (7). Lord Phillimore in delivering the judgment of the Board while referring to the previous case observed :

"This Board held that the compromise on its true construction did not mean an alienation and that it was not right to say that the heir at law or the derivative purchasers derived a title from the daughters. It is obvious that to put it as the respondents in that case did, that the purchasers derived title from the daughters, was begging the question. The property belonged to one or other, or possibly both, of the parties to the dispute, and the compromise proceeded upon the footing that it was uncertain in which of them the title was As their Lordships put it, it was based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledged and defined what that title was."

The principle of law thus laid down by their Lordships of the Privy Council amounts to this that where several members of a family arrive at a settlement each one relinquishing his claim in respect of the property not falling to his share and recognizing the rights of the others as they had previously asserted it to the portions allotted to them, respectively, the transaction should be looked upon as a family arrangement and not as a transfer from one member to the other member This view was also held by Mr. Lindsay, J C (Now Lindsay, J.) in *Dilapat Singh* v *Kashi Nath* (8). The learned Judge held in that case that the test of a family arrangement was that it constituted a recognition of a pre-existing title and not that the parties derived any title from each other. In White and Tudor's Leading Cases in Equity (Vol 1 Edn 8) it is stated on p. 241 that the real consideration and motive of a compromise consisting of a family arrangement is not the sacrifice of a right but the abandonment of a claim We are also supported in this view by a recent decision of a Bench of this Court consisting of Stuart, C. J. and Hasan, J. and reported in *Harihar Partap Bakhsh Singh* v. *Bisheshar Bakhsh Singh*, known as the *Gangwal* case (9).

We therefore come to the conclusion that the scheme of settlement as laid down in the award cannot be looked upon as an alienation on behalf of the minor members and as such invalid

The next objection raised in respect of this family arrangement was that it had not been proved that the plaintiffs ever adopted the arrangement The reply to this argument is a very short one We have already stated that Mt. Faiyazunnisa, the mother of the plaintiffs was appointed their guardian by virtue of an order of the District Judge of Lucknow passed on 18th September 1912 (P R 91 of part 3) The appointment was, therefore, made about six months after the death of Sheikh Mohammad Husain and a little over five months after the award In the application for guardianship filed by Mt. Faiyazunnissa she showed as the property of the minors the very same property which had been given to them under the award This was a very clear evidence of her conduct accepting the arrangement laid down in the award. After she had been appointed as guardian by the Court no objection was raised by her to the effect that the arrangement of partition laid down by the award was injurious to her minor children of whom she had been appointed guardian by the Court. In our opinion her adoption of the arrangement after her appointment as guardian should be considered to be an adoption of the arrangement by the minors themselves But matters did not rest here. It is admitted that Mohammad Iftikhan Husain, the eldest son among the children of Faiyazunnissa, who is defendant 1 in the case and who attained his majority on 18th August 1920—vide Ex. 7 P. R. 92 of part 3—has not till now raised any objection to the validity of this arrange-

(6) 3 Agra. H. C 82.
(7) A. I. R. 1922 P. C. 356=1 Pat. 741=49 I. A. 342 (P.C.).
(8) [1914] 17 O. C. 108=24 I. C. 542.
(9) A. I. R. 1928 Oudh. 307=3 Luck 326.

ment The present suit was filed on 20th October 1926. It would thus appear that one of the sons of Faiyazunnissa has not chosen to repudiate the arrangement arrived at under the award and has abided by it for a period extending over six years. Plaintiff 1, Mohammad Ejaz Husain reached his age of majority on 21st October 1923 and for a full period of three years he accepted the arrangement laid down by the award It is only one day before the expiration of the period of limitation that he has filed the present suit. These facts speak for themselves.

We further find that on the basis of mortgage-deeds dated 16th September 1905, 19th September 1906 and 11th December 1906 which were mortgage-deeds executed in favour of Sheikh Mohammad Husain and which have fallen into the share of the plaintiff and his brothers under the award—vide Ex. 1 P. R. 73,—a suit was instituted by Iftikhar Husain, defendant 1 after attaining majority and by his other three brothers of whom plaintiff 1 was one as minors under the guardianship of their mother Mt. Faiyazunnissa on 13th October 1922. A decree was passed in their favour on 11th October 1923 This decree was made absolute on 1st November 1924 The application for making the decree absolute is on the record vide Ex. A 120 P. R. 179. This application was filed on 22nd September 1924 and is signed both by Iftikhar Husain and Ejaz Husain, plaintiff 1. It is admitted that the decree absolute which was passed on the basis of this application on 1st November 1924 has been put into execution and the property which was mortgaged has been purchased by the plaintiffs at an auction sale on 25th September 1926 : vide note appended to item 17 of list (A) P. R 9 Part 1. It is therefore clearly established that the award was acted upon not only by defendant 1, after he became a major but also by plaintiff 1 after he attained his majority.

One other objection raised by the learned counsel for the appellants was that the settlement exhibited by the award could not be considered to be a valid settlement since it had not been proved by any evidence on the record that there was any dispute among the children of Mohammad Husain relating to partition or otherwise. It was argued that there being no dispute it was idle to contend that any settlement could have been arrived at. We do not think this contention is possessed of any force. In order to have a valid family settlement it is not necessary that there must be a dispute in existence at the time when such settlement is arrived at It may be that the members of the family may anticipate disputes likely to arise thereafter and if in order to prevent the arising of such disputes and to secure peace and happiness in the family they arrive at a settlement among themselves, the settlement arrived at must be deemed to be valid. We are supported in this view by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Gandharp Singh* v *Nirmal Singh* (10). It was held in that case that in order to validate a family settlement it is not necessary that there should be an existing dispute. It is sufficient that there should be the possibility of a further dispute which might result in litigation, and to avoid a possible litigation and the consequent preservation of the family property is to be deemed a sufficient consideration for a family settlement.

We may now summarize briefly how the facts stand. Sheikh Mohammad Husain died on 4th March 1912 leaving a widow and a certain number of children some of whom were majors and some of whom minors. The widow was not the only person left to look after the interest of her minor children but there was her own father a respectable gentleman against whom nothing has been established and who stood in the position of the maternal grandfather of the plaintiffs Certain items of property stood in the name of one of the sons who was a major and certain items of property stood in the name of the mother of the plaintiffs. The Ice and Flour Factory which was owned by Mohammad Husain was claimed by one of the sons as his property having been gifted to him during the lifetime of Mohammad Husain. All the members of the family agreed to refer their disputes to arbitration. An award was delivered by the arbitrators against the fairness of which nothing has been established The learned trial Judge has found it to contain a fair and just arrangement. The partition effected by the award seems to have been accepted by every member of

(10) [1919] 22 O. C. 300=54 I. C. 325=6 O. L. J. 529.

the family since no objection by any body has been proved to have ever been raised against it. Soon after the award the mother of the plaintiffs files an application for guardianship in a competent Court in which she shows the property belonging to the minors the same which had been allotted to them under the award. At no time after her appointment as guardian do we find her raising any dispute or objection to the arrangement laid down by the said award Matters continue in this position for a long number of years One of her sons attains majority but does not dispute the said arrangement. Another son attains majority and he too does not for about three years after attaining his majority dispute the arrangement. Indeed we find him joining with his elder brother in bringing a suit on the basis of the mortgages allotted to him under the said award. A decree was passed by the Court and the same property was purchased by both of them in execution proceedings held on the basis of that decree. We further find that it is after a period of over 14 years that the present suit has been instituted by the present plaintiffs.

Looking to the facts and circumstances which we have mentioned above we are clearly of opinion that although the award dated 2nd April 1912 may not be an effective and good award in law as such but the arrangement laid down by it for the distribution of the property was accepted by all the adult members of the family at the time, was also subsequently accepted by the mother of the plaintiffs who was appointed by the Court as their guardian and no dispute or objection has been raised against it for a period of 14 years. We therefore hold that the arrangement of distribution as exhibited by the award dated 2nd April 1912, must be upheld as a valid family arrangement.

Point No. 2. This point relates to the alleged oral gift by Mohammad Hussain to his son Amir Hasan, defendant 4. The learned Subordinate Judge has decided this point against the defendant and has held that the alleged oral gift has not been established. The learned counsel for the defendant-appellant has taken us through the entire evidence on the record on this point, but we do not find that evidence sufficient to enable us to give a finding in favour of the defendant. The first point which strikes us is that Mohammad Husain was a man of business and had large dealings both commercial and otherwise. For such a man to make an oral gift of such a large property as that of Victor Ice and Flour Mills seems to us to be improbable. The second point which we should like to mention is that if defendant 4 wanted to prove the oral gift it was necessary for him to set it up in his pleadings with accuracy as to detail and to prove it as alleged This rule was laid down by their Lordships of the Privy Council so early as 1867 in regard to nuncupative, i. e., oral wills : vide *Baboo Beer Pertab* v. *Rajendra Pertab* (11), where their Lordships observed that where a party relied upon an oral will he was bound to prove with the utmost precision the words on which he relied with other circumstances of time and place. Referring to para. 13 of the written statement of defendant 4 we find that without giving any time or specifying any place his plea was in the following words :

"Mohammad Husain about two months before his death having gifted the said factory to the answering defendant made him the owner thereof and delivered him proprietary possession instead of that of a manager."

On 14th May 1927, he was asked to give the exact date of the oral gift, but he was unable to do so When defendant 4 gave his evidence in Court and was in the witness-box his own side put him this question and on P R 96 he stated that the gift was made two or 2½ months before his death We thus see that till after the defendant went into the witness-box no indication of time and place as to where this alleged gift took place had been given. In view of this circumstance any proof subsequently given by defendant 4 through his witnesses would in our opinion be considered to be highly suspicious. (Judgment then discussed evidence and concluding that the oral gift was not established proceeded). *Point No.* 3. The question to be dealt with under this head is to the effect that the two new ice factories started by defendant 4 one at Aishbagh, City Lucknow, and the other at Gorakhpur should be held to have been acquired by defendant 4 out of the profits of the Victor Ice and Flour Factory at Bagh Sherjang, and the plaintiffs should be given a share in those factories and they should also be

(11) [1867] 12 M. I. A. 1=9 W. R. 15=2 Suther. 114=2 Sar. 348 (P.C.).

given mesne profits in respect thereof from 1st September 1925, up to 1st October 1926, as entered in list E. The Subordinate Judge has discussed this question at great length under issues 10 and 11, and has given his finding against the plaintiffs. He has held that the two new factories are the exclusive property of defendant 4 and that the plaintiffs cannot claim any share in them. We are in entire agreement with the finding of the learned Subordinate Judge on this point Although after the death of Mohammad Husain, defendant 4 continued to work the Victor Ice and Flour Factory and derived large profits, which enabled him to acquire considerable property afterwards and to develope his business, yet it cannot be said that those profits could be attributed to no other cause but to his being in possession of that factory. It is obvious that until it had been actually worked by defendant 4 and until he had spent his skill and labour on working it, it was not possible for the factory to yield any profits. We find ourselves unable to determine how far these profits could be attributed to one cause or the other and under these circumstances, the only course open to us is what the learned Subordinate Judge did: namely, to determine the valuation of the Victor Ice and Flour Factory situate at Bagh Sherjang, Lucknow, as it stood at the time of the death of Mohammad Husain and to give the plaintiffs a share in the said valuation and in lieu of profits to decree to them interest not at the ordinary Court rate of 6% but at a higher rate, which the learned Subordinate Judge has determined and in our opinion rightly to be 12% per annum

The learned counsel for the plaintiffs relied upon S 88, Trust Act, and upon the well-known case of *Docker* v *Somes* (12) We are in full agreement with the principle laid down by the Lord Chancellor in this case On p 324 it was remarked by his Lordship that should in any case a serious difficulty arise in tracing and apportioning the profits, that might be a reason for preferring a fixed rate of interest in that case. In the case before us no accounts of the profits of the factory have been filed, nor has an enquiry been made by the trial Judge on this point Indeed it would have been impossible to make an enquiry and to separate the profits in a manner so as to determine the share of such profits in which the plaintiffs would be entitled to participate. In a case reported in *Davis* v *Davis* (13) this proposition has been clearly enunciated by their Lordships of the Court of appeal On p 317 they have laid down the rule that it will be in the option of the Court either to decree the profits or to decree such interest, which it may deem proper in the circumstances and which need not necessarily be the current rate of interest. Our finding, therefore, on this point is that the plaintiffs are neither entitled to any share in the two ice factories started by defendant 4 one at Aishbagh, Lucknow, and the other at Gorakhpur, nor are they entitled to claim any profits of those concerns. The only thing to which the plaintiffs are entitled is the share in such value of the Victor Ice and Flour Factory as may be determined to be the proper valuation thereof at the time of the death of Mohammad Husain. This will be dealt, with under the next point. We also find that the rate of interest, which has been awarded by the learned Subordinate Judge as 12% per annum is a fair rate and it should be awarded to the plaintiff in lieu of profits in consideration of all the circumstances of the case. (Judgment then discussed evidence and proceeded) It was contended by the learned counsel for the appellant that according to the rule laid down by their Lordships of the Privy Council there ought not to be made any presumption in this country as to the property having been acquired for the advancement of the son and of the wife and in support of this contention reliance was placed upon three cases reported in

(1) *Gopeekrist Goysain* v. *Gungapersaud Gosain* (14); (2) *Nawab Ibrahim Ali Khan* v. *Ummat-ul-Zohra* (15); (3) *Lakshmiah Chetty* v *Kothandarama Pillai* (16)

We fully agree with the principle enunciated by their Lordships of the Privy Council in these cases, and are bound to

(12) 39 R. R. 317=39 E. R. 1095.

(13) [1902] 2 Ch. 314=71 L. J. Ch. 539=51 W. R. 8=86 L. T. 523.

(14) [1854] 6 M. I. A. 53=4 W. R. 46=2 Suther 13=1 Sar. 493 (P.C.).

(15) [1897] 19 All. 267=24 I. A. 1=7 Sar. 117 (P.C.).

(16) A. I. R. 1925 P. C. 181=48 Mad. 605=52 I. A. 286 (P.C.).

follow it. There being no presumption as to advancement the decision has to be given according to merits in each case. Evidence has been given regarding this matter, which the learned Subordinate Judge has discussed in great detail and we must state that after the whole of the evidence was placed before us we came to exactly the same conclusion as was arrived at by the learned Subordinate Judge. (The judgment then discussed evidence and proceeded to consider whether plaintiff 1 attained majority three years prior to October 1926). The document relied upon in this connexion was Ex. 7 the certificate of guardianship granted by the District Judge of Lucknow to Mt. Faiyazunnisa on 20th September 1912. It will be found printed at P. R 92. That document clearly mentions that Ejaz Husain was to attain majority on 21st October 1923 It was contended on behalf of defendant 4 that this document was inadmissible to prove the age The argument was that the document could not be held admissible under S 35, Evidence Act, since it could not be considered to be a record kept by a public servant in the discharge of his official duty and consequently any entry therein could not be considered to be relevant. In support of this argument reliance was placed on three rulings, that is, *Satis Chunder* v *Mohendro Lal* (17), *Gunjra Kuar* v. *Ablakh Pande* (18) and *Harihar Prasad Singh* v *Edul Singh* (19).

On behalf of plaintiff 1 reliance was placed on a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Mohan Lal* v *Muhammad Adil*, decided by Messrs. Dalal and Wazir Hasan, A J Cs reported in (20) In this case the three rulings mentioned above were considered but not followed and it was held that a certificate of guardianship issued in Oudh was a record made by a public servant in the discharge of his official duties and an entry in that certificate was a relevant fact and could be relied upon to prove the age of a particular person

We have examined all these cases ourselves and after examination we are satisfied that the view of law taken by the late Court of the Judicial Commissioner of Oudh in *Mohan Lal* v *Muhammad Adil* (20) is a correct view at least so far as the province of Oudh is concerned.

In *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (17), the certificate of guardianship was held to be a document which could not be considered to be a record kept by a public servant in the performance of a duty specially enjoined by the law of the country. It was pointed out that there was no law enjoining upon a Judge to keep a record of such a certificate It was pointed out in *Mohan Lal* v. *Mohammad Adil* (20) that the certificates of guardianship so far as the province of Oudh was concerned were issued by the Court of a District Judge in accordance with para 258, Oudh Civil Digest They are to be issued in a particular form prescribed therein. It was also pointed out that para 258, Oudh Civil Digest, which was in force at the time when the present certificate was issued contained a rule framed by the late Court of the Judicial Commissioner of Oudh which was to be reckoned as the High Court for Oudh under S 50, Cl (j), Guardians and Wards Act 1890. When the Chief Court came into existence and the rules were framed by it with the sanction of the Government under the same section of the Guardians and Wards Act, a similar rule has been incorporated in the Oudh Civil Rules as R 272 We think that this position which was pointed out in *Mohan Lal* v. *Muhammad Adil* (20) makes the ruling of the Calcutta High Court inapplicable in the province of Oudh We are not aware whether any rule has been framed by the Calcutta High Court under S 50, Cl (j) making it compulsory for the Court of a District Judge to issue a certificate in a prescribed form Be that as it may, it is clear from the Calcutta ruling that this aspect of the case was not present to the mind of their Lordships of the Calcutta High Court who decided the said case

As to the case reported in *Gunjra Kuar* v. *Ablakh Pande* (18) it is quite enough for us to state that that case can be of no assistance to us in deciding this matter since the judgment reported is a short judgment and does not discuss the question on the merits The case decided by the Calcutta High Court was followed and this was considered sufficient for the decision of the appeal.

(17) [1890] 17 Cal. 849.
(18) [1896] 18 All. 478=(1896) A. W. N. 158.
(19) [1920] 5 Pat. L. J. 460=57 I.C. 333.
(20) A.I R. 1926 Oudh 88.

In *Harihar Prasad Singh* v. *Edul Singh* (19) the question of the admissibility of the certificate of guardianship was never considered The only thing that was held in that case was that an order appointing a guardian could be no evidence of minority and the Calcutta case quoted above was relied upon in support of the proposition. No reasoning is to be found in the said ruling beyond a statement to the effect that the Calcutta ruling laid down the proposition and it ought to be followed.

With all due respect to the learned Judges responsible for the decision of the cases quoted above we are constrained to hold in agreement with the case decided by the late Court of the Judicial Commissioner of Oudh and reported in *Mohan Lal* v *Muhamad Adil* (20), that in the province of Oudh a certificate of guardianship issued by a District Judge to a guardian appointed by him of a particular minor is a record made by a public servant in the discharge of his official duties and an entry in such record is therefore admissible under S 35, Evidence Act

We, therefore, hold that the certificate of guardianship filed in this case (Ex. 7) is admissible in proof of the age of plaintiff 1

It was contended on behalf of defendant 4 that the date of birth of plaintiff 1 in Ex. A-79 and A-80 (P. R 172 and 174) was entered as 6th August 1900 and that ought to be considered the correct date of his birth On examination of the facts as disclosed by the evidence on the record it appears to us that that date was not an accurate date of birth and must be rejected. It was stated by plaintiff, Ejaz Husain, in his evidence on P R. 59 that he had to appear for the Second Class Engineer's Examination which was to be held in August 1921 and if he had put his correct date of birth he would not have been allowed to sit for that examination since under the Government rules in force he must have been at the time of the examination over 21 years of age. We have satisfied ourselves by looking into the Government rules on the subject that this is so. It also appears from the evidence of Amir Hasan, defendant 4: vide P. R. 80 that the first certificate which he gave to the plaintiff was on 26th July 1921. This must have been for an examination which was to be held in the month of August next. The plaintiff states clearly that he entered this age, 6th August 1900, in order that he might be 21 years of age in the examination held in August 1921 We accept this explanation and reject the date of birth given in Exs. A79 and A80 as incorrect. Our finding on this point therefore is that plaintiff 1 was actually born on 21st October 1902 According to that conclusion he attained his majority on 21st October 1923 The suit was filed on 20th October 1926 and was within limitation.

The result of all our findings is that the plaintiffs' suit must stand dismissed. We have confirmed every finding of the learned Subordinate Judge except on two points One of those points is that we have disagreed with him on the question of the arrangement as laid down in the award not being binding on the plaintiffs. The other is that we have found the price of the old Victor Ice and Flour Factory situate in Bagh Sherjang, City Lucknow, to be Rs 25,000 at the time of the death of Mohammad Husain instead of Rs 25,526 as found by the learned Subordinate Judge. If we could have found our way not to uphold the arrangement arrived at soon after the death of Mohammad Husain as exhibited by the award dated 2nd April 1912, we would have confirmed the decree passed by the learned Subordinate Judge on 17th January 1928 as modified by his subsequent judgment dated 8th March 1928 with a slight variation in the price of the factory as indicated above

The result is that the appeal of defendant 4 Sheikh Amir Hasan (No 50 of 1928) will be allowed and the plaintiffs' suit shall stand dismissed. In the special circumstances of the case we order both the parties to bear their own costs in both Courts The appeal brought by the plaintiff's Ejaz Husain and Khaliqunnisa (No 61 of 1928) will stand dismissed but without costs

The cross-objections filed by Mt Hamidunnissa, respondent 8 in appeal No. 61 will also stand dismissed, since we are of opinion that no separate costs should be allowed to her inasmuch as the suit was mainly conducted by her husband, Amir Hasan, who was defendant 4 in the case. No order as to costs in respect of the cross-objections.

R.K. *Suit dismissed*

* A. I. R. 1929 Oudh 148

NANAVUTTY, J.

Gopi Nath—Applicant.

v.

Mumtazali and *another* — Opposite Party.

Civil Revn Appln. No. 48 of 1928, Decided on 2nd January 1929, from order of Munsif, South Lucknow, D/- 5th November 1928.

*** (a) Civil P. C., S. 115—Scope—Civil P. C., O. 1, R. 10 (2)** (*Cf. A. I. R.* 1926 *P.C.* 142)

An order refusing to make a person as defendant can be revised under S. 115 : 12 *O. C.* 405, *Ref.*, 13 *O. C.* 109 and 15 *O. C.* 304, *Rel. on.* [P 148 C 2]

(b) Civil P. C., O. 1, R. 10 (2)—*A* suing *B* for house rent—*G*, purchaser of house, applying for making him defendant—*G* is necessary party and should be impleaded.

A sued *B* for arrears of rent of a house but did not implead *G* who had already purchased the house, and who had already got his title to the house declared as against *A* in a civil Court. *G* applied for being made a defendant.

Held that *G* was a necessary party and for the ends of justice should be impleaded in the suit [P 148 C 2]

Ram Prasad Varma—for Applicant.

Ramapat Ram—for Opposite Party.

Judgment—I have heard the learned counsel of both parties. Mr. Ramapat Ram on behalf of the opposite party raises a preliminary objection that this application is not maintainable under S. 115, Civil P. C, inasmuch as this is not "a case" within the meaning of S 115, Civil P C. He relies upon the ruling in *Hemanchal Kunwar* v *Kandhiya Lal* (1), in which it was held that no application for revision would lie against an interlocutory order which did not determine the case but which was made with the object of collecting materials upon which the case was to be determined thereafter. On the other hand, the learned counsel for the applicant relies upon the rulings of the late Judicial Commissioner's Court reported in *Riyasat Ali* v *Rajeshwar Bali* (2) and *Allahabad Bank* v *Mohommad Raza Khan* (3) In these two rulings it was held that proceedings under which a person is ordered to be added as a defendant amounts to "a case" within the meaning of S 115, Civil P. C, and therefore the order was liable to revision by the High Court. In the present case the learned Munsif refused to make the applicant B. Gopi Nath a defendant in the case. I am therefore, clearly of opinion that the order of the Munsif refusing to allow B Gopi Nath to be made a party is revisable. I, therefore, reject the preliminary objection.

Coming now to the facts of the case, it is necessary to give a very short resume of the events leading up to the present application On the 27th July 1925 B Gopi Nath purchased some land and houses from Mt Haideri Khanum, the mother-in-law of the plaintiff Mumtaz Ali for a sum of Rs. 5,600 On 3rd December 1927 Mumtaz Ali filed a suit against Husaini, a tenant in possession of a house included in the property sold to B, Gopi Nath, for arrears of rent in the Small Cause Court at Lucknow. On 25th January 1928 Gopi Nath filed a suit before the Subordinate Judge of Lucknow for a declaration against Mumtaz Ali and Husaini to the effect that he was the owner of the house and that Mumtaz Ali had no right to sue Husaini for rent in respect of the house sold to him. On 20th June 1928 this suit of Gopi Nath was decreed by the learned Subordinate Judge of Lucknow and the appeal against that decision was dismissed by the learned Additional District Judge of Lucknow by his judgment dated 17th December 1928. The plaintiff Mumtaz Ali has now filed a suit before the Munsif of South Lucknow against Husaini claiming arrears of rent in respect of the house sold to Gopi Nath without impleading Gopi Nath In these circumstances it is clear that B Gopi Nath is a very necessary party to the present suit I am unable to understand the reasoning of the learned Munsif whereby he rejected the application of B Gopi Nath to be made a co-defendant If as averred by the learned Munsif the matter in dispute between the parties had been settled by the former decision of the learned Subordinate Judge the present suit before the Munsif ought also to have been summarily dismissed by him on the same reasoning. Be that as it may, I consider that for the ends of justice, B Gopi Nath should have been impleaded in the present suit. I accordingly allow this application for revision, set aside the order of the learned Munsif of South Lucknow, dated 5th November 1928 and direct that Gopi Nath be impleaded as a defendant

(1) [1909] 12 O. C. 405=4 I. C. 878.
(2) [1910] 13 O. C. 109=6 I. C. 977.
(3) [1912] 15 O. C. 304=16 I. C. 592.

in the suit before him. Costs here and hitherto will abide the result. The temporary order staying proceedings dated 9th November 1928 is hereby cancelled.

S.N./R.K. *Revision allowed.*

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* A. I. R. 1929 Oudh 149

MISRA AND PULLAN, JJ.

Ram Das—Creditor—Applicant.

v.

Sultan Husain Khan — Insolvent—Opposite Party.

Revn. Appln No. 42 of 1928, Decided on 3rd December 1928, from order of 3rd Addl. Dist Judge, Lucknow, D/- 10th September 1928.

*** Provincial Insolvency Act (1920), S. 43 —Order of discharge not obtained, nor adjudication annulled—Insolvent cannot apply for second adjudication—Provincial Insolvency Act S. 10 (2).**

Under the Provincial Insolvency Act once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled . 26 *Bom.* 171, *Dist.*

[P 150 C 2]

Ram Prasad Verma, *K. P. Salsena* and *P. D Rastogi*—for Applicant

K. N. Tandon—for Opposite Party.

Judgment.—This is an application for revision against the order passed by the 3rd Additional District Judge of Lucknow, dated 10th September 1928. The facts of the case are that the respondent, Sultan Husain Khan, was adjudged an insolvent on 20th December 1911. The Act, which was then in force was the Provincial Insolvency Act, 3 of 1907, but the insolvent never obtained an order of discharge which he could have under S 44 of the Act or under S 41 of the Act now in force, viz , Act 5 of 1920. Without obtaining any such order of discharge the respondent has now applied for being re-adjudged an insolvent, the present application filed by him being dated 17th September 1927

One of the objections raised to this application was to the effect that the petitioner had not obtained an order of discharge either under the old Act or under the Act now in force, and without such an order no fresh application could be maintained This contention was, however, overruled by the learned Judge of the Small Cause Court, Lucknow, by his order dated 1st February 1928. An appeal was lodged against the said order to the Court of the learned Additional District Judge, Lucknow, who has maintained that order and has dismissed the appeal.

The applicant, who is one of the creditors mentioned in the present application and who took this objection in the trial Court, has now come to this Court in revision against the order of adjudication passed a second time by the Court below. We have heard the counsel for the parties at considerable length and have come to the conclusion that this application must be allowed. We now proceed to give our reasons for having come to that conclusion. It is clear to us that under the old Act 3 of 1907, after a person has been adjudged an insolvent, all the property that he may acquire subsequent to the said order of adjudication and before his discharge is to vest in the Court or the receiver and would be divisible among the creditors: vide S. 16 (4) Under S 41 of the Act now in force, namely, Act 5 of 1920, it has been provided that it is incumbent upon an insolvent, who has obtained an order for adjudication to obtain an order of discharge within the period specified by the Court at the time of passing an order of adjudication as to his insolvency If no such application is made by the insolvent for an order of discharge, it would be open to any creditor to apply to the Court for getting the order of adjudication annulled under S 43, Act 5 of 1920. It is no doubt true that in the old Act there was no such similar provision and it was open to an insolvent to apply for discharge whenever he chose to do so. This, however, does not mean that if he failed to apply for that discharge, it would be open to him to apply a second time for an order for adjudication It would be anomalous to hold that such a position would be available to him All the property of the insolvent, as already pointed out by us above, must have vested in either the Crown or the receiver and it is difficult to understand how a second order of adjudication can be validly passed when it would not be possible for any of the creditors against whom the second application has been made, to avail themselves of the property subsequently acquired by the insolvent.

Several rulings of the English Courts were cited in the Courts below to justify

the proposition that a second application by an insolvent for re-adjudication as such would be maintainable, if filed by the different sets of creditors, and it was pointed out that if such an application was entertainable, it should also be open to a debtor to get a second adjudication In regard to these cases it is sufficient for us to remark that they are based on the state of law which is stated to prevail in the English Courts, and would be no justification for adopting the same course when a different procedure has been specially laid down for us in the Provincial Insolvency Act, 5 of 1920. Apart from this even in English Courts a discretion is given to an insolvency Court to refuse such an application, if it is satisfied that there are no assets likely to be available for administration under the second bankruptcy vide Halsbury's Laws of England, Vol 2, S 18, p 13 If, as we have pointed out above, there is no property which could be considered to be the assets of the insolvent available for administration under the second adjudication, even a Court in England would be unwilling to entertain a second application. We are, therefore, of opinion that the cases decided by the English Courts which are referred to in the judgments of the Courts below and which have been relied upon before us on behalf of the petitioner-respondent, do not justify us in arriving at the conclusion, which we are asked to do

A reference was made in the course of arguments before us, as was before the Courts below, to a case decided by the Bombay High Court in the insolvency jurisdiction and reported in *Dossa Gopal* v. *Bhanji* (1). It was pointed out that in that case the High Court of Bombay held that a second application for adjudication was maintainable We need only point out that that case can be no authority for taking the similar view in the mufassil Courts, which are governed by the provisions of the Provincial Insolvency Act, 5 of 1920 We may state that in the Presidency Towns the Act which was originally applicable was the Indian Insolvency Act (Statute 11 and 12 Vic Ch 21) This Act was passed in 1848 and was in force till 1909 when the Presidency Towns Insolvency Act, 3 of 1909, came into force A decision which was passed under the old Indian Insolvency Act which has now ceased to be law could hardly be considered as an authority which should guide us in determining the procedure to be followed under the Provincial Insolvency Act, 5 of 1920

We are, therefore, of opinion that under the Provincial Insolvency Act of 1920 once that a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled. If this has taken place and subsequently he contracts debts and acquires property, it would be open to him to apply again and the Court could then see whether a case has been made out which would justify it to pass a fresh order of adjudication as to his insolvency On these grounds we are of opinion that the order as to adjudication of insolvency passed on 1st February 1928, and upheld by the learned District Judge by his order dated 10th September 1928, must be set aside and that the application of the respondent dated 17th September 1927, must be dismissed. We order accordingly The applicant will get his costs of both the Courts.

S N/R K. *Order set aside.*

(1) [1902] 26 Bom. 171=3 Bom. L. R. 453.

A. I. R 1929 Oudh 150

RAZA AND PULLAN, JJ

Emperor

v

Ghura—Accused.

Criminal Revn No 86 of 1928, Decided on 20th December 1928, from order of Asst Sess Judge, Hardoi, D/- 28th August 1928.

(a) Criminal P. C., S. 439—Nature of offence can be cause of enhancement of sentence.

Accused attempted to murder his relation by giving him Dhatura poison, who narrowly escaped from death

Held, that the sentence of five years' rigorous imprisonment should be enhanced [P 151 C 1]

(b) Practice — Criminal Trial — Sessions Judge should try offence of attempted murder.

Cases of attempted murder which vary greatly in gravity should ordinarily be tried by a Sessions Judge and not by Assistant Sessions Judges. [P 151 C 1]

G H. Thomas—for the Crown.

M A. Haidar—for Opposite Party.

Judgment.—This is a revision against an order passed by the learned Sessions Judge of Hardoi with a request that the sentence of five years' rigorous imprisonment passed on one Ghura under S. 307, I. P. C., should be enhanced. The accused appealed against his conviction but that appeal was rejected and we are satisfied that the judgment of the Court below is correct and that the accused attempted to murder his relation Bhola by giving him Dhatura poison We also find that this Bhola narrowly escaped from death. He remained unconscious for two days and would undoubtedly have died but for the treatment that he received in hospital. The case has been referred to us merely on the question of sentence, and partly perhaps to bring to our notice the fact that such cases should not ordinarily be tried by Assistant Sessions Judges whose powers are limited to inflicting a sentence of seven years' rigorous imprisonment. If that is so, we are prepared to endorse this view We consider that cases of attempted murder which vary greatly in gravity should ordinarily be tried by Sessions Judges. We are not prepared to order a retrial in this case and consider it sufficient for the ends of justice that we accede to the other prayer made on behalf of the Crown, namely, that we should enhance the sentence to the maximum allowed by law in trials conducted by Assistant Sessions Judges We therefore enhance the sentence to one of seven years' rigorous imprisonment.

M.N./R.K. *Sentence enhanced.*

A. I. R. 1929 Oudh 151

RAZA, J

Jamna Prasad and *another*—Accused—Applicants.

v

Emperor—Opposite Party.

Criminal Revn No 93 of 1928, Decided on 22nd December 1928.

(a) Criminal P. C., S. 264—Summary trial—Substance of evidence and not of every deposition is necessary—Judgment containing necessary substance is legal.

The substance of the evidence required by S. 264 is a matter distinct from the facts which may be considered as proved by the evidence and it should be recorded in such a manner that a superior Court acting in appeal or revision may be in a position to judge that there were sufficient materials before the Magistrate to support the conviction. A Magistrate is not bound to record substance of every deposition. He has to state the substance of witnesses' evidence. A judgment when it contains the substance of the evidence, which is sufficient for convicting the accused, is a legal judgment. [P 152 C 1]

(b) Public Gambling Act (3 of 1867), S. 3—Accused must be owner, occupier or person using the place kept for gaming to be convicted under S. 3.

For the purpose of conviction it is not sufficient to say that an accused used a house for the purpose of gaming. It should be proved that the accused is the owner or occupier or a person having the use of the place alleged to be kept as a gaming house. [P 152 C 2]

R. F Bahadurji—for Applicants

Government Advocate—for the Crown.

Judgment.—Several persons, including Jamna Prasad and his brothers Kanhaiya Lal and Jhabban Lal, were sent up for trial under Ss 3 and 4, Public Gambling Act (Act 3 of 1867) Jamna Prasad was convicted by the learned City Magistrate of Lucknow under Ss 3 and 4 of the Act He was sentenced to a fine of Rs 200 (or in default two weeks' simple imprisonment) under S 3, and a fine of Rs. 100 (or in default one week's simple imprisonment) under S 4 of the Act Jhabban Lal and Kanhaiya Lal were convicted under S 4 of the Act and sentenced each to a fine of Rs 100 (or in default one week's simple imprisonment) The rest of the accused were also convicted under S 4 of the Act and sentenced each to a fine of Rs 50 (or in default one week's simple imprisonment) One of the accused persons, namely, Jagdish Prasad, who pleaded guilty, was examined as a witness for the prosecution

It was a summary trial All the accused persons went in appeal to the Sessions Judge of Lucknow but their appeals were dismissed on the 15th November 1928 Jamna Prasad and Kanhaiya Lal alone have now come to this Court in revision This revision has been pressed before me upon two grounds only: (1) The judgment of the trial Court is not a legal judgment as it does not embody the substance of the evidence required by S. 264, Criminal P C (2) The trial Court was wrong in convicting Jamna Prasad under S. 3, Gambling Act

I think there is no force in the first ground I have read the judgment of the learned City Magistrate carefully. It contains the substance of the evidence which is quite sufficient for convicting

the accused persons under S 4, Gambling Act It is true that the judgment does not contain the substance of every separate deposition ; but the Magistrate was not bound to record the substance of every deposition under S 264, Criminal P. C He had to state generally what was the substance of the witnesses' evidence and this he had done I agree that the substance of the evidence is a matter distinct from the facts which may be considered as proved by the evidence I agree also that the substance of the evidence should be recorded in such a manner that a superior Court acting in appeal or revision may be in a position to judge that there were sufficient materials before the Magistrate to support the conviction The evidence might profitably have been summarized more fully in this case, but it cannot be said that the judgment is not a legal judgment when it contains the substance of the evidence which I think is sufficient for convicting the accused persons under S 4, Gambling Act

The second ground is not, I think, without force The warrant was issued for the search of the house of Jamna Prasad which, according to the warrant, was being used as a common gaming house However, there is no reliable evidence to show that the house or portion of the house which was searched was owned or occupied or kept by Jamna Prasad or that he had the charge of the house in question In dealing with this part of the case the learned City Magistrate has made the following observations in his judgment :

" Among the accused Jamna Prasad, Jhabban Lal, and Kanhaiyalal are brothers. Two of them are employed in the post office and the third in the railway. It is urged on behalf of these brothers that the house mentioned in the search warrant Ex. 1 does not belong to Jamna Prasad and hence the warrant is illegal having been directed for the search of the house of Jamna Prasad. According to the defence it belongs to Jhabban Lal. The evidence on this point is not at all definite. While the witnesses state that the brothers reside in separate houses or in different portions of the same house, they are unable to say definitely which portion is in the occupation of a particular brother. The warrant was, as a matter of fact, meant for search of the house in which, according to credible information, gambling arranged by Jamna Prasad was going on. It is immaterial whether that house belongs to him or to his brother as long as it can be proved that it was being used by Jamna Prasad as a common gambling house. I do not think, therefore, that the warrant becomes illegal even if it could be conclusively proved that the particular portion of the house or the house itself which was raided was actually being used as a common gaming house did not belong to Jamna Prasad."

There is no reliable evidence on the record to show that Jamna Prasad had arranged the gambling which was going on in the house in question or that he being the owner or occupier or having the use of the house, was using it as a common gaming house The judgment of the learned Magistrate does not contain the substance of any evidence on which findings can be safely based on these points It is true that Jagdish Prasad stated in his plea of an accused person that Jamna Prasad was taking the ' nal " but it is not clear if he stated that also at the time he was examined as a witness in the case It cannot be safely held on what Jagdish Prasad stated in his plea as an accused person that it was Jamna Prasad who had arranged gambling in the house in question. Jagdish Prasad being an accomplice his statement (or even evidence) should be received with great caution It is said that the house was being used by Jamna Prasad as a common gaming house but was he using the same as a common gaming house being the owner or occupier or having the use of the house?. There is no reliable evidence on that point I think it is not sufficient to say that the accused used it for the purpose of gaming It is to be proved that the accused is the owner or occupier or a person having the use of the place alleged to be kept as a gaming house The person having the use must be of the same genus as the owner, occupier or keeper of the house and of course a different person from those who resort to the house I am not satisfied that there were sufficient materials to support the conviction of Jamna Prasad under S 3, Gambling Act.

The result is that I accept this application to this extent only that I set aside Jamna Prasad's conviction and sentence under S. 3, Gambling Act The fine (Rs 200), if paid or realized, shall be refunded The application is dismissed in other respects. The applicants have been rightly convicted and punished under S. 4, Gambling Act.

M.N./R.K *Application partly allowed*

* A. I. R. 1929 Oudh 153

RAZA AND PULLAN, JJ.

Mt. Lachmin and *another*—Defendants—Appellants.

v.

Ishuri Prasad and *others*—Plaintiffs and Defendant—Respondents.

Second Appeal No 341 of 1928, Decided on 19th January 1929, from decree of 2nd Addl Dist. Judge, Lucknow, D/- 22nd May 1928.

*** (a) Hindu Law—Widow—Adverse possession.**

If adverse possession against a widow is sought to be made adverse also against the reversioner, it can only be so in a case where the widow has been in actual possession and has been dispossessed: *A. I. R.* 1928 *Cal.* 670, *Not Appr.*; *A. I. R.* 1925 *P.C.* 249 *Expl.*; *A.I.R.* 1928 *All.* 561 (*F.B*), *Rel. on*; 9 *M. I. A.* 539 and 23 *Bom.* 725 (*P.C.*), *Cons.* [P 154 C 1]

(b) Hindu Law—Widow—Mother taking possession of deceased's property—His widow living but minor and unable to look after property—Mother's possession is not adverse but only nearest reversioner's possession.

Where mother of the deceased takes possession of his property and obtains mutation in the Revenue Courts, in the lifetime of the deceased's widow who is minor and unable to look after the property, the possession of the mother is not adverse against the widow, but merely possession of the nearest reversioner before her time. [P 154 C 1, 2]

G C. Sinha and *R. D. Sinha*—for Appellants.

Radha Krishna and *Hargobind Dayal*—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the reversioners to the estate of one Durga Din who died in the year 1896, against the persons who are now in possession of the estate. These persons are alleged in the plaint to be unlawfully in possession of the property holding as they did, under a gift made in favour of Mt Lachmin who is defendant 1 by Mt Umeda, who was the mother of Durga Din, and who is stated by the plaintiffs to have had only a limited interest in the property as a Hindu female. The suit has been brought within twelve years of the death of Mt Umeda and is prima facie within time under Art. 141 Lim. Act The defence set up was that Mt. Umeda obtained a title by adverse possession and that this title set up a bar to the reversioners.

The facts are that Durga Din died in the year 1896. At the time of his death he was a minor and his widow Mt. Parbati was also a minor. Mt. Umeda, the mother of Durga Din, was in actual possession at the time of Durga Din's death and she obtained mutation in her own name from the revenue Court, the order of which is on the record The order shows that Parbati was not in possesion and that as her *gauna* ceremony had never been performed, she was still with her parents, who contemplated her remarriage. There was therefore no question of her being able to manage the property and the order was passed in favour of Mt. Umeda Mt. Parbati died in 1913 and Mt. Umeda died in 1921 Long before her death, Mt. Umeda, had executed a deed of gift in favour of her daughter Mt Lachmin. The argument which has been addressed to us is that Mt. Umeda did not succeed to the property as the heir of Durga Din, although she was after Mt. Parbati the person entitled to succeed to his estate in preference to the other reversioners but that she obtained adverse title against the widow, and when the widow allowed the title to become absolute by lapse of time the title was perfected also against the other reversioners. The question whether an adverse title obtained against a Hindu widow is adverse also against the reversioners is one which has been discussed at length in a recent judgment of a single Judge of the Calcutta High Court reported in *Aurabindh Nath Tagore* v *Manorama Debi* (1). The gist of that ruling is that the decision of their Lordships of the Judicial Committee in *Varthialinga Mudaliar* v. *Srirangath Anni* (2) is authority for the view that any adverse possession obtained against a Hindu widow operates in the same manner against the reversioners and that the period from which the suit should be brought begins to run from the date when the possession became adverse But it does not appear to us that the judgment of their Lordships referred to is an authority for that proposition It is true that they quoted a judgment of the Calcutta High Court in which some of the Judges appear to have taken this view ; but the only conclusion which their Lordships of the Judicial Committee arrived at was:

(1) A. I. R. 1928 Cal. 670=55 Cal. 909.
(2) A. I. R. 1925 P. C, 249=48 Mad. 889=52 I. A. 322 (P.C.).

"that the Board has invariably applied the rule of the *Shivagunga* case as sound Hindu law, where that rule was applicable,"

and the case which their Lordships had to decide was one similar to that which they had referred to as the *Shivagunga case i. e. Katama Natchiar* v. *Raja of Shivagunga* (3) All that that case laid down was that the whole estate is vested in a Hindu female absolutely for some purposes, though in some respects with a qualified interest, and that a decree fairly obtained against a widow must be held to be binding on the succeeding heirs. In argument before their Lordships it was contended that that ruling had not been followed by the Board themselves in the case in *Runchordas Vandrawandas* v *Parvatibhai* (4), but their Lordships said that this was not the case, and that the ruling in the *Shivagunga* case (3) had no application to the case of *Runchordas* (4) because in that case the widows had never been vested with the estate and the property had never been represented by them.

Recently a Full Bench of the Allahabad High Court has considered the same question in the case of *Bankey Lal* v. *Raghunath Sahai* (5). The Judges have not found that their Lordships of the Judicial Committee intended in the case reported in *Vaithialinga Mudaliar* v. *Srirangath Anni* (2) to extend the principle laid down in the *Shivagunga* case, or if they have done so they have not intended to go beyond the decision in the case of *Runchordas* and therefore if adverse possession against a widow is sought to be made adverse also against the reversioner, it can only be so in a case where the widow has been in actual possession and has been dispossessed We are not prepared to carry the matter any further than this, and as Parbati never obtained possession we do not consider that the possession of Mt. Umeda, even if it were adverse possession, would be such an adverse possession as to operate against the reversioners But we do not consider that the possession of Mt Umeda was adverse. She obtained mutation in the revenue Court on the basis of possession, it being impossible for the minor widow to look after the property, and her possession was not adverse possession but merely the possession of the nearest reversioner before her time. After the death of Mt. Parbati Mt. Umeda was in possession as heir of her son and in our opinion her title could not be challenged during her lifetime. A gift in favour of her daughter could not be challenged by the heirs until Mt. Umeda's death and as the suit has been brought within twelve years of the death of Mt. Umeda it is within time.

It has also been argued before us that the appellants were prejudiced by the fact that the learned District Judge in appeal did not decide the question whether the defendant Lachman was not an illegitimate son. If Lachman was not illegitimate he would have an equal share with the three plaintiffs. It does not appear that the appellants would have been in any way prejudiced by the fact that three persons have obtained the property from them rather than four, but we find in the first place that the question of Lachman's illegitimacy was never raised by the appellants themselves, secondly, that it was denied by Lachman himself and decided against him, thirdly, that he never questioned the decision of the Court in appeal and lastly that the appellants themselves admitted that it was the three plaintiffs who were entitled to sue as the nearest reversioners. This ground of appeal has no force, and we are of opinion that the suit has been correctly decided by the Courts below. We therefore dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed*

(3) [1886] 9 M. I. A. 539 (543).
(4) [1899] 23 Bom. 725=26 I. A. 71=1 Bom. L. R. 607=7 Sar. 543 (P.C.).
(5) A. I. R. 1928 All. 561 (F.B.).

A. I. R. 1929 Oudh 154

RAZA AND PULLAN, JJ.

Ram Adhin and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No 117 of 1928, Decided on 4th January 1929, from order of Sess. Judge, Fyzabad, D/- 20th November 1928.

Oudh Criminal Rules, Ch. 5, R. 14—Original selection of jurors made without any objection—Out of eight present in Court, Judge choosing five without conducting second ballot—Accused having no objection to that choice—Irregularity was covered by Criminal P. C., S. 537,—Criminal P. C., S. 276: [*But see A. I. R.* 1927 *Cal.* 242.]

No objection was taken to the original selection of the jurors, eight of whom were present in the Court, and instead of conducting a second ballot, as required by R. 14, Ch. 5, Oudh Criminal Rules, the Judge chose five out of the eight present. The Judge asked the accused whether they had any objection to this selection but they had none.

Held : that the irregularity was covered by S. 537, Criminal P. C., and did not vitiate trial : 8 *Cal.* 739, *Foll.*; 33 *All.* 385, *Not. Foll.*
[P 155 C 1]

H. N. Misra for *J. N Misra* and *Hyder Husein*—for Applicants.

Govt. Pleader—for the Crown.

Judgment.—This is an application in revision of the order of the Sessions Judge of Fyzabad who dismissed an appeal against a conviction by the Assistant Sessions Judge of Fyzabad in a case tried by a jury The only point raised in appeal before him was that the trial was vitiated by the fact that the jury were not selected by lot in the manner provided for by R 14, Chap. 5, Oudh Criminal Rules The same point has been raised before us The rule in question lays down an elaborate procedure which should be adopted by Judges in trials both by jury and with the aid of assessors Not only have the jurors in the first instance to be chosen by lot out of the list of jurors, but those who have been so chosen have to be again subjected to a similar process in open Court in order to determine which of the jurors or assessors who are present should sit for the trial. In the present case no objection has been taken to the original selection of the jurors eight of whom were present in Court, but it appears that instead of conducting a second ballot the Judge chose five of the eight persons present and asked the accused if they had any objection As the accused had no objection the trial proceeded We have no hesitation in saying that this irregularity is one which can be covered by S 537. Criminal P. C It is not even suggested that the five persons who sat on the jury were unable to perform their duties fairly, or that the three persons who were not selected would have been more impartial. It is a purely technical error and one which in our opinion does not vitiate the trial. In coming to this decision we have followed the authority of the Calcutta High Court in the case of *The Empress* v. *Jhubbo Mahton* (1) a decision of the year 1882 which, as far as we know, still expresses the view of the Calcutta High Court The only ruling which we have been shown to the contrary is reported in *Emperor* v. *Bradshaw* (2) This was a case where a European British subject was tried under the special rules which were then in force, but we are unable to ascertain from the judgment of the learned Judge what the exact error was which was committed by the Court below, and which in his opinion vitiated the trial We are satisfied that the decision of the Calcutta High Court, to which we have referred, rightly expresses the law on the subject and we dismiss this application.

S N /R K. *Revision dismissed.*

(1) [1882] 8 Cal. 739=12 W. R. 233.

(2) [1911] 33 All. 385=9 I. C 278=8 A. L. J. 192.

A I R 1929 Oudh 155

WAZIR HASAN, AG. C. J AND MISRA, J.

G. Mekenzie & Co., Ltd. — Plaintiff—Appellant

v.

Mohammad Ali Haider Khan—Defendant—Respondent

Second Appeal No. 306 of 1928, Decided on 16th January 1929, from decree of Dist Judge, Lucknow, D/- 22nd May 1928

Contract—Construction — Hire purchase—*A* let his motor to *B* and received initial money as consideration for allowing *B* option to buy—*B* to become absolute owner after paying certain monthly instalments—*B* obtained option to buy but was under no obligation to exercise it — Contract was merely one of hire and ownership of motor did not vest in *B*.

If in substance there is an agreement to buy, the parties cannot by calling it a hiring or by mere juggling with words escape from the consequences of the contract in which they entered , but if the contract imports no legal obligation to buy there is no such agreement.
[P 157 C 1]

A and *B* entered into a contract whereby *A* (described as owner in the contract) agreed to let his motor to *B* (called the hirer), and received a sum of money from *B* in consideration for allowing the option of purchasing the car. The motor was to be the absolute property of *B* when he paid a certain number of monthly instalments following upon the payment of the initial sum.

Held : that the purchaser obtained the option of purchase but he was under no legal obligation to exercise it. So it was merely a contract of hire and the ownership of the car did not vest in *B*. *Lee* v. *Butler*, (1893) 2 *Q. B.*

318 *Expl.* and *Dist.*; *Lewis* v. *Thomas*, (1919) 1 *K. B.* 319; *Helby* v. *Mathews*, (1895) *A. C.* 471 and *A.I.R.* 1925 *Bom.* 18, *Rel. on.* [P 157 C 2]

M. Wasim and *D. N. Bhattacharji*—for Appellant.

Hyder Husein—for Respondent.

Judgment.— This is the plaintiffs' appeal from the decree of the District Judge of Lucknow dated the 22nd May 1928, which reversed the decree of the Court of first instance and dismissed the plaintiffs' suit. The only relief for which the claim was laid was the recovery of a motor car. The appellants are entitled to the relief if the agreement under which the car passed into the possession of the defendant-respondent was a contract of hire with an option to purchase. On the other hand, if under the same contract the ownership of the car vested in the defendant the relief must fail. The lower appellate Court is of opinion that the latter view is the right view.

The contract in question is evidenced by a duly executed deed dated 1st November 1924. We are of opinion that the interpretation placed by the appellants on the deed just now mentioned is the correct interpretation. The deed opens by the description of the respective status of the parties in the matter of the contract contained therein. The appellants are described as "the owners" on the one part and the respondent "the hirer" on the other part The relevant clauses of the deed are as follows:

1. The owners agree to let on hire to the hirer and the hirer agrees to take from the owners one 01 model maker Overland touring car No. 1,28526 as described in the schedule attached hereto.

2. The owners hereby acknowledge receipt of the sum of rupees one thousand and thirty-six for the option of purchase hereinafter contained. If the hirer shall exercise such option credit will be given to the hirer for that sum. If he does not, then such sum shall belong absolutely to the owners.

3. The hirer to pay the owners without demand the sum of rupees one hundred eighty-nine on the first day of every calendar month for the hire of the said motor car, the first of such payments to be made on the first day of December 1924.

4. All such payments made under the last preceding clause shall be credited to the account of the hirer against the total cost of the motor car as set forth in the next succeeding clause.

5. When the hirer has paid the owners monthly instalments of Rs. 2,268 making, inclusive of the initial payment set forth in Cl. 2, the total sum of Rs. 8,304, the said motor car shall become the absolute property of the hirer and this agreement shall terminate.

6. The hirer agrees that until such time as he shall have paid the aforesaid monthly payments herein before mentioned. . . .

(a) The said motor car shall remain the absolute property of the owners.

(b) . . . (c) . . . . (d) . . . . (e) . . . . . (f)

7. If the hirer

(a) shall make default in punctually paying any hire instalment or

(b) . . . (c) . . . (d) . . .

(e) shall fail to observe and perform any of the agreements and conditions contained in this agreement then in any such case this agreement shall immediately cease and it shall be lawful for the owners, their servants or agents to enter by force if necessary upon any premises in which the said car may for the time being be and to seize and take away the same, no matter where the said motor car may be at the time of seizure and in the event of such seizure the owners may sell the motor car either privately or by public auction and out of the proceeds of such sale shall be entitled to pay to themselves all moneys which may be then due to them under these presents and shall pay the balance of such proceeds (if any) to the hirer.

In the plain language of this deed we find nothing to support the contention that the ownership of the car in question was transferred from the date of the contract from the appellants to the respondent. Indeed according to our judgment there is no room for such a contention on the face of this document. It is said, however, that the substance of the transaction evidenced by the deed in question must be looked at and not its mere words. We agree But the substance must be ascertained by consideration of the rights and obligations of the parties as stated in the several provisions of the whole of the agreement. In support of the construction placed by the defendant the learned District Judge relies on the case of *Lee* v. *Butler* (1) According to him this case

"decided that where the alleged hirer agreed to pay all the instalments the agreement amounted to an agreement to pay."

We think that the learned Judge has misunderstood the decision in that case. There one *L*, being in possession of furniture under a hire and purchase agreement made with the plaintiff, sold and delivered the furniture, before the last payment had accrued due or been paid, to the defendant, who received it in good faith and without notice that the plaintiff had any right in respect of it. It was decided that the sale and delivery to the

(1) [1893] 2 Q. B. 318=62 L. J. Q. B. 591=42 W. R. 88=69 L. T. 370.

defendant was within the provisions of S. 9 Factors Act 1889 (52 and 53 Vict. C. 45) and therefore valid. Lord Esher, M. R and Kay, L. J., held that the agreement was hire and purchase agreement to buy the goods and Kay L. J. added that the clause provides in effect that

"the goods shall become the absolute property of the hirer when the two sums, amounting to ..... £s have been paid."

In the arguments before us stress was laid on Cl. 5 of the agreement in question and it was said that in the present case—as in *Lee* v. *Butler* (1)—the motor car was to become the absolute property of the hirer when the hirer has paid the owners the monthly instalments following the initial payment of Rs 1,036. This argument ignores altogether the provision contained in Cl 2 of the agreement. According to that clause the hirer had the option to buy or not to buy the car. In consideration of this right of option the hirer paid the initial sum of Rs 1,036 It was open to him not to exercise this right. If he did then the initial sum paid by him shall be credited in his favour but if he did not, it shall belong to the owners In face of this provision as to option it is impossible to construe this deed as a deed evidencing an out-and-out sale where the price of the thing bought was to be paid in certain instalments We think that the present case is in line with the case of *Lewis* v. *Thomas* (2). The leading case on the subject is *Helby* v *Matthews* (3). In this case *Lee* v *Butler* (1) was referred to in the judgments delivered by their Lordships and distinguished. From the decision in that case we infer the principle of interpretation to be that if in substance there is an agreement to buy the parties cannot by calling it a hiring or by mere juggling with words escape from the consequences of the contract in which they entered but if the contract imports no legal obligation to buy there is no such agreement. We think it would be useful to quote the following from the judgment of Lord Waston in the case of *Helby* v. *Mathews* (3):

"Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy the appellant was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it."

As we have said before, in the present case the hirer obtained the option of purchase in consideration of the initial payment and having thus obtained the right it was open to him to exercise it or not to exercise it, in other words, he was under no legal obligation to exercise it.

The respondent's learned advocate cited the case of *A Cecil Cole* v *Nanalal Morari Dave* (4). The judgment in that case clearly shows that the distinction between the two classes of cases lies in the element as to whether there is or there is not an obligation to purchase.

We accordingly allow this appeal, set aside the decree of the Court below and decree the plaintiffs' suit with costs in this Court and in the lower appellate Court. As to the costs in the Court of first instance we direct that the parties shall bear their own costs in that Court.

S.N /R K. *Suit decreed*

(1) A. I. R. 1925 Bom. 18=49 Bom. 172.

(2) [1919] 1 K. B. 319=118 L. T. 689=88 L. J. K. B. 275.

(3) [1895] A. C. 471=64 L. J. Q. B. 465=30 J. P. 20=42 W. R. 561=72 L. T. 841.

A. I R. 1929 Oudh 157

RAZA AND PULLAN, JJ.

Emperor—Appellant.

v.

Ori—Accused—Respondent

Criminal Appeal No 324 of 1928, Decided on 20th December 1928, from order of 1st Class Magistrate, Gonda, D/- 27th April 1928.

Arms Act (11 of 1878), S 19 (c)—Even servant carrying master's gun in British India for having it repaired—No acknowledged license—Servant will not be protected.

Even a servant who is found in British India carrying a gun for the purpose of having it repaired, which has no license acknowledged by the British Government, will not be protected from the provisions of S. 19 read with S. 6. 24 *All.* 454, *Dist.* [P 158 C 1]

G. H. Thomas—for the Crown.

Zafar Husain—for Respondent.

Judgment.—This is an appeal preferred by the Local Government against

the acquittal of one Ori who was found in possession of a double-barrelled muzzle-loading gun without license at Kawwapur railway station in the district of Gonda The Magistrate acquitted the accused on the ground that no offence has been committed Although there is no license for this gun in British India, the Magistrate is of opinion that as the accused is a servant and the gun belongs or is said to belong to his master, he was able to bring it into British India for the purposes of repairs without a license The Magistrate relies upon certain rulings none of which apply to a case where a gun has been brought into British India without any license in British India for possession of the gun The judgment on which he principally relies is reported in *Emperor* v *Harpal Rai* (1), which is the case of the transfer of a licensed gun for a temporary purpose to a person other than the licensee The other rulings mainly deal with the cases of servants and others who carry guns belonging to their masters for some temporary purpose No doubt the case set up by the accused is that this gun belongs to his master and that he was carrying it for a temporary purpose. It may be so, but in the first place he had to prove that this was a gun for which there was a valid license in British India He has attempted to show that the gun is licensed in Nepal State He has not done so The two documents which he has produced and which are alleged to be licenses are not legally proved and the number contained in one of them which refers to a double-barrelled muzzle-loading gun is not the same as the number on this gun In the license the number is 666 whereas the gun bears the number 796 and we cannot see how the license can refer to this gun

In our opinion there is no ruling which protects a person without license and who is found in British India carrying a gun which has no license acknowledged by the British Government from the provisions of S. 19 read with S 6, Arms Act. On the other hand we are prepared to accept the Magistrate's view that the accused is merely the servant of some lady in the Nepal State and that he brought this gun to British India for the purpose of having it repaired. Under those circumstances we do not consider it necessary to impose a sentence of imprisonment.

We therefore accept this appeal, set aside the order of acquittal passed by the Magistrate and find the accused guilty under S. 19 (c), Arms Act (Act 11 of 1878) and sentence him to pay a fine of Rs 50 or in default to undergo three month's simple imprisonment

S N /R K *Acquittal set aside.*

(1) [1902] 24 All. 454=(1902) A. W. N. 129.

A I R 1929 Oudh 158

WAZIR HASAN, Ag C. J., AND MISRA, J.

Ram Narain—Plaintiff—Appellant

v

Sheo Darshan—Defendant — Respondent

First Appeal No 145 of 1927, Decided on 17th January 1929, from decree of Sub-Judge, Rae Bareli, D/- 8th September 1927

Oudh Laws Act, S. 13 — Son, manager of family — Father's personal right of pre-emption is not lost by son's refusal.

Even where a son is the manager of the family property, it cannot be concluded that the son is the agent of the father for the purpose of refusing an offer of a sale of property to which the father may wish to lay claim in his personal right by bringing a suit for pre-emption founded on the statutory provisions of the Oudh Laws Act. 1 *O. C.* 254 and 5 *O. C.* 395, *Ref.* [P 160 C 1]

Radha Krishna for *A. P. Sen* and *Sheo Gobind Tripathi*—for Appellant

M Wasim and *Naimullah* — for Respondent

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Rae Bareli, dated 8th September 1927. The appellant's suit has been dismissed by the decree under appeal

On 28th January 1926 a 5 annas 4 pies share situate in village Pindaria, pargana Inhauna, in the district of Rae Bareli, was purchased by Sheo Darshan, defendant (since deceased and now represented by his son, Shanker Dat, the sole respondent in this appeal) ostensibly for a sum of Rs 12,000 By means of the suit out of which this appeal has arisen Ram Narain claimed to enforce his right of pre-emption in respect of the sale of 28th January 1926. The defence gave rise to several issues One of the issues was: "Is the plaintiff estopped from suing as alleged?" In answer to this issue the finding of the Court below is in the

affirmative and on the basis of that finding alone the suit has been dismissed. The decision of the learned Subordinate Judge on every other issue in the case has been accepted before us by both the parties and it is agreed that if the finding of the Court below on the issue relating to estoppel is reversed by us, the plaintiff should be given a decree for pre-emption on payment of Rs 12,000.

The law of pre-emption, as it is administered in the Province of Oudh, is contained in Chap. 2, consisting of ten sections (Ss. 6 to 15), Oudh Laws Act, 1876. By virtue of the provisions of S. 13 a person entitled to a right of pre-emption may bring a suit to enforce such right on the ground, amongst others that no due notice was given as required by S. 10. It is admitted on both sides that the appellant is a person entitled to a right of pre-emption. It is also admitted that no due notice as required by S 10 was given in this case. On these facts, therefore, the appellant is prima facie entitled to a decree but it is said that he is estopped from enforcing his right of pre-emption on the ground that one of the vendors, Surajpal Singh, asked Mohan Lal, son of the appellant, as to whether he would purchase the property. Mohan Lal in answer declined to do so. On these premises being established, according to the learned Subordinate Judge, the plea of estoppel must be given effect to.

It is not necessary to decide the somewhat vexed question as to whether a plea of estoppel of the nature put forward in this case is entertainable at all, having regard to the requirement of the statutory law that there must be a notice as to the proposal of sale given according to the formalities prescribed by that law. A single Judge of the late Court of the Judicial Commissioner of Oudh decided in *Maryam Begam* v. *Tika* (1) that oral evidence of notice prescribed in S 10, Oudh Laws Act, 1876, is inadmissible. In the case of *Bhagwat Singh* v. *Nazir Husain* (2) decided by Mr. (now Sir Edward) Chamier, it was held that in a suit for pre-emption although notice in writing is not given by the vendor the plaintiff may be estopped from claiming pre-emption, if it is proved that the property was offered to him for a certain price, that he refused to purchase at that price and that he expressly consented to the purchase of the property by the vendee

The facts are as follows and they were not disputed before us at the hearing of the arguments in this appeal The appellant and his son, Mohan Lal, constitute a joint Hindu family. The family is possessed of certain zamindari share in the village of Pindaria, in which the share in suit is also situate. The appellant generally lives in Calcutta where he carries on a printing press. At times he comes to his village While the appellant is absent Mohan Lal naturally carries on the household work and the management of the zamindari share in the village. Mohan Lal is 25 years of age. Early in the year 1925 the appellant executed a formal power-of-attorney in favour of Mohan Lal and on its destruction by fire a fresh power was executed in August 1926 Neither a copy of the former power nor the original or a copy of the latter has been produced in this case and it has never been suggested on behalf of the respondent that Mohan Lal had received under any of these powers express authority to act on behalf of his father in matters like the one involved in the present case But it is argued that on the facts stated above Mohan Lal must be deemed to be a manager of the joint Hindu family, that his conduct in refusing to buy the property fell within the scope of usual authority of a manager and was therefore binding on the plaintiff.

We cannot accede to this argument. In the first place, having regard to the evidence on the record and particularly of Mohan Lal, who alone gives some details as to the work he does on behalf of his father, we are unable to accept the contention that Mohan Lal must be treated to have been occupying the position of a manager of the family at the time when the offer is said to have been made to him The sale in question was made by a registered deed of 28th January 1926 and according to the evidence of Surajpal Singh, one of the vendors, the sale was settled a month before the execution of the deed. Surajpal Singh's version is that after the sale had been settled with the respondent he offered the property for purchase to Mohan Lal. He took Mohan Lal to be an agent of his father. Mohan Lal in his evidence

(1) [1898] 1 O. C. 254.
(2) [1902] 5 O. C. 395.

denied the alleged offer. The learned Judge in the trial Court has accepted the evidence of Surajpal Singh and of Sheo Adhar as against the evidence of Mohan Lal as to the offer made and the refusal by Mohan Lal and we have done the same. Mohan Lal was examined as a witness in this case on 7th September 1927. He states that he is the plaintiff's agent for 1½ years. This obviously has a reference to the power-of-attorney executed in August 1926 by the appellant in favour of Mohan Lal. As to the terms of the authority we have already said that they are not proved. As to his work on behalf of his father outside the scope of the written authority, all he tells is that he has been doing his father's work for the last two years since the death of his grandmother and that during her lifetime she looked after his father's work with the aid of an agent. He also said that his father comes home at times.

On the evidence therefore we are not satisfied that Mohan Lal occupies the position of a manager of the family in whose favour an agency by implication may be deemed to have been created by his father. But even if it be granted that he is the manager of the property of the family, from that alone we are unable to draw the conclusion that the son is the agent of the father for the purpose of refusing an offer of a sale of property to which the father may wish to lay claim in his personal right by bringing a suit for pre-emption founded on the statutory provisions of the Oudh Laws Act. Clearly a right of pre-emption is a personal right in the sense that it is conferred on a cosharer. It must be conceded that both, father and son, being members of a joint family are cosharers if any of them is recorded as such in the revenue registers of the village. That the appellant is so recorded is admitted. This being so, it follows that each is entitled to enforce his claim for pre-emption in his own right. We accordingly allow this appeal, set aside the decree of the lower Court and decree the plaintiff's suit on condition that he deposits in the Court below the sum of Rs. 12,000 within three months from the date of the decree of this Court. In case of default the suit shall stand dismissed with costs in both the Courts. If the deposit is made as is hereby directed the plaintiff will be entitled to his costs in both the Courts and he will be permitted to deduct the amount of costs from the sum of Rs. 12,000 in making the required deposit.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 160

MISRA AND PULLAN, JJ.

Jagmohan Das—Plaintiff—Appellant

v.

Indar Prasad and *others*—Defendants—Respondents.

First Appeal No. 81 of 1928, Decided on 25th January 1929, from order of the Addl Sub-Judge, Lucknow, D/- 22nd March 1928

(a) Transfer of Property Act, S. 41—S. 41 will not protect transferee who has not made necessary enquiries about title of real owner.

Only those persons are entitled to claim protection under S. 41 who, in spite of necessary enquiry, have not been able to discover who the real owner of the property is, and who have, in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary enquiries about the title of the real owner the protection afforded by S. 41 is not available to him. [P 162 C 1]

(b) Evidence Act, S. 115—Mortgagor and mortgagee—*A* suing on his mortgage joining his co-mortgagee *B* as defendant—*B* not appearing in Court and decree passed exclusively in favour of *A*—*A* executing decree receiving money and giving discharge—*B* cannot urge that this position was not legally available to *A*,

Where a co-mortgagee *A* sued on the mortgage impleading the other mortgagee *B* as defendant, but the latter never appeared in Court, and the decree was exclusively passed in former's favour, *A* was entitled to execute it and to give valid discharge to the judgment-debtor or to the puisne mortgagee and if such discharge has been given and *A* has received money, it would dot be open to *B* to urge that this position was not legally available to *A*. [P 162 C 2]

Daya Kishan Seth—for Appellant.

Ram Bharose Lal—for Respondent 3.

Judgment—This is an appeal arising out of a declaratory suit The facts of the case are that the plaintiff-appellant, Lala Jagmohan Das, and his brother, Lala Indar Prasad, defendant 1, constituted prior to 1915 members of a joint Hindu family; that out of the joint family funds money was advanced to one Mt. Bakhtawar Begam by virtue of a mortgage deed, dated 20th July 1914, in which

was hypothecated the property situate in the district of Cawnpore and in the city of Lucknow; and that in a partition between the two brothers which took place in 1915 the said mortgage-deed had been allotted in equal shares to both of them.

A suit was brought on the basis of this mortgage-deed by Lala Inder Prasad alone, and a decree was passed on 20th February 1925, in his favour. It appears that when Lala Inder Prasad instituted the suit on the aforesaid mortgage he also impleaded plaintiff-appellant as a defendant in that case alleging that he had declined to join him as a plaintiff in the suit. It further appears that the said decree was transferred by Lala Inder Prasad to defendants 2 and 3, who are the sons of one Lala Purshottam Das, who is also a defendant (5) in this case. His brother Lala Jugal Kishore has been impleaded as defendant 4. It would thus appear that defendants 2 to 5 constitute a joint Hindu family. The present suit has been brought by the plaintiff-appellant for obtaining a declaratory decree to the effect that he is the owner of half the decree since the mortgage on the basis of which the said decree was passed was owned in equal shares by him and his brother, defendant 1, that the sale-deed executed by Lala Inder Prasad in favour of defendents 2 and 3 in respect of the entire decree is null and void and that he is entitled to have the decree executed to the extent of his half share in it.

The suit was contested principally by defendants 2 and 3, who urged in their defence that the decree obtained by defendant 1 being in his favour alone he was entitled to have it executed and realize the whole amount due; that they having paid the whole amount due under the decree had obtained a sale-deed in respect thereof from defendant 1; and that, therefore, the plaintiff had no remedy against defendants 2 and 3, but should obtain from defendant 1 half the amount which had been paid by them to him as sale price for the said decree. They also contended that they had purchased this decree out of their own personal funds and not of the funds of the joint family, to which they and their father and uncle (defendants 4 and 5) belonged, and that they having purchased it from an ostensible owner, the plaintiff was not entitled to avoid the sale executed in their favour under the provisions of S. 41, T. P. Act, 4 of 1882.

The suit was tried by the learned Additional Subordinate Judge of Lucknow to whose Court it had been transferred and who by his decree dated 22nd March 1928, gave the plaintiff a decree against defendant 1 for half the consideration, for which the original decree had been transferred by him in favour of defendants 2 and 3 and dismissed the suit so far as the other defendants were concerned. This decree was passed upon a finding to the effect that defendants 2 and 3 having taken a sale-deed of the decree from Lala Inder Prasad in whose favour it stood, the plaintiff was not entitled to claim any relief against them, but was only entitled to claim from defendant 1 half the sale consideration for which the decree had been sold.

The plaintiff-appellant has brought the present appeal against this decree and the contention now urged on his behalf is to the effect that the mortgage-deed executed by Mt. Bakhtawar Begam being the property of the plaintiff and his brother defendant 1 in equal shares, he must be held to be entitled to be the owner of the decree also to the extent of half and that, therefore, the sale-deed executed by defendant 1 in favour of defendants 2 and 3 should be considered operative only to the extent of half, and that, therefore, they should be declared as entitled to execute the decree only to that extent.

We have heard the arguments in this case at great length and it appears to us that the decree passed by the learned Subordinate Judge is correct and should, therefore, be maintained. It was argued on behalf of the plaintiff-appellant that defendants 2 and 3 cannot invoke in their favour the protection of S. 41, T. P. Act, since they must be presumed to know full well that the decree in dispute was the joint property of plaintiff-appellant and of defendant 1 We have looked into the record and it appears that defendants 4 and 5 brought a suit against the son and husband of the mortgagor Bakhtawar Begam on the basis of a mortgage executed by her in their favour on a date subsequent to the deed, in which the plaintiff is admittedly entitled to a half share. The decree was passed in their favour on the basis of the said mortgage deed on 27th May 1927. It is

clear from the proceedings of that suit that the rights of plaintiff and of defendant 1, who were impleaded in that suit in the capacity of prior mortgagees as defendants 3 and 4, were fully known to defendants 4 and 5, who were plaintiffs in that suit. It is also equally clear from the evidence on the record that defendants 2 and 5 constitute a joint family It is also admitted that defendants 2 and 3 have failed to prove that the money with which they purchased the decree from Lala Inder Prasad was their own personal money. Under these circumstances defendants 2 and 3 being members of a joint family with defendants 4 and 5, they must be saddled with the knowledge of the fact that the decree obtained by Lala Inder Prasad was his property as well as that of the plaintiff-appellant to the extent of half and half. The defendants having full notice of the title of the plaintiff-appellant cannot be allowed to seek protection of S. 41, T. P. Act. It is a settled rule of law that only those persons are entitled to claim protection under that section, who, inspite of necessary enquiry, have not been able to discover who the real owner of the property is, and who have, in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary enquiries about the title of the real owner the protection afforded by the said section is not available to him. We are, therefore, constrained to hold that defendants 2 and 3 cannot be allowed to take advantage of S 41, T. P Act, 4 of 1882.

There is, however, another aspect of the case from which it has to be looked at. It would appear from the facts already stated in the earlier portion of this judgment that the plaintiff-appellant refused to join defendant 1 as his co-plaintiff when the latter brought the suit on the basis of the mortgage-deed, dated 20th July 1914. He had, therefore, to be impleaded as a defendant in the case and in spite of the fact that notice of the suit went to him, he never appeared in Court, nor did he express his willingness to be impleaded in the said suit as a co-plaintiff along with defendant 1 It was due to his own action that a decree was passed exclusively in favour of defendant 1. If any complications have now arisen from that situation it is the plaintiff-appellant who has to thank himself. It appears to us that after the decree in the mortgage-suit was passed in favour of defendant 1 alone he was entitled to execute it and to give discharge to the judgment-debtor or to the puisne mortgagee If such a discharge has been given and money has been received by defendant 1, it would not be open to the plaintiff appellant to urge that this position was not legally available to defendant 1. The sole remedy to which he would be entitled in such a case would be to claim his half share in the money paid to defendant 1. We are inclined to hold that the sale of the decree in favour of defendants 2 and 3 should place them in the same position as if they were judgment-debtors and had by making the payment obtained a discharge. It is admitted that the defendants 2 and 3 are puisne mortgagees of the property mortgaged in favour of the plaintiff-appellant and defendant 1 under deed dated 20th July 1914, and in such a case it would be open to them to pay the decretal money to defendant 1 in whose favour alone the decree stood and to obtain a discharge in respect of the mortgage, on the basis of which the decree had been passed in favour of defendant 1

We are, therefore, of opinion that the defence of defendants 2 and 3 must prevail, and that it is not open for the plaintiff-appellant to question the sale of the decree in favour of defendants 2 and 3 when it was effected by defendant 1, in whose favour alone it stood, and which position was brought about by the own conduct of the plaintiff-appellant himself. The learned Subordinate Judge was, therefore, correct in passing a decree for half the sale consideration against defendant 1 and in dismissing his claim for a declaratory decree against the other defendants. The appeal, therefore, fails and is dismissed with costs.

S.N/.R K *Appeal dismissed.*

A. I. R. 1929 Oudh 162

MISRA AND SRIVASTAVA, JJ.

Hira Lal—Plaintiff—Appellant.

v.

Kali Charan & another—Respondents.

First Appeal No. 33 of 1928, Decided on 18th October 1928, from decree of Sub-Judge, Mohanlalgang, Lucknow, D/- 30th November 1927.

(a) Hindu law—Partition—Suit for—Offer to include omitted property if proved joint —Suit should not be dismissed—Practice—Duty of Court.

An offer by the plaintiff in a suit for partition to include other property, not mentioned in the plaint, which may be proved to be joint, is sufficient to cure the defect of omission of any properties from the partition and the suit is not liable to be dismissed on the technical ground of certain items not having been included in the plaint. [P 165 C 2]

(b) Civil P.C., O. 2, R. 2—Joining several causes of action is not compulsory.

The general principle of avoiding multiplicity in litigation must be controlled in its application by the rules of procedure regarding frame of suits and joinder of causes of action. The law only requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. But a plaintiff cannot be compelled to join several causes of action though in certain cases he can do so. [P 166 C 1]

(c) Partition—Suit—Partition of common, not joint, property—Partial partition is allowed.

A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition : *A. I. R.* 1924 *Mad.* 124, *Foll. A. I. R.* 1923 *Cal.* 501, *not Foll.* [P 166 C 1]

K. P. Misra, *R. B. Lal* and *Harish Chandra*—for Appellant.

Wasim—for Respondents.

Judgment.—This is a first appeal by the unsuccessful plaintiff and arises out of a suit for partition One Lachhman Prasad was a well-to-do kalwar, residing in Amaniganj, a hamlet of Kasmandi Khurd, near Malihabad District Lucknow. He had four sons, the eldest of whom is Hira Lal, plaintiff. The other three were Ram Prasad, Kali Charan and Ram Lal. Ram Prasad predeceased his father, leaving a widow, Mt. Birma. Kali Charan and Ram Lal are the defendants in the case. On 17th May 1924, Lachhman Prasad executed a will, bequeathing all his property, immovable and moveable including cash, to his three sons. In this will he made a specification of the immovable property allotted to each of the sons and directed that they shall be the owners in equal shares of certain mortgagee rights and that the moveable property such as ornaments, utensils and the household effects shall be divided in this way that the plaintiff, Hira Lal, was to get a 5 annas 6 pies share and Kali Charan and Ram Lal were to get 5 annas 3 pies each. As regards the cash also, he directed that it was to be divided in the same proportion. Lachhman Prasad died on 7th June 1924. The plaintiff, Hira Lal, instituted the present suit on 14th May 1927, claiming a one-third share in two houses and an orchard specified in list E., attached to the plaint on the allegation that they had been left undivided in the will and for a partition of his 5 annas 6 pies share in the moveable property and cash as specified in lists A, B, C and D, attached to the plaint on the allegation that the defendants were in possession of all the properties in the said lists.

The defence was that Lachhman Prasad in his lifetime on 22nd May 1924 had made a division of all his moveable property and that the defendants were not in possession of any property except what had been allotted to them at the division made by the father. Referring to the lists the defendants alleged that the properties entered in lists A, B and C., were all fictitious and that they were not in possession of a single item of the properties entered in those lists. As regards list D the defendants admitted some of the properties entered in that list being in their possession and said that they had got them at the division made in the lifetime of Lachhman Prasad. With respect to the houses and orchard entered in list E., they pleaded that they were included in the immovable property which was given to the defendants under the will. They further pleaded that the suit was defective inasmuch as the plaintiff had not brought into the hotchpot the property in his possession On these pleadings the learned Subordinate Judge of Mohanlalganj framed the following issues for decision:

"1. Whether the moveable property was partitioned in May 1924, as alleged ? 2. Whether plaintiff is not entitled to sue for partition until he offers and discloses the joint property which he has received or which is in his possession ? 3. What joint property he has received which should be included in the division ? 4. What items of joint property are in the possession of the defendants or have been received by them ?"

He dealt with issue 2 as a preliminary issue and on 20th July 1927, before recording evidence in the case gave a finding to the effect that if the defendants were able to establish the existence of any items of joint property in the plaintiff's possession besides the two items which were admitted by the plaintiff in his statement made in the

course of oral pleadings the suit should be dismissed.

After the trial had been completed the learned Subordinate Judge found that the defendants had established beyond doubt the existence of at least seven such items of joint property in the plaintiff's possession. As a result of this finding on issue 3 he held that the plaintiff's suit must fail by reason of his failure to bring into the hotchpot all the joint property in his possession. As regards the partition alleged to have been made in May 1924, his finding under issue 1 was that the partition had not been satisfactorily proved. Lastly on issue 4 he held that the plaintiff had failed to prove that any items of moveable property specified in lists A to D were in the possession of the defendants. As regards the houses and orchard in list E, he found that the claim in respect thereof was also not maintainable as they were included in the properties given to the defendants specifically under the will. As a result of the above findings he dismissed the plaintiff's suit The plaintiff has come up in appeal and has impugned all the findings of the trial Court which are against him. The learned counsel for the defendants-respondents has, on the other hand, questioned the correctness of the finding on issue 1. Thus between the plaintiff-appellant and the defendants-respondents all the findings of the lower Court have been challenged before us and we have to determine all the questions on which the parties were at issue We think it would be convenient to deal with these points in the order of the issues framed in the trial Court

Issue 1 relates to the partition alleged to have been made by Lachhman Prasad before his death. The defendants' case was that the partition was made on 22nd May 1924 (The judgment after considering the evidence on the issue concluded that the defendants had failed to prove the alleged partition and proceeded) The next question requiring consideration is as regards the effect of the plaintiff not offering for partition joint properties in his possession. It is the common case of the parties that the entire property possessed by Lachhman Prasad was his self-acquired property, that the title of the plaintiff as well of the defendants is based on the will of Lachhman Prasad and not upon any right of inheritance and that the interest possessed by the parties in the properties in suit is that of tenants-in-common and not of joint tenants. The defendants' case is that if a coparcener in a joint family in a suit for partition of the family property fails to bring into hotchpot all the joint property in his own possession his suit must be dismissed and that the same principle ought to govern suits for partition between tenants-in-common also. We have, therefore, to consider, firstly, the rule applicable with regard to suits for partition of joint family properties and, secondly, whether the same rules would govern the cases of tenants-in-common.

As regards joint Hindu families, there is no text in the Mitakshara directly prohibiting partition of a portion only of the entire family property. But the definition of the word "partition" in the Mitakshara, Chap. 1, S 4, namely that "it is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate" implies that the partition must be of the entire estate. The nature of the interest possessed by coparceners in joint Hindu families is also such that in order to determine the rights and liabilities of the coparceners it is necessary and desirable that the partition should embrace the whole family property. Thus while there are certain well-recognized exceptions, for instance, where part of the property lies outside the jurisdiction of the Court in which the suit for partition is brought or where it is held jointly with a stranger or is not available for actual partition, yet the general rule is that the partition should not be partial but should comprise all the joint family property. While this is so, the tendency of the Courts always is not to dismiss suits on the technical ground of some items having been left out .but to allow inclusion of such items by amendment of the plaint. This view would be borne out by an examination of the cases cited before us [n *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1), Petheram, C. J , with considerable hesitation, decided that a suit would not lie for partition of a portion of the joint family property but in dismissing the suit he added:

"that we reserve to the plaintiff liberty to bring a fresh suit for the partition of this property bringing in the whole of the family property."

(1) [1887] 14 Cal. 122.

In another case reported in the same volume *Punchanun Mullick* v. *Shib Chunder Mullick* (2) it was recognised by Trevelyan, J., that the plaintiff should be afforded an opportunity to amend his plaint before his suit is dismissed. Coming to more recent cases we find that in *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* (3), their Lordships of the Privy Council observed as follows :

"It was argued that his failure to disclose at the outset his possession of this property converted the suit into one for partial partition only, and that the suit ought therefore to have been dismissed. But their Lordships cannot assent to this argument. The plaint seeks a complete partition of the whole of that family property, and at an early stage of the case, the principal plaintiff expressed his willingness to bring these jewels into hotchpot . . . . . There is therefore no question of partial partition."

In *Amir Chand* v. *Lakhmi Chand* (4) Sulaiman, J , said :

"In our opinion in a suit for partition of the whole family property the plaintiff is not bound to file with the plaint such a complete and exhaustive list of all the properties as not to exclude any item, howsoever small. If any defendant wishes to raise the plea that any part of the joint family property has been excluded it is for him to specify such properties and show that they belong to the family and and have been wrongly excluded. In our opinion, in view of the offer made by the plaintiff to include the properties which it had been suggested, also formed part of the joint family property the suit should not have been dismissed on the technical ground that when it was originally brought, these items had not been included in the plaint. The only inference that under the circumstances we can draw is that the Court below shirked its duty and tried to get rid of the case in as short a way as possible. The result of the dismissal would be that the plaintiff will have to bring a second suit for partition and the parties will be put to further embarrassment and trouble . . . . In our opinion there was really no defect, either in form or procedure, in the suit ; but even if there had been any, we are of opinion that he should have been allowed to amend the plaint and include these items of property. As soon as the application was made by the plaintiff all defects in the case had disappeared and we fail to see why the learned Subordinate Judge thought fit to dismiss the suit on an admittedly technical ground, namely, that the plaintiff did not include the whole of the joint family property."

In *Mukund Lal* v. *Jogesh Chandra* (5) which is a case decided by the Patna High Court, the trial Court had dismissed the suit, which was for partition of joint family property, solely on the ground that the plaintiff had omitted five properties from the list of joint properties attached to the plaint. Their Lordships remarked that :

"in a case like the present one it was the obvious duty of the Court to have allowed the amendment of the plaint and as amended to allow the action to proceed, including all the properties that were found to be joint family properties. Such power of amendment is vested in the Court by the provisions of S. 153, Civil P C., coupled with O 6, R. 17."

In the present case the plaintiff in his application dated 25th July 1927 stated in detail his reasons for not considering properties which the defendants alleged had been excluded from partition, to be joint properties and wound up his application in the following terms :

"The applicant has not intentionally concealed any joint property. If perchance any property might have remained excluded from this suit, and if any sort of property be proved to be joint, the applicant has no objection to its being divided."

In our opinion this offer by the plaintiff was sufficient to cure the defect of omission of any properties from the partition and the learned Subordinate Judge was wrong in holding that the suit was liable to be dismissed on the technical ground of certain items not having been included in the plaint.

Then as regards suits for partition of properties held by persons as tenants-in-common and not as joint tenants we find ourselves unable to hold that the same rule should apply to such suits. Reliance has been placed by the learned Subordinate Judge on a decision of the Calcutta High Court in *Rajendra Kumar Bose* v. *Brojendra Kumar Bose* (6) No doubt it was laid down in this case that cases of co-tenants are governed by the same rule as that of joint tenants. But with great respect to the learned Judges who decided that case we cannot agree with this opinion. Unfortunately we have been unable to examine the English authorities referred to by Sir Asutosh Mookerjee, J., in his learned judgment because they were not available in the Court library. The rule stated in Freeman on Co-tenancy and Partition, S. 508, as quoted in the judgment, namely, that a tract held in common cannot be partitioned by fragments and a suit for partition should always embrace the whole

(2) [1887] 14 Cal. 835.
(3) [1902] 25 Mad. 367=29 I. A. 76=8 Sar. 258 (P.C.).
(4) [1920] 18 A. L. J.=869=58 I. C. 275=2 U. P. L. R. (A) 290.
(5) [1916] 20 C. W. N. 1276=35 I. C. 870=1 Pat L. J. 393.
(6) A. I. R. 1923 Cal. 501.

tract held by the co-tenancy is perfectly correct. But we cannot take this to mean that if there are different properties held by the same co-tenants, a suit for partition between them must embrace all such properties Suppose *A*, a Christian, *B* Muhammadan, and *C*, a Hindu jointly purchase at different times ten different villages and each of them makes equal contribution to the price and and has an equal share in each village. It is obvious that each village is held by *A*, *B* and *C* in common tenancy If the rule laid down in this case is correct, *A* cannot get a partition of his share in any one or more of the villages, until he seeks partition of all the ten villages. We do not think that this can be the law. The learned Judge refers to the principle of avoiding multiplicity of litigation as the foundation for the rule. We would respectfully point out that this general principle in its application must be controlled by the rules of procedure regarding frame of suits and joinder of causes of action. The law only requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action A plaintiff is not compelled to join several causes of action though in certain cases he can do so This principle therefore would support the view that a single tract or a single item of property cannot be partitioned by fragments but cannot justify the opinion that distinct items of property must be included in one suit merely because they happen to be held by the same tenants-in-common. We agree with the view taken by the Madras High Court in *Pakkiri Kanni* v. *Mahammad Manjoor Sahib* (7), here it was laid down that a suit for partition of common property and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition. In the present case it being admitted that the parties are tenants-in-common and not joint tenants the suit could not be dismissed on this ground.

However, the learned counsel for the plaintiff has before us maintained the offer which was made by the plaintiff in the lower Court and has expressed his willingness to include in the suit all properties in his possession which might be adjudged as joint properties. We, therefore, proceed to consider the finding of the learned Subordinate Judge on this point. (The judgment then considered the findings and concluded as follows): It would be clear from what we have stated above that for the complete determination of the case, it is necessary to remand it to the learned Subordinate Judge for findings on certain points. The plaintiff's counsel in the course of his arguments laid emphasis on the attitude of the lower Court and the pronounced bias shown by him against the plaintiff. Although we think that there is not much to choose between the plaintiff and defendant 1 yet we have no hesitation in saying that the plaintiff by his own improper conduct drew against himself the wrath of the learned Subordinate Judge At the same time we should add that use of strong language does not always make a judgment strong. Very often it gives a handle to the counsel assailing the judgment for adverse comments and makes the position of the counsel supporting it rather difficult

Taking all the circumstances into consideration we send the case back to the Court of Babu Mahabir Prosad, Additional Subordinate Judge, Lucknow, with directions as given in the body of this order that he should again appoint a commissioner to go to the houses of the plaintiff and the defendants and to prepare a complete list of the moveables and account books which may be found in their possession and another commissioner for the purpose of drawing up a plan of the house at Amaniganj. The Subordinate Judge should also try to get all the account books before him and if any of the account books are not forthcoming he should find out which of the parties is responsible for withholding their production. He should also examine them himself or appoint a commissioner for the purpose. He should also after receiving the reports of the commissioners record his findings on the following issues :

1. What sums, if any, belonging jointly to the parties are held by the plaintiff in respect of the following items :

(a) Money realized from Ram Dayal on account of four hundis ; (b) Income of the business of Lachhman Prosad ; (c) Money realized from Mathura Prosad ; (d) Money realized from Sarju Prosad Chandika Prosad.

(7) A. I. R. 1924 Mad. 124=46 Mad. 844.

2. What items of gold and silver articles in list A are the *stridhan* of the ladies ?

3. What items in list A other than those which are stridhan of the ladies and of other moveables in lists B, C , and D are properties belonging to Lachhman Prosad and in the possession of the defendants ?

4. Is there any portion of the house situate at Amaniganj which was in possession of Mt. Birma and which is not included within the portions bequeathed to the plaintiff and defendants 1 and 2 ?

The parties will be allowed to adduce any further evidence which they wish to produce on the above issues The findings should be returned within three months from this date and ten days from the date of the findings will be allowed to the parties for filing objections.

M.N /R.K. *Case remanded.*

A. I. R 1929 Oudh 167

RAZA AND PULLAN, JJ.

Sheo Ratan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 4 of 1929, Decie ded on 29th January 1929, against th order of Addl Sess. Judge, Lucknow, D/- 22nd December 1928.

Evidence Act, S. 114, Ill. (b)—Retracted confession of co-accused is conclusive against himself but is only evidence against other co-accused.

Where a confession does not appear to have been tutored nor made under the influence of drugs or fear but is one which adds to the knowledge which was then available as to the cause of death in many particulars and has not been contradicted by anything and thus appears to be in the evidence a true confession, it is sufficient, without any corroborative evidence, for the conviction of the maker though retracted : *A. I. R.* 1927 *Oudh* 17, *Foll.*

[P 170 C 2; P 171 C 1]

Such a confession is not alone sufficient evidence to justify a conviction of a co-accused but that confession if unrebutted is admissible in evidence against a co-accused.

[P 171 C 1]

G. G. Chatterji—for Appellant.

Government Advocate—for the Crown.

Judgment.—Three Brahmans Sheo Ratan, Sheo Narain and Sheo Gobind have been convicted of murder and sentenced to death. The sentence is before us for confirmation and all the prisoners have filed appeals from jail. Sheo Gobind has engaged counsel, while Sheo Ratan and Sheo Narain, who are father and son, have been provided with counsel by the Crown.

The story which has been unfolded by the evidence in this case is one of exceptional atrocity The lower Court has found and we, for reasons which we shall state later, agree in the finding, that the origin of this crime dates from the year 1924. In May of that year the wife of Sheo Narain, son of Sheo Ratan, was abducted, and on 29th May a complaint was filed by Sheo Narain against Birj Lal and his wife and another person under S 498 and 363, I. P. C The complaint was dismissed and the accused persons were discharged on 7th July 1924. From that date Sheo Ratan allowed his hair to grow long, and told several persons that he was doing this in order to cast the evil influence of his hair on the persons who got his daughter-in-law kidnapped. He also said more clearly to the witness Bodh Lal that he had taken a vow that he would not shave until the person who got his daughter-in-law kidnapped was ruined (sattyanas hojae). There is no question that this vow of Sheo Ratan was well-known in the village. The growing of the hair long has been adopted by many nations as a means of emphasizing a vow or oath. It was the practice amongst the ancient Jews and is part of the ceremonial of the Nazarite vow, and it is also the practice among Brahmans Sheo Ratan himself says that he grew his hair long from the date of his wife's death many years before, but there is no evidence in support of this statement. We notice that in cross-examination a question was put to the witness Lachman, clearly on the instigation of the accused himself, as to whether it was not the fact that Sheo Ratan had grown his hair long for the destruction of this witness.

Birj Lal and his wife lived in the house next to and adjoining the house of Sheo Ratan and his son. On the morning of 19th August 1928 the ploughman of Birj Lal went to his master's door and asked him to give out the plough. He could not arouse the inmates of the house and the village chaukidar advised him to look inside. The door was found to be open and not latched from inside as is customary in the case of the house of respectable villagers. The ploughman look-

ing inside saw Birj Lal and his son lying on one bed and Birj Lal's wife lying naked on another. He would not go in, but called other persons and they also refrained from going near the bodies. They saw from the blood that a murder had been committed and the chaukidar went to the police station and made a report. He left a man sitting at the door and no body went into the house until the police came. It is only natural that under the circumstances Sheo Ratan should have been suspected and this suspicion was noted in the first report The police Sub-Inspector reached the village at about 4 P. M. and began investigation He found that the bodies had received terrible injuries The child of two years old had a lacerated wound 6" × 4" in the abdomen and the intestines were protruding The child's scalp was ruptured in several places and the skull fractured. The father had four lacerated wounds on the head, face and neck and two other lacerated wounds on the leg But the injuries to the woman who had been pregnant and whose belly had been ruptured so that the fætus of seven months had issued from the womb presented such a horrible spectacle that the Sub-Inspector could not make a further investigation but for decency's sake covered the naked corpse with a cloth after coming to the conclusion that the woman had been strangled apart from other injuries.

This fact is most important in view of the importance which we attach to a confession made by one of the accused. The bodies were sent for post mortem examination but owing to the great distance from headquarters that examination was not held until the morning of 21st August by which time all the bodies were to a large extent decomposed. In the doctor's opinion the cause of the child's death was fracture of the skull and abdominal injury, the cause of the woman's death was "asphyxia due to pressure on neck and shock of abdominal wound" and the man's death was due to 'fracture of the skull and injuries in neck." In the post mortem report the doctor did not note that any weapon had been inserted into the vagina of the woman and it was only when he was examined in Court on 6th October that he stated that in his opinion more than a foot of a lathi must have been thrust into her private parts to cause the injuries to the abdomen and the uterus. On the following morning, that is to say, 20th August, the Superintendent of Police visited the village at 8 o'clock. On the night before, it had been impossible for the Sub-Inspector to do much except to despatch the bodies for post mortem examination. But in the morning he had made a search of the house of Sheo Ratan and had taken possession of two dhotis which appeared to have been recently washed and to be stained with blood

When the Superintendent of Police came it appears that inquiry was made as to how the house had been entered. The Sub-Inspector had already noticed that there was a hole in the roof and as the door had been found open it was suspected that the murderer or murderers had come in by the roof and left by the door The Superintendent went on to the roof and found close to the place where the hole had been made a burnt match He also found, though the significance of the fact did not occur to him at the time, a ladder standing in the courtyard of Sheo Ratan by which it was possible to reach the roof of his house and consequently the roof of the house of Birj Lal. The Superintendent also saw the marks of foot-prints between the ladder and the hole in the roof. A second search of the house of Sheo Ratan disclosed a box of matches of the same kind as the burnt match stick which han been found on the roof. This clue confirmed the suspicion that Sheo Ratan was concerned with the murder and the Sub-Inspector made inquiries as to the relations and associates of Sheo Ratan with the result that Sheo Gobind accused was brought to him on 22nd August. This Sheo Gobind is a man of 38 years of age, although he gave his own age as 25 and there is no reason to doubt that he is doubly related to Sheo Ratan and Sheo Narain by marriage. It appears that this man showed himself ready to confess, and he was taken to the Superintendent of Police on the following day with a view to having his confession recorded by a Magistrate The Superintendent of Police very wisely sent the man to jail with a request that he should be kept in separate havalat :

"to escape adverse influence. and called for his confession after a day or two with the approval of the Court."

On the following day, 24th August the confession of Sheo Gobind was recorded

by Mr. Mahfooz Ali, who is a Magistrate of the first class and who has been examined as a witness in the case. The Magistrate in his statement in Court bears out what is already clear from his own note of the confession, that he took every precaution in order to ascertain that the statement was voluntary. He even went so far as to keep the man in his Court for, as far as he remembers. two or three hours in order that he might be entirely clear from police influence

The confession which was recorded with great patience and minuteness by the Magistrate extends to eleven pages of Urdu writing and it is a most elaborate and detailed statement It describes how this murder was designed for over a year when Sheo Ratan first approached Sheo Gobind with a suggestion that he should hold the neck of Birj Lal while he was asleep, when Sheo Ratan and his son would cut his throat. Sheo Gobind says that he declined the first offer of Rs. 200, but afterwards, when the matter had been discussed with certain Pasis many of whom are known to be criminals and are registered as a criminal tribe, the witness began to waiver. On one occasion he was present when Sheo Ratan told the Pasis that Birj Lal should be killed near the Guria festival. This Guria festival, which is also known as Nagpanchmi, was celebrated on 20th August and it is the day on which married daughters return to the house of their parents The fact that this murder was committed on the eve of the Nagpanchmi festival, for it probably took place in the early morning of 19th August, affords a further reason for believing that the murder was committed out of revenge for the abduction from her husband's house of the wife of Sheo Narain.

It appears that Sheo Gobind lingered over his statement and was rather reluctant to come to the point but he ultimately stated clearly enough the events of the evening. According to him Sheo Narain and the Pasis, who have been acquitted in this case owing to the lack of evidence to corroborate the statement of Sheo Gobind, but not owing to the existence of any proof that they did not take part in the crime, met on the bank of the river. After midnight they all went to Sheo Ratan's house, but first of all Sheo Narain told Sheo Gobind that they were about to kill Birj Lal and gave him a chance of leaving at the last moment, but Sheo Gobind says : "I cannot help it now I have come." Sheo Ratan was awake inside his house. This man gave his age as 85 but the Judge says that he is perhaps about sixty years of age, and it does not appear that he is infirm on account of his age. Sheo Narain and one of the Pasis then went out. How they went out Sheo Gobind does not say After sometime they returned and they all, that is to say, Sheo Ratan, Sheo Narain, Sheo Gobind and four other persons whom he named, went into the house of Birj Lal through the door which was open The father and the son were sleeping on one bed and the wife was on another According to Sheo Gobind they were all strangled. Sheo Ratan and one of the Pasis throttled Birj Lal. Sheo Narain and two of the Pasis throttled the wife and Sheo Gobind himself throttled the child. Sheo Ratan then asked them to cut them into pieces but the murderers refused to do this as they thought that the night was almost over and they were afraid they would be caught But Sheo Gobind admits that before they left, one of the men, who have been acquitted, at the instance of Sheo Ratan, thrust a lathi between the woman's legs This was done after tying the woman's legs to the frame of the charpoy with a rope in order to pull them apart Sheo Gobind does not admit that any knife or lathi was used, except the lathi which was thrust into the woman while he was there, but he suggests that after he and the others left, Sheo Narain and Sheo Ratan may have returned to the house At least after leaving the house they went back and did not accompany Sheo Gobind and the Pasis. In the confession Sheo Gobind also tells the story of Sheo Ratan's vow saying that Sheo Ratan allowed his hair to grow, that is, he would not shave his hair until he had killed Birj Lal and his wife. He also says that some of the money promised to the Pasis was paid, namely, Rs 200 but he himself had not been paid It is on this confession that the conviction of all these three persons is based.

Sheo Gobind himself retracted the confession in the Court of the Committing Magistrate and he said that he had been beaten by the police and that he had been given some drug to drink so that he was not in his proper senses when he made the confession The whole of this story

is rendered absurd by the fact that he was kept for a day in jail in solitary confinement and that the Magistrate left him sitting in his Court for two or three hours before taking his statement. It is perfectly clear that he was neither under the influence of drugs nor affected by beating when he made the confession. We are not prepared to say that it is impossible that a confession so detailed and elaborate might have been made on some inducement offered by the police even after all these precautions had been taken, but in our opinion there is proof in the statement itself that it was not made at the direction of the police. The first reason which leads us to this conclusion is that even if the post mortem report had been known to the Sub-Inspector on 23rd August, when he took the accused to the Superintendent of Police, there was nothing in that post mortem report which showed that a lathi had been thrust into the private parts of Mt. Bhagirati. This fact had not been observed by the Sub-Inspector himself and therefore it was a fact stated by the accused for the first time and only corroborated when the Civil Surgeon was examined in Court long after the statement was made. Secondly according to Sheo Gobind all the deceased were throttled Although the Sub-Inspector himself for some reason which is not clear to us, deposed that he thought that the child had been throttled, we cannot understand how he had that opinion. To the ordinary observer the child died either from the fracture of his skull or from severe injury to the abdomen : and it never occurred even to the Civil Surgeon that the child had been throttled. Similarly Birj Lal to all appearance died as the result of cuts which he received about the head and neck and in his case also the Civil Surgeon at the time of his post mortem examination did not suspect throttling. It was only in the case of the woman that he found clear symptoms showing that she had been throttled.

When therefore Sheo Gobind stated that all had been throttled he was making a statement which, whether the post mortem report was in the hands of the police or not, was contrary to the opinion which any ordinary person at that time must have held as to the cause of death both of Birj Lal and of the child. Yet when the learned Sessions Judge conducted in his own Court a very careful examination of the Civil Surgeon it was made to appear quite possible that all these persons were killed by throttling before the infliction of the other injuries. Birj Lal had two signs of throttling, namely, the protrusion of his tongue and eyes and no test could be made from his lungs which were completely decomposed. In the case of the child both lungs were congested which is a sign of asphyxia but cannot be due to decomposition. The doctor had never looked at these bodies with the idea of finding that the obvious injuries were not the cause of death, and, as he says, he did not examine them on the supposition that theirs were cases of throttling. All that he can say definitely is that they may or may not have been throttled and that the lacerated incised injuries were either ante mortem or caused immediately after death, that is to say within two hours Thus in a most unexpected way a statement made by Sheo Gobind, which appeared at the time to be contrary to the facts of the case, was shown several months afterwards in the Sessions Court to be possibly true. The third point in which Sheo Gobind added to the knowledge possessed by the police at the time when he was taken into custody is the use of the rope which was found tied to the woman's legs. It does not appear that the reason why the rope was tied to her legs was ascertained by the investigating officer and the explanation given by Sheo Gobind is clearly correct. We are not of opinion either that this explanation can have been given to him by the Sub-Inspector or that he can have invented it himself.

The confession therefore is not one of those which can be considered to have been tutored ; and it was certainly not made under the influence of drugs or fear. It is a confession which adds to the knowledge which was then available as to the cause of death in many particulars and has not been contradicted by anything which has been shown to us in the evidence. Even the fact that two men left the party in the house of Sheo Ratan and then came back and took them to the open front door, lends support to the view that they climbed on to the roof by means of the ladder, entered the house of Birj Lal by making a hole in the roof and opened the door from inside, although these facts were probably not in the knowledge of

Sheo Gobind. The confession, therefore, being in our opinion a true confession, is sufficient, without any corroborative evidence, for the conviction of Sheo Gobind himself. This view of the law has been taken both by the Allahabad High Court and by this Court on many occasions. The first ruling to which we would refer is that reported in *Queen Empress* v. *Mayku Lal* (1). In that case it was held that such a confession, namely a retracted confession, was sufficient evidence, if a Court believed it to be true, for convicting the persons who made it. This view was carried further in the case of *Emperor* v. *Kheri* (2). It is there expressly laid down that as regards the person making it the retracted confession may, even without any corroborative evidence, form the basis of a conviction. These views have been recently confirmed by a Full Bench of the Allahabad High Court in the case of *Raggha* v. *Emperor* (3) and this Court has followed that judgment of the Allahabad High Court on more than one occasion, in particular in the case reported in *Raj Bahadur Singh* v. *Emperor* (4). Thus even if we hold that there was no corroborative evidence we would feel ourselves justified in upholding the conviction of the accused Sheo Gobind on the basis of his own confession alone.

As to the effect of that confession against the co-accused we would not be prepared to follow the judgment of the Allahabad High Court in the case of *Emperor* v. *Kheri* (2) to which we have referred above and lay down that a retracted confession of a co-accused can alone be sufficient evidence to justify a conviction, nor has this view been maintained by the Allahabad High Court itself in more recent decisions, but that confession standing as it does unrebutted is admissible in evidence, and it is in the present case a strong piece of evidence. There is nothing to show that Sheo Gobind had any reason for naming these men falsely, and his story fits in exactly with all the facts which are known to us. The actual evidence which goes to corroborate the confession, apart from the motive which has been so clearly shown to exist in the case of these two men, is the circumstantial evidence offered by the discoveries made by the Superintendent of Police. There can be no question, in view of the fact that the door was found open, that a hole was found in the roof, that a ladder was set against the wall leading to the roof from the house of Sheo Ratan and that a burnt match corresponding to the matches in Sheo Ratan's match box was found on the roof, that the murderers entered the house from the house of Sheo Ratan Sheo Ratan and his son were the only persons living in his house, and they had no defence to offer. They did not even attempt to say that some other persons entered their house, took one of their matches, climbed on to the roof by their ladder and so entered the house of Birj Lal In our opinion this circumstantial evidence would have been difficult to answer and no attempt has been made to answer it.

Lastly there is the recovery of two dhotis which had been recently washed. This fact presents nothing unusual, but still it is worthy of notice that one of those dhotis was marked with human blood and it was the dhoti of Sheo Ratan He has given three explanations as to how there was blood on his dhoti. It cannot be proved that one of these explanations may not be right, but it forms the link, even though a weak link, in the chain of evidence against these men We have mentioned already the motive for the murder. The manner in which the bodies were treated, probably after death, shows clearly enough that this was a murder for revenge. If, as appears to be the case, mercenaries were employed who removed some money from the house, there can still be no question that the persons who submitted this woman's body to these atrocities were actuated by motives of revenge and not by motives of gain. The persons, who were incensed against this family and particucularly against the woman, were Sheo Ratan and his son, and where there is direct evidence against these persons that they committed the crime we cannot regard the existence of a strong motive as immaterial. In our opinion the confession of Sheo Gobind is corroborated sufficiently by material evidence against both the co-accused. We believe that

(1) [1897] 20 All. 133=(1897) A. W. N. 224.
(2) [1907] 29 All. 494=4 A. L. J. 310=(1907) A. W. N. 140.
(3) A. I. R. 1925 All. 627 (F.B.).
(4) A. I. R. 1927 Oudh 17.

the learned Sessions Judge, who has tried this case with great care throughout, and has personally brought to notice many points which had escaped the investigating officer, has come to a correct decision. As to the sentence there can, in a case of this kind, be no sentence except that of death We therefore dismiss these appeals, uphold the convictions and sentence and direct that Sheo Ratan, Sheo Narain and Sheo Gobind be hanged by the neck till they be dead.

D D. *Appeal dismissed.*

** A. I. R. 1929 Oudh 172

Full Bench

WAZIR HASAN, AG. C. J., MISRA AND PULLAN, JJ.

Kedar Nath—Defendant—Applicant.

v.

Baldeo Prasad—Plaintiff —Opposite Party.

Revn. Appln. No. 38 of 1928, Decided on 17th January 1929, against order of Sub-Judge, Hardoi, D/- 13th March 1928

**** (a) Civil P. C., S. 11—Prior suit by transferee of pronote against executant and assignor dismissed—Second suit by transferee against assignor alone for damages is barred.**

A subsequent suit for damages brought by the transferee of a pronote against the holder of the note, who has transferred it in his favour, is barred by the rule of res judicata, when he has already claimed a relief against the holder of the note by impleading him as a defendant along with the executant of the note in a suit previously brought against them for recovery of the money due under the promissory note, and that relief has been refused to him. 4 *Cal.* 190; 12 *Beng. L. R.* 304; 20 *Cal.* 79 (*P. C.*) and *A. I. R.* 1925 *P. C.* 55, *Rel. on.*; *A. I. R.* 1929 *Oudh* 88, *Expl.* [P 174 C 1]

(b) Civil P. C., S. 11—Causes of action need not be same.

Wazir Hasan, Ag. C. J.—The test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter does not lie in the fact as to whether the two causes of action are different or the same: 12 *O. C.* 347; 20 *All.* 110 *Affirmed in* 24 *All.* 429 (*P.C.*), *Foll.*; *A. I. R.* 1924 *Pat.* 265, *Ref.* [P 175 C 1]

(c) Civil P. C., S. 11—Question whether a whole class of cases is barred is difficult to reply in general terms.

Pullan, J.—It is difficult, if not impossible, to answer in general terms a question as to whether a whole class of cases can or cannot be held to be barred by the principle of res judicata. [P 178 C 1]

Ali Zaheer—for Applicant.

Radha Krishna—for Opposite Party.

Order of reference

Misra, J.—This is an application for revision out of a suit for damages. The appellants filed originally a second appeal in the case but when the matter came up for hearing before a learned Judge of this Court, it was found that no second appeal lay in the case and the appeal was permitted to be converted into an application for revision. The facts out of which this suit has arisen are that on 18th April 1926, a pronote was executed by one Rameshwar Prasad in favour of Kedar Nath, the respondent before us, for a sum of Rs 200. On 24th February 1927 the said Kedar Nath sold the aforesaid promissory note to one Baldeo Prasad. Shortly after the transfer he filed a suit in the Court of the Munsif of Bilgram to recover Rs 232-9-0 due to him under the said pronote. The suit was instituted on 3rd March 1927 against two persons they being Rameshwar Prasad the original executant of the pronote, and Kedar Nath, the person in whose favour the pronote stood and who had transferred it in favour of the plaintiff. In para 6 of the plaint the respondent claimed relief that a decree should be passed for the amount claimed against Rameshwar Prasad who was defendant 1 or against both Rameshwar Prasad and Kedar Nath, who were defendants 1 and 2 respectively in the case, or against such of the defendants as the Court may find liable for the sum claimed whether jointly or severally.

The suit was tried by the learned Munsif of Bilgram on the Small Cause Court side He held that the pronote in suit was without consideration and no decree could, therefore, be passed on its basis against defendant 1. As regards the applicant who was defendant 2 in that case he held that no decree could be passed against him because: (1) such a pronote was unenforcible in law; and (2) that the respondent (the plaintiff in that case) had knowingly purchased this litigation from defendant 2 The suit was according to these findings dismissed on 28th April 1927.

After the dismissal of this suit the plaintiff respondent Baldeo Prasad instituted the present suit for recovery of a sum of Rs 348-9-0 as damages and costs. The amount which he claimed was in respect of the amounts paid by him as consideration for the transfer of the pro-

missory note, and the sum incurred by him in prosecuting the original suit, brought against the executant Rameshwar Prasad and the defendant appellant Kedar Nath. In the present suit he states his cause of action to have accrued to him on 28th April 1927, the date when the previous suit was dismissed. The defence put forward in the present suit by the applicant was to the effect that the plaintiff-respondent fully knew the circumstances in which the pronote in question had been executed and that he knowingly took the transfer of the said deed Under these circumstances it was alleged that no suit for recovery of any damages could lie. The second contention put forward was to the effect that the present suit of the plaintiff-respondent was barred by the rule of res judicata since he had in the previous suit claimed a decree against the defendant which had been refused. The learned Munsif of Bilgram who tried the suit came to the conclusion that the plaintiff had purchased the pronote with full knowledge that it was without consideration and that he was not, therefore, entitled to recover any damages and that the suit was barred by the rule of res judicata. On these findings he dismissed the suit with costs by his decree dated 19th November 1927.

The plaintiff-respondent appealed against this decree to the Court of the Subordinate Judge, Hardoi, who differed from the learned Munsif on both questions He held that it was not proved that the plaintiff had any knowledge of the circumstance that the pronote was without consideration, and that he had purchased it bona fide and had paid the consideration. On the question of res judicata he also took a difierent view from that taken by the Munsif. He took the view that the cause of action for the present suit had only arisen after the dismissal of the previous suit, and although the plaintiff had impleaded in the previous suit the defendant of the present suit as defendant 2 he could not be considered to have sued him in that case for damages on the foot of the sale-deed and therefore his joinder in that case did not estop him from suing for recovery of damages in the present suit In this view of the case he decreed the plaintiff's suit but passed a decree in his favour only for Rs. 261-8-0 with interest on Rs. 200 from the date of his purchase up to the date of the suit at the rate of 6% per annum and also future interest at the same rate from the date of the suit up to the date of realization. His decree is dated 13th March 1928.

As stated above the defendant has now brought the matter to this Court Originally he filed a second appeal, but that has now been treated as a revision. Two points have been urged in revision against the decree passed by the learned Subordinate Judge. The first point is that no application for revision lies and the second point is to the effect that the decision in the previous suit operates as res judicata

As to the first point we may state that it has no substance If the present suit is really barred by the rule of res judicata we would in that case be inclined to entertain the present application for revision. The second point, however, raises a question of some difficulty The contention raised on behalf of the defendant applicant is to the effect that when the plaintiff respondent brought the previous suit and impleaded him as well in that suit and prayed for a decree against him he must be deemed to have claimed the same relief, which he now claims against him in the present suit. The further argument advanced is to the effect that if the relief which is being claimed in the present suit has already been claimed and has been refused, it is no more open to the plaintiff-respondent to bring a second suit in respect of the same relief

The reply on behalf of the plaintiff respondent is to the effect that the cause of action for the present suit is quite different from that of the previous suit. It is argued that the cause of action for the present suit had not even arisen at the time when the previous suit was brought, it having arisen only after the dismissal of the previous suit. It is, therefore, contended that though the plaintiff claimed a relief against the defendant in the previous suit, yet he could not be considered to have claimed a relief on the present cause of action and that the matter now in controversy was never directly and substantially in issue in the previous suit. It was also argued that Explu 4, S 11, could not be held applicable to the facts of the present case inasmuch as it was not incumbent on the

plaintiff to claim the present relief in the previous suit The question is one of some difficulty and also of importance. We have, therefore, thought it proper to refer it to a Full Bench under S. 14, Cl. (1), Oudh Courts Act, 4 of 1925. The question which we refer to the Full Bench is as follows :

"Whether a subsequent suit for damages brought by the transferee of a pronote against the holder of the note who has transferred it in his favour, is barred by the rule of res judicata, when he has already claimed a relief against the holder of the note by impleading him as a defendant along with the executant of the note in a suit previously brought against them for recovery of the money due under the promissory note, and that relief has been refused to him."

Wazir Hasan, Ag. C J.—I agree

Opinion.

Wazir Hasan, Ag. C J.—This is a reference to Full Bench by a Division Bench of this Court for decision of the following question : (The question referred was quoted as above) I was a party to this reference. It seems to me that the question as framed can admit of one answer and that is in the affirmative When a relief has already been claimed against a party and that relief has been refused to him, I see no escape for the application of the rule of res judicata as enacted in S. 11, Civil P. C. But in order to elucidate the substance of the reference it is necessary now to state a few facts, which are not incorporated in the question just now mentioned In the previous suit the plaintiff had impleaded two defendants. Defendant 1 was one Rameshwar Prasad and defendant 2 was Kedar Nath. Kedar Nath is again the dedefendant in the present suit. The facts of the previous case were that Rameshwar Prasad had executed a pronote in lieu of a consideration of Rs. 200 in favour of Kedar Nath. Kedar Nath had on 24th February 1927, assigned the pronote in favour of the then plaintiff, who is the same person as the plaintiff in the present suit In para 1 of the plaint in the previous suit the fact of the execution of the pronote by Rameshwar Prasad, defendant 1 of that suit, in lieu of the sum of Rs. 200 in favour of Kedar Nath, defendant 2 of the same suit, was stated. In para 2 the assignment by Kedar Nath in favour of the plaintiff Baldeo Prasad was alleged. It was further stated that the right to sue under the assignment had arisen in favour of the plaintiff. The averment in para. 3 of the plaint was that, in spite of repeated demands made on defendant 1 to repay the sum of money advanced under the pronote, the said defendant had failed to make any payment either to the plaintiff Baldeo Prasad or to his assignor Kedar Nath defendant 2 ; and it was further said that the fact of the non-payment to either of the two had necessitated the institution of the suit. In para. 4 of the same plaint the date of the cause of action was stated to be the date of the execution of the pronote, that is 18th April 1926. Para 5 relates to the valuation of the claim with reference to the Court-fee and the jurisdiction of the Court. Para 6 is devoted to the claim for reliefs, and that is important. It may be translated as follows :

"The plaintiff prays that a decree may be passed for a sum of Rs. 232-9-0 principal and interest as stated below together with the costs of the suit and also together with interest during the pendency of the suit and future interest till the date of recovery as against the defendant 1, that is Rameshar Prasad the executant of the pronote, or as against both the defendants, that is Rameshwar Prasad and Kedar Nath, the second defendant being the assignor of the plaintiff or as against any one of the two defendants jointly or severally."

A general prayer for any other relief, which the Court may deem fit to grant in the circumstances and justice of the case, was added. The judgment, which the Court delivered in the case, to the plaint of which reference has just now been made, is also before us By that judgment the plaintiff's suit was dismissed in its entirety. When we come to consider the language of that judgment there is no difficulty in interpreting the intention of the Court. Clearly the Court directed its mind to the prayer contained in the plaint in respect of the relief claimed by the plaintiff against both the defendants, either jointly or severally The relief in so far as the defendant 1, that is, Rameshwar Prasad, the executant of the pronote, was concerned, failed on one ground. With that ground we are not concerned. The relief as against defendant 2, that is to say, present defendant Kedar Nath , the assignor of the plaintiff, was also rejected on two grounds. Here again we are not concerned with the merits of those grounds. It follows from the analysis of the plaint and of the judgment founded on that plaint that relief against the present defendant was

claimed by the present plaintiff in the previous suit and the relief was refused. Is it then on those facts open to the plaintiff to bring a second suit for the same relief against the same person, the relief in substance being for the recovery of the same sum of money or is the claim barred by the rule of res judicata? On my part I have no hesitation in holding that it is so barred.

In support of the maintainability of the claim several arguments were addressed to us. I will notice some of them briefly. It was urged in the first place that the cause of action for the present suit is different from the cause of action on which the previous suit was founded. In answer to this argument little need be said. The test as to whether a previous adjudication operates as a bar to a subsequent adjudication of the same matter does not lie in the fact as to whether the two causes of action are different or the same. The law as it stands to-day is perfectly clear on this point. There was some room for such an argument under the earliest Code of Civil Procedure (Act 8 of 1859) but it became wholly untenable under the Code of 1877, 1882 and is now equally untenable under the present Code. This has been repeatedly pointed out by the High Courts of India and even by their Lordships of the Judicial Committee. The cases will be found collected in a very illuminating, if I may respectfully say so, judgment of the late Dr. Sir Sundar Lal when he was one of the Judges of the late Court of the Judicial Commissioner of Oudh. I refer to *Daya Sankar* v. *Ganga Sahai* (1). For the purpose of this judgment it is enough to re-state the reference to *Sri Gopal* v *Prithi Singh* (2), affirmed by their Lordships of the Judicial Committee in *Sri Gopal* v. *Prithi Singh* (3) Recently the matter was again discussed at some length in a decision of the High Court of Patna in the case of *Ram Lal Malikand* v. *Deodhari Rai* (4). This argument therefore fails.

The second argument was that defendant 2, that is the plaintiff's assignor might have been impleaded in the previous suit and the relief claimed against him might have been claimed on the ground that since the date of the assignment or previous to it any money due under the pronote might have been paid to him by defendant 1 Rameshwar Prasad and not on the alternative ground of the assignment failing for want of consideration. The argument is excluded altogether by the allegation made in para. 3 of the previous plaint. We have quoted that paragraph in extenso and a careful perusal of it will show that it is impossible to attribute that intention to the plaintiff which is now being attributed to him in the arguments. When we carry this matter a little further, and indeed to its logical conclusion, there can be no doubt left that defendant 2 was impleaded in that suit and relief was claimed as against him on the sole possible and reasonable ground of an alternative claim on the failure of the assignment This exposition of the pleadings leads to the conclusion that the title on which the present suit is based is exactly the same on which the title to the relief as against defendant 2, that is Kedar Nath the assignor, in the previous suit, was based. If this view is correct, as I humbly say it is, there can be no question of the application of Expl. 4, S. 11, Civil P. C.

The third argument addressed to us was based on the assumption that it was only by the force of the application of Expl. 4 to the present case that the rule of res judicata could be held to constitute a bar to the adjudication of the present suit. It was argued that that Explanation did not apply and therefore there was no such bar. The learned advocate for the respondent developed this argument with some warmth, repeatedly insisting on us that the ground of claiming a relief against his assignor on the failure of the assignment might not and ought not to have been alleged in the previous suit for the reason that it would have introduced dissimilarity in the allegations and confusion in the trial. To my mind there was no danger of either introducing dissimilarity or confusion. That the plaintiff might not have claimed any relief against defendant 2, his assignor, or might not have brought any suit against him may be conceded, but the fact remains that he did bring the previous suit against him and that he did also claim a relief against him. Now I have already shown that there could

(1) [1903] 12 O. C. 347=4 I. C. 763.
(2) [1897] 20 All. 110=(1897) A. W. N. 216.
(3) [1902] 24 All. 429=29 I. A. 118=8 Sar. 293 (P.C.).
(4) A. I. R. 1924 Pat. 265=2 Pat. 771.

be no reasonable ground for any relief against the assignor except the ground that the assignment had failed for want of consideration Now either that was impliedly alleged in the plaint or it was not so alleged. If it was alleged then, as stated before, Expl. 4 has nothing to do with the case whatsoever. If it was not so alleged, there can be no doubt to my mind that it might have been alleged ; and I also hold that it ought to have been alleged What dissimilarity or confusion could arise in an alternative claim as against one of the two defendants to the previous suit on the ground that the assignment had failed ? If we test the argument in the light of the events that have happened, it seems to me that it would have been more expedient and more reasonable on the part of the plaintiff, having impleaded defendant 2 Kedar Nath as a party to his previous suit, to have claimed the relief, which he did claim against him, on the ground of the failure of the assignment. Nothing has happened, so far as the legal relationship between the two persons is concerned since the date of the judgment in the previous suit which has made the ground for attack against Kedar Nath either more certain or clearer now. It was said that what has happened is the judgment in the previous suit refusing relief against defendant 1, that is the executant of the pronote ; but this event was, in the alternative, clearly anticipated, according to my interpretation, in the plaint of the previous suit and it was on that anticipation that relief was claimed against the assignor. These were all the grounds which were urged in support of an answer in the negative to the question referred to us by the Division Bench.

I now proceed to refer briefly to some of the decisions of their Lordships of the Judicial Committee which bear on the arguments advanced by me in support of the answer which I have given to the question In the case of *Tekait Doorga Prasad Singh* v. *Tekaitni Doorga Konwari* (5) Sir Barnes Peacock in delivering the judgment of their Lordships of the Judicial Committee referred to a previous decision of the same Committee in the case of *Soorjamonee Dabee* v. *Sudanund Mohappatter* (6), and quoted the following observations from the judgment of that case :

" Their Lordships are of the opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action and they are of opinion that in this case the cause of action was in substance to declare the will invalid on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause (Cl. 2 Act 8 of 1859) in the Code of Procedure would by no means prevent the operation of the general law relating to res judicata founded on the principle *nemo debet bis vexari pro eadem causa*."

Sir Barnes Peacock proceeded to say :

" This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in a case which was referred to in Vol. 3 of Atkyns, *Gregory* v. *Molesworth* (7), in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between the parties to the suit, they could not raise the same question as between themselves in any other suit in any other form ; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able note of Mr. Smith to the *case of the Duchess of Kingston*."

It would appear from what I have stated in the preceding portion of this judgment that the remarks of Lord Hardwicke are apposite to the present case. In the case of *Kameshar Prasad* v. *Rajkumari Ruttun Koer* (8) Lord Morris after considering the scope of Expl. 2, S. 13, Code of 1882, which is similar to Expl. 4, present Code, said :

" That it ' might' have been made a ground of attack is clear that it ' ought' to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important. In this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadoor and it appears to their Lordships that the matter ' ought' to have made a ground of attack in the former suit and, therefore, that it should be deemed to have been a matter directly and substantially in issue in the former suit and is res judicata."

I have already held that the title for an alternative relief founded on the failure of consideration of the assignment in favour of the plaintiff might well have

(5) [1879] 4 Cal. 190 = 5 I. A. 149 = 3 Sar. 827 (P.C.).

(6) 12 Beng. L. R. 304=1. A. sup vol. 212=20 W. R. 377=3 Sar. 265 (P.C.).

(7) 3 Atk. 626.

(8) [1893] 20 Cal. 79=19 I. A. 234 = 6 Sar. 241 (P.C.).

been made a ground of attack in the previous suit. That an attack was made in the form of a relief against the assignor is admitted. What is disputed is that the ground of attack now made is not the same as the one in the previous suit. But to my mind there is nothing to show that it might not have been made and I have no difficulty in further holding that it ought to have been made The matter was not so dissimilar that its union with the primary ground of attack against the executant of the pronote might have led to any confusion To use the language of Lord Morris, it was only an alternative way of seeking to impose a liability upon the assignor alternative to the liability which was, according to the respondent's learned advocate, pleaded on the ground of the possibility of any payment having been made by the executant of the pronote to the assignor Expl 2, Old Code, was also considered by their Lordships of the Judicial Committee in the case of *Fateh Singh* v *Jagannath Bakhsh Singh* (9), and the view taken in the previous cases was affirmed

Before taking leave of this case I would also mention a decision of this Court in *Bansi Dhar* v. *Jagmohan Das* (10) on which reliance was placed by the learned advocate for the respondent Two of us in the case considered the applicability or otherwise of the rule of res judicata to the facts of that case as contemplat d by Expl. 4 of the Code, and in disposing of that matter we said :

"It appears to us that the conduct of Lala Jagmohan Das in withdrawing the issue which was raised in the suit amounted to no more than an abandonment of a plea which was wholly foreign to the substance of that suit."

If we could predicate the same of the previous suit of the plaintiff we would certainly then hold that there was no bar of res judicata, but we could not do so as I have endeavoured to show in the preceding portion of this judgment. My answer to the reference therefore is in the affirmative.

Misra, J.—I am of the same opinion as the Hon'ble Acting Chief Judge. It is clear from the plaint filed by the plaintiff-respondent in the previous case that he claimed a relief against defendant 2, the applicant before us. That claim clearly meant that the plaintiff-respondent wanted a decree against the applicant. It is also clear that such a relief could only be claimed, as explained by the learned advocate for the plaintiff-respondent, on two grounds : Firstly, that the money due under the pronote had either wholly or partially been paid by the executant of the pronote, who was arrayed as defendant 1 in the previous suit to the applicant who was defendant 2 in that case. Secondly, that if the pronote be found to have been without consideration, that is, if there was proved to be a failure of consideration It is true that neither the first ground nor the second ground was set up by the plaintiff-respondent in the previous suit and it is only left to us to find out what could be the possible grounds on which he could be considered to have claimed a decree against the applicant, who was as stated above arrayed as defendant 2 in the previous case

As to the first aspect it is clear from the allegations made by him in para 3 of the plaint that he (the plaintiff-respondent) could not be considered to have put forward that case. In that paragraph he clearly stated that defendant 1 of the previous case had paid no money either to the plaintiff-respondent or to defendant 2 who is the applicant before us. If then this aspect be considered to be one that cannot be entertained the only aspect that could have been in the mind of the plaintiff-respondent when he claimed a decree against defendant 2 of the previous case, now the applicant before us, is that embodied in the second ground. Indeed the Court deciding the previous case understood the plaintiff to mean this very thing It considered that aspect and gave a clear finding against the plaintiff. We are not here concerned whether it was right or wrong in doing so. We are only concerned with the finding as it was actually given The result therefore seems to me that the same relief which the plaintiff is now claiming in the present suit was claimed by him in the previous suit and that it was refused If this is the conclusion to which we have to arrive in the case, in my opinion there is no room left for doubt that the matter is now res judicata

It has been remarked by the learned Subordinate Judge in his judgment that the present suit cannot be held to be barred by the rule of res judicata inas-

(9) A. I. R. 1925 P. C. 55 = 47 All. 158 = 27 O. C. 334=52 I. A. 100 (P.C.).
(10) A. I. R. 1929 Oudh 88=3 Luck. 472.

much as the cause of action for it can only be considered to have accrued on the dismissal of the previous suit, and this argument has been urged before us with vehemence by the learned advocate for the plaintiff-respondent. In reply to this I need only state that if the plaintiff himself claimed a decree against the applicant who was a defendant in the previous suit and if the only ground on which he could be considered to have claimed that decree was the ground of the failure of consideration as pointed above, it is no more open to him to say that the cause of action had not accrued to him for the present claim when he had brought the previous suit and claimed a relief against the applicant. If the plaintiff-respondent had not impleaded defendat 2 in that case and had not claimed a decree against him it would have been open to him to take up this position, but having claimed the relief and the case for that relief having been considered in the previous suit I do not think it is any more open to him to take up that position. I am therefore of opinion that the present suit is barred by the rule of res judicata and that the answer to the reference made to the Full Bench should be in the affirmative.

Pullan, J—Before expressing briefly my full concurrence in the judgment pronounced by the Hon'ble Acting Chief Judge, I must promise that in my opinion it is difficult, if not impossible, to answer in general terms, a question as to whether a whole class of cases can or cannot be held to be barred by the principle of res judicata. Our judgment should therefore apply strictly to cases exactly parallel with that which has given rise to this reference.

We have to consider then a case when a person buys a promissory-note from the holder, and brings a suit against the assignor and the executant of the note, claiming from both of them jointly and severally the consideration of the note, and at the same time stating in express terms that nothing has been paid to the assignor by the executant It is such a plaintiff who having lost his suit against both the defendants essays to bring a second suit against the assignor claiming damages, and is met in limine by the plea of res judicata.

We have only to consider whether the previous decision is one covered by the provisions of S. 11, Civil P. C. Undoubtedly the plaintiff is litigating under the same title against one who was a party in the previous suit. The real question for determination is whether the matter now in issue, was directly and substantially in issue in the former suit. In my opinion it was The fact that the present suit is said to be a suit for damages, and the former was a suit for money decree on a promissory note is in my opinion immaterial. The plaintiff is now claiming, as he claimed in the first suit, the sum due on the promissory note It matters not that he puts forward a different cause of action. A competent Court has decided in a reasoned judgment that he cannot recover that money, and that is a decision which bars the subsequent suit The defence that the plaintiff did not at the time of the first suit contemplate the possibility that the pronote would be held to be without consideration, is in my opinion negatived by his own plaint If no money had been paid by the executant to the assignor, the plaintiff could have no claim against the latter, unless the consideration failed. It is only on the ground that the consideration has failed that he bases the present suit. I would answer the reference in the affirmative

D.D *Reference answered in affirmative.*

A. I R 1929 Oudh 178

STUART, C. J., AND RAZA, J.

Shambhu Singh and *others*—Plaintiffs —Appellants.

v.

Sukhraj Kuer and *others*—Defendants —Respondents

First Appeal No. 136 of 1927, Decided on 13th August 1928, against decree of Sub-Judge, Bahraich, D/- 30th July 1927.

(a) Arbitration — Ordinary principles of personal law cannot be varied.

An arbitrator has no power to alter the course of legal devolution in a mode at variance with the ordinary principles of law applicable to the parties An award directing that the son of a particular party to the award should not be competent to devise his property as he would ordinarily be entitled to devise by law, but should be confined to appointing a person of a particular class as his successor, is void. 23 *All.* 383 (*P. C.*), *Rel. on.*

[P 184 C 1,.2]

(b) Succession Act (1925), S. 61 — Will challenged—Propounder must prove that testator had disposing mind.

Where a will is challenged it is for the propounder to show not only that it was ex-

executed but that it was executed by the testator intelligently and that he had a sound disposing mind and after they have put forward their evidence it is for the objectors to break that evidence down or to meet it with other evidence. [P 185 C 1]

Tej Bahadur Sapru, Ghulam Hasan, Ali Raja, Bhairon Nath and *A Rauf*—for Appellants.

Iqbal Ahmad, Munni Lal, Raj Bahadur Asthana and *Karta Kishan*—for Respondents

Judgment—This is a plaintiffs' appeal against the decree of the learned Subordinate Judge of Bahraich, dated 30th July 1927 by which the plaintiffs' suit was dismissed. The plaintiffs were Shambhu Singh, son of Jagmohan Singh, Daya Shanker Singh, Mahadeo Singh and Ram Karan Singh, son of Adhar Singh After their suit had been dismissed and this appeal has been filed they have sold their title to half the property, which is the subject-matter in this suit, to Lala Ram Sarup Rastogi of Lucknow city. He has been joined as an appellant The facts, which it is necessary to state in order to appreciate the nature of appeal, are these A certain Indar Pal Singh owned three entire villages and a share in a fourth village in the District of Bahraich These villages will be described in this judgment as the estate Indar Pal Singh died on 21st August 1871 leaving three sons: the eldest was Madho Singh (or Mahadeo Singh) the two other sons were Chhattar Singh and Sheo Ratan Singh After his death the estate was entered in the name of Madho Singh, who provided maintenance for his brothers in a manner which will be detailed subsequently This maintenance has been continued to their descendants The plaintiffs are the descendants of Chhattar Singh. The descendants of Sheo Ratan Singh are in existence As they did not join in the suit they were made defendants. Madho Singh died on 16th June 1890 On his death the estate was entered in the name of his son Shanker Baksh Singh Shanker Bhaksh Singh remained in enjoyment of the estate, continuing the payment of maintenance to the descendants of Chhattar Singh and the descendants of Sheo Ratan Singh. Shanker Baksh Singh died on 25th September 1922. He left no male issue He was survived by his widow Mt. Sukhraj Kuer, respondent 1 and five daughters, Jagraj Kuar known as Bari Bachhi, who was s widow at the time of her father's death, Mt. "Babu" who married Thakur Bishrup Singh and three others. "Babu" was not a widow when her father died but is a widow now Jagraj Kuar "Bari Bachhi" is respondent 2 He also left surviving him two married daughters, Jagpal Kuar and Harfa or Batauli and an unmarried daughter, Jagpal Kuar has a son Birendrapal Singh or Lal Saheb who is respondent 3. Shanker Baksh Singh was about forty-seven years of age at the time of his death. He had not been born in 1874 He resided in the village of Naugaiyan in the Bahraich District It is proved and admitted on both sides that for some months previous to his death he had been suffering from chronic dysentery and harmorrhoids He was daily becoming weaker.

On 2nd and 3rd September 1922, he was brought from Naugaiyan to Bahraich to the house of Babu Sheo Gopal, a legal practitioner, whom he had consulted on previous occasions. He stayed in the house of Babu Sheo Gopal, pleader and underwent medical treatment. About 10th or 11th September 1922, his wife Sukhraj Kuer and his widowed daughter Jagraj Kuer arrived at Bahraich and went to the house of Babu Sheo Gopal where they resided with the invalid. According to the evidence on 15th September 1922, Shanker Baksh Singh instructed Babu Sheo Gopal to draft a will On 18th September 1922, he issued further instructions A rough draft was made by Sheo Gopal Babu Sheo Gopal sent at about 10 A. M for a petition-writer called Mahadeo Prasad Mahadeo Prasad faired out the draft. At 2 P M. the will was signed, being executed in the presence of attesting witnesses Sheo Gopal and Lal Bahadur. Lal Bahadur had died before he could be called as a witness in this suit. The will was registered by the Sub-Registrar of Bahraich on the same day Shanker Baksh Singh had up to this time been under the medical attendance of an hakim called Mohammad Umar. On 21st September 1922, Dr Plant, a regularly qualified medical man, who was then Assistant Surgeon at Bahraich, was called in to attend Shanker Baksh Singh. Shanker Baksh Singh was then in a precarious state of health. On 22nd or possibly on 24th September 1922,

Shanker Baksh Singh was taken back to Naugaiyan. He died on 25th September 1922.

After his death Buddhu Singh, the brother of Shambu Singh, plaintiff and Gaya Singh, the son of Ahbaran Singh who was the brother of Adhar Singh applied to the revenue authorities to have their names entered to engage for the revenue of the estate Gaya Singh and Buddhu have since died. Gaya Singh died in July 1923, and Buddhu Singh died in January 1924. Sukhraj Kuer opposed this application claiming inter alia under the will of 18th September 1922 The plaintiffs agreed that her name should be entered and that the question of title should be left to be decided in a regular civil suit In the proceedings before the revenue authorities defendants 4 to 7, who belong to the Sheo Ratan Singh branch, made an application to the effect that they accepted the title of Sukhraj Kuer. The revenue authorities entered her name as the person entitled to engage for the revenue of the estate and she is still in possession. The present suit was filed in the Court of the Subordinate Judge of Bahraich on 15th September 1925.

We had considerable difficulty in discovering from the plaint in the suit what the case of the plaintiffs actually was. We shall advert later to this question. It is sufficient to note for the present, that we consider that the plaint, as it stands, reflects little credit on those responsible for its preparation. So far from putting the case of the plaintiffs in a coherent and intelligent manner the plaint leaves in considerable doubt what their case actually was, and even leaves the question of the relief sought doubtful. This is one of the cases in which the right to seek alternative reliefs was pressed in a manner which interfered considerably with the subsequent decision. Put broadly, the case for the plaintiffs, appears to have been that Madho Singh had the property for the benefit of himself and his brothers, that he was entitled to manage the estate and to enjoy the profits subject to a liability to provide maintenance for the collateral branches, but that he had not full title as proprietor The case continued, that on the death of Mahadeo Singh, Shanker Baksh Singh obtained the same status as that possessed by his father, that Shanker Baksh Singh had no power of alienation either by devise or otherwise, and that on his death without male issue the property reverted to the collateral branches Great stress was laid upon the contents of an award of 27th July 1874. We shall consider the terms of this award later. In event of it being found against the plaintiffs that Shanker Baksh Singh had a right to devise the property by will the plaintiffs attacked the will itself. They asserted that Shanker Baksh Singh, at the time that he executed the will, was not of sound disposing mind, and they further asserted that the will had been executed as the result of undue influence. The directions of O. 6, R. 4 in respect of particulars of the undue influence alleged were not in our opinion, satisfied. The plaint asserted, for a reason which the learned counsel for the appellants has been unable to ascertain, that daughters and daughters' sons were excluded from inheritance under a family custom. It is difficult to see how the question could arise on the merits of the suit. After a series of pleadings and a replication, which so far from clearing up the position went rather to confuse and complicate it, issues were framed.

The main issues with which we are concerned are the issue as to the effect of the award and the issue as to the validity of the will. There was further an issue that Sukhraj Kuer was debarred from inheriting the properties in suit under the terms of the award and also under a family tribal custom. We have difficulty in finding when the plaintiffs first asserted a tribal and family custom excluding widows from inheritance under the Mitakshara law as to intestate succession. It is not, however, of importance as to whether this latter plea was properly raised, as the learned trial Judge has decided on the evidence that the existence of a custom excluding widows has not been established, and as his decision upon this point has been accepted as correct by the learned counsel for the appellants. The grounds of appeal question the accuracy of this decision in ground 10, but the learned counsel has abandoned that ground of appeal. The learned trial Judge decided that Shanker Baksh Singh was at the time of his death a full proprietor of the estate and that he had complete title to devise the estate by

will. He found that there was nothing in the terms of award which prevented his exercising this power of devise. In respect of the will he found that it had been executed by Thakur Shanker Baksh Singh in the manner required by law, and he further found that Shanker Baksh Singh was of sound disposing mind at the time that he executed the will, and that the plaintiffs had been unable to establish that the execution was vitiated by the exercise of undue influence upon the testator. Having thus found that Shanker Baksh Singh was a full proprietor with a full power of devise and that he had made an effective devise which excluded the plaintiffs absolutely, he dismissed the suit. He further found that daughters and daughters' sons were in this family excluded from succeeding to property under the intestate succession provided by the law as there was a special local and family custom established which so excluded them This point is immaterial to the decision of this suit, as Jagraj Kuar did not claim except under the terms of the will, and Lal Saheb has based his title upon a transfer made in his favour by his grandmother, Sukhraj Kuar.

We now approach the matters for decision in the appeal We have first to note our appreciation of the great care which the learned trial Judge has devoted to the decision of a suit complicated by inaccurate pleadings and by the introduction of much irrelevant and useless evidence. We have further to note that we have received the most valuable assistance from the experienced senior learned counsel who have appeared on both sides

We have now to advert to the plaint It is necessary to examine this closely in order to appreciate the arguments of Sir Tej Bahadur on behalf of the appellants We have indicated the case asserted by the plaintiffs in respect to the limitations of Shanker Baksh Singh. We here quote in extenso the second, third and fourth paragraphs of the plaint:

Para. 2.—That Indar Pal Singh was the proprietor and possessor of Naugaiyan estate, which includes the villages and property in suit, entered in the list hereto attached.

Para. 3.—That Indar Pal Singh was Raikwar Suraj Bansi and he died on 21st August 1871, leaving three sons, Mahadeo Singh, Chhattar Singh and Sheo Ratan Singh.

Para. 4.—That after the death of Indar Pal Singh disputes arose between his sons the decision of which was referred to Lalta Singh, Sheikh Nawazish Ali and Zafar Mehdi as arbitrators, under an agreement for arbitration, executed by Mahadeo Singh, Chhattar Singh and Sheo Ratan Singh. That the said arbitrators under the award on 27th July 1874, decided the case to this effect that in view of the preservation of the estate, Mahadeo Singh would remain proprietor of the estate, that Chhattar Singh and Sheo Ratan Singh would get some land by way of maintenance and it was held that in case of Mahadeo Singh having a male issue he would be the successor of Mahadeo Singh in respect of the estate and that in case of his having no male issue it would be incumbent on him or his heirs to appoint some one from among the sons of Chhattar Singh or Sheo Ratan Singh as his successors, and that in the presence of the descendants of Chhattar Singh and Sheo Ratan Singh nobody would have a right to be the successor or representative of Mahadeo Singh."

It is to be observed that in these paragraphs the plaint does not describe clearly the title of Madho Singh, the father of Shanker Baksh Singh Nowhere does the plaint assert that Indar Pal Singh and his sons Madho Singh, Chhattar Singh and Sheo Ratan Singh were members of a joint Hindu family. Nowhere does it suggest that the property was joint family property. In the whole course of the pleadings, in the issues and in the conduct of the case the plaintiffs never put forward that the property was joint family property; and in the grounds of appeal it is not suggested that the property was joint family property. The circumstances here are such that the ordinary presumption of the Mitakshara law is rebutted by the facts of the case There is evidence on the record which shows that during the lifetime of Indar Pal Singh his son Madho Singh had claimed as against him portions of the estate The evidence upon this point though scanty precludes the view that the family was a joint family. It is established from this evidence that this estate had come into being before the confiscation of 1858 and it was clearly awarded by the British Government to Indar Pal Singh after the confiscation. There is no evidence as to the manner in which it was awarded. The mere circumstances that it was entered in Indar Pal Singh's name is not of great assistance, for it is well known that many estates were awarded to a person as head of a joint family. But the award, upon which the appellants rely, precludes the view that the family was joint, and it even precludes a view other

than the view that the property after Indar Pal Singh's death was obtained by Madho Singh as his own property subject to the obligation of providing his brothers with maintenance. We have to emphasize these points as the position taken by the appellants varies according to the findings at which we arrive. If the property had been the self-acquired property of Indar Pal Singh and the family was not a joint family it should under the Mitakshara law have, upon his death, been divided into three shares one of which would have gone to Madho Singh, one of which would have gone to Chhattar Singh, and one of which would have gone to Sheo Ratan Singh The award, however, clearly shows that the property was not divided in that manner We now come to the award itself It is printed at two places We refer to Ex A-5 which is printed at p 95 of Part 3. We shall note in examining it certain inaccuracies in translation We have first to see how this award came into being It appears from its heading that in a suit brought early in the seventies by Chhattar Singh and Sheo Ratan Singh against Madho Singh in the Court of the Assistant Commissioner of Bahraich in which they claimed maintenance against their brother, the determination of the maintenance due was referred to the decision of arbitrators who made this award on 27th July 1874 The award was subsequently made a decree of Court

We have been unable to obtain any evidence as to the origin of the suit or its subsequent conduct except the evidence contained in the award itself This much, however, appears to us clear The suit was a suit for maintenance brought by two younger brothers against an elder brother. The fact that they considered it necessary to institute a suit in this form would go to show, not only that the family was not a joint family, but that the estate had not devolved as self-acquired property under the provisions of the Mitakshara law for had it devolved under the provisions of the Mitakshara law it would, if joint family property, have been inherited by all three brothers by survivorship, and if it had been the self-acquired property of Indar Pal Singh it would have been divided in three equal shares amongst them. But we find that the eldest brother Madho Singh was in possession of the estate and that his brothers were suing for maintenance. The estate would appear from this to have been an estate held singly by an elder brother under a common practice in Oudh which was prevalent before 1857 which placed upon him the obligation to provide maintenance to the younger members of the family

The following are the necessary extracts from the award :

"The parties by executing an agreement for mutual arbitration on 26th July 1874, empowered us (and agreed) to the effect that the parties would agree to anything that we might decide with regard to the parties."

This is certainly general enough but it must be remembered that the suit was a suit for maintenance and for nothing else. It was not a suit to decide title to the estate The arbitrators continued :

"In our opinion it is expedient that for the preservation of the family estate, Madho Singh should remain the owner of the estate and that he should give in perpetuity for the purpose of maintenance of Chhattar Singh and Sheo Ratan Singh and their heirs"

—here certain land is specified and certain other privileges are specified The award then continues

"During the lifetime of Madho Singh, the persons should be content with the said lands. If God is pleased to grant male issue to Madho Singh he (i. e., such son) would be the representative of Madho Singh's estate."

As Madho Singh begot a son Shanker Baksh Singh we are clear on the first point that Shanker Baksh Singh succeeded Madho Singh as "owner of the estate" The word owner in the Urdu is "malik" There is nothing stated affirmatively as to the powers of Madho Singh and his son, if any, to deal with the property as they wished, but, on the other hand, there is nothing to restrain them in any way and the use of the word "malik" as we read the context, would give both Madho Singh and his son full proprietary rights We now come to the passage upon which the learned counsel for the appellants had laid great stress We note before we come to it that this passage only refers to the eventuality of Madho Singh having no son :

"In case there be no male issue of Madho Singh it will be incumbent upon Madho Singh and his wife that they should constitute one of the sons of either Chhattar Singh or Sheo Ratan Singh as successor and representative. So long as there are Chhattar Singh and Sheo Ratan Singh's sons in the field no one shall be entitled to become successor and represen-

tative of Madho Singh. When the daughter of any of the aforesaid persons is to be married it shall be incumbent upon Madho Singh to help them with cash and kind in proportion to his income and means. At present Madho Singh should pay Rs. 100 in cash to the said persons."

We have to note that in the copy of this award filed by the plaintiffs instead of the word "wife" is inserted the word "heirs" The learned trial Judge has given good reasons for showing that the defendants' copy Ex. A-5 is correct in this particular and that the plaintiffs' copy has been tampered with.

This latter incident is one of the many unsatisfactory incidents in the conduct of the plaintiffs' case in the trial Court. It is upon this passage that the learned counsel for the appellants has relied. He frankly accepts the view that the word "heirs" in his clients' copy is an interpolation, and that the power of appointment was given to Madho Singh and his wife and not to Madho Singh's heirs. He argued in the first place that the property was joint family property which, for the purpose of convenience, was left first in the hands of Madho Singh and then in the hands of his male descendants, if any, to be enjoyed by them for their individual benefit subject to the provision of maintenance to the collaterals, but he maintained that the property remained joint family property. It is upon the plea that the property is joint family property that he pressed his claim for the first relief sought in the plaint, which is a relief by way of immediate possession of the property.

He then took the position that even if the property is not joint family property and is to be considered as the self-acquired property of Madho Singh his clients are entitled to a declaration of their title to succeed Here he took a position which was certainly included in the relief claimed in the plaint but which was inconsistent with allegations in the body of the plaint, to the effect that in absence of a valid testamentary disposition, the property would vest under the provisions of the Mitakshara law in Thakurain Sukhraj Kuar after her husband's death. His case was that the will was bad, and that she would have the estate of a Hindu widow. The learned counsel agreed that in order to succeed on this plea he would have to set aside the will, but maintained that if he succeeded in setting aside the will his clients were entitled to a declaration that Sukhraj Kuar's title was only that of a Hindu widow and that his clients were entitled to a declaration that they were the nearest reversioners. The learned counsel agreed that it would be difficult for him to obtain the second declaration in view of the fact that it is impossible to determine at this stage who will be the nearest reversioners after the death of Sukhraj Kuar, the lady being still alive. But he has pointed out that if he can upset the will he is entitled at least to a declaration that the estate of Sukhraj Kuar is only that of a Hindu widow We agree with him upon the latter point

We now turn to the passage in the award itself In the first place we have to consider what this award means and if it has the meaning which the learned counsel for the appellants suggests, we should then have to consider whether the restriction placed by the arbitrators on such a construction is a restriction which is enforceable in law The learned trial Judge did not go into the latter point because he found that there was no restriction upon Shanker Baksh Singh under this portion of the award. Shanker Baksh Singh had not been born when this award was made. The learned trial Judge has written:

"It may be thus seen that the award contemplates two contingencies for each of which it has made a separate provision. Madho Singh had a son and so the other contingency, viz., that arising in the case of his having no son, did not at all arise making the provisions in the award relating to it nugatory and inapplicable. No restriction, whatsoever, has been imposed by the award on the powers of Madho Singh's son of his succession to the properties in suit on Madho Singh's death, nor is there anything at all in the award indicating that the devolution of the properties after the death of Madho Singh's son would take any course other than laid down by the ordinary rules of succession. It is thus clear that under the award the properties in suit absolutely vested in Madho Singh's son Shanker Baksh Singh after the death of Madho Singh without any restriction on his powers, and that the said properties did not, as they could not under the circumstances, vest in Chhattar Singh and Sheo Ratan Singh. This being so, the plaintiffs cannot, in any way, benefit by the award."

After consideration we have arrived at the same conclusion. It appears to us that the arbitrators were looking no further then Madho Singh's death. They were concerned with the claims of his

two brothers to maintenance. So long as Madho Singh lived the two brothers were to receive maintenance and nothing more; but they were to get something more if Madho Singh died without leaving male issue. If he died without leaving male issue the arbitrators considered that a son of Chhattar Singh or a son of sheo Ratan Singh would be selected who would become owner of the estate in the manner in which Madho Singh had been owner of the estate. It is obvious that this provision could only affect one of the sons of the two brothers. The provision for maintenance of the remainder had already been made by the previous part of the award We do not read this award as meaning, as the learned counsel for the appellants would have it, that on the extinction of the line of Madho Singh the successor was to be appointed by the last holder or his widow or both of them from the collaterals, and there is certainly nothing in this award which can support the plaintiffs' case, which is not that the widow, or in the event of her refusal the Court should make the appointment, but that they should succeed according to the Mitakshara law as reversioners. The claim to succeed as reversioners under the Mitakshara law is palpably not based upon the award We decide that the award does not help the plaintiffs in any way. This being the case we need touch very lightly on the validity of such a provision, if it existed We consider that upon the authority of the decision in *Jafri Begam* v *Ali Raza* (1) such a provision, if it had existed, would have been invalid. Their Lordships of the Judicial Committee in that case had to decide whether a provision in an award which deprived a lady, called Abbasi Begam, of the right, which she had under the Mahomedan law, to obtain partition of certain property could be enforced against her son, who had succeeded her after her death. Their Lordships said at page (118 *of* 28 *I A*):

"As regards the effect of the fifth clause, their Lordships agree with the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed among themselves to abide by it; but as against the present plaintiff the clause has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law indivisible for ever."

(1) [1901] 23 All. 393=28 I. A. 111=8 Sar. 27 (P.C.).

The facts were, of course, different but the principle appears to us to bind the present case. If the arbitrators had directed that the son of Madho Singh should not be competent to devise his property as he was entitled to devise it by law, but was to be confined to appointing a person of a particular class as his successor, the arbitrators would have been endeavouring to alter the course of legal devolution in a mode at variance with the ordinary principles of Hindu law

We summarize our conclusions. We find that the estate was owned and possessed by Shanker Baksh Singh with full proprietary title We find that it was not family property The whole history of the estate is in favour of the view which we take It is noticeable that in the year 1895 an appeal was decided by the Judicial Commissioner's Court, in respect of this very estate This litigation has been referred to by the learned trial Judge. He found assistance from a translation of the award now in suit which was made in that litigation and he has referred to the litigation in support of his finding that the copy of the award produced by the defendants was accurate and that the copy of the award produced by the plaintiffs was inaccurate. We refer to this litigation upon another point This litigation originated in a suit brought by Jagmohan Singh (the father of Shambhu Singh plaintiff) against Shanker Baksh Singh for a contribution towards the marriage expenses of his daughter. The appeal was decided on 6th August 1895 by Mr. G. T. Spankie It is *Shanker Baksh Misra* v. *Jagmohan Singh* (Second Civil Appeal No. 162 of 1893) The judgment in that suit shows clearly that Jagmohan Singh never suggested that this estate was joint family property or that he had any title or claim thereto except the right to maintenance and the right to have the expenses of his daughter's marriage satisfied. The Judicial Commissioner found that he had no right in that case to any contribution from Shanker Baksh Singh. The decision is immaterial as far as we are concerned, but it is very noticeable how the property was treated in that

litigation. Thus finding that the estate was held with full proprietary title by Shanker Baksh Singh, who undoubtedly was liable to provide maintenance for his collaterals but who was in no way debarred from disposing of the estate in any manner in which he wished (the charges for maintenance remaining as charges upon the estate) we find that he had power to devise his property.

This brings us to the remaining question. Was the devise a good devise in law? This question is important for, if this devise is not a good devise in law, Sukhraj Kuar's estate is only the estate of a Hindu widow. We proceed to examine the contents of the will which is translated as Ex A-1. The will is not a very long will. After a preliminary recital as to the testator's age, ill-health and uncertainty as to the future the testator devised possession and enjoyment over the whole of his estate to his widow Sukhraj Kuer He devised to her full proprietary rights over half, and a life-estate over the residue with remainder to his eldest daughter Jagraj Kuar. He added a clause which might have given rise to future litigation had it not been for a subsequent disposition Under this clause he directed that if his widow has not disposed of the moiety of the property over which she had absolute title within her lifetime that moiety was to pass to Lal Saheb the son of his daughter. As the lady has already transferred to Lal Saheb the moiety during her lifetime by a registered deed of gift dated 11th October 1925, Ex. C-1, this provision is not likely to be made the subject of future judicial determination

The position with regard to this will is as follows: As the will is challenged it is for the propounders, that is to say, the respondents, to show not only that it was executed but that it was executed by Shanker Baksh Singh intelligently and that he had a sound disposing mind. After they had put forward their evidence it was for the appellants to break that evidence down or to meet it with other evidence. But after these two conditions had been satisfied it was still open to the appellants to establish that the execution of the will had been obtained by exercise of undue influence. The defendants' evidence in support of the will is the evidence in the main of Babu Sheo Gopal (D. W 1), the pleader who prepared it under the testator's instructions and of the Sub-Registrar Mohammad Wasi Ali Khan, whose evidence was recorded on commission There is other evidence, but this is the most important. (The judgment then discussed the case and concluded that the will was not only executed by Shanker Baksh Singh but that it was executed under his instructions, that he thoroughly understood its contents, that he was of sound disposing mind at the time of its execution, and that the execution of the will was not caused by undue influence It then proceeded) We can now proceed to decide the appeal. The first ground of appeal to the effect that the evidence showed that the cash *nanka* in suit in village Reoli was also owned by Indar Pal Singh was not pressed by the learned counsel. The only grounds that were pressed were that Shanker Baksh Singh had no power to devise his estate and that the will which he made was bad in law. We have already found on both these grounds against the appeal. We accordingly dismiss the appeal The appellants will pay their own costs and the costs of the contesting respondents. Jagraj Kuar was unrepresented and she will get no costs. Sukhraj Kuer will receive one set of costs Lal Saheb who was separately represented will receive another set of costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1929 Oudh 185

WAZIR HASAN, AG. C. J., AND MISRA, J

Bindeshwari Singh — Defendant — Appellant.

v.

Har Narain Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 202 of 1928, Decided on 24th January 1929, against decree of Dist. Judge, Fyzabad, D/- 2nd April 1928.

(a) Transfer of Property Act, S. 43 — Person selling land as full owner—Vendor full owner at least as to portion and having reversionery interest as to rest—S. 43 does not apply.

Where the vendor in his sale-deed expressly states that the property sold by him is the property in which he has a title in presenti and he is in actual possession thereof as an owner and it was found that it was so only as to a portion, S. 43 does not apply, merely because some portions of the lands sold were

actually situate in an estate in which the vendor had only a reversionary interest. [P 187 C 1, 2]

(b) Evidence Act, S. 115—Estoppel.

An estoppel cannot have the effect of making a void transfer valid. [P 187 C 2]

(c) Transfer of Property Act, S. 43—Sale of Hindu reversioner's interest is not validated—Hindu law.

Section 43, T. P. Act, clearly enacts a rule of estoppel commonly known as "feeding the grant by estoppel." This estoppel cannot make a transfer forbidden by law good e. g., a transfer of spes successionis of a Hindu reversioner. *A. I. R.* 1923 *P. C.* 189 and *A. I. R.* 1921 *P. C.* 112 *Rel. on.* [P 187 C 2]

*** (d) Hindu Law—Reversioner assuming that property had already been gifted to donee by widow's husband when living and therefore consenting to its gift by widow to him as he (donee) had allowed widow to remain in possession—Consent is not to an alienation by widow as female heir.**

A consent to gift by widow, by a reversioner given under assumptions of facts which never existed e g., that the alleged donee was nephew of her husband and that the estate had already been gifted by the husband to the donee but as the donee had allowed the widow to remain in possession she executed a gift deed in his favour, is a consent to an act which the widow did not do in her right of a female heiress but by virtue of her bare possession which she held under the good will of the donee of the estate and thus is not a consent by a reversioner to an act of transfer of the estate by the female heir at all. *A. I. R.* 1923 *All.* 387 (*F. B.*) *Dist.* [P 189 C 1]

(e) Hindu Law — Alienation by widow—Gift to stranger—Reversioner consenting — Presumption as to gift being legitimate does not arise.

There can be no case of an alienation by a Hindu widow unless the alienation is made for legitimate purposes which may be proved either aliunde or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof, be passed on the consent of reversioners. A transfer by way of gift in favour of a stranger is not an alienation to which the presumption of its being legitimate founded on the consent of the reversioners can be applicable *A. I. R.* 1918 *P. C.* 196 *Rel. on.*; *A. I. R.* 1927 *P. C.* 227, *Dist.* [P 190 C 1]

Ghulam Hasan—for Appellant.

S. C. Das and *Faiyaz Ali* — for Respondent 1.

Judgment —This is the appeal by defendant 1 from the decree of the District Judge of Fyzabad, dated 2nd April 1928, affirming the decree of the Subordinate Judge of the same place dated 17th January 1928. In the suit, out of which this appeal arises, the plaintiff-respondent claimed to recover possession of a 5 annas 4 pies share situate in pukhtadari mahal Debi Singh, patti Lakhpati Koer, in the village of Parsauli, pargana Bidhar, in the district of Fyzabad. The facts of the case are as follows:

The share in suit originally belonged to one Mangal Singh Mangal Singh died many years ago On his death he was survived by his minor son, Mendai Singh and widow Mt Lakhpati. Mangal Singh's estate, in the circumstances, devolved by right of inheritance on Mendai Singh but the mutation of names in the revenue records was made in favour of Mt Lakhpati. Mendai Singh died in 1908 unmarried. The estate then devolved on Mt. Lakhpati in the character of the mother of her deceased son, Mendai Singh She therefore held a Hindu female's estate in the share in suit On 14th February 1917 one Ram Lagan sold certain specified plots of land situate in the village of Parsauli to the defendant-appellant under a deed of sale of the date just now mentioned (Ex. A4). On 15th May 1918 Mt Lakhpati made a gift of the zamindari share, which had devolved on her by right of inheritance from her deceased son, Mendai Singh, in favour of the defendant-appellant with the exception of certain *sir* lands. On 28th May 1922 Ram Lagan aforementioned relinquished a certain zamindari share to which he had become entitled, not the share in suit, in favour of the defendant-appellant. He executed a deed, which is Ex A2. In this deed he refers to the gift made by Mt. Lakhpati on 15th May 1918 and it is this reference which has given rise to a ground of contest on the part of the appellant in the present litigation. To this matter we will advert again

Mt. Lakhpati died in April 1925 It is agreed that on her death the share in suit devolved by right of succession on Ram Lagan, whose name we have already mentioned twice, and on one Gopi in equal moieties and it was on the death of the widow that they became entitled in that right to the possession of the property in suit. On 16th September 1926 Ram Lagan and Gopi sold the share under a deed of sale (Ex. 1) in favour of the plaintiff-respondent and the suit, which is now being considered by us, was instituted to enforce the title which came to be vested in the respondent under the transfer of 16th September 1926. In defence several pleas were

taken but we are in the appeal before us concerned with two of such pleas. 1. That the plaintiff-respondent is not entitled to a decree in respect of the specific plots of land, which were sold to the defendant-appellant by Ram Lagan under the deed of 14th February 1917 by reason of the estoppel, as the argument is now put before us, arising out of the provisions of S 43, T. P Act, 1882, and (2) that the reference to the deed of gift of 15th May 1918 made by Ram Lagan in the deed of relinquishment of 28th May 1922 by way of approval thereof disentitles the plaintiff from claiming his share in the property in suit. The Courts below have rejected both these pleas and decreed the plaintiff's suit as already stated The same pleas are again urged upon us at the hearing of the appeal

As to the plea of estoppel under S. 43, T P Act, 1882, the first observation which falls to be made is that it was never taken in either of the Courts below. There are certain facts in relation to this plea which have to be stated to enable a proper appreciation of its bearing on the present case Before the year 1915 the village of Parsauli stood divided into two distinct mahals of equal proportions. One of these mahals was called mahal Narindar Bahadur Singh and the other mahal was called mahal Debi Singh. In the former mahal, Ram Lagan and Gopi held a 4 annas 4 pies share in their own right In the latter mahal of Debi Singh is situate the share, which formerly belonged to Mangal Singh and latterly was possessed by Mt Lakhpati This is the share of 5 annas 4 pies now in suit. In the year 1915 an imperfect partition of mahal Debi Singh was made by the revenue authorities and a separate patti of 5 annas 4 pies held by Mt. Lakhpati was constituted This was called patti Lakhpati. On a comparison of the sale-deed of 14th February 1917 with the partition chitti in respect of patti Lakhpati (Ex. 19), we find that some portions of the land transferred under the sale by Ram Lagan in favour of the defendant-appellant are situate in the newly formed patti Lakhpati. It is now argued on these facts that though Ram Lagan had no interest in those portions of the lands sold, which are now included in patti Lakhpati on the date of the sale he has acquired a proprietary interest therein in the character of a revesionary heir after the death of Mt. Lakhpati in the year 1925 and that therefore he is entitled to those lands by the effect of the provisions of S 43, T P. Act, 1882.

We are of opinion that those provisions are wholly inapplicable to the facts of this case. The deed of sale which Ram Lagan executed in favour of the defendant-appellant expressly states that the property sold thereby was the property in which Ram Lagan had a title in presenti and was in actual possession thereof as an owner This description of the interest transferred is clearly applicable to Ram Lagan's interest as a cosharer of the village in his own right. The fact that some portions of the lands sold are actually situate in Mt. Lakhpati's patti formed after the partition does not lead to the inference that Ram Lagan considered himself to be the owner of anything which lay within that patti It might be that at the date of the sale he had forgotten that two years previous to it an imperfect partition of mahal Debi Singh had taken place But be that as it may, it is perfectly clear and the contrary is not shown to us to exist, that when Ram Lagan lost at the partition some of the lands of the village which he held in severally before the partition, he must have received other lands in lieu thereof and the sale, if otherwise valid, must fasten on the lands so received

The second ground, on which this plea fails, is that the provisions of S. 43, T P. Act, 1882, cannot obviously be so given effect to as to override any other provision of the same Act A transfer by a Hindu of immovable property to which he on the date of the transfer in the reversionary heir expectant on the death of a widow to come into possession is forbidden by S. 6 (a), T P Act, 1882 It is therefore void : *Annada Mohan Roy* v. *Gour Mohan Mullick* (1). We have no hesitation in stating as a proposition of law that an estoppel cannot have the effect of making a void transfer valid. S. 43, T. P Act, 1882, clearly enacts a rule of estoppel commonly known as "feeding the grant by estoppel." This estoppel cannot make a transfer forbidden by law good This view was recognized by their Lordships of the Judicial Com-

(1) A. I. R. 1923 P. C. 180=50 Cal. 923=50 I. A. 299 (P. C.).

mittee in the case of *Tilakdhari Lal* v. *Khedan Lal* (2). In that case Lord Buckmaster in delivering the judgment of the Committee said :

This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes, *Doe d Christmas* v. *Oliver* (3), discussed in Smith's Leading Cases, vol., II., p. 724. It is unfortunate that this view of the case does not seem to have been presented either before the Subordinate Judge or to the High Court ; but it appears to their Lordships that it could have been raised under issue 15 (2) and it is raised in the appellant's case. In these circumstances it is not in accordance "with their Lordships' practice to determine a point of law of such importance. *There may be statutory provisions or provisions of native law which would prevent the operation of the doctrine* ; for the law of conveyance in England depends on special and complicated considerations."

(The italics in the above quotation are ours). Finally their Lordships remitted the case to the Court of first instance to be tried on the point just now mentioned. The provisions of S. 43, T. P. Act, 1882 may also be stated in another form familiar in English law, that is, a man cannot in equity any more than in law assign what has no existence; he can cantract to assign property which is to come into existence in future and when it has come into existence equity treating that as done which ought to be done fastens upon that property and the contract to assign, if supported by consideration, then becomes a complete transfer The leading case in support of the rule is *Tailby* v. *Official Receiver* (4). But surely as said before, a principle of equity must yield to express provisions of a statute and if the contract to assign or the transfer itself is declared by the statute as void the principle that equity considers as done that which ought to be done must be held to be inapplicable to such a transfer. This we gather is the effect of the recent decision of their Lordships of the Judicial Committee, to which we have already referred, that is *Annada Mohan Roy* v. *Gour Mohan Mullick* (1). The precise point was considered by Jenkins, C. J., in the case of *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (5). In delivering the judgment in that case Jenkins, C. J., said with reference to Cl. (a), S. 6, T. P. Act, 1882 :

"Having regard then to the fact that the chance of an heir-apparent is thus specially excepted from the category of transferable properties I am of opinion that the principle that equity considers that done which ought to be done has no application."

We therefore overrule the first plea taken before us.

The second plea is founded on the recitals contained in the deed of relinquishment dated 28th May 1922. We have already said that the subject-matter of the relinquishment evidenced by this deed is not the share in suit but a differerent share in the village. Into the mouth of Ram Lagan are put the following words in this deed :

"Mangal Singh, uncle of Bindeshri Singh, died after having made in his lifetime a gift of all his property in favour of his nephew, Bindeshri Singh, and Bindeshri Singh had out of his good will got the name of Lakhpati, his aunt, entered into the revenue papers and she was accordingly in possession of the estate. Consequently she has executed a deed of gift in favour of Bindeshri Singh, grandson of Sambhal Singh, brother's son of her deceased husband, and having done this she has made him malik and put him in possession of the property. To this I have no objection. Bindeshri Singh is in proprietary possession of the whole of the estate of his uncle, Mangal Singh."

It is argued that the words " To this I have no objection " conclusively establish a case of consent on the part of the reversioner, Ram Lagan, to the gift made by Mt. Lakhpati in favour of the defendant-appellant and that such a consent validates the alienation. In support of the argument we were pressed hard with the decision of a Full Bench of the High Court at Allahabad in the case of *Fateh Singh* v. *Thakur Rukmini Ramanji* (6). In the case before us the question of consent as a question of fact stands on quite a different footing. Both the Courts below have pointed out and we are of opinion that there is a good deal of force in it that Ram Lagan's acquiescence to the gift made by Mt. Lakhpati is based on assumptions which have no foundation in facts. Mangal Singh was not the uncle of Bindeshri Singh nor Bindeshri Singh is the grandson of Mangal Singh's father, Sambhal

(2) A. I. R. 1921 P. C. 112=48 Cal. 1=47 I. A. 239 (P. C.).
(3) [1829] 5 Man. & R. 202=8 L. J. K. B. 137 =10 B. & C. 181.
(4) [1889] 13 A. C. 523=51 L. J. Q. B. 75=37 W. R. 513=60 L. T. 162.
(5) [1907] 31 Bom. 165=8 Bom. L. R. 781.
(6) A. I. R. 1923 All. 387=45 All. 330 (F.B.)

Singh. Indeed it is now admitted before us that Bindeshir Singh has no blood relationship with the family of Mangal Singh. The second assumption which is of a very serious nature is that Mangal Singh had made a gift of his entire estate in favour of the appellant, Bindeshri Singh. It seems to us that the consent rests on the assumption that title to the estate of Mangal Singh had already come to be vested in Bindeshri Singh by virtue of a gift from the former to the latter and therefore it is a consent to an act which the widow did not do in her right of a female heiress but by virtue of her bare possession which she held under the good will of the donee of the estate, that is the appellant Bindeshri Singh In the circumstances and having regard to the finding of the lower appellate Court, we are unable to hold that the recital contained in the deed of relinquishment dated 28th May 1922 evidence a consent by a reversioner to an act of transfer of the estate by the female heir.

As a pure proposition of law we are not prepared to state it is broadly as it has been done by the learned Judges of the High Court at Allahabad in the case of *Fateh Singh* v. *Thakur Rukmini Ramanji* (6) mentioned above We think as at present advised that we should go no further than what has been expressly decided by their Lordships of the Judicial Committee in the case of *Rangasami Gounden* v *Nachiappa Gounden* (7). Nor are we prepared in this case to take the liberty of making logical deduction from or extension of the principle of that decision. In the case of *Rangasami Gounden* v. *Nachiappa Gounden* (7) Lord Dunedin in giving the judgment of the Judicial Committee says :

"On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as Seshagiri Aiyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation which is the first head of the subject, and the power of alienation for certain purposes, which is the second."

We think that the observation of Lord Dunedin quoted above clearly defines the limits of an act which a Hindu widow may do as such She may do either an act of surrender or an act of alienation We are unable to add a third head of the subject. His Lordship, then, proceeds first to consider the power of surrender. It is not argued that the case before us is a case of surrender but it is a case of alienation. But clearly an alienation by a Hindu widow must be an alienation "for certain specific purposes" as Lord Dunedin says in the passage already quoted. In dealing with the case of alienation his Lordship observes :

"The purposes for which alienation is legitimate may be summarized as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband, or necessity. Now, necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof."—*Banga Chandra Dhur* v. *Jagat Kishore* (8). An equitable modification has also been admitted in the case where the alienee has in good faith made proper inquiry and been led to believe that there was a case of true necessity. Thus far the alienation stands alone. But it may be fortified by the consent of reversionary heirs. (We desire to lay emphasis on the use of the word "fortified" in this quotation). The remaining question is what is the effect of such consent ? If the alienation be total, and the reversionary heirs be the nearest, it falls within the first division. But what if it be partial ?"

His Lordship then refers to and quotes a passage from the judgment of the Judicial Committee in the case of the *Collector of Masulipatam* v. *Venkata Narrainapah* (9) which is as follows :

"On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption of law that when that consent is given, the purpose for which the alienation is made must be proper."

His Lordship proceeds :

"The opinion which is here only tentatively expressed viz., that consent does not give force per se, but is of evidential value is corroborated by much subsequent authority."

After referring to the case of *Raj Lukhee Debea* v. *Gokool Chunder* (10) *Sham Sundar Lal* v. *Achhan Kunwar* (11) and *Debi Prasad* v. *Golap Bhagat* (12) his Lordship refers to the

(7) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P.C.).

(8) A. I. R. 1916 P. C. 110=44 Cal. 186=43 I. A. 249 (P.C.).

(9) [1861] 8 M. I. A. 529=2 W. R. 61.

(10) [1869] 13 M. I. A. 209=12 W. R. 47=3 B. L. R. 57=2 Suther. 275=2 Sar. 518 (P. C).

(11) [1898] 21 All. 71=25 I. A. 183=7 Sar. 417 (P.C).

(12) [1913] 40 Cal. 721=17 C. L. J. 499=19 I. C. 279=17 C. W. N. 701 (F.B.).

decision of the Privy Council in *Bijoy Gopal* v. *Girindra Nath* (13) and says that in that case :

" The consent of reversioners was looked on " as affording evidence that the alienation was under circumstances which rendered it lawful and valid." But, further, if the matter be considered on principle, it seems clear that this must be the true view. Nor, first, if mere consent, as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly, mere consent could only validate on the theory that the reversioner, together with the widow, represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a spes successionis. "

His Lordship then proceeds to consider the decision in *Bajrangi Singh* v. *Manokarnika Bakhsh* (14) and finally states the conclusion on the point of consent in the following words .

" When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. "

We do not think that we should pursue this matter any further Our own reading of the judgment of the Judicial Committee in the case of *Rangasami Gounden* v. *Nachiappa* (7), is that there can be no case of an alienation of a Hindu widow unless the alienation is made for legitimate purposes which may be proved either aliunde or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof, be passed on the consent of reversioners Obviously a transfer by way of gift in favour of a stranger such as the one we have before us is not an alienation of its being legitimate founded on the consent of the reversioners can be applicable

There is one more case to which reference must be made before we take leave of this appeal. The learned advocate for the appellant cited the decision of their Lordships of the Judicial Committee in *Ramgouda Annagouda* v *Bhausaheb* (15) in support of the argument that even a gift by a Hindu widow may be validated by consent of the reversioners. We do not think that the decision lays down the proposition that a pure gift by a Hindu widow of her husband's estate in favour of a stranger can hold good if it is supported with the proof of consent of the reversioners We are clearly of opinion that the consent does not operate *proprio vigore* and that in the case cited by the learned advocate the gift and the two sales were " inseparably connected " to use the language of their Lordships of the Judicial Committee, and that the reversioner had himself acquired a part of the estate out of the three dispositions which constituted one and the same transaction We accordingly dismiss this appeal with costs

D.D. *Appeal dismissed.*

(13) A.I.R. 1914 P.C. 128=41 Cal. 793 (P.C.).
(14) [1908] 30 All. 1=35 I. A. 1=5 A. L. J. 1=11 O. C. 78 (P.C.).
(15) A. I. R. 1927 P. C. 227=52 Bom. 1=54 I. A. 396 (P C.).

A. I. R 1929 Oudh 190

RAZA AND PULLAN, JJ

Bhagwan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 44 of 1929 (Capital Sentence No. 5 of 1929), Decided on 15th February 1929, against order of 1st Addl. Sess Judge, Lucknow, D/- 18th January 1929

(a) Penal Code, S. 300— Person knowing of his wife's murder but making no report to police nor trying to find out murderer— His conduct may lead to conclusion that he was murderer—Evidence Act S. 114.

Where the person admittedly knew that his wife was murdered shortly after midnight and yet he made no report to the police station, nor made any attempt to find out who killed his wife, his conduct was unnatural and may lead to the conclusion that he himself was the murderer. [P 191 C 2]

(b) Criminal P. C., S. 337 (2-A)—Magistrate wrongly committing approver to sessions along with accused — Sessions Judge instead of referring to High Court to get commitment quashed, proceeding with case as if there was no commitment — Sessions Judge's procedure though wrong did not vitiate trial.

Magistrate supposing that Cl. (2-A), S. 337, Criminal P. C., directed him to commit the approver to Sessions, committed him along with the accused to Sessions. The Sessions Judge, instead of referring the matter to the High Court in order to have the commitment quashed proceeded with the case as though there had been no commitment.

Held . that although the procedure of the Sessions Judge was wrong, still the irre-

gularity committed was one which did not vitiate the trial. [P 192 C 2]

(c) Criminal P. C., S. 337 (2-A) — One accused granted pardon —Case against other must be committed to sessions.

The meaning of S. 337 (2-A) is simply that where a pardon has been granted to one accused the case against the other must be committed to sessions. *A. I. R.* 1925 *Oudh* 472, *Ref.* [P 192 C 2]

B. N. Roy—for Appellant.

Government Advocate—for the Crown.

Judgment.—Bhagwandin Lohar has been convicted of the murder of his wife Mt Ram Dei. He has been sentenced to death and this sentence is before us for confirmation. He has submitted an appeal from jail and has been representsd in this Court by a counsel appointed by the Crown.

There is no question that Mt Ram Dei, wife of Bhagwandin, was murdered with a gandasa in her house on the night of 1st and 2nd October 1928. The murder was reported by the village Chaukidar at 7 a. m. on the 2nd October. In this report he did not give the name of any person as being the murderer, but he stated that he had been sent to make the report by Ajodhia Lohar This Ajodhia Lohar is the uncle of the accused, and has been examined as a witness for the prosecution He stated in Court that he did not tell the Chaukidar that Bhagwandin had murdered his wife, and this would appear to be the reason why Bhagwandin's name did not appear in the first report. There is, however, ample evidence that immediately after the crime was committed that is, in the middle of the night Bhagwandin went to Ajodhia and to his other uncle Santu and told them that he had killed his wife. He subsequently made the same statement to a witness named Lalta who lives in the adjoining house and to the mukhia Ram Jiwan. Another man Mendai also states that he was present when the accused confessed his guilt in the presence of the mukhia and Ajodhia Mendai is by caste a Bhujwa. Lalta is an Ahir Ram Jivan mukhia is a Kurmi and no reason is alleged why any of these persons should have made a false statement as to the confession of Bhagwandin. It is even more unlikely that his two uncles Santu and Ajodhia would make such statements falsely. Apart from this extra-judicial confession there is clear evidence that after the Sub-Inspector came to the village Bhagwandin produced a blood-stained dhoti from the roof of the adjoining house and stated that he had been wearing it at the time of the murder. Another indication of the guilt of this man may be seen in his own conduct. Admittedly he knew that his wife was murdered shortly after midnight, yet he made no report to the police station, and he appears to have made no attempt to find out who killed his wife. Such conduct is unnatural and leads to the conclusion that he himself is the murderer.

Bhagwandin was put upon his trial along with his daughter-in-law Mt Sarjudei. This woman lived in the same house as her father-in-law and she was a widow. She herself says that she had an illicit connexion with her father-in-law and she produced before witnesses certain blood-stained garments which belonged to her and which were worn by her, as she says, at the time of the murder She made a confession before a Magistrate, and she was offered a pardon in the Magistrate's Court In accordance with this pardon she was examined on oath and made a statement which is not entirely in accordance with her first confession, but still is substantially the same on the most important points. She states that Bhagwandin planned the crime with her and asked her to call him in the night It appears that he slept outside the house while the women and children slept inside Apart from the motive arising from their guilty connexion it appears that there were constant disputes between Ram Dei and her daughter-in-law on account of their children. In her statement Sarjudei says that she called Bhagwandin into the house at midnight, and that he killed his wife with the gandasa while she looked on She accounts for the blood stains on her own clothes by saying that she took up the child who was sleeping near her mother in her lap and that the child was stained with blood. Surjudei is an approver and her evidence must be regarded with suspicion. We do not consider that her explanation as to the blood stains on her clothes is satisfactory and it does not agree with the statement that she made in the first instance There she said that Bhagwandin took up the child We have also considered the nature of the

injuries inflicted on the deceased. There were many wounds, perhaps as many as fifteen and many of them were only skin deep. It is true that the gandasa which we have seen is very light in weight and not sharp, but even so we can hardly believe that all these injuries were inflicted by a man. It is more probable that Mt. Sarjudei herself inflicted some of them, but she has chosen to conceal this fact in her evidence But apart from the evidence of Sarjudei we consider that the case is proved against Bhagwandin It is proved by his own conduct, in particular by his confessions to his relations and the other villagers, and also by his production of the blood stained dhoti from the adjoining roof. He now wishes to suggest for the first time that the murder was committed by Sarjudei alone, but this was not the case which he wished to set up in the Court below. There he started a case implicating his neighbour Lalta, who according to him had illicit connexion with Sarjudei. He had, however, no evidence of any kind to support this assertion and there is no reason to believe that it was true. It may be remarked that had the crime been committed by Sarjudei alone or by her with the assistance of some stranger there could be no reason for the uncles of the accused coming forward to give evidence against him.

The case, as we have said, is sufficiently proved without the evidence of Sarjudei. We have been obliged to consider very carefully whether the trial was not vitiated by the procedure of the Courts below in dealing with this woman as an approver. The Magistrate misinterpreted S 337, Criminal P. C., and supposed that Cl. (2-A) of that section directed him to commit the approver to Sessions. He accordingly committed her along with Bhagwandin, and the learned Sessions Judge instead of referring the matter to this Court in order to have the commitment quashed proceeded with the case as though there had been no commitment. Undoubtedly the proper procedure for the Sessions Judge to adopt was that which has been adopted on previous occasions when a similar mistake has been made by Magistrates who persisted in misreading this section, but in our opinion the so-called commitment was not really a commitment because Sarjudei was not charged, and was never put upon her defence. In saying that he committed her to sessions the Magistrate merely meant that she was to be put before the Sessions Judge at the time of trial of Bhagwandin. She could not be tried firstly because she had been given a pardon and secondly because she had never been charged. It is evident that she herself knew that she was not being tried, and that she was fully aware of the terms of the pardon which had been offered to her. This being so, although we are of opinion that the procedure of the Sessions Judge was wrong, we do not consider that the irregularity committed was one which vitiates the trial. As a matter of fact the accused was not prejudiced in any way by the technical mistake committed by the Magistrate.

It is not necessary for us to explain S 337 again as this has already been done by the Judicial Commissioner of Oudh in the case of *Emperor* v. *Peru* (1) We may briefly state that the meaning of the section which the Magistrate has misinterpreted is simply that where a pardon has been granted to one accused the case against the other accused must be committed to sessions We might also observe that a similar case was brought to the notice of the Judicial Commissioner of Oudh by one of us when a Sessions Judge in the year 1924, and a Circular letter was issued to all Magistrates. It is to be regretted that this Circular letter appears to have become dead even although it was supplemented by a ruling reported in the Oudh Law Journal.

We are satisfied that the case has been fully proved against Bhagwandin and the sentence in this case must be one of death. We, therefore, dismiss this appeal, uphold the conviction and sentence and direct that Bhagwandin be hanged by the neck till he be dead.

S.N./R.K. *Conviction upheld.*

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(1) A. I. R. 1925 Oudh 472.

A. I. R. 1929 Oudh 193

RAZA AND PULLAN, JJ.

Hanuman Sahu and *others*—Defendants—Appellants.

v.

Abbas Bandi Bibi—Plaintiff—Respondent

First Appeals Nos. 108 and 159 of 1927 and 2 of 1928, Decided on 4th January 1929, against the decree of Addl Sub-Judge, Fyzabad, D/- 25th May 1927.

(a) Pardanashin lady—Independant advice is not absolutely necessary — Disposition must really be a mental act.

In the case of transactions with pardanashin women the question of independent advice is not one of vital importance because the advice if given might have been bad advice or the settlor might have insisted on disregarding it. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it and there is a further danger that if this necessity for independent advice is carried too far the legal protection given to the pardanashin lady may be actually transmuted into a legal disability. *A. I. R.* 1925 *P. C.*, 204, *Foll*, 36 *All.* 81 (*P.C.*) *Ref.* [P 197 C 2]

(b) Registration Act (16 of 1908), S. 60—Formalities of registration—Things verified by competent official as done in his presence are presumed to be duly done.

The registration of a deed is a solemn act to be performed in the presence of a competent official appointed to act as Registrar (or Sub-Registrar) whose duty it is to attend to the parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order: 33*Cal.* 537, (*P. C.*), *Rel. on.* [P 198C 1]

(c) Mahomedan Law—Limited estate—Shia Law allows existence of number of limited estates.

Shia law admits of the existence of a number of limited estates one after another and consequently the interposition of life estates, before the estate comes as a life estate to third persons, raises no legal difficulty and does not involve the necessity of holding that on the expiry of the life estates the estate in the third persons was an absolute estate. [P 199 C 2]

(d) Words and Phrases—Malik means owner—Addition of other words can qualify the meaning.

The word " malik " means owner in the full sense of the word ; but it is not a term of art and its meaning can always be qualified by the addition of other words which contradict the idea of absolute ownership ; *A. I. R.* 1922 *P. C.* 63, *Foll.* [P 199 C 2]

(e) Family arrangement — Conflicting claims are recognised and settled—Settlement is not transfer within the meaning of Transfer of Property Act, S. 10.

A family settlement is based on the assumption that there is an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is. So a deed of family settlement is not a transfer within the meaning of S. 10, T. P. Act, but is a recognition of conflicting claims. [P 201 C 1]

(f) Transfer of Property Act. S. 10—Section not applicable—General principles underlying it cannot be applied unless they are general principles of law.

Where S. 10 does not apply in set terms the general principles underlying the Act may not be applied. Where an Act itself is inapplicable the principles underlying that Act except in so far as they are general principles of law cannot be applied to a particular case . *A. I. R.* 1925, *P. C.* 272, *Dist.* [P 201 C 1]

(g) Family arrangement — Condition not valid in ordinary deeds may be inserted, though, estate contrary to law cannot be created.

A family settlement cannot create an estate which is contrary to law but in the case of family settlements conditions may be inserted therein which would not be valid in the case of ordinary deeds under the ordinary law, but such conditions in the deed would be valid and enforceable when forming a part of such family settlements. *A.I. R.* 1926 *Oudh* 561, *Foll.* [P 201 C 2]

(h) Transfer of Property Act, S. 41—Enquiry into title of ostensible owner is necessary.

All who wish to take alvantage of S. 41 must be able to show that they have made an enquiry about the title of the ostensible owners. [P 203 C 1]

Naimullah—for Appellants

Bisheswar Nath—for Respondent.

Judgment.—These appeals arise out of two suits brought by Mt. Abbas Bandi Bibi in the Court of the Subordinate Judge of Fyzabad to recover certain property to which she claims title as the heir of 2/3rds of the estate of Mt Sughra Bibi who died, as is now admitted, on 26th July 1914. The first suit was brought on 26th March 1926 and relates to several items of village property which have come by different means into the possession of the various defendants in the suit The second suit has been brought in respect of a single village Daryapur which is in the possession of certain other parties. In both cases the plaintiff deponded for success on being able to prove that Mt Sughra Bibi had no right of alienation in respect of the property which came to her under the terms of a deed of compromise executed in the year 1870 between Mt Sughra Bibi herself and Afzal Husain

who became her husband after the execution of the compromise. It seems unfortunate that for some reasons unknown to us the two cases were tried simultaneously in different Courts in the same District. The first suit in point of date of the institution was heard by the Subordinate Judge who gave his opinion on a preliminary issue on 26th November 1926. This issue runs as follows :

" Was the restriction placed by the compromise deed dated 19th September 1870, upon Sughra Bibi's power of alienation valid and legally enforceable. "

It was after this decision had been obtained that the issues were framed in both cases, and the evidence was recorded in the first suit until April 1927 and in the second suit until March 1927. On 25th May 1927 the Additional Subordinate Judge pronounced judgment in the suit relating to Daryapur village in favour of the plaintiff, holding that the family settlement of 1870 gave a life estate to Mt. Sughra Bibi and a remainder over to her heirs. This decision is entirely contrary to that of the Subordinate Judge on the same point, and on 30th September 1927 another Subordinate Judge, who relieved his predecessor when almost all the evidence in the case had already been recorded, delivered judgment in the suit dealing with the bulk of the property. This judgment proceeds on the lines of the Subordinate Judge who tried the preliminary issue and is against the plaintiff whose suit was dismissed with regard to the greater part of the property, but she was permitted to obtain three properties which were under mortgage by paying certain sums to the mortgagees. In our opinion it would have been better had both suits been disposed of by one and the same Judge, though as matters now stand we have the advantage of having before us an exposition of each point of view on what is the main issue in the case The pedigree given below shows in detail the relationship between the various persons whose names will appear from time to time in our judgment.

(For pedigee see page 195)

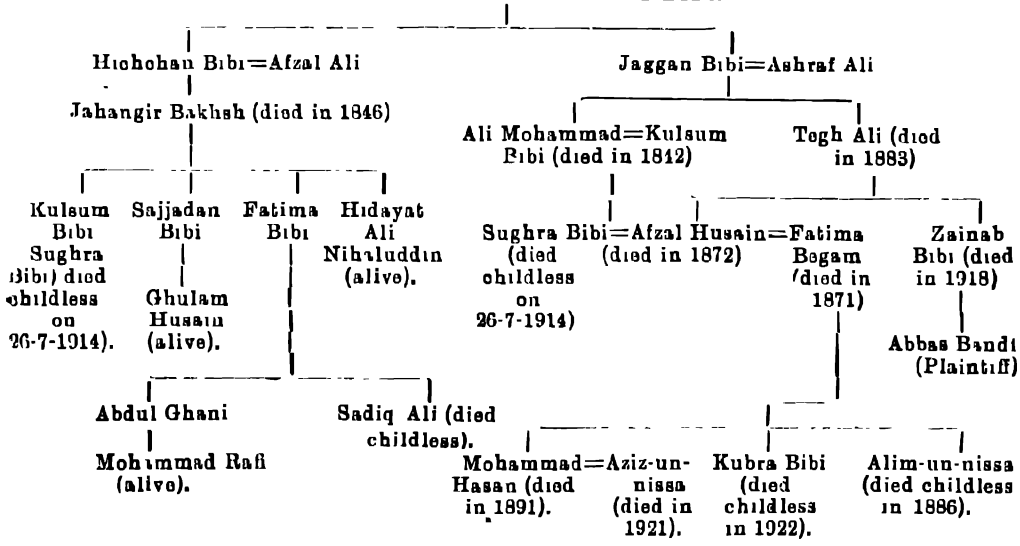
Mt. Sughra Bibi was the daughter of Ali Mohammad and Kulsam Bibi and Afzal Husain was the son of Tegh Ali, the brother of Ali Mohammad. The bulk of the property in suit in both cases belonged to Haji Mohammad Hafiz the maternal grandfather of Tegh Ali and Ali Mohammad. He gifted the property to his wife Mt. Nanhi Bibi and she in her turn gifted it to her grandsons Tegh Ali and Jahangir Bakhsh. The latter was the son of her daughter Hichchan Bibi. Jahangir Bakhsh made certain dispositions of his share which emboldened Mt. Sughra Bibi in the year 1868 to bring certain suits against her cousin Afzal Husain for a half share in the property. It may be mentioned that the property was settled in the name of Afzal Husain at the Second Summary Settlement after the Mutiny although his father Tegh Ali was still alive. It is immaterial whether Mt. Sughra Bibi's suits were well founded or not. At least they resulted in protracted litigation, for it was not until September 1870 that a compromise was arrived at between the parties which we have to interpret.

As a result of this compromise Mt. Sughra Bibi became the wife of Afzal Husain. He had another wife named Fatima Begam and in the compromise the estate which he then held was divided between the two wives some of it immediately and the rest after the death of himself and his father Afzal Husain himself died in 1872, his first wife Fatima Begam having already predeceased him in 1871. There is abundant evidence that the children of Fatima Begam inherited one half share in the property from their mother and that Mt Sughra Bibi was in possession of the other half. There is also no question that Mt. Sughra Bibi herself entered into numerous transactions by which she mortgaged with possession almost the whole of her share in the property. Some of these mortgages were executed jointly with Mohammad Hasan or Husain the son of Afzal Husain by his first wife, and others were executed by Mt. Sughra Bibi alone. The first transaction of which we have knowledge was as far back as 1873 and the last transaction of Mt Sughra Bibi was a sale deed in favour of Mt Imam Bandi Bibi on 31st March 1914. When this transaction was completed Mt Sughra Bibi had either sold or mortgaged with possession the whole of the property which she had obtained in 1870, with the exception of certain *sir* rights and some houses and a grove, and the sale deed gave a charge over these also to the vendee.

The plaintiff is the daughter of Mt. Zainab Bibi, sister of Afzal Husain and

first cousin of Mt. Sughra Bibi. The plaintiff is therefore one of the heirs of Mt. Sughra Bibi and under Shia law she is entitled as is admitted by parties, to two-thirds of her estate. The remaining one-third would devolve upon other descendants of Jahangir Bakhsh who are at the present time Ghulam Husain, Nihaluddin and Mohammad Rafi. These persons have taken no part in the suit and it is consequently only the two-thirds share of the plaintiff Mt. Abbas Bandi Bibi which is being claimed The major part of the evidence in these suits has been recorded in the case before the Subordinate Judge, and when the appeals arising from that suit are decided it will be necessary to add only a little in order to decide the

PEDIGREE.



other appeal. We shall therefore commence with appeal No. 2 of 1928 which is the appeal preferred by Mt. Abbas Bandi Bibi against the dismissal of her suit in respect of the properties contained in her original plaint filed by her in the Court of the Subordinate Judge.

Mt. Abbas Bandi Bibi did not in her plaint make any reference to the sale-deed of 31st March 1914, but when this sale-deed was set up by defendant 1, who is the son-in-law of the ostensible vendee under that sale-deed the plaintiff denied the execution of the document, and we shall decide this point before turning to a consideration of the compromise of 1870. An attempt has been made to show that Mt. Sughra Bibi was unable to understand the document which was executed by her, even if the physical execution itself is admitted. It is also suggested that, even if she could understand the document, she had not the advantage of the advice of those persons who were best able to give it. We have been referred to a series of pronouncements of their Lordships of the Judicial Committee which protect the interests of pardanashin women in India. Mt Sughra Bibi stated her age to be thirty-two in 1870. There is no reason to suppose that she was more. She was therefore 76 when the sale-deed in question was executed Mere age is not a proof of incapacity to act, and though an attempt has been made to show that Mt Sughra Bibi was not only old but almost unconscious owing to illness as well as being mentally deficient, we do not find that any of these facts are established by the evidence. The most reliable witness examined on the part of the plaintiff is Saiyed Liyaqat Husain who is a Deputy Collector and related to the parties. He did not bear out the theory that Mt Sughra Bibi was in any way mentally deficient. He said that she was an ignorant female of ordinary understanding. Another witness for the plaintiff Ghulam Husain who is one of the heirs of Mt. Sughra Bibi, described her as dull witted (motisamajh) but he explained this by saying that she put question after question in order to understand any thing and

" without these scrutinising questions about details she was not satisfied."

In re-examination he gave an example of his meaning :

" Suppose there was a talk of some mortgage she would say ' call such and such a man and if that man advises, then only I can enter into the transaction and not otherwise. . . . . Her servants and employees often defrauded her and so she used to be always very alert that she might not be deceived.' "

Apart from this oral evidence on the plaintiff's own side there is the evidence of Nihaluddin, who was called by the defendant but dissatisfied him so much by his evidence that an attempt was made by counsel to treat him as hostile But the Judge observed in a note that he was of opinion that the witness had shown no animus against either party. Nihaluddin never suggests that Mt. Sughra Bibi was deficient in intelligence, though he says that when the deed was executed she was affected by old age and after she began to be affected by a boil in her mouth she took half an hour to understand what she had formerly been able to understand in five minutes. There is also documentary evidence which shows that Mt. Sughra Bibi entered into numerous business transactions and not only signed her name on documents but made a regular practice of noting in her own hand the nature of the document We have been shown endorsements in which she has written the words Ikrarnama (agreement), Rahinama (mortgage) Tammassukh (bond) and bainama (sale-deed) and in each case she used the word correctly. Her handwriting was not good, but it could be easily deciphered and she cannot, therefore, be classed as an illiterate woman, nor as one of deficient understanding. At the time of her death she was engaged in a law suit against Kamlapat Ram, who is one of the respondents in Appeal No. 2 of 1928 and the Judicial Commissioner's judgment was published in *Sughra Bibi* v. *Kamlapat Ram* (1) In that case Mt Sughra Bibi herself attempted to set up a plea that she was unable to understand a deed executed by her in 1905 on the ground of her physical and mental incapacity, and we see from the judgment that she was examined as a witness and impressed the Court with the view that as late as 1912 she was woman of business habits, who thoroughly understood what she was doing In an appeal in a suit decided by the Judicial Commissioner on 7th January 1907 the same plea of incapacity had been raised by her but was found against her and we are not of opinion that the evidence before us justifies us in holding that on 31st March 1914 she had lost her capacity to understand a simple sale-deed. No doubt she was ill at the time, because in December 1913 she had a tooth extracted and as a result she was suffering from some form of ulcer in the mouth, but the evidence which shows that she lived thereafter in a state of semi-consciousness is conflicting as well as absurd. She died four months later, but in the interval we find instructions given in her name and apparently with her knowledge in the case for mutation set up on the basis of this sale-deed, and she also executed a will in favour of Nihaluddin which was set up in Court by Nihaluddin after her death , and as far as we have been able to ascertain, its genuineness was not disproved Thus we have come to the conclusion that Mt. Sughra Bibi was not precluded by age or infirmity, whether mental or physical from making an intelligent execution of the sale-deed in favour of Imam Bandi Bibi

But we have also to consider whether as a matter of fact she did not understand the document. On this point we have been asked to consider first that the document was not sufficiently explicit, secondly that it was against her interest, thirdly that she did not receive the best possible advice, and fourthly that one clause in the document was not explained to her at the time of the execution The document is printed at p. 145 part. 3 of the printed record It is written in very simple language and purports to be a sale of certain property a list of which is given at the bottom, for Rs 65,000 made up of Rs 50,000 which was left in deposit with the vendee for payment of debts which might be found against the property, and Rs. 15,000 in cash. It was also a condition that if more money were found due than Rs. 50,000 the residue of the property of the vendor was to be hypothecated. The details of this property are given at the bottom of the deed. The objection that the deed is not sufficiently explicit is based on the fact that there is no list of the debts and it might be considered that the vendor was

(1) [1915] 18 O. C. 147 = 30 I. C. 269 = 2 O. L. J. 313.

unaware of her own liabilities and that she might not have owed so much as Rs 50,000. This objection is really answered by the fact that the vendee actually paid off debts including those due to herself or her son-in-law amounting to Rs 63,000 and there is no reason whatever for supposing that Mt Sughra Bibi was not well aware of the fact that the liabilities on her property could not be satisfied for a less sum than Rs 50,000. As to the second point it is not easy to say what even a very intelligent person may consider to be for his or her benefit. The facts are that Mt. Sughra Bibi's property was mortgaged up to hilt and she was in possession of only a few *sir* fields. Moreover she was constantly in need of money for litigation By this document she was able to clear off all her debts and get fifteen thousand rupees in cash We cannot form an exact estimate as to the value of the property, but if, as appears to be the case, the purchaser spent over Rs 63,000 in paying off the mortgages on the property, we do not find that Rs. 15,000 was an inadequate sum from the point of view of the vendor.

There have been many cases dealing with illiterate pardanashin women who have denuded themselves of a large proportion of their property without professional or independent advice, and such women have in many cases been permitted to get those transactions set aside, but in the present case we find in the first place that Mt Sughra Bibi was a woman of business capacity, in the second that she was receiving a substantial sum in cash in consideration of the sale of her property and thirdly that she had no near heir whese interest could have weighed with her so that she had only herself to consider and lastly she had surrounding her only surviving stepdaughter Kubra Bibi and two of her heirs Nihaluddin and Sadiq Ali, who appear to have been the persons whom she trusted in most of her dealings The absence of the plaintiff and her husband who were in another district is not a fact which suggests to us that Mt. Sughra Bibi did not receive proper advice It does not appear that she had any interest in the present plaintiff and although the plaintiff's husband had witnessed two deeds on her behalf on previous occasions one of these at least was a deed executed in favour of the Raja in whose service the plaintiff's husband then was. Moreover the question of advice is not one of vital importance. As stated by their Lordships of the Judicial Committee in *Faridunnisa* v. *Mukhtar Ahmad* (2):

> "Advice if given might have been bad advice or the settlor might have insisted on disregarding it. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it."

And there is a further danger that if this necessity for independent advice is carried too far the legal protection given to the pardanashin lady may be actually transmuted into a legal disability: see *Kali Bakhsh Singh* v. *Ram Gopal Singh* (3). The last point is whether the whole deed was understood by Mt Sughra Bibi. We find that the deed was executed as well as registered in the presence of the Sub-Registrar and there were numerous witnesses, among them two persons at least Nihaluddin and Sadiq Ali who were themselves interested in the inheritance of Mt. Sughra Bibi's estate. There is no question that the whole document was read out to the executant and received her assent. But the witnesses, examined as as they were thirteen years after the execution of the document, were unable to state what exactly the terms of the deed were, and so they were unable to say in detail which clauses were explained to the lady. This has given an opportuuity to the plaintiff's learned advocate to draw our attention to the judgment of their Lordships of the Judicial Committee in *Annoda Mohun Chowdhuri* v. *Bhuban Mohini Debi* (4). In that case a document was read fluently to a pardanashin lady, who merely nodded her head, and it was held that this did not go far to show that she knew what liability she was undertaking. But in that case there was definite evidence that the ladies were not asked whether they had understood what was said about the previous debt Here we do not know that Mt. Sughra Bibi did not have her attention drawn to the clause providing that if the debts due on the mortgages exceeded

(2) A. I. R. 1925 P. C. 204=47 All. 703=52 I. A. 342=28 O. C. 338 (P. C).
(3) [1914] 36 All. 81=21 I. C. 985=41 I. A. 23 (P. C.).
(4) [1901] 28 Cal. 546=28 I. A. 71=5 C. W. N. 489=8 Sar. 58 (P.C.).

fifty thousand rupees the vendee should be able to recover the balance by means of a charge on the residue of Mt. Sughra Bibi's estate. All that can be said is that there is no definite evidence that this clause, which has never been acted upon was explained to her. The whole deed is couched in perfectly simple language and we see no reason to suppose that the Sub-Registrar, who is now dead and therefore could not be called as a witness, took no pains to ascertain that the lady understood this clause as well as the rest of the document R 249 of the Registration Manual, which contains rules made by the Inspector-General of Registration under S. 69, Registration Act, provides that :

"In the case of documents executed by pardanashin ladies, registering officers should be careful to obtain an admission of execution from the executant's own lips. The mere statement of the relatives or other persons accompanying her is not sufficient. The lady should be seen and identified by some person acquainted with her appearance and the name and relationship of such person to the executant should be noted in the endorsements. The terms of the document should be explained to the executant, and if, admitting execution, she objects to any of the terms such objection should be noted. The instructions apply to the case of all documents executed by pardanashin ladies, whether registered at the Registration Office or on visit or by commission at the executant's residence."

The Sub-Registrar who had registered the sale-deed in question (Ex A-55) had expressly noted in his endorsement that :

Mt Sughra Bibi had heard and understood that document word by word and admitted it in a loud voice."

The registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar (or Sub-Registrar) whose duty it is to attend to parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction ; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order : See *Gangamoyi Debi* v *Troloikhya Nath Chowdhry* (5)

We are of opinion therefore that the attempt made by the plaintiff-appellant to challenge the execution of the sale-deed of the 31st March 1924, fails and that deed was executed by Mt. Sughra Bibi with full knowledge of what she was doing. On this point we agree with the finding of the learned Subordinate Judge.

Three other deeds were challenged also on the question of execution, namely a mortgage in favour of defendant 1 dated 20th February 1914 printed at p 139, a deed of further charge dated 23rd July 1912 printed at p. 134 and a sale-deed executed on the same day which is marked as Ex. B-1 but is not printed We have examined all these documents and the evidence as to their execution We cannot find that the execution of any of them is defective It is true that in the case of the sale deed Ex. B-1 the object of the sale was stated to be to obtain money for the journey to Karbala and this journey was never carried out. But parties may raise money for a certain object, and then find that it is necessary to divert the money to some other object, and this is in itself no sufficient reason for holding that the document was made without the full understanding and will of Mt. Sughra Bibi. As to the other documents there is nothing in the circumstances of their execution which raises any doubt in our mind as to the intention of the vendor

We now turn to the interpretation of the deed of compromise Ex 1 printed at p. 44 of the paper book executed between Afzal Husain and Mt Sughra Bibi in 1870 If this deed conferred an absolute title on Mt. Sughra Bibi to dispose of the property which she obtained under that deed, the plaintiffs's case must fail If on the other hand Mt. Sughra Bibi obtained a limited estate without the power of transferring the property, the plaintiff, subject to the law of limitation can sue for possession of the property either as the heir of Mt. Sughra Bibi or as she styled herself as the remainder man under the deed of compromise As we have stated above this compromise was filed in the settlement Court on 19th September 1870, in order to settle the claims which had been made by Mt. Sughra Bibi to a share in a certain estate The object of the compromise was to settle the question once for all by making Mt Sughra Bibi the wife of Afzal Hussain and dividing the Shadipur property then and there between the two wives and giving the said wives the rest of the property half-and-half after the death of Afzal Husain and his father. It is only by the

(5) [1 06] 33 Cal. 537=33 I. A. 60=10 C. W. N. 522=3 C. L. J. 349 (P. C.).

study of the document as a whole that we can arrive at an opinion as to the nature of the title conferred on the two wives. After a recital of the names of the parties to the compromise the document proceeds as follows:

"Whereas the above mentioned case between the parties, in which a share is claimed has been amicably settled in this manner that the marriage of the plaintiff by nikah shall be performed with the defendant in the following month, therefore in view of a marriage settlement no dispute as to shares may remain, and inasmuch as the defendant has a former wife, daughter of the late Raja Said Abbas Ali, it has been settled that both wives in accordance with this agreement shall in their capacity of wives be declared from now permanent owners (malik mustaqil) of the whole mahal Shadipur half and half, and the names of Mt. Fatima Begam first wife and Mt. Sughra Bibi, plaintiff shall be entered in the Government papers as owner half and half (bil munasfa milkiatan). The said wives shall have no power of transfer over this property to any stranger: but generation after generation line after line the ownership thereof shall devolve upon the legal heirs of the said two wives. and the management and collections of the entire estate of Shadipur shall be in the hands of their husband Said Afzal Husain, in his capacity of husband. If on the part of the husband there is any neglect or estrangement towards either of the wives, then in that case the wife's only remedy will be to have the management of the share which is owned by her performed by the Government through the Court of Wards; but during the lifetime of Afzal Husain neither of the wives shall have the power on her own authority to have the management of the share which is owned by her performed by any member of her fasher's family and if in contravention of this agreement the defendant refuses to marry the plaintiff by way of nikah, that the plaintiff shall in accordance with the terms of this document remain owner of a moiety, and if the plaintiff acts contrary to the stipulation of nikah she shall cease to have any rights whatever. If God forbid contrary to custom the divorce of either of the wives takes place, then even in that case ownership as before shall remain vested in the wives subject to the conditions mentioned above provided that the divorced wife should regard herself as an undivorced wife, and continue to live in the house like a woman without a husband."

These clauses are very important in themselves to indicate the main intention to Afzal Husain at the time, and that was that he was always to have the management of the property as long as he lived, and if for any reason he forfeited his right the management was to go to the Court of Wards and not to any of the relations of the wives on their father's side. After detailing the Shadipur property the compromise proceeds:

"And besides these whatever property there is at present such as Chitoi and Nausanda and Munsha etc., in the pargana of Tanda and Hatimpur and Lodhana and Nathupur in the pargana of Hariharpur etc., or shall be acquired in future shall remain in the possession of myself the defendant during the lifetime of Mir Tegh Ali and myself the defendant and after me this property also shall devolve upon the two wives or their descendants in equal shares."

The position which has been accepted by the Court below in the first case (Appeals Nos 159 of 1927 and 2 of 1928) is that the two ladies were placed in absolute possession of the property and the clause depriving them of rights of transfer to a stranger was therefore void. A further plea has been raised in argument before us, namely that whatever be the nature of the estate conveyed in the first portion of the document the two ladies must be deemed to have been given an absolute estate in the property specified in the latter portion. As to this latter plea we would be slow to accept the suggestion that in the same document two estates of a different nature passed to the same person in respect of different property unless there was a specific statement to that effect. Here there is nothing to show that the estate of the ladies and their children is considered differently in the second portion of the document from the manner in which it has been considered in the first. All that has been done is to establish a life interest before the estate comes into the possession of the ladies. Shia law admits of the existence of a number of limited estates one after another and consequently the interposition of the life-estate of Afzal Husain and his father before the estate came to the ladies, raises no legal difficulty and does not involve the necessity of holding that, on the expiry of that life-estate, the estate vested in the ladies was an absolute estate. We hold, therefore, that the position of the ladies in regard to transfer is the same throughout the document in respect of both portions of the property.

The word "malik" has been construed many times and it has always been held that the word means owner in the full sense of the word. But it is not a term of art and its meaning can always be qualified by the addition of other words which contradict the idea of absolute ownership. As observed by their Lordships of the Judicial Committee in *Mt.*

Sasiman Chawdhurian v. *Shive Narain Chowdhury* (6):

"The term "malik" when used in a will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conveyed."

In the document before us the two wives have been made owners (malik) " in their capacity as wives " whatever these words may mean, and they have been definitely prohibited from making any transfer to a stranger, that is to say, they have not been given full rights of alienation They have also been definitely distinguished from their legal heirs, that is, their heirs under Mahomedan law, for it is to these latter and not to the ladies themselves that the clause vesting the estate " generation after generation and line after line like ancestral property " refers. Quite apart from any interpretation that can be placed upon the words " in their capacity as wives " or the subsequent restrictions as to the management of the property, we are of opinion that the rights given to these ladies are not the rights of absolute owners but limited rights, and the limitation deals with that important and inseparable feature of full ownership the right of alienation It has been argued in support of the judgment in appeal that the word "mustaqil" (permanent) should be regarded as strengthening the word " malik " but in our opinion this word has only a temporal significance, and the conception of permanence in time is quite separate from the conception of absolute ownership. Secondly we have been asked to consider the words " generation after generation and line after line " These words no doubt have an important bearing on the title of those persons to whom they refer. There are numerous authorities on the meaning of these words, and it is sufficient for us to refer to the views expressed by their Lordships of the Judicial Committee in *Thakur Harihar Bakhsh* v *Thakur Uman Prasad* (7) but in our opinion the words in this document do not refer to the ladies but to their heirs and it appears to us that the intention of the document is to give a limited ownership without power of alienation to a stranger to the ladies and an absolute right to their heirs under Mahomedan law. We have to consider next whether this intention on the part of the framers of the compromise is one to which effect can be given in law. In our opinion the estate contemplated is one permissible under the Shia law, even if it were held that the permanent estate is vested in persons unborn But it is not the case that all the heirs under Mahomedan law were unborn in 1870; on the contrary Mt. Fatima Begam, who obtained one half of the estate, had three children living and although Mt Sughra Bibi being at the time unmarried had no children living she had heirs under Mahomedan law both in the person of her husband and the mother of the present plaintiff It may very well be that Afzal Husain at that time contemplated the possibility of issue of Mt Sughra Bibi herself and we are not prepared to hold that he cannot have intended to vest the absolute estate in the heirs-at-law of his two wives merely because, had his second wife died immediately, her portion of the estate would have vested partially in a person in whom he had no immediate interest Both the commentators Ameer Ali and Tyabji agree that under Shia law a series of limited interests in succession can be created and that neither creating a perpetuity nor giving the remainder to unborn persons seem to them to be objections invalidating settlements:

"A grant may be made to *A* for life and then to *B* absolutely or a grant may be made to *A* for life and then to *A*'s children absolutely."

There is some difference of opinion as to whether only children living at the time of the grant will take the remainder absolutely or any children born to *A* after the grant will take also. The approved opinion seems to be that " all children will take whether living at the time of the grant or born afterwards "— Ameer Ali 4th Edn Vol 1 p 179; Tyabji's Principles of Mahomedan law, 2nd Ed para 449 We are, therefore, unable to find either that this was an absolute estate in which a restraint on alienation is invalid, such as the case reported in *Faiyaz Husain Khan* v. *Nilkanth* (8), which

(6) A. I. R. 1922 P. C. 63=1 Pat. 305=49 I. A. 25 (P.C.).

(7) [1887] 14 Cal. 296=14 I. A. 7=4 Sar. 766 (P.C.).

(8) [1901] 4 O. C. 163.

has been followed by later decisions of Oudh Courts, or that an estate has been created which is contrary to law We consider that it is improper to bring into this case any consideration of the terms of S 10, T P. Act, first because that section does not refer to cases under Mahomedan law, and secondly because it refers to transfers, and this being a deed of family settlement is not a transfer, but is a recognition of conflicting claims. A family settlement

"is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is," : see *Khunni Dal* v. *Gobind Krishna Narain* (9)

It would, therefore, serve no good purpose for us to enter into a discussion as to whether the restriction imposed upon the ladies is an absolute or partial restraint on alienation We are aware that Courts have from time to time held that even where S 10, T. P Act, does not apply in set terms the general principles underlying the Act may be applied We do not consider that where an Act itself is inapplicable the principles underlying that Act, except in so far as they are general principles of law, can be applied to a particular case We observe that the Judicial Commissioners in the case of *Nageshar Sahai* v *Mata Prasad* (10), after expressing the view that the principles of S 10 may be applied to a transfer when the terms of the section were not strictly applicable, went on to hold that they in no way affected a restraint on alienation embodied in a compromise by way of family settlement and their judgment was upheld by their Lordships of the Judicial Committee in their decision which is reported in *Mata Prasad* v *Nageshar Sahai* (11). The general principles of law do not prevent limitations of interest even upon those who are held to have an absolute estate, as in the case decided by the House of Lords in 1905 *Comiskey* v *Bowring Hanbury* (12) Moreover the document which we are construing is admitted by both sides to be a family settlement and every attempt must be made to give effect to the wishes of the parties to such an agreement. We do not go so far as to say that a family settlement can create an estate which is contrary to law but we can follow at least a decision of a Bench of this Court in *Ahmad Azim* v *Safi Jan* (13), in saying that in the case of family settlements conditions may be inserted therein :

"which would not be valid in the case of ordinary deeds under the ordinary law, but such conditions in the deed would be valid and enforceable when forming a part of such family settlements."

We do not think it necessary to discuss at length the nature of the restriction placed upon the ladies or to adopt any unusual interpretation of the word "ghair" which we have translated stranger Unless there is something in the context which would force us to place a strained meaning upon a word we would always hold it to be intended in the sense generally understood by the persons who had executed the deed The word "ghair" is constantly used in connexion with pre-emption cases which are a feature of Oudh Law as meaning first a stranger to the family and then a stranger to the village community. An attempt has been made to suggest that there is some reference to the law of pre-emption here and this view has found favour with the lower Court. We do not consider that there was any intention on the part of Afzal Husain and Mt Sughra Bibi to insert a clause in this agreement directing the ladies not to transgress the law of pre-emption, that is to say not to sell the property to a stranger without giving notice to the near relations and cosharers It is improper to read such words into a document without any necessity We believe that the clause simply means that the ladies are forbidden to transfer to a stranger and if the transactions entered into by Mt Sughra Bibi were entered into with strangers they were in contravention of this compromise and can be challenged by her heirs in whom the ultimate estate was vested by the compromise itself It is not suggested that Imambandi in whose favour the sale deed was executed or the defendants 1 and 2, who are in possession of the bulk of the property, are members of the family of Afzal Husain and Sughra Bibi. The plaintiff is admitted to be the heir to the extent of two-thirds in the estate of Mt Sughra Bibi

(9) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P.C.).
(10) A. I. R. 1922 Oudh 236=25 O. C. 189.
(11) A. I. R. 1925 P. C. 272=47 All. 883=28 O. C. 352=52 I. A. 398 (P.C.).
(12) [1905] A. C. 84=74 L. J. Ch. 263=21 T. L. R. 252=53 W. R. 402=92 L. T. 241.
(13) A. I. R. 1926 Oudh 561=2 Luck. 335.

under Mahomedan Law, and the absolute estate in the property was therefore vested in her along with others according to the terms of the compromise, and she can lawfully sue for possession of the property of Mt. Sughra Bibi which has been transferred in contravention of the deed.

The cross appeal by defendants 1 to 8 raises in particular the question of limitation which has no force in view of our finding that Sughra Bibi had only a limited estate. The second plea deals with those properties which were not transferred by Sughra Bibi herself but by Mohammad Hasan her stepson The defendants contend that there was a partition between Mt Sughra Bibi and the children of Mt. Fatima Begam in the person of Mohammad Hasan in the year 1887, by which several villages fell to the share of Mt. Sughra Bibi alone and certain others to Mohammad Hasan alone The properties with which this suit is concerned are those in the village of Qutubpur, Daudpur and Makundpur all of which were sold by Mohammad Hasan or his heirs, but if there was no partition Mohammad Hasan could only have sold his half share in these properties, and the plaintiff would be able to recover Mt. Sughra Bibi's portion in these villages. It is proved that after the year 1886 Mt. Sughra Bibi and Mohammad Hasan each entered into separate transactions as though they had control of specific shares in certain villages, but the evidence that there was a formal partition is quite unsatisfactory We have been referred to various khewat entries relating particularly to the villages here in dispute, Qutubpur, Daudpur and Makundpur but all we can find is that at some time before 1886 Mohammad Hasan's share was recorded in the name of Mt. Sughra Bibi in addition to her own and that after 1887 that share was recorded again in the name of Mohammad Hasan We are not satisfied that the name of Mt. Sughra Bibi was entirely removed in favour of that of Mohammad Hasan. Moreover the theory rests upon an exchange of villages and the village of Daryapur is said to have been one of those given over entirely to Mohammad Hasan but no entry in the khewat supports this theory. Similarly there appears to be no such entry in favour of Mt. Sughra Bibi in the case of the village Nausanda which is said to have fallen to her lot. The actual evidence as to the partition was not admitted in the lower Court but we have admitted it here. It only shows that an application was made some time in the year 1886 alleging that a partition had been entered into in certain terms between the parties, but we do not find that any effect was given to that application. On the other hand there is a very strong piece of evidence that no partition was completed or even intended between the parties This is the statement of Munshi Mohammad Panah, who was vakil of Mt Sughra Bibi in a case in the Settlement Officer's Court in 1893 He refers to the agreement between the parties dated the 11th December 1886, and he says that by that compromise no partition of land was made, but only a specification of shares was made for the reason that if later on any charge were created by Mohammad Hasan it might affect his share only. It is difficult in view of this statement to find that there had been really a partition either in 1886 or 1887 by which an absolute division was made of the estate between Mt. Sughra Bibi and Mohammad Hasan. Another point has been made against this alleged partition, and that is that the shares which are supposed to have been allotted to Mt. Sughra Bibi and Mohammad Hasan respectively are of grossly unequal value. Lastly as in our view Mt. Sughra Bibi had only a limited estate we are not of opinion that a partition made by her with Mohammad Hasan would have been binding on her heirs.

The last point raised in this cross-appeal is that the appellants should be regarded as purchasers in good faith from an ostensible owner, and that they should be protected by S. 41, T. P Act. We do not consider that this view can be taken in the case of the principal appellants Mohammad Raza and his wife. They were intimately connected with the affairs of Mt. Sughra Bibi during the last 14 years of her life, and they prepared the sale-deed with the assistance of Nihal-ud-din and Sadiq Ali who knew everything that ought to be known about Mt. Sughra Bibi's estate. They must have known therefore that in the year 1887 in proceedings between Mt. Sughra Bibi and Mohammad Hasan both Mohammad Hasan and Mt. Sughra Bibi's general attorney stated that Mt. Sughra Bibi had

no power of alienation. The fact that Mohammad Raza defendant-appellant 1 attempted to secure himself by obtaining from Mt. Kubra Bibi, sister of Mohammad Hasan, a deed relinquishing her claim of pre-emption before executing the sale-deed of 31st March 1914, indicates that he felt that there was a good reason why he should secure his title in every possible way, and in our opinion he was well aware that in taking this sale-deed from Mt. Sughra Bibi he was running a risk. He is therefore not entitled to the benefit of the provisions of S. 41, T. P Act, and to recover the money which he has undoubtedly spent in clearing off the liabilities of Mt Sughra Bibi. Had we held otherwise we would have been faced by a difficulty. Mohammad Raza paid off the mortgage due to one Tirloki Nath amounting to a sum of nearly Rs. 30,000 as being a donee by an oral gift from his mother-in-law in whose name the sale-deed was executed He now comes forward and pleads that he himself was the purchaser of the property and that his mother-in-law is entered benami He failed to establish this plea in the Court below and we are satisfied that the learned Judge had very good reasons for disbelieving a plea which is entirely different to that on which he had established his title already We are of opinion that Mohammad Raza cannot succeed on a plea based on equity. Moreover he himself admitted in his evidence at p. 87 of the paper book that he had made no enquiry about Sughra Bibi's title, and the other defendants including Kamlapat Ram produced no evidence to show that they had made any such enquiry All who wish to take advantage of S. 41, T. P. Act, must be able to show that they have made an enquiry of this nature.

We consider that the appeal 159 of 1927 filed on behalf of defendants fails, and it is dismissed with costs The appeal of the plaintiff (2 of 1928) succeeds as against respondents 1 9 and the plaintiff will obtain possession of a two-thirds share in all the properties claimed by her, including the properties Nos. 6 and 8 in List A and 5, 7 and 9 in List A which have been accorded a different treatment by the Court below. On our finding that Sughra Bibi had no right to make any of these transfers, the reasons which led to the order of the lower Court have no longer any weight The plaintiff can obtain possession of properties 6 and 8 in List A without bringing a further suit for redemption, and of properties 5, 7 and 9 in List A without making any payment to the defendants named in the judgment of the lower Court.

As regards the plaintiff's appeal in respect of the property in possession of Kamlapat Ram respondent 10, the lower Court hold that the decision of the Judicial Commissioner's Court in the case between Mt. Sughra Bibi and Kamlapat Ram operated as res judicata, but it is admitted before us that if Mt Sughra Bibi had not an absolute estate but only a life estate without power of transfer that judgment could not operate as res judicata As we have shown above the respondent Kamlapat Ram cannot claim the benefit of S. 41, T. P Act, and this property also can be recovered in this suit by the plaintiff without payment.

The plaintiff will receive her costs in appeal No 2 of 1928 as against the defendants-respondents to the extent of the value of their interest in each case.

There remains only the appeal of the defendants in the suit relating to Daryapur village decided in favour of the plaintiff by the Additional Subordinate Judge. This is appeal No 108 of 1927 As we have now found that Mt Sughra Bibi was not an absolute owner and that there was no partition between her and Mohammad Hasan it follows that Mohammad Hasan could not transfer the share of Mt Sughra Bibi in the village of Daryapur and the plaintiff is entitled to recover a two-thirds share in that property as ordered by the Additional Subordinate Judge In this case the appellants cannot take advantage of S 41, T. P Act, because Mohammad Hasan was not even the ostensible owner of eight annas share in Daryapur, which always remained recorded in the revenue papers as being half in the possession of Mt. Sughra Bibi and half in the possession of Mohammad Hasan and his sisters. In our opinion the suit which gives rise to appeal No. 108 of 1927 was rightly decided by the lower Court and we dismiss the appeal with costs.

M N./R K *Order accordingly.*

A I. R 1929 Oudh 204

MISRA AND SRIVASTAVA, JJ

Moshuq Ali and *others* — Plaintiffs — Appellants

v

Hurunissa and *another* — Defendants —Respondents.

First Appeal No 152 of 1927, Decided on 1st October 1928, against decree of Sub-Judge, Mohanlalganj, Lucknow, D/- 24th August 1927.

(a) Practice — New plea — Plaintiff's pleader making statement at hearing—Case proceeding on that basis—Plaintiffs cannot in appeal raise plea inconsistent with it.

Where the plaintiffs' pleader made a statement just at the threshold of the trial before the defendants started cross-examination of the first witness for the plaintiffs and the whole trial thereafter proceeded on the footing of that statement, the statement must be considered to be explanatory of and supplementary to the pleadings of the plaintiffs and plaintiffs could not in appeal raise any plea inconsistent with it. [P 206 C 2 ; P C 207 1]

(b) Words —" Life estate " as such does not imply power to transfer for necessity.

There is no authority in support of the broad proposition that a life-estate holder as such has the power of making transfers for necessity. [P 207 C 2]

(c) Civil P. C., O. 6, R. 4—Custom.

Ordinarily a party should not be allowed to prove a custom different from that set up by him. [P 208 C 1]

(d) Civil P. C., O. 6, R. 4—Custom set up by party must be taken as a whole and not piecemeal—Pleadings.

Where plaintiffs set up a particular custom and the defendants in terms deny the custom set up by the plaintiffs and go on to plead a different custom, it is not permissible in such a case to split up the custom but the case as regards the custom set up either by the plaintiffs or by the defendants must be taken as a whole and not piecemeal . 6 *Beng. L. R.* 303, (*P. C*), *Appl.* [P 208 C 1]

(e) Evidence Act, S. 101—Negative necessary for proving title — Claimant must prove.

The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative, the party who avers a title cannot be absolved from proving it 9 *W. R.* 190, (*F. B*), *Foll.* [P 208 C 2]

(f) Custom — Widow succeeding as absolute owner and after her death, undisposed residue to go to husband's heirs— Custom is not unreasonable.

A custom under which the widow succeeds as an absolute owner but on her death any portion of the estate left undisposed of goes not to her heirs but to those of her husband is not unreasonable because the custom only amounts to this that her husband's heirs are regarded as her heirs to the property. [P 208 C 2]

(g) Deed—Construction — Ambiguities — Contemporaneous usages may be looked to.

One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed . *Attorney General* v. *Drummond*, (1842) 1 *Dr.* and *War.* 353, *Rel. on.* [P 210 C 1]

(h) Words—Ba-ikhtiar-malika.

The expression " ba-ikhtiar malika " was held to include the right of making transfer. [P 210 C 1]

(i) Wajib-ul-arz—Widow given power to adopt—She cannot he held to have no power to transfer—Custom

No inference about the widow's having no power of transfer can be drawn from the fact of her having been given the power of adoption in a Wajib-ul-arz. [P 210 C 1]

(j) Custom — Mahomedan of Ujarion — Widow holds husband's property with absolute power of transfer.

Among the Mahomedan inhabitants of village Ujarion, the widow has absolute power of transfer in respect of husband's property in her hands. [P 210 C 2]

H. Husain, *Aditya Prasad*, *Niamullah*, *K P. Misra*, *H N. Misra*, *A. C. Mukerji* and *Ganesh Prasad* — for Appellants

M. Wasim and *Nazirudddin*—for Respondents

Judgment —This is an appeal against the decision of the Subordinate Judge of Mohanlalganj at Lucknow, dismissing the plaintiff's suit for a declaration that the deed of gift dated 3rd June 1926 executed by Mt Hurun-nisa defendant 1 in favour of her brother, Khairat Nabi defendant 2 :

" shall be void and unlawful after the death of defendant 1 and shall have no effect on the reversionary rights of the plaintiff. "

The admitted facts are that Dildar Ali, husband of defendant 1 was the owner of the property in suit. He died about 11 or 12 years ago and on his death defendant 1 came in possession of the entire property according to the family custom. Both parties are agreed that succession in the family of Dildar Ali is governed by custom and not by the Mohamedan law. The point of differences between them is the nature of the custom. According to the plaintiffs the widow gets only a life estate and the property on her death passes to the husband's reversioners. The defendants, on the other hand, contend that

the widow succeeds as full owner. So the only point which arose for decision in the case was embodied in a single issue which was framed in the following terms.

Whether there is a prevailing custom in the family of the plaintiffs and the defendants under which the widow gets only a life estate on the death of her husband ?

The learned Subordinate Judge after a careful examination of the entire evidence, oral and documentary, produced by the parties has decided the issue against the plaintiffs-appellants Before we enter into a discussion on the merits of the finding it would be convenient to dispose of a few preliminary matters which have been raised in the course of arguments. The learned counsel for the parties have addressed elaborate arguments on the pleadings as regards the family custom The necessity for these arguments arose because the learned counsel for the plaintiffs admitted that he was unable to substantiate the custom in terms of the statetment made by the plaintiffs' pleader in the course of the trial of the suit. He therefore wanted to confine himself to a custom more limited in scope which he claims to have been established on the evidence adduced in the case He also claims that the custom as put forward before us is not inconsistent with the pleading in the trial Court and in any case he has tried to justify the variation sought to be introduced by him by contending that the defendants have also shifted their position The line of argument adopted before us as indicated above made it necessary for us to record the statement of the learned counsel for the parties regarding their respective cases about the custom in question.

Before we refer to those statements it seems necessary to examine the pleadings in some detail The plaintiffs in para 6 of their plaint said :

"that according to the custom obtaining in the family of the parties the widow of a childless person has power to remain in possession and occupation of her husband's property for life only and that after the demise of the widow the nephews and brothers of her husband become the absolute owners of the property irrespective of exclusion from inheritance and nobody is deprived from inheriting on account of being excluded from inheritance (mahjubul-irs). "

The reply given to this by the defendants in the corresponding paragraph of their written statement was :

" Only this much is admitted that according to the family custom in the village, the Mohamedan law is not followed in respect of the exclusion from inheritance. The custom mentioned in this paragraph is not admitted , and the rest of the contents is wrong. "

Paragraphs 10, 11 and 12 of the additional pleas are as follows .

" 10. The custom set up by the plaintiffs is not admitted. It is quite wrong that the widow gets possession of the husband's assets for life only.

"11. According to the family custom of the parties as well as of the village the childless widow becomes the absolute owner of the entire assets of her (deceased) husband and enters into proprietary possession and occupation thereof. "

12. The parties to the suit and the inhabitants of village Ujariou are the descendants of a common ancestor and all the widows who have up to this time got possession of their husbands' assets since the *shahe* time have been all along in proprietary enjoyment thereof and have been mortgaging and selling their husband's properties. No objection has ever been taken on account of the custom mentioned in para. 11. On the other hand the ancestors of the plaintiffs themselves having admitted the proprietary rights of the widows have got many sale deeds executed in their favour. "

On 19th April 1927 when the issue was framed the counsel for the plaintiffs stated that

"the family custom is that the widow gets only life interest in the husband's entire estate. The custom is ancient and immemorial."

This was followed by a statement of the defendants' pleader to the effect that "the only defence of both the defendants is that the family custom is that the widow succeeds as full owner to the entire estate of the husband."

These pleadings show beyond any doubt that the custom set up by the plaintiffs was that the widow succeeds to a life estate on her husband's death and that the defendants traversed this allegation and pleaded that the widow succeeds as full owner. It is worthy of note that beyond the implication contained in the use of the words "life interest" the plaintiffs did not say anything specific about the powers of transfer possessed by the widows Evidently the defendants or the Court felt some misapprehension about the matter and we find that just after the examination in chief of the first witness examined by the plaintiffs had been completed the Court recorded a statement of the pleader for the plaintiffs The pleader stated :

"that the widow cannot make valid transfer whether there be or not any necessity (including what is called legal necessity under the Hindu law)."

The learned Subordinate Judge in his judgment stated the case of the parties as placed before him in arguments in the following terms:

"It is common ground between the parties that in the matter of succession they are governed not by the rules of Mahomedan law, but by custom. According to the plaintiffs the widow takes only a life-estate without any right to transfer the property whether with or without what is called legal necessity; while the defendant's case is (1) that the widow becomes the absolute owner and (2) that even if she succeeds to a life-estate, she has full power to transfer the property. In arguments the first position has not been pressed on behalf of the defendants. They take their stand on the alternative case, viz., that though the widow gets a life estate she has full power of transfer and on her death what is left undisposed of goes to the husband's collaterals."

The position taken up by the learned counsel for the parties in the arguments addressed to us will be clear from the statements made by them which we reproduce below

Mr Haider Husain on behalf of the plaintiffs appellants stated:

"that the custom prevailing in the family of Muhammad Hayat to which belonged Dildar Ali with whose estate we are concerned in this case is as follows:

"The widow of a childless person has power to remain in possession and occupation of her husband's property for life only and that after the death of the widow the collaterals of the husband succeed to the property. With regard to the power of transfer possessed by the widow, the custom is that the widow is entitled to make a transfer for purposes justifiable by legal necessity, for instance payment of husband's debts, meeting expenses of marriage of the daughter of the last male holder, if any, her own maintenance and objects of a similar nature. She has under no circumstances power to make a gift or a will or other transfers without necessity."

Mr Wasim, counsel for the defendants respondents stated that:

"according to the family custom the widow succeeds as an absolute owner with full power of enjoyment and transfer. But if she dies without making any transfer or bequest the collaterals will succeed to the property left by the widow instead of the heirs of the widow herself."

It will be apparent from the facts as stated above that the case set up by the learned counsel for the plaintiffs is not only materially different from the case as it was set up in the Court below but is directly contrary to the statements made by the plaintiff's pleader before the commencement of the cross examination of their first witness. It has been urged on behalf of the plaintiffs that the only case set up by them in the pleadings was that the widow succeeded to a life interest and "widow succeeds as full owner to the entire estate of the husband." that this should be taken to imply that she can make a transfer in cases of legal necessity. As regards the statement made by the plaintiff's pleader on the date when the evidence began it is said that it cannot be regarded as a part of the pleadings and that in spite of it it is permissible for the plaintiffs to take up the position which they seek to adopt in appeal as at best it amounts to nothing more than their adopting a part of the defendant's case.

We find ourselves unable to accept any of the above arguments. As remarked by Lord Cairns in *Browne* v. *Mc Clintock* (1)

"the first object of pleading is to inform the persons against whom the suit is directed, what the charge is that is laid against them."

It is true that "pleading" has been defined in O. 6, R 1, Civil P. C to mean plaint or written statement and therefore the statement made by the plaintiff's pleader cannot be considered to be pleading in the strict sense of the term but O. 6, R 4, of the Code, requires that in cases in which particulars may be necessary they should be stated in the pleading and under O 6, R. 5, the Court can order further and better particulars of any matter to be stated in any pleading. In *Milbank* v. *Milbank* (2) at p 385, Vaughan Williams, L J., observed as follows :

"At different times in the history of proceedings at law and in equity particulars have been allowed for different reasons. Sometimes particulars have been allowed in order that there might not be a surprise at the trial. Sometimes they have been allowed as limitations of the claim, whether of the plaintiff or of the defendant, to limit the extent of the evidence to be given at the trial. But under the Judicature Act particulars are allowed for quite a different purpose ; they are really supplemental to the pleadings."

The statement was made by the pleader just at the threshold of the trial before the defendants started cross examination of the first witness for the plaintiffs The whole trial thereafter proceeded on the footing that the plaintiffs did not set up any case about the widow's hav-

(1) 6 E. & I. App. 459.
(2) [1901] 1 Ch. 376=69 L. J. Ch. 287—48 W. R. 339=82 L. T. 69.

ing any power of transfer in cases of legal necessity. We are therefore of opinion that the statement of the pleader must be considered to be explanatory of and supplementary to the pleadings of the plaintiffs regarding the custom S. 58, Evidence Act, provides that no fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agreed to admit by any writing under their hands or by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. The object of the statements made by the pleader clearly was to waive controversy as regards the widows having any limited power of transfer in cases of necessity After the statement had been made it became unnecessary for the defendants to question the plaintiffs' witnesses in order to show that no necessity existed in the case of transfers by widows relied upon by them or to examine any witnesses in proof of it It would under the circumstances be most unfair to the defendants to allow the plaintiffs to start this surprise on them in appeal more particularly when they by their express statement lulled them into the belief that they did not mean to take up any such position The unfairness of allowing the plaintiffs to set up this new case has been forcibly brought home to us by the fact that during the review of the entire evidence by the counsel for the parties we have failed to find any evidence one way or the other in respect of legal necessity in any except two out of the 56 instances of transfers by widows which have been sought to be proved by the defendants The plaintiff's counsel seeks to build up his case by asking us to make presumptions of fact and the defendant's counsel in his turn seeks to answer the arguments by invoking the aid of counter presumptions It is obvious that on questions of fact of this nature it would be a most unsatisfactory method to make conjectures and surmises on matters which were fully capable of proof but on which no proof has been given by either party.

It is not correct for the learned counsel for the plaintiffs to say that the plea raised by them about the widow having a life-interest necessarily implies that she has the power to make transfers for legal necessity He has failed to refer us to any authority in support of the broad proposition that a life-estate holder as such has the power of making transfers for necessity. He simply relies upon the analogy of cases of Hindu widows. The present case relates to a Muhammadan family and if the plaintiffs intended to allege that widows in the family have under custom the same powers as those possessed by the Hindu widows it was their duty to set up such a case in explicit terms.

The plaintiffs also cannot derive any help from the alleged change made by the defendants in their case. In the first place it is a truism that two wrongs cannot make a right. Secondly we do not agree with this contention that the defendants have been guilty of shifting their position The plaintiffs have failed to point to any statement by or on behalf of the defendants admitting that the widows succeed to a life estate. They have all along consistently maintained that the widows succeed as absolute owners with power of transfer. When the learned Subordinate Judge says in his judgment that the defendant's case was (1) that the widow becomes the absolute owner and (2) that even if she succeeds to a life-estate she has full power of transfer but that on her death what is left undisposed of goes to the husband's collaterals we think that the second alternative as put by him is only a free paraphrase of the defendant's position as undertook by him. As a matter of fact for all practical purposes there is hardly any difference between a life estate with full powers of transfer and an absolute estate when in either case the undisposed of residue is to go to the husband's reversioners.

Further we are of opinion that the case being one based upon the existence of a custom the party setting it up must be required to adhere to the form of it as set up in the pleadings more rigidly than in a case based on different grounds. We do not mean to lay down that it is impossible to conceive of cases in which it might transpire on the evidence adduced by both parties that the custom which really exists is one more limited in its scope than the one set up and that the Court in such cases if no prejudice is made out cannot give a finding in favour of the limited custom as proved but all that we mean to say is that ordinarily a

party should not be allowed to prove a custom different from that set up by him. We are therefore of opinion that the plaintiffs cannot be allowed to resile from the case set up by them in the trial Court and must adhere to the custom as set up in that Court

Next it has been argued that the onus lies on the defendants to prove that the widows possess the power of transfer The argument is that it is common ground between the parties that succession in the family is governed by custom The plaintiff's case is that the widow succeeds for life without power of transfer. It is alleged that the defendant's case, as it was also understood by the learned Subordinate Judge is that they admit the life estate but further plead that she has the full power of transfer So the plea must be taken to be one in confession and avoidance and therefore the defendants must prove the power of transfer. We have already held that the defendants never admitted that the widows succeed only to a life estate But apart from it we have no hesitation in holding that the case is not one of a plea in confession and avoidance but what is technically called an argumentative traverse. The plaintiffs set up a particular custom The defendants in terms deny the custom set up by the plaintiffs and go on to plead a different custom. It is not permissible in such a case to split up the custom as the plaintiffs would wish to do The case as regards the custom set up either by the plaintiffs or by the defendants must be taken as a whole and not piecemeal. In *Raja Chandranath Roy* v. *Ramjai Muzumdar* (3), at pp. 307 and 308) their Lordships of the Privy Council remaked as follows :

" Now, it is obvious that this issue, in substance, is this : Is the plaintiff's story, stated in his plaint, true, or is the defendant's story, stated in his answer, true ? It is, of course, a possible thing that neither of the stories may be true, and the question then arises, which of these two alternatives of the issue is the really material one ? Their Lordships think that the really material one is the first part of the issue, viz., is the plaintiff's story true ? It is not as if the defendant's story is true. It is not as if the defendant's defence was, as we should say in the Common Law, a plea in confession and avoidance, a plea which admitted that the plaintiff's story was true, and then avoided it. If that had been the case, and the defendant had failed to prove his case, of course the defendant must have failed, and the plaintiff ought to recover. But it is substantially what at Common Law we should call an argumentative traverse of the truth of the plaintiff's story, for it does not admit that one word of it is true, but sets up certain things perfectly inconsistent with it."

These remarks fully apply to the present case

It has been further contended that the general rule is that onus lies on the party setting up the affirmative. It is said that the defendants' affirmative case is that the widows have the power of transfer and the plaintiffs only deny it So the plaintiffs should not be called upon to prove the negative proposition This argument is fallacious In *Poolin Beharee Sein* v. *R Watson & Co* (4) Sir Barnes Peacock C. J., delivering the judgment of the Full Bench remarked as follows :

" The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove the title."

Therefore assuming that the case as set up by the plaintiffs involves proof of the negative of facts the plaintiffs cannot be absolved, from proving them.

It was also faintly argued on behalf of the plaintiffs that the custom relied upon by the defendants, namely, that the widow succeeds as an absolute owner but that on her death any portion of the estate left undisposed of goes not to her heirs but to those of her husband is unreasonable. It is said that under no system of law one absolute estate can be followed by another absolute estate and so the custom being opposed to basic principles of law and being one creating an estate unknown to any system of law must be rejected as being unreasonable The fallacy of this argument lies in its overlooking the fact that the essence of a custom is that it is in derogation of the ordinary law. The custom only amounts to this that the widow succeeds as an absolute owner and that on her death the property held by her as such goes to her husband's heirs, in other words, her husband's heirs are regarded as her heirs to the property We do not consider that such a rule of succession is unreasonable. Some analogy for such a rule can be found in the rule of succession relating to stridhan property under the Hindu Law.

Having disposed of the preliminary points we now proceed to deal with the

(3) 6 B. L. R. 303=15 W. R. 7=2 Sar. 613 (P.C.).

(4) 9 W.R 190, B. L. R. Sup. Vol. 904 (F.B.).

question of custom on its merits. The evidence in support of the custom consists of : (1) wajib-ul-arz ; (2) judicial decisions; (3) opinions of persons possessed of special means of knowledge and (4) instances. We will discuss each class of evidence in the order given above

1. *Wajib-ul-arz.*—The plaintiffs rely on two wajib-ul-arz, namely Ex. 3 B-56, the wajib-ul-arz of Ujarion and Ex 4, the wajib-ul-arz of Babu Sarai. The last-mentioned wajib-ul-arz may be disposed shortly. No reliance was placed upon it in the lower Court. In our opinion it is quite irrelevant. The plaintiffs have entirely failed to prove the connexion between the family of the parties and that of the zamindars of Babu Sarai. Reference has been made to the Gazetteer of the Lucknow District, p 267. It is stated there with reference to the first Mussalman invaders who conquered the village from the hands of a Bhar chieftain that after the victory,

"a few days later he was surprised and slain with all his comrades by the brother of the dead chief, while engaged in prayer during the Id festival."

The sole survivor was a woman Ujiali "who was then living with her infant son, Ghiasuddin at her father's house in Bado Sarai of Bara Banki."

There is no evidence to show that the zamindars of Bado Sarai who held the village at the time of the first regular settlement when the wajib-ul-arz was prepared were descended from the same stock as the father of Ujiali but even assuming that they are descendants of the same stock it is obvious that their family is quite different from the family of the zamindars of Ujarion. At best the relation between the two families can be only a very remote one by marriage This wajib-ul-arz must therefore be rejected

The relevant portion of the wajib-ul-arz of Ujarion is a follows :

"In this village the rule of division of inheritance is this. that on the death of a co-sharer his sons become the owners (malik) of heritage in equal shares : daughter shall not get share in presence of son. In case there is no son but there is daughter only then she shall become the owner (malik). In such a case brother and nephew shall not be the owners in presence of daughter i e., in presence of male issue, female issue shall not be the owner (malik) but if there be no male issue and there is a female issue, then the female issue shall get the share. If the deceased co-sharer has got two or several legally wedded wives and there are different numbers of issues from each wife then division of inheritance shall take place in this way that the one son from one wife shall get half share and two sons from the other wife shall get equal share in the other half. In case the deceased co-sharer has left no male issue, then on his death his wife shall come in possession with the power of a proprietor (ba-ikhtiar malikana qabiz hogi) and on her death her daughter shall come in possession of the heritage left by mother as well as that by her father. In case there be not even the female issue then on the death of the widow brother and nephew of the deceased cosharer shall become the owner (malik) subject to the rules of inheritance. The widow has got power to adopt any one she likes."

The plaintiff's contention is that whereas the son, the daughter and the collaterals have been described as malik the language used in the case of the widow is different, she is described as entitled only to possession with the powers of a proprietor (ba-ikhtiar malikana qabiz hogi). Emphasis has also been laid on the fact that on the death of the widow there is reversion in favour of the collaterals and that she has been given a power of adoption It has also been argued that the word "malik" as used in a wajib-ul-arz in Oudh should not be construed in the same sense as it would be when used in a deed or will and that in any case the words "ba-ikhtiar malikana" only imply that she is to remain in exclusive possession like a son but do not mean that she has absolute powers of transfer The learned counsel for the defendant-respondents on the other hand, contends that the words "ba-ikhtiar malikana" are more specific and expressive than the word "malik." In *Sartaj Koer* v. *Mahadeo Bakhsh* (5) a Bench of this Court has held that the word "malik" as used in wajib-ul-arz should receive the same interpretation as has been put upon it by their Lordships of the Privy Council in cases where the word had been used in deeds or wills. In the present case it is not necessary for us to commit ourselves to any definite opinion on this point. It is enough to say that while there is room for argument as regards the meaning of the word "malik" as used in the wajib-ul-arz the interpretation of the words "ba-ikhtiar malikana qabiz hogi" is beset with greater difficulties. We agree with the learned Subordinate Judge that the interpretation of the words "qabiz ba-ikhtiar malikana" is by no means free from ambiguity The maxim, *contemporanea expositio est*

(5) A. I. R. 1926 Oudh 332=29 O. C. 153=1 Luck. 120.

fortissima in lege, will apply to such a case. The rule contained in this maxim has been applied even to the interpretation of statutes: see Norton on Deeds, p 141 There is no reason why the rule should not be invoked in aid of the interpretation of the wajib-ul-arz Lord Sugden in the well-known passage in *Attorney-General* v. *Drummond* (6) at p. 368 said :

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed ; tell me what you have done under such a deed, and I will tell you what that deed means."

Fortunately in this case there is a mass of evidence showing a long course of conduct of the declarants of the wajib-ul-arz and of other cosharers We think that evidence relating to the acts and conduct of these persons is admissible as affording a clue to the intention of the framers of the wajib-ul-arz The wajib-ul-arz was written at the dictation of six cosharers, namely Ahmad Ali, Salar Bakhsh, Najatulla, Rahim Bakhsh, Pir Bakhsh and Ghulam Husain We have no evidence regarding the first two but as regards the others there is considerable evidence showing that they accepted transfers from widows and attested deeds of transfer executed by them in favour of others (The judgment then narrated the several deeds of transfer and proceeded.) In our opinion the conduct of the various persons who dictated the wajib-ul-arz and of other members of the family in freely obtaining deeds of transfer in their favour and in recognizing the transfers made in favour of outsiders leaves no room for doubt that they understood the custom to invest the widows with full power of transfer. In view of this we construe the expression "ba-ikhtiar malika" as including the right of making transfer.

As regards the power of making adoption given to the widows it can in this case amount to nothing more than a power of appointment. It may be superfluous but it cannot be considered inconsistent with the absolute estate. Very often we find provisions in wajib-ul-arz which overlap each other. It would not be reasonable to expect wajib-ul-arz to be drawn up as artistically and carefully as one might expect in the case of a deed or statute. We cannot, therefore, draw any inference about the widow's having no power of transfer from the fact of her having been given the power of adoption. For these reasons we hold that on a proper construction of the wajib-ul-arz as a whole and in the light of the interpretation placed upon it by the declarants and the members of the family the widow possesses absolute powers of transfer (The judgment then discussed the judicial decisions, opinions of persons with special means of knowledge and instances and concludes as follows) To sum up We find an unbroken record of instances of transfers by widows. These transfers are not only in the shape of mortgages and sales but also gifts and wills. Most of them are in favour of cosharers The documents relating to these transfers show that the widows have throughout been making these transfers as of right. Except in two cases the widows in no other case made any mention of any necessity for making the transfers though recitals of such necessity are very usual in case of transfers made by limited owners. The cosharers and reversioners have always acquiesced in these transfers It is most significant that there is not a single instance of any protest or challenge by any reversioner. In 1890 when in a litigation in Court the widow's was set up it was not only not disputed but the right was admitted The overwhelming evidence furnished by these instances is supported also by the evidence of a number of witnesses who have special means of knowledge and is also fully consistent with the terms of the wajib-ul-arz The instances no doubt are of varying degrees of importance but when we take into consideration the cumulative effect of the entire evidence and the fact that the various lines of evidence all converge to the same point we feel overborne in favour of the view that the widows must be held to possess absolute powers of transfer. We have, therefore, no hesitation in agreeing with the finding of the learned Subordinate Judge The result is that the appeal fails and is dismissed with costs.

D D *Appeal dismissed.*

(6) [1842] 1 Dr. & W. R. 353=2 Id. 98=1 Cox. & L. 210=3 Id. 162.

A. I. R. 1929 Oudh 211

MISRA AND PULLAN, JJ.

Paran Kuer—Plaintiff—Appellant.

v

Manni Lal and *another* — Defendants —Respondents

First Appeal No. 165 of 1927, Decided on 8th November 1928, against order of Addl. Sub-Judge, Fyzabad, D/- 28th September 1927.

Civil P. C., O. 23, R. 3—Pleader confessing judgment on party's behalf — Court passing consent decree thereon must be presumed to have enquired as to his authority to confess—Legal Practitioner.

Where a consent decree is passed by a Court on confession of judgment by a party's pleader it must be assumed that the Court must have satisfied itself before the passing of the consent decree that the pleader confessing judgment had authority on behalf of the party to act in the manner in which he did. The person challenging the authority must prove to the contrary by positive evidence. [P 212 C 2]

Niamatullah and *Naimullah* — for Appellant

A P. Sen, *B. N Roy*, *Rajeshwari Prasad* and *Raj Bahadur Srivatsava*— for Respondents.

Judgment —This is an appeal from a judgment and decree passed by the Additional Subordinate Judge of Fyzabad dated 28th September 1927 dismissing a declaratory suit. The facts of the case are that the respondent Manni Lal Nanha Lal Gandhi obtained a decree for sale from the High Court of Bombay in 1913 against one Dr. Shiam Sabal Sita Ram Misir. The doctor was a resident of the Fyzabad District and was practising in Bombay. He owned a village named Bansgaon in the District of Fyzabad and a share in village Ahmadabad, District Barabanki On 25th October 1911 he executed a mortgage for Rs. 3,000 in favour of the above named Manni Lal Nanha Lal Gandhi On 18th February 1912 he executed another mortgage for Rs. 7,000 in respect of the share in village Ahmadabad in favour of the same person. On 21st August 1913 the mortgagee instituted a suit on the original side of the Bombay High Court for recovery of the money due to him under the aforesaid two deeds of mortgage and a consent decree was passed by the said High Court in his favour on 16th September 1913

Dr. Shiam Sabal died in June 1914 leaving behind his widow Mt. Paran Kuer, the appellant before us, who was the plaintiff in the Court below. The preliminary decree for sale was made absolute on 18th February 1915. The plaintiff mortgagee after having obtained the final decree got his decree transferred to Fyzabad and put it in execution. In the sale held in execution of the decree defendant-respondent 2, Babu Sidh Gopal Singh, purchased the village Bansgaon and has also taken possession of it as auction-purchaser.

The suit out of which the present appeal has arisen was brought by Mt. Paran Kuer, the appellant, in the Court of the Subordinate Judge of Fyzabad on the main allegation that she is not bound by the decree for sale passed by the Bombay High Court because it was obtained fraudulently by the defendant-respondent Manni Lal Nanha Lal Gandhi, inasmuch as no notice was served upon her when the decree was made absolute by the Bombay High Court on 18th February 1915 It was alleged that a false affidavit was filed by the clerk of the attorney of the defendant-respondent who was plaintiff decree-holder in the suit brought in the Bombay High Court to the effect that notice had been served upon the plaintiff appellant whereas no such notice has actually been served on her. The validity of the preliminary decree passed against Dr. Shiam Sabal by the High Court on 16th September 1913 was also challenged by the plaintiff-appellant on the ground that the attorney who was engaged by Dr. Shiam Sabal has no authority to confess judgment and it was fraudulent on his part to have instructed the advocate, engaged by the said attorney to represent Dr. Shiam Sabal before the Bombay High Court. to confess the claim In short the validity of both the preliminary decree and the final decree is challenged on the ground of fraud..

It is, therefore, contended by the plaintiff-appellant that the sale held in execution of such a decree is bad in law and confers no title on the defendant-respondent 2. The plaintiff-appellant therefore prays that the aforesaid decrees for sale passed by the Bombay High Court be set aside and so should also the sale held thereunder, and that the plaintiff-appellant should be given possession over the village Bansgaon situate in the District of Fyzabad. The plaintiff, Mt. Paran

Kuar, has sold a portion of her claim to one Permushore Dat Shukul, also a resident of Fyzabad who joined her as plaintiff 2. He died during the pendency of the suit and his sons were brought on the record in his place as plaintiffs 2 to 6.

The defence raised by defendants 1 and 2 is practically the same and is to the effect that the consent decree was a valid decree having been obtained by defendant 1, Manni Lal Nanha Lal Gandhi, against Dr Shiam Sabal on proper confession of judgment by the advocate who represented Dr. Shiam Sabal before the High Court at Bombay. As to the decree absolute it was denied that there was any fraud practised by him (defendant 1). It was contended that the notice of the application for making the decree absolute was sent to Mt. Paran Kuar, the appellant, through the post office and was actually served upon her and consequently the decree was quite valid. The sale held in execution of the decree was, it was urged, quite proper and regular and defendant 2's title could not be assailed

The two main points among other points for trial in the Court below were, firstly, whether the preliminary decree, passed by the High Court at Bombay by consent of the defendant in that suit, was a valid decree or whether it was obtained fraudulently; secondly, whether the final decree for sale was obtained after giving due notice to the appellant Mt. Paran Kuar, or whether it was also obtained fraudulently. The learned Additional Subordinate Judge of Fyzabad, to whose Court the suit was sent for trial, held that the preliminary decree obtained by consent was a valid decree and could not be challenged, that the final decree for sale was also good and could not be said to have been obtained fraudulently though he held that it was not proved to his satisfaction that the notice of the application to make the said decree absolute had been given to Mt. Paran Kuar. On these findings he held that the sale in favour of defendant 2 was good and could not be challenged and in result he dismissed the plaintiff's suit.

In appeal both the points have again been contested before us; on behalf of the respondents objection has been taken as to the accuracy of the finding arrived at by the lower Court on the question of service of notice on Mt. Paran Kuar in regard to the application for making the decree absolute. We have, therefore, to decide two points, namely :

(1) Whether the consent decree is valid ; and

(2) Whether notice of the application making the decree absolute was served upon the plaintiff-appellant Paran Kuar ; if not, whether it would make the decree absolute and the sale held thereunder, void and inoperative.

We now proceed to give our decision on both these points As to the first point it has been contended by the learned advocate for the appellant that the summons of the original suit was served upon Dr Shiam Sabal on 6th September 1913 and on 9th September 1913 a warrant was lodged in the Bombay High Court by the said Doctor addressed to the Prothonotary, High Court, Bombay, to the effect that he intended to defend the suit brought by Manni Lal Nanha Lal Gandhi and had appointed Messrs. Dhunji Shah and Batliwalla as attorneys for the purpose (vide plaintiffs' Ex. 13). It is contended that this document proves that Dr. Shiam Sabal intended to contest the suit and he never instructed his attorneys to confess judgment before the High Court at Bombay No evidence has, however, been led on the point The above-named attorneys have not been examined on behalf of the plaintiffs in support of this allegation. The contention put forward on behalf of plaintiffs is merely to the effect that the Doctor could not have instructed his attorneys to confess the judgment since such a position would be against the tenor of Ex 13. It was also urged that the defendants in the present case had given no evidence to prove that the Doctor had ever authorised the attorneys to confess judgment. We are unable to accept this argument. In our opinion there is a presumption attaching to the proceedings of the High Court at Bombay that they were properly and regularly held. It must be assumed that the Court must have satisfied itself before the passing of the consent decree that the person confessing judgment had authority on behalf of the defendant in that case to act in the manner in which he did. We refrain from presuming that the proceedings were irregular. It was in our opinion incumbent on the plaintiff-appellant to prove this by positive evi-

dence if this was fact. No evidence having been led on the point the presumption remains unrepudiated. As to the argument based on Ex. 13 it appears to us sufficient to state that although, on 9th September 1913 Dr Shiam Sabal no doubt declared his intention that he intended to defend the suit yet it is quite possible that subsequently, on advice given to him he changed his mind and might have thought it proper not to defend the suit but to confess judgment. We, therefore, hold that the preliminary decree passed by the High Court at Bombay on 16th September 1913 is a valid decree and the plaintiffs-appellants have failed to establish that it is vitiated by fraud

As to the second point we have heard the parties at great length and gone through the entire evidence on the record, both documentary and oral. We regret to observe that on a consideration of the entire evidence on the record we have come to a different conclusion from that arrived at by the learned Additional Subordinate Judge. In our opinion the service of the notice of the application, to make the decree absolute, on Mt. Paran Kuar, has been established and no question of the invalidity of that decree on the ground of its being a fraudulent decree can possibly be maintained. The original postal acknowledgment purporting to bear the signature of Mt Paran Kuar has been filed in the case. It is Ex. A 8 and formed part of Ex. B15 on the record of the original suit brought in the Bombay High Court. This document is proved by the evidence of the defendant Manni Lal Nanha Lal Gandhi who was examined in the case as D. W 6 and swears on oath that this was the acknowledgment which was received by him through the post office According to him the acknowledgment was in regard to a notice of the application, filed by him in the High Court at Bombay for the passing of the final decree, which was served upon her and other defendants in the case.

Two objections have been urged against the genuineness of this postal acknowledgment. One is to the effect that it does not bear the postal mark of Fyzabad and consequently it cannot be said that it has reached the appellant, Mt. Paran Kuar, who is resident of the District of Fyzabad. The other objection is to the effect that this acknowledgment does not bear her signature since it appears to be written as " Paran Kor " and not " Paran Kuar " which is her actual name. We have considered both these objections and it appears to us that none of them has any substance

As to the first objection it would be enough to observe that sometimes postal acknowledgments do not bear the seal of the post office of delivery, although as a rule they do. (The judgment discussed evidence as to these two objections and concluding against appellant in respect of both proceeded) We might state that in our opinion there is a presumption under S 114, Evidence Act, that the letter which was posted at Bombay, which fact is established by the evidence of D W. 6, and which contained a notice to Mt. Paran Kuar of the application to make the decree absolute must have in the ordinary course of business reached her, until shown to the contrary. We also feel that the proceedings of the Bombay High Court must also be presumed to have been held in a regular way. The High Court must have satisfied itself that the notice of the application was really served upon the appellant Paran Kuar It is no doubt open to her to show that she never received such notice. The attempt was made by her but we must say she has hopelessly failed in the attempt.

We, therefore, hold that the notice of the application to make the decree absolute which was sent to Mt. Paran Kuar by the attorneys of defendant 1 was served upon her and that the decree absolute dated 18th February 1915 is valid and binding upon her. No question of fraud under the circumstances arises in the case We, therefore, dismiss this appeal with costs

D D *Appeal dismissed.*

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* A. I. R 1929 Oudh 213

RAZA, J.

Suraj Prasad—Accused—Applicant

v.

Emperor — Complainant — Opposite Party.

Criminal Revn No. 131 of 1928, Decided on 2nd February 1929, against order of Sess. Judge, Hardoi, D/- 8th December 1928.

*** Penal Code, S. 411—Circumstances convincing of stolen nature of property are necessary for S. 411—Word "believe" therein is stronger than "suspect."**

The word "believe" in S. 411 is stronger than the word "suspect" and involves the necessity of showing that the accused must have felt convinced in his mind that the property with which he was dealing was a stolen property. Mere carelessness, or omission to inquire, or existence of reasons to suspect are not sufficient grounds to accuse him. 6 *Bom.* 402, *Foll.*

K. P. Misra—for Applicant.

Government Advocate—for the Crown

Judgment—This is an application in criminal revision A bullock belonging to one Chhotey Lal was found missing on 15th February 1928 It was traced on 21st February 1928 in the Rawalpur bazar in the possession of one Sher Khan Banjara Sher Khan's case was that he had purchased the bullock from Tika Ram of Laknor. The matter was reported to the police and the result was that Tika Ram and Suraj Prasad were sent up for trial Tika Ram was charged under S. 411, I P. C, and Suraj Prasad under S. 414, I. P C. The defence of Tika Ram was that he had purchased the bullock from one Ram Lal under a receipt His defence was not accepted by trial Court His appeal also was dismissed by the learned Sessions Judge of Hardoi. The defence of Suraj Prasad was that he knew Tika Ram and so he identified him (Tika Ram) at the time the bullock was sold to Sher Khan He said that he did not know that the bullock belonged to Chhotey Lal or that it was stolen property He stated further that the bullock was in the possession of Tika Ram and that he had simply identified Tika Ram the vendor at the time of sale. His defence also was not accepted by the trial Court His appeal was also dismissed by the learned Sessions Judge of Hardoi on 8th December 1928

He filed the present application for revision in this Court on 20th December 1928 I think this application should be accepted. So far as I see, there is no reliable evidence on the record to prove that Suraj Prasad applicant knew or had reason to believe that the bullock was stolen property. Jan Mohammad (P.W. 4) and Sher Khan (P W 6) are the only witnesses with respect to Suraj Prasad's case. The charge is not made out against Suraj Prasad on their evidence There is nothing in their evidence to show that Suraj Prasad knew or had reason to believe that the bullock was stolen property. As pointed out in the case of *Empress* v. *Rango Timaji* (1), the word "believe" in S 411, I P C, is much stronger than the word "suspect" and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property It is not sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been dishonestly (honestly ?) acquired As there is nothing to show that Suraj Prasad knew or had reason to believe that the bullock was stolen property, he cannot be legally convicted under S 414, I. P. C, Hence I accept the application, set aside the conviction and sentence and direct that Suraj Prasad be acquitted. He is on bail. The bail bond will be discharged.

P.D /R K *Application accepted*

(1) [1881] 6 Bom. 402.

A I. R. 1929 Oudh 214

STUART, C J, AND RAZA, J.

Sheo Bahadur Singh and *another*—Plaintiffs—Appellants.

v

Naubat Singh and *others*—Defendants—Respondents

Second Appeal No 158 of 1928, Decided on 2nd October 1928, against decree of Addl Dist, Judge, Gonda, D/- 20th January 1928

Transfer of Property Act, S. 60—Mortgagor and Mortgagee—Mortgagor executing two successive mortgage-deeds—Intention to pay both debts together—Mortgagor suing for redemption on first deed only—Mortgagee contending that redemption should not be allowed until other debt also paid—Court holding that two debts were not consolidated and decreeing redemption—Decision was binding on parties and time against second deed accrued when debt became payable and not when redemption money on first deed was paid—Lim. Act, Art. 132.

A mortgagor executed two successive mortgage-deeds in favour of the mortgagee, and it was intended that both the debts should be paid together. Mortgagor sued for redemption on the first deed only. Mortgagee contended that the redemption should not be granted until the debt on the other deed also was

paid. The Court held that the two mortgages had not been consolidated and decreed the redemption. In his suit on second deed the mortgagee contended that time accrued for his second deed only when redemption money on first deed was paid.

Held: that the decision of the Court in that suit was binding on the parties and as regards the other mortgage-deed time began to run only when the debt became payable according to the terms of the deed and not when money was paid in the redemption suit on the first deed. [P 215 C 1]

Radha Krishna—for Appellants.

Kashi Prasad—for Respondents.

Judgment.—The mortgagors executed two deeds One was dated 9th June 1882. It was a deed of usufructuary mortgage mortgaging certain land with possession. The second was a deed of simple mortgage with which we are now concerned. It is dated 23rd December 1886. Under this deed the mortgagors agreed to repay the principal and interest within 15 years and six months. The reason for fixing this particular period was that under the terms of the first deed redemption could not take place till 9th June 1902 and it was the intention of the parties that both deeds should be paid off together. The mortgagors brought a suit for redemption of the first deed only, and in that suit the present plaintiffs-appellants who are the mortgagees put forward a claim that redemption should not be permitted until the amount due on the present deed was also paid off. That contention was, however, repelled by the Courts and it was finally decided by Mr. Dalal, Judicial Commissioner, in *Buniyad Singh* v. *Naubat Singh* (1), that the mortgagors could redeem the first deed without paying up the amount due on the second The learned Judicial Commissioner found that there had been no consolidation The parties are bound by that decision. The case for the appellants here is that as the money was paid in the redemption suit on the first deed in the year 1926, the period for limitation in the present suit did not arise till 1926. We are unable to accept this view. To us it is clear that the period of limitation for the present deed accrued on 23rd June 1902, and the suit is thus time barred. We dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1926 Oudh 59.

* A. I. R. 1929 Oudh 215

MISRA AND NANAVUTTY, JJ.

Chandra Shekhar Singh and *others*—Plaintiffs—Appellants.

v.

Jagjiwan Bakhsh Singh and *another*—Defendants—Respondents.

First Appeals Nos. 141 and 142 of 1927, Decided on 5th September 1928, from decree of Sub-Judge, Fyzabad, D/- 8th August 1928.

(a) Hindu Law—Widow—Her possession is not adverse to reversioners nor that of person in possession with her consent.

The possession of a Hindu widow for her life is a possession to which she is entitled by virtue of law, and it cannot be deemed to be adverse against the reversioners in the sense that it might extinguish their rights. Similarly if any person during the lifetime of the widow comes into possession of the property with the consent of the widow, his or her possession cannot be deemed to be adverse to them. [P 219 C 2]

*** (b) Hindu Law—Widow in possession of property which she is not entitled to inherit—Possession is adverse unless she declares herself a life-tenant or holds with reversioner's consent.**

It is a settled rule of law that the possession of a Hindu female, in respect of the property to which she has come into possession, but is not entitled to it by way of inheritance under the Hindu law, must be deemed to be adverse to the reversioners and cannot be considered to be that of a mere life-estate holder, unless an arrangement or an agreement to that effect is proved to have been arrived at between her and the reversioners or unless she has herself declared that she held only as a limited owner possessed of a life-estate 22 *Cal.* 445 (*P. C.*), 23 *Cal.* 661 (*P. C.*); *A. I. R.* 1919 *P. C.* 60 and *A. I. R.* 1927 *Oudh* 138, *Foll.* [P 221 C 1]

But the mere fact that a Hindu female declares that she is in possession of such property by way of inheritance does not show that she declares herself to be in possession as a limited owner. The real view in such a case would be that she not being entitled to possession by way of inheritance, her possession must be deemed to be that of a trespasser and consequently adverse against the reversioners, unless they prove that it was with their consent. [P 222 C 1]

*** (c) Adverse possession—Equity of redemption is capable of adverse possession—Transfer of Property Act, S. 60.**

It cannot be maintained as a wide proposition that an equity of redemption can never be considered as capable of adverse possession. It must be held on the facts established in each case whether they would amount to be the cogent evidence of adverse possession of the equity of redemption: 32 *Cal.* 296 (*P. C.*); 27 *Bom.* 43, *A. I. R.* 1924 *Oudh* 40, 38 *All.* 411, *Rel. on.* [P 223 C 1]

*** (d) Adverse possession—Nankar allowance not received by a person for some years—Right to receive it is not barred by adverse possession—Denial of the right and continuous receipt thereof by the holder must be proved.**

The mere fact that a person has not received his nankar allowance for some years would not destroy his right to the said allowance. It is a recurring right and in order to establish adverse possession in respect of such a right it must be clearly established by cogent evidence that the right to receive the nankar was clearly and openly denied to the claimant's knowledge, and that after such denial, the person setting up adverse possession had been continually in receipt thereof by virtue of such an asserted right. [P 224 C 2]

A. P. Sen, M. H. Qidwai and *B. N. Ray*—for Appellants.

M. Wasim and *Khaliquzzaman*—for Respondents.

Judgment.—These two appeals arise out of a suit for possession and mesne profits from the decree of the learned Subordinate Judge, Fyzabad, dated 8th August 1927. The attached pedigree* will show the relationship between the parties and will also indicate the respective dates of the deaths of various persons, which are for the decision of this case relevant. The facts of the case are rather complicated and will have to be stated in detail

As will appear from the pedigree the plaintiffs in this case are the sons and grandsons of one Kamta Bakhsh, son of Sheo Pal Singh and the defendants are the grandsons of one Sitla Bakhsh shown in the pedigree The property in suit consists of the zamindari property entered in list B attached to the plaint, the right to recover nankar allowance from the Ajudhia estate, and certain specific plots of land The plaintiffs also prayed for recovery of possession of a house together with a well and for mesne profits as well as for a certain sum on account of costs of the material of that house and for damages. We may at once state that we are not in any way concerned in this appeal with the house, or the mesne profits or the cost of material of the house or damages. The enquiry into these matters has been postponed by the lower Court till after the decision of the suit.

It is necessary to state that the property consists of underproprietary (zamindari) property in villages Khandarkha, Debai, Khunnipur and Bodaipur, district Fyzabad. The superior proprietor of all these villages is the Ajudhia estate. The nankar allowance in dispute consists of Rs 198-0-9 out of a larger sum, which is received by the members of the family from the Ajudhia estate. The specific plots of land consist of four plots Nos 1713, 1716, 1718 and 1719, situate in village Debai, named above.

In order to understand the case of the plaintiffs it is necessary to classify the property entered in list B attached to the plaint into three classes mentioned below :

Class I—consists of the property which belonged to Ambika Bakhsh, the husband of Mt. Ramkali, and which after his death passed on to Mt. Ramkali, his widow. This property consists of shares in villages Kandarkha, Khunnipur and Bodaipur.

Class II—consists of the property which belonged to Sant Bakhsh, son of Harpal Singh, and after his death came into possession of his widow Mt. Hans Raj Kuar and after her death a moiety of it came in the possession of Mt. Ahbaran Kuar, mother of Ambika Bakhsh, and widow of Aman Singh, and after her death in the possession of Mt. Ramkali. This property is also situate in villages Kandarkha, Debai and Khunnipur.

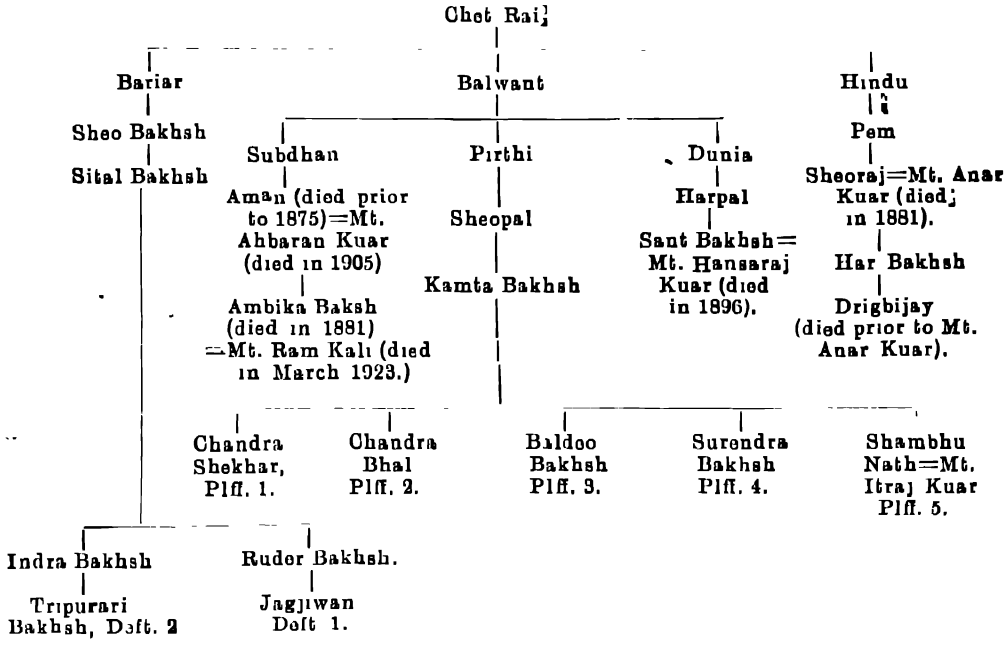
Class III—consists of the property, which once belonged to Drigbbijai Singh and after his death came into possession of Mt. Anar Kuar, and after her death 1/6th share of the same came into possession of Mt. Ahbaran Kuar, mother of Ambika Bakhsh and after her death into the possession of Mt. Ramkali,

The four plots of land as mentioned above situate in village Debai are those which fall into the share of Mt. Ramkali by virtue of a partition of the revenue Court held in the year 1923. In order to understand the plaintiff's case, we think it also necessary to mention here the dates of the deaths of various persons mentioned above, which are relevant for the purposes of this case and about which except in one case there is no further dispute between the parties.

Aman Singh, father of Ambika Bakhsh Singh died prior to 1875 whereas Ambika Bakhsh Singh died in 1881. The defendants, however, do not admit this but allege that both died in 1881, Ambika having, died a few days prior to Aman Mt. Anar Kuar, mother of Drigbijai Singh and widow of Sheoraj Singh, died in 1881. Mt Hans Raj Kuar, widow of Sant Bakhsh, died in 1896. Mt. Ahbaran Kuar, mother of Ambika Bakhsh Singh, died in 1905 Mt Ramkali, widow of Ambika Bakhsh Singh, died in March

* For pedigree see p. 217.

1923. We may also mention that the present suit was brought in March 1926. The plaintiffs' case regarding the property mentioned in Class I is that it belonged to Ambika Bakhsh Singh, and after his death went to his widow Mt Ramkali, who was then of tender years (in age) and was helped in the management of the same by her mother-in-law, Mt. Ahbaran Kuar. Mt Ramkali was in possession of the said estate as a Hindu widow, and she having died in 1923, the plaintiffs are entitled to the said property as next reversioners of her husband, the defendants having no title to it in the presence of the plaintiffs.



The plaintiffs' case regarding the property mentioned in Class II is that after the death of Mt. Hans Raj Kuar in 1896, Kamta Bakhsh Singh, their predecessor-in-title, became entitled to the whole of it, but he got mutation effected in respect of a moiety thereof in favour of Mt. Ahbaran Kuar giving her a life-estate with no power of alienation, and that after the death of Mt. Ahbaran Kuar, Mt. Ramkali also entered into possession of the said property as a Hindu widow and now after her death in 1923, the plaintiffs are entitled to that property as well.

The plaintiffs' case regarding the property mentioned in Class III is that after the death of Mt. Anar Kuar in 1881 half the property went to the branch of Sital Bakhsh Singh, the ancestor of the defendants, and half the property was divided among three branches, each taking 1/6th. One of the said branch was that of Sant Bakhsh, the other being that of Kamta Bakhsh, ancestor of the plaintiffs, and the third being that of Aman Singh. This share was in patti Sheo Raj Singh, named after the husband of Mt Anar Kuar. The plaintiffs' case is that the share which Mt. Ahbaran Kuar got in the said property was also that of a life-estate without power of alienation with the consent of their ancestor Kamta Bakhsh Singh, and consequently she possessed only a widow's estate in the said property, and Mt Ramkali who came into possesssion thereof after the death of Ahbaran Kuar was also in possession as a life-estate holder, and after her death the plaintiffs as the next reversioners of her husband are entitled to the said property

In this Court the plaintiffs applied to us for the amendment of their plaint to the effect that if all these properties be held to be absolute properties of Mt. Ramkali and as such her streedhan, they being the nearer heirs of her husband are the heirs of her streedhan property also, there being no other preferential heirs in

existence. The amendment was not opposed by the defendants and we have allowed it. It was also admitted on behalf of the defendants that the plaintiffs are the streedhan heirs of Mt. Ramkali.

It will thus appear from what we have stated above that the case of the plaintiffs is that Mt Ramkali was in possession of all the various properties in suit as a Hindu widow and that they as the next reversioners of her husband are now entitled to it In the alternative their case is that if any item of the property in suit be held to be the absolute property of Mt. Ramkali, they are also entitled to it, being the streedhan heirs of the said lady

The defendants contend that the possession of Mt Ramkali in respect of none of the property in suit was that of a Hindu widow. As to the property mentioned in Class I their case is that Ambika Singh died during the lifetime of his father Aman Singh and consequently Mt. Ramkali had no right to inherit the property in suit, and that if she remained in possession, her possession must be deemed adverse They also denied that Mt. Ahbaran Kuar was in possession of the property as a life-estate holder and that Mt Ramkali succeeded her in the same capacity. Their contention is that Mt. Ahbaran Kuar was in possession without any title and thus her possession must be deemed to be adverse and if Mt Ramkali came into possession of the said property whether in her lifetime or after her death her possession must also be deemed to be adverse.

As to the nankar allowance they also denied the plaintiffs' title and set up the adverse possession of Mt Ramkali in respect thereof. They also contended that the effect of the revenue partition was that Mt Ramkali should be deemed to be the absolute owner of the four above mentioned plots in the village Debai, and that plaintiffs could not claim those plots.

With regard to these various kinds of the property they set up a deed of gift of 6th November 1922, executed in their favour by Mt. Ramkali and also a lease for thirty years executed in their favour by her on the same date.

The plaintiffs denied the validity of the deed of gift and of the lease and urged that in any case they were entitled to the lessor's interest at present and to the actual possession of the property after thirty years since they were the heirs of Mt. Ramkali.

We might also mention one more point and it is regarding the share in the village Khunnipur. The plaintiffs alleged that apart from the above allegations neither Mt. Ahbaran Kuar nor Mt. Ramkali was in possession of the said share, but that it had been in possession of the mortgagees one after another and that the plaintiffs had redeemed that property from the last mortgagee and were now in possession of the same Their case, therefore, in regard to this property is that there could be no adverse possession of Mt. Ramkali in respect of the same.

From the pleadings stated above it will appear that the principal points for trial in the case were as follows :

(1) Whether Ambika Bakhsh had survived his father Aman Singh ?

(2) Whether Mt. Ahbaran Kuar was in possession as a life-estate holder with the permission of the plaintiffs or whether her possession was adverse ?

(3) Whether the possession of Mt. Ramkali was in respect of any of the property in suit that of a Hindu widow of whether her possession was also adverse ?

(4) Whether the share in village Khunnipur had been in possession of mortgagees one after another and whether the plaintiffs had redeemed the last mortgagee and whether under these circumstances either Mt. Ahbaran Kuar or Mt. Ramkali could be deemed to have been in adverse possession of the same ?

(5) Whether the plaintiffs were entitled to the nankar allowance, claimed by them ?

(6) Whether Mt. Ramkali was the absolute owner of the four plots of land in village Debai, which had fallen to her share at the time of the partition.

A number of issues were framed in the trial Court but the principal points covered by them have been mentioned by us above. The learned Subordinate Judge of Fyzabad found that Ambika Bakhsh Singh survived Aman Singh ; that Mt. Ahbaran Kuar was in possession as life-estate holder with the permission of the predecessor-in-title of the plaintiffs; that Mt Ramkali's possession in regard to the property mentioned in Class I was that of a Hindu widow and that her possession with regard to the property mentioned in Classes II and III was adverse. He also found that the possession of the mortgagees over the share in the village Khunnipur had not been established, nor the fact of the redemption by the plain-

tiffs of the said property. He, however, held that the plaintiffs' right to the nankar allowance in suit was established but they were not entitled to claim the four plots of land, since they were the absolute property of Mt. Ramkali As to the property regarding which the learned Subordinate Judge held that Mt Ramkali was absolute owner by virtue of her adverse possession or partition, he upheld the deed of gift and the lease dated 6th November 1922. He, therefore, dismissed the plaintiffs' suit in respect of those items of the property and decreed it in respect of the rest

Both parties have now appealed to this Court against the decree of the Subordinate Judge, the plaintiffs appeal being First Civil Appeal No. 141 of 1927, and the defendants' appeal being First Civil Appeal No. 142 of 1927 The result of these two appeals is that all the points, which were decided by the learned Subordinate Judge, now require a decision from us, and the whole case has, therefore, been argued in respect of each of the point on both sides We therefore, now proceed to give our findings in respect of each of the points stated above as the main points for trial in the Court below·

As to point No 1

Whether Ambika Bakhsh Singh had survived his father Aman Singh. (The judgment discussed the evidence and concluded as follows). We are, therefore, of opinion that it has been satisfactorily eslablished that Ambika Bakhsh survived his father Aman Singh. The first point, is, therefore, decided against the defendents and in favour of the plaintiffs

As to point No 2.

Whether Mt. Ahbaran Kuar was in possession as a life-estate holder with the permission of the plaintiffs or whether her possession was adverse ?

We may state that this point is covered by issues 3, 5 and 8 and has been found by the learned Subordinate Judge in favour of the plaintiffs. It is clear from the evidence on the record that Mt. Ramkali and Mt Ahbaran Kuar both lived together, and that the relations between the daughter-in-law and the mother-in-law were quite good. That fact shows that both of them maintained themselves out of the income of the same property and under these circumstances it cannot be said that the possession of the mother-in-law was in any way adverse to the daughter-in-law. As to whether it was adverse to the plaintiffs we find it established from the evidence on the record that it was not so. Regarding the property which came to Mt Ramkali as heir to her husband Ambika Bakhsh Singh it is evident that the possession of Ahbaran Kuar could not be deemed to be adverse to the plaintiff as long as Mt Ramkali lived. Their right to possession of the said property would accrue only after the death of Mt. Ramkali and if any other person with the consent of Mt. Ramkali was in possession during her lifetime her possession could not be deemed to be adverse against them The possession of a Hindu widow for her life is a possession to which she is entitled by virtue of law, and it cannot be deemed to be adverse against the reversioners in the sense that it might extinguish their rights. Similarly if any person during the lifetime of the widow comes into possession of the property with the consent of the widow, his or her possession cannot be deemed to be adverse to them As to the property which was left by Mt Anar Kuar, mother of Drigbijai Singh, and by Mt Hansraj Kuar, widow of Sant Bakhsh Singh, we find that Mt Ahbaran Kuar was not entitled to get any share out of those properties since her husband Aman Singh had died before the death of Anar Kuar or the death of Mt Hansraj Kuar, when the succession should be deemed to have opened.

As to the property held by Anar Kuar it is clear that after her death in 1881 it was divided between the two branches, one consisting of the defendants and the other consisting of Bakhsh Singh, Kamta Bakhsh and Ambika Bakhsh, all descendants of Balwant Singh. After the death of Mt. Hansraj Kuar in 1896 Mt. Ahbaran Kuar applied for mutation of names and the plaintiffs filed objections and ultimately a compromise was arrived at to the effect that half the property should be recorded in the name of Mt. Ahbaran Kuar for her life only without the power of alienation and that the other half should be recorded in the name of the objectors. This would appear from Ex. 45, which is printed on P. R. 36, part 3. The compromise was filed in the mutation case relating to village Kandarkha and is dated 27th August 1896 The compromise purports to have been signed by Chandra Shekhar Singh

the plaintiff and Mt. Ahbaran Kuar. The revenue Court ordered the mutation of names to be effected in accordance with the compromise on 21st November 1896. It appears from the record that in regard to village Debai the name of Mt. Ahbaran Kuar was entered by virtue of the order of the same date: vide Ex 39 This shows that it was by virtue of the same compromise that mutation was effected in favour of Mt. Ahbaran Kuar in respect of that village also. It is in evidence of P. W. 8 that mutation in favour of Mt. Ahbaran Kuar in respect of all the villages was by virtue of the said compromise. The witness has been believed by the learned Subordinate Judge and we do not see any reason why his testimony should be rejected. It is also proved by the khewat of the village Khunnipur (Ex. 40 printed on P. R. 8) that the mutation was effected in favour of Mt. Ahbaran Kuar in the same proportion as the two other villages. The learned Subordinate Judge says that this fact indicates that the mutation must have been effected in respect of this village also in pursuance of the compromise mentioned above. We agree with him In a case decided by this Court and reported in *Ram Abhilakh* v. *Mt Chaurasi* (1), it was held that in similar circumstances it may be presumed that possession in regard to the entire property was by virtue of a compromise. We adhere to the view of law taken in that case It appears to us to be therefore clearly established that the mutation in favour of Mt Ahbaran Kuar in respect of all the villages was made in pursuance of a compromise between her and the plaintiffs, which was to the effect that she was to remain in possession of the share given to her for her life and without any power of alienation Indeed this finding of the learned Subordinate Judge was not assailed by the learned counsel on behalf of the defendants-respondents during the course of the arguments in appeal We therefore find that Mt. Abharan Kuar was in possession of property entered in her name with the consent of the plaintiffs and that her possession in respect thereof could not be deemed to be adverse

As to point No 3.

Whether the possession of Mt. Ramkali was in respect of any of the property in suit that of a Hindu widow or whether her possession was also adverse — This point is embodied in issue 6. This is one of the most important points in the case. The question which we have to deal with under this head relates to the nature of possession of Mt. Ramkali in respect of different classes of property, of which she was in possession. As to the property of Class 1, which belonged to Ambika Bakhsh and was mutated in favour of his widow Mt Ramkali after his death, there is no difficulty. The only point urged by the defendants in that connexion was that Ambika Bakhsh had died during the lifetime of his father Aman Singh and consequently Mt. Ramkali had not succeeded to that property as a Hindu widow. We have already dealt with this question under the first point. We have agreed with the finding of the learned Subordinate Judge on this point that Ambika Bakhsh survived Aman Singh. In that view of the case there can be no doubt that Mt Ramkali succeeded to that property as a Hindu widow and the plaintiffs are now entitled to it as the next reversioners of her husband. It is in regard to this property that the claim of the plaintiffs has been decreed by the learned Subordinate Judge. We, therefore, maintain that part of the decree of the learned Subordinate Judge and hold that Mt Ramkali could not be considered to be in adverse possession of that property

The question of adverse possession only arises in respect of the property which was in possession of Mt Ahbaran Kuar, the mother of Ambika Bakhsh, and after her death it came into the possession of Mt Ramkali To be strictly accurate the mutation of name in respect of the property situate in Debai was with the consent of Mt. Ahbaran Kuar effected in favour of Mt Ramkali during her lifetime. The question whether she obtained possession of that property during the lifetime of Mt. Ahbaran Kuar, or after her death is in our opinion immaterial because it is admitted that except the share in village Khunnipur, which is alleged by the plaintiffs to have been in the possession of the mortgagees and in their possession after redemption, she remained in possession of the entire property, which was originally mutated in favour of Mt. Ahbaran Kuar for more than 12 years after her death. The learned Sub-

(1) A. I. R. 1927 Oudh 582.

ordinate Judge has found that Mt. Ahbaran Kuar died somewhere in 1895 and it is admitted that Mt Ramkali died in 1923.

In order to determine the nature of possession of Mt Ramkali in respect of the property which came to her possession either during the lifetime of Mt. Ahbaran Kuar or after her death we have to see what the law on the subject is.

It is a settled rule of law that the possession of a Hindu female, in respect of the property to which she has come into possession, but is not entitled to it by way of inheritance under the Hindu law, must be deemed to be adverse to the reversioners and cannot be considered to be that of a mere life-estate holder, unless an arrangement or an agreement to that effect is proved to have been arrived at between her and the reversioners or unless she has herself declared that she held only as a limited owner possessed of a life-estate. This rule of law will be found to be laid down in two decisions of their Lordships of the Privy Council, one reported in *Mt. Lachhan Kunwar* v. *Manorath Ram* (2) and the other reported in *Sham Koer* v. *Dah Koer* (3). In the former case it was laid down by their Lordships that where a Hindu female made a clear declaration either at the time when she took possession or subsequently that she took the property as a Hindu widow, her possession could not be deemed to be adverse to the reversioners, who would be entitled to the property after her death This proposition is based upon the elementary principle of law that no man can acquire by adverse possession a right higher than what he declares to be in possession of. In the latter case it was laid down by their Lordships that if a Hindu female be shown to have come into possession of a property, to which she was not entitled by way of inheritance, as a result of arrangement with the reversionary heirs, her possession cannot be deemed to be adverse against them, and they would be entitled to recover the property after her death. This proposition is based upon another elementary principle of law which is to the effect that a person's possession cannot be deemed to be adverse to another when he enters upon it with his consent.

The rule of law stated by us in regard to the possession of a Hindu female as enunciated by their Lordships of the Privy Council in the two cases quoted above was again affirmed by their Lordships in a subsequent case reported in *Satgur Prasadh* v. *Kishore Lal* (4). It was recently followed by a Bench of this Court in *Raj Bahadur Singh* v. *Kadhaiya Bakhsh Singh* (5), to which one of us was party. We have, therefore, to see whether Mt. Ramkali's possession in respect of the property which was in possession of Mt. Ahbaran Kuar could after her death be deemed to be ascribable to any one of the two principles laid down by the Privy Council. As to village Kandarkha we find that Mt. Ahbaran Kuar got mutation of name effected in favour of Mt Ramkali in her own life time. This would appear from Ex 49, which will be found printed on P. R. 43 of part 3, which is an extract from mutation register in respect of *pukhtadari haciyat* in village Kandarkha. It shows that Mt. Ramkali's name was entered in place of Mt. Ahbaran Kuar by virtue of inheritance due to old age. The actual words used in the vernacular are "*Wirasat alam zaifi*"

It is difficult to follow the legal significance of this expression because a right of inheritance cannot be deemed to accrue during the lifetime of a person, who is old. Such right can only accrue after his death. What appears to us to be the real meaning of this is that Mt. Ahbaran Kuar had got old and therefore she put Mt. Ramkali in possession of the property and because the revenue Courts would only recognize possession obtained either by inheritance or transfer, it was thought proper in this case to describe her coming into possession of the property by virtue of inheritance. The order is dated 28th July 1904 and the entry was made by the patwari in the village registers on the 8th October 1904 The learned Subordinate Judge has found that Mt Ahbaran Kuar died in 1905, with which finding we quite agree, and consequently it is proved clearly from this document that the mutation of names was effected

(2) [1875] 22 Cal. 445=22 I. A. 25=6 Sar. 523 (P.C.).
(3) [1902] 29 Cal. 664=29 I. A. 132=6 C. W. N. 657=8 Sar. 280 (P.C.).
(4) A. I. R. 1919 P. C. 60=42 All. 152=46 I. A. 197 (P C).
(5) A. I. R 1927 Oudh 138.

in favour of Mt. Ramkali in respect of the property situate in village Kandarkha during the lifetime of Mt. Ahbaran Kuar. No proof has been given on behalf of the plaintiffs to prove that the mutation of names in respect of this village was effected in favour of Mt Ramkali as a result of an arrangement with them The only contention put forward before us by the learned counsel for the plaintiffs-appellants was that as mutation of names has been effected in favour of Mt Ramkali by way of inheritance it must be deemed that she took the property only as a life-estate holder The contention was that she could not take more than what was possessed by Mt. Ahbaran Kuar. We do not think this contention is a sound one It may be that during Mt. Ahbaran Kuar's life the possession of Mt. Ramkali may be deemed to be of some character as that of Mt. Abharan Kuar, since she took possession with her consent, but it appears to us to be clear that after the death of Mt. Ahbaran Kuar the plaintiffs could have taken possession of the property from Mt Ramkali, and unless it be proved that she continued in possession with the consent of the plaintiffs, her possession after the death of Mt Ahbaran Kuar cannot be considered to be in the same capacity as that of Ahbaran Kuar. The mere fact that a Hindu female declares that she is in possession of the property by way of inheritance does not show that she declares herself to be in possession as a limited owner. The real view in such a case would be that she not being entitled to possession by way of inheritance, her possession must be deemed to be that of a trespasser and consequently adverse against the reversioners, unless they prove that it was with their consent

We are, therefore, of opinion that the possession of Mt. Ramkali in respect of the property situate in village Kandarkha must be deemed to be adverse to the plaintiffs. We must make it clear that this is only in respect of the property which she got as an heir to her husband Ambika Bakhsh Singh. (The judgment then discussed the evidence in respect of the remaining items and concluded) The result of our finding on this point is that we maintain the finding of the learned Subordinate Judge in respect of the shares which stood mutated in favour of Mt. Ahbaran Kuar in regard to two villages Kandarkha and Debai, and set it aside in respect of the village Khunnipur.

As to point No. 4.—Whether the share in village Khunnipur had been in possession of mortgagees one after another and whether the plaintiffs had redeemed the last mortgagee and under these circumstances either Mt Ahbaran Kuar or Mt. Ramkali could be deemed to have been in adverse possession of the same?

The next point with which we have to deal is the alleged adverse possession of Mt. Ahbaran Kuar or Mt Ramkali in respect of the property situate in village Khunnipur, which, the plaintiffs alleged, had been in actual possession of the mortgagees and which after redemption in 1917 had come into their possession. The learned counsel for the plaintiffs took up two positions with regard to this property The first position was that he challenged the finding of the learned Subordinate Judge to the effect that the possession of the mortgagees over this property had not been established, nor had the alleged subsequent redemption of the said property by the plaintiffs and their possession over the same been proved The second position was that the property being in possession of the mortgagees and after redemption that of the plaintiff there could be no adverse possession in regard to the equity of redemption. We now proceed to deal with each of these positions. (The judgment discussed evidence as to the first position and concluded) Our finding therefore on this point is that the property in village Khunnipur was never in possession of either Mt. Ahbaran Kuar or Mt Ramkali, but it was at first in the possession of Jagdatt and then in the possession of Raghunath and Sheo Sahai as mortgagees of the said property and after the redemption of 1917 it came to the possession of the plaintiffs, who remained in possession thereof till the death of Mt. Ramkali.

As to the second position we may observe that we have already held while dealing with point No. 3 that the mutation of names effected in favour of Mt. Ramkali in the year 1910 in respect of the property situate in village Khunnipur was by virtue of an arrangement with the plaintiffs. That alone would show that Mt. Ramkali's adverse possession in regard to this property could not be held

to have been established. But apart from this we are also of opinion that the mere fact that the name of Mt. Ramkali was entered in the khewat in respect of this property cannot be held to be a sufficient proof that she was in adverse possession of the equity of redemption, and and we say so for two reasons: firstly, that the property was in possession of the mortgagees and secondly that the mutation of names was effected in her favour, with the consent of the plaintiffs. We are not prepared to hold that mutation effected under such circumstances could be any evidence of adverse possession of Mt Ramkali in respect of the equity of redemption The learned counsel for the plaintiffs-appellants argued that an equity of redemption could never be considered as capable of adverse possession In face of the ruling of their Lordships of the Privy Council in *Khairajmal* v. *Daim* (6) such a wide proposition cannot be maintained It would appear from the judgment of their Lordships (p. 32) that if certain facts had been established in that case they would have been considered by them as sufficient evidence of adverse possession of the equity of redemption. We are, therefore, of opinion that it must be held on the facts established in each case whether they would amount to be the cogent evidence of adverse possession of the equity of redemption. The same view was taken in a well-known judgment of the Bombay High Court reported in *Tarubai* v *Venkatarao* (7) Batty, J, considered this question in a most learned and exhaustive manner and observed as follows on p. 66 :

"The result is, as above indicated, if there has been no ouster or "open and notorious act of taking possession," then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding the suit. The mere existence of the claim without possession, actual or constructive, will not suffice as a bar to a title proved or admitted. *Secy. of State* v. *Krishnanomi Gupta* (8). And even where there is possession, if it has commenced without any act of dispossession, and is susceptible of explanation by reference to a title not inconsistent with the rights of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights, there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge."

The same principle was followed in the late Court of the Judicial Commissioner of Oudh, in a recent case where this subject was discussed exhaustively by Mr. Dalal, A J C, (now Mr. Justice Dalal), vide *Jai Govind Singh* v *Abhairaj Singh* (9), We are in entire agreement with the view of law taken in that case

The facts that have been established in the case before us are that the property was in possession of the mortgagee and the persons in whom the equity of redemption vested allowed the mutation of names to be effected in favour of Mt Ramkali under circumstances which show that mutation was to be made in her favour as an heir to another lady, which meant that mutation was allowed only for her lifetime, with no power of alienation In such a case we are unable to hold that adverse possession of the equity of redemption has been established We are supported in this view by a recent decision of their Lordships of the Allahabad High Court reported in *Kuar Sen* v *Darbari Lal* (10) In that case a mortgagee was in possession of certain property under an usufructuary mortgage and certain persons had succeeded in getting their names recorded in the revenue papers in place of the mortgagor against his consent and it was held that they could not on that basis acquire adverse possession of the right to redeem. We must point out that for the purpose of our case it is not necessary to go to the extent to which their Lordships of the Allahabad High Court went in that case. In the case before us the mutation was effected in favour of Mt. Ramkali with the consent of Chandra Shekhar, the plaintiff, while in the case before the Allahabad High Court the mutation had been effected in spite of the resistance offered by the person

(6) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P.C.).
(7) [1903] 27 Bom. 43=4 Bom. L. R. 721.
(8) [1902] 29 Cal. 518=29 I. A. 104=8 Sar. 260 (P.C.).
(9) A. I. R. 1924 Oudh 40=26 O. C. 308.
(10) [1916] 38 All. 411=34 I. C. 171=14 A. L. J. 498.

actually entitled to the property. At any rate it is clear that in the circumstances proved in this case it is not possible for us to hold that Mt. Ramkali acquired adverse possession to the equity of redemption on the basis of the mutation effected in her favour in respect thereof in the year 1910.

Our finding, therefore is that Mt. Ramkali's possession in respect of the equity of redemption cannot be held to be adverse and the plaintiffs are entitled to claim this property of their suit which is within 12 years from the date of her death in 1923.

As to point No. 5.

Whether the plaintiffs were entitled to the nankar allowance claimed by them ?

The point under this head relates to the plaintiffs' claim in respect of nankar allowance and forms the subject-matter of issues 11 and 12.

The learned Subordinate Judge has gone into this matter in great detail as will be found from his finding on issue 11, and has held that Mt. Ramkali's share in the entire nankar payable to the family comes to Rs. 109-0-9 This account is admitted by both the parties Indeed no arguments were addressed to us by any side in regard to this question. The plaintiffs have claimed a declaration with respect to Rs. 108-0-9, because this is the sum entered in the deed of gift executed by Mt. Ramkali in favour of the defendants

The only point which was argued during the course of the arguments in this Court was the point, whether the fact that Mt. Ahbaran Kuar had received the nankar of the shares of Ambika and Harpal and whether by such receipt her adverse possession could be made out. The learned Subordinate Judge has held that although Mt Ahbaran Kuar enjoyed the nankar allowance of Harpal and Ambika's shares, she acquired no rights in them, for regarding the latter's share she could not have any adverse possession during the lifetime of Mt Ramkali and also because she was in possession of the whole property with the consent of Mt Ramkali. Regarding Harpal's share the learned Subordinate Judge has held that the adverse possession of Mt. Ahba-Kuar regarding these rights could not be held to have been established, because she was in possession of all the property with the permission of the plaintiffs, and apart from this she had been in possession only for nine years. We are in entire agreement with this view of the learned Subordinate Judge. Nothing was shown in argument to show that this finding of the learned Judge is wrong We may state as a general principle relating to the nankar allowance that the mere fact that the plaintiffs have not received their allowance for some years would not destroy the right to the said allowance It is a recurring right and in order to establish adverse possession in respect of such a right it must be clearly established by cogent evidence that the right of the plaintiffs to receive the nankar was clearly and openly denied to their knowledge, and that after such denial, the person setting up adverse possession had been continually in receipt thereof by virtue of such an asserted right. We have looked into the record to find evidence of this character, but we have not been able to discover any evidence led by the defendants, which could the considered to be of the nature indicated by us above. Under these circumstances we are compelled to hold that the plaintiffs are entitled to the declaration prayed for by them in respect of the nankar allowance and that their right to it has not bee extinguished by the alleged adverse possession.

As to point No. 6.

Whether Mt. Ramkali was the absolute owner of the four plots of land in villag Debai, which had fallen to her share at the time of partion ?

This point relates to the claim of the plaintiffs in respect of plots Nos 1713, 1716, 1718 and 1719 situate in village Debai, and forms the subject of issues 9 and 10 (The judgment discussed evidence in respect of this point and held that in respect of these plots of land the plaintiffs are entitled to a half share by virtue of the partition in their own right; they are also entitled to 1/3rd out of half allotted to Mt. Ramkali of which she must be deemed to have been in possession as the widow of Ambika Bakhsh Singh. The plaintiffs' claim must, therefore, be decreed in respect of half plus 1/3rd, i e 5/6th in the entire four plots mentioned above, which constitute the proprietors' grove. The plaintiffs' claim regarding one-sixth must be dismissed. The deed of gift executed

by Mt. Ramkali in favour of the defendants can, therefore, be deemed to be valid only to the extent of 1/6th of those plots, which consitute the property of Mt. Ramkali Kuar by adverse possession. The judgment then proceeded). As to point No. 7. There is one more point, which is not covered by the six points which we have stated in the earlier portion of our judgment. This is the point relating to the plaintiffs' right to claim the lessor's right in respect of the land regarding which Mt. Ramkali executed the lease in favour of the defendants for a period of thirty years. This lease was executed by her on 6th November 1922, the same date on which the gift in favour of the defendants was executed by her. It is Ex. B 89 and will be found to be printed on P. R. 65. The learned counsel for the plaintiffs argued that even if Mt. Ramkali be considered to be the full owner of the property covered by the lease, they would be entitled to the lessors' right and to actual possession after the expiration of the period for which lease had been executed as heirs of Mt. Ramkali. The defendants objected that this claim of the plaintiffs could not be entertained, since they had not put it forward in their plaint as amended in the Court below This is undoubtedly so, but an application was made before us during the course of arguments on behalf of the plaintiffs asking our permission to amend the plaint so as to include this claim of the plaintiffs as well In order to meet the ends of justice we have allowed this amendment. Indeed the defendant's counsel did not press any objection to such amendment. The amendment, was, therefore, allowed. After having allowed the amendment we called upon the defendant's counsel to state whether Chandra Sekhar, Chandra Bhal, Baldeo and Surendra Bakhsh, plaintiffs 1 to 4 and the husband of plaintiff 5 were entitled to this property as streedhan heirs to Mt. Ramkali. The defendants' counsel admitted this to be the case. In view of this admission we hold that so far as the property covered by the lease dated 6th November 1922 (Ex. B 89) is concerned, the plaintiffs are entitled at present to the rights of Mt. Ramkali as a lessor and to actual possession after the expiration of the period of 30 years fixed in the lease.

The result of all these findings is that the plaintiffs' claim with regard to all the properties in regard to which their claim was decreed by the learned Subordinate Judge will be maintained They will be given also a decree in respect of the property situate in village Debai in regard to which we have held that Mt Ramkali's adverse possession is not established and in respect of four plots of land mentioned above to the extent of 5/6ths. The plaintiffs will also be entitled to the house and the well provided they are found to stand on the property decreed to the plaintiffs as decided by the lower Court The question of mesne profits and damages will also be subsequently decided in accordance with the findings given by us above. We, therefore, allow the appeal of the plaintiffs (F C A 141 of 1927) to this extent that they will, besides the property decreed to them by the Court below, also get a decree in respect of the share situate in village Debai, District Fyzabad, the mutation of which stood in the name of Mt. Ramkali at the time of her death, and in respect of 5/6ths share in plots Nos 1713, 1716, 1718 and 1719 situate in patti Chandra Sekhar, mahal Gaya Prasad, of the aforesaid village Debai They will also be entitled to the lessor's interest in respect of the property covered by the lease dated 6th November 1922 (Ex. B 89). We dismiss the appeal of the defendants (F. C. A 142 of 1927). As to costs our order is that the plaintiffs will get costs of both the Courts in proportion to the property decreed to them, whereas the defendants-respondents will pay their own costs in both the Courts.

D.D. *Appeal* 141 *of* 1927 *allowed*
Appeal 142 *of* 1927 *dismissed.*

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* A. I. R. 1929 Oudh 225
Full Bench

WAZIR HASAN, AG. C. J., MISRA AND RAZA, JJ.

Shabbir Husain—Applicant.

v.

Ashiq Husain—Opposite Party.

Civil Revn. Appln. No. 43 of 1928, Decided on 27th February 1929, from order of Dist. Judge, Lucknow, D/- 3rd September 1928.

*** (a) Charitable and Religious Trusts Act (14 of 1920), S. 3—Wakf for benefit of specified person or class of persons such as**

kindreds, dependants and others is not a trust for a public purpose.

The signification of "charity" is very wide in the Mahomedan law generally and it is wider in the Imamia law. Provision for the maintenance of one's kindred, dependants, servants and persons occupying similar position in relation to the wakf is "charity" in the eyes of the Mahomedan law and a wakf made in favour of any such person or class of persons is a valid wakf. But it cannot be said according to the same law that every wakf made for the benefit of a specified person or class of persons including persons and class of persons of the character described above is a trust for a "public purpose." [P 227 C1,2]

(b) Charitable and Religious Trusts Act (14 of 1920) — Scope and applicability—Mussalman Wakf Act, (42 of 1923).

A trust covered by the provisions of the Charitable and Religious Trusts Act of 1920, is not to be so wide in its purpose as a wakf under the Mussalman Wakf Act of 1923. The Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose public or private or partly public and partly private. On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only. [P 228 C 1]

(c) Charitable and Religious Trusts Act (14 of 1920), S. 3—Interpretation of words "public purpose"—Real substance and primary intention of creator must be looked at.

The words "public purpose" in S. 3 of the Act of 1920 should not be interpreted in such a sense as to allow a trust which is created or exists for a public purpose in its substance and essence though supplemented by an illusory or wholly trifling provision, the purpose of which may not be public or may be even private to be taken out of the provisions of the Act of 1920. The real substance of the trust and the primary intention of the creator of the trust must be looked at in every case. [P 228 C 1]

(d) Charitable and Religious Trusts Act (14 of 1920)—Applicability.

The Act of 1920 applies only to those cases where the entire benefit "under the wakf or trust is allotted for public purposes:" *A. I. R.* 1922 *P. C.* 253, *Appl.* [P 229 C 1]

(e) Mussalman Wakf Act (42 of 1923), S. 4—Trust partly private and partly public—Interested person can apply under S. 4—Charitable and Religious Trusts Act, S. 3, is not applicable.

Where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S. 3, Charitable and Religious Trusts Act of 1920, but he is not so entitled if the purpose of the trust created by a Mahomedan is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923. [P 229 C 1]

(f) Mussalman Wakf Act (42 of 1923)—Definition of wakf.

Per Rafa, J.—"Wakf" as defined in the Mussalman Wakf Act of 1923, includes wakfs of all kinds except such wakf as is described in S. 3, Mussalman Wakf Validating Act of 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants. [P 230 C 1]

Hyder Husein—for Applicant.

H. D. Chandra and *Jafar Husain*—for Opposite Party.

Opinion

Wazir Hasan, Ag. C. J.—(18*th February* 1929), This reference has arisen out of proceedings taken under the Charitable and Religious Trusts Act of 1920, in the Court of the District Judge of Lucknow. Facts material to the reference are few and simple. The applicant Saiyid Shabbir Husain purporting to act under the Mussalman Wakf Act 1923 furnished particulars required by S 3 of that Act to the Court of the District Judge of Lucknow in respect of certain immovable property which he holds in the character of a mutwalli. Following on the heels of this act of Saiyid Shabbir Husain, the respondent Sheikh Ashiq Husain made an application, purporting to fall within the provisions of S. 3, Charitable and Religious Trusts Act 1920, to obtain an order embodying ceatain directions to be issued to Saiyed Shabbir Husain for compliance. Amongst others two objections were raised by the applicant to the last mentioned application:(1) that the Act of 1920 did not apply to the trust of which Saiyid Shabbir Husain was the mutwalli and (2) that Sheikh Ashiq Husain was not a "person having an interest" in the said trust. The learned District Judge rejected the objections and issued certain directions which he thought necessary in the circumstances of the case to be complied with by the applicant Saiyid Shabbir Husain in relation to the trust of which he was the trustee. As against this exercise of jurisdiction by the learned District Judge an application in revision under S 115, Civil P C was preferred to this Court. That application came for hearing in due course before a Bench consisting of my learned brothers G N Misra and M. Raza. Having regard to the importance of the questions involved in the case the learned Judges who constituted the Division Bench referred the following questions for decision by a Full Bench:

1. Whether the Charitable and Religious Trusts Act (14 of 1920) applies to the cases of mixed wakfs or trusts where a portion of the benefit is allotted for private purposes and a portion for public purposes so far as the latter

portion is concerned or whether it applies only to those cases where the entire benefit under the wakf or trust is allotted for public purposes ?

2. Whether a person interested in a public religious or charitable wakf is entitled to make an application under S. 3, Charitable and Religious Trusts Act (14 of 1920), when the trustee of the said wakf has already furnished to the Court all the particulars and accounts relating to the wakf under Ss.3 and 5, Mussalman Wakf Act (42 of 1923) ?

The questions raised in the reference clearly involve the task of interpreting the provisions of the Act of 1920 and also of the Act of 1923 This in itself is a difficult task and the difficulty is enhanced by the fact that there is no precedent before us to which we can turn for help or guidance In the circumstances I must proceed to determine the interpretation required of us by the aid of general principles. The first principle to which I should resort is that we should so construe these Acts as to avoid overlapping of or conflict between the provisions contained therein The second principle to which also appeal may legitimately be made for the purpose before us is to take aid from accepted interpretation of provisions of law enacted for purposes akin or similar to the purposes of the Acts with which we are concerned, but the primary principle of interpretation to which all other principles must yield is to construe the provisions in accordance with the natural and obvious meaning of the words used therein.

That part of S. 3 of the Act of 1920, which is relevant for the purposes of the reference is as follows:

"Any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply."

To answer the first question we must assume that the trust in question is neither a trust for a "public purpose" nor for a private purpose, but it is a trust partly for a public purpose and partly for a private purpose, if I may be permitted to use the last mentioned phrase. There is no dispute before us that the whole of the trust in question is of a charitable if not also of a religious nature Even if there were any dispute in this behalf, as I understood the Mahomedan law, I should have no hesitation in holding that the nature of the present trust is certainly charitable. The signification of "charity" is very wide in the Mahomedan law generally and it is wider in the Imamia law Provision for the maintenance of one's kindred, dependants, servants and persons occupying similar position in relation to the wakf is "charity" in the eyes of the Mahomedan law and a wakf made in favour of any such person or class of persons is a valid wakf. But can it be said according to the same law that every wakf made for the benefit of a specified person or class of persons including persons and class of persons of the character described above is a trust for a "public purpose" ? My answer is in the negative Mahomedan law includes the Imamia law, and this is the particular law with which we are concerned in the present case, clearly recognizes a distinction between a public trust and a trust in which specified persons or class of persons are the immediate objects of the bounty of the author of the trust. When realizing and appreciating the difference between the two trusts just now mentioned it is essential to bear in mind the doctrine of cypres also. It may be that when the persons or the class of persons for the maintenance of whom the trust provides become extinct in course of time, the doctrine of cypres comes into operation in administering the trust.

In the deed of trust in the present case I can find no trace of a dedication of a specified sum of money for the purpose of being spent on the poor and the needy in general. Indeed there are no words of dedication at all. Specified sums of money are allotted for the benefit of specified individuals and this allotment consumes the bulk of the trust property. The balance is left in the hands of the trustee for being utilized according to his direction on objects of charity at large and it is with reference to this balance that the learned Judges of the Division Bench from which this reference has come speak of the settlement as a wakf for a public purpose.

We must assume that the legislature in enacting the provisions of the two Acts mentioned above was aware of the distinction which exists in law between a trust for a public purpose and a trust for a private purpose, yet we find that in enacting S. 3 of the Act of 1920 the words used by the legislature are "trust for a public purpose" and that it has not used the words "or partly public and partly private purpose." But what is still more significant is that the legis-

lature has not used the word "wakf" either in S. 3 or in any other section of the Act of 1920. When we come to the Act of 1923, we find that the Act exclusively deals with "wakf" made by a person professing the Mussalman faith. In the Act of 1920 no definition of the word "trust" is given. On the other hand the word "wakf" is defined in Cl (e) S 2 of the Act of 1923 and the definition is as follows :

"Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable. . . . . ."

We have seen that in S. 3 of the former Act the words used are "for a public purpose," but the words in the section of the later Act are "for any purpose" It follows that a trust covered by the provisions of the Act of 1920 is not to be so wide in its purpose as a wakf under the Act of 1923 The conclusion which we draw, therefore, is that the Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose public or private or partly public and partly private On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only. As we are dealing with the case of a trust created by a person professing the Mussalman faith my observations, therefore, should be read as relevant to the case of that nature alone. The legislature has not thought fit so far to enact a law on the lines of the Act of 1923 with respect to a trust created by a person professing any other faith than the Mussalman faith

Clearly when interpreting the words "public purpose" in S. 3 of the Act of 1920 we should not interpret them in such a sense as to allow a trust which is created or exists for a public purpose in its substance and essence though supplemented by an illusory or wholly trifling provision, the purpose of which may be not public or may be even private to be taken out of the provisions of the Act of 1920. We must look to the real substance of the trust and the primary intention of the creator of the trust in every case.

If the argument advanced by the learned Judge of the Court below and repeated before us by the learned advocate for the respondent to the effect that the words "public purpose" include purposes which are partly public and partly private were accepted, the result in so far as the Mussalmans are concerned will be that the substantial provisions of the two Acts will overlap each other, and some of the provisions will come into a clash. Indeed to my mind the later Act of 1923 will become mostly superfluous Every purpose aimed at and object intended to be secured by the Act of 1923 in so far as the Mussalmans are concerned shall have been amply fulfilled and realized under the provisions of the earlier Act of 1920 Such a result we should obviously avoid to reach

Section 12 of the Act of 1923 says that nothing in that Act shall affect any other enactment for the time being in force in British India providing for the control or supervision of religious or charitable endowments. This provision clearly shows that the later Act of 1923 was not intended to have the effect of superseding the earlier Act of 1920 in so far as the Mussalmans were concerned. The law under the two Acts, therefore, must be administered simultaneously, and if both the Acts are held to cover the same subject-matter qua the Mussalmans, we may find contradictory orders passed by Courts of co-ordinate jurisdiction. I am, therefore, of opinion that the trust in the present case not being a trust for a public purpose only as the order of reference assumes that it is not, the provisions of the Act of 1920 are inapplicable

The enactments in S. 3 of the Act of 1920 and in S 92, Civil P. C , 1908, are clearly pari materia and the words :

"express or constructive trust created for public purpose of a charitable or religious nature"

are the same in both the sections The decision of their Lordships of the Judicial Committee in the case of *Gopal Lal* v. *Purna Chandra* (1) on the construction of the words "public purpose" in S. 539 of the former Civil P. C is therefore relevant In that case the trustee was directed to spend money out of the income of the trust property on the worship of certain family idols. Such a trust was held to he a private trust and therefore not falling within the purview of S. 539 of the old Civil P. C.

My answer to the first question therefore is that the Act of 1920

(1) A. I. R. 1922 P. C. 253=49 Cal. 459=49 I. A. 100 (P. C.).

"applies only to those cases where the entire benefit under the wakf or trust is allotted for public purposes."

My answer to the second question is that where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S 3 of the Act of 1920, but that he is not so entitled if the purpose of the trust is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923. The defaulting mutwalli is liable to be penalized under the provisions of S. 10 of the same Act.

Misra, J (*18th February* 1929).—I would also answer the two questions referred by the Division Bench in the same way as answered by the learned Acting Chief Judge. It appears to me to be clear on referring to the provisions of the Mussalman Wakf Act (Act 42 of 1923) that the cases of mixed wakfs or trusts where a portion of the benefit is allotted for private purposes and a portion for public purposes must be governed by the provisions of the said Act Where, however, the entire benefit under the wakf or trust was allotted for public purposes the case would fall under the provisions of the Charitable and Religious Trusts Act (Act 14 of 1920) One difficulty in taking up this position was, however; pointed out by the learned advocate for the respondent that the Mussalman Wakf Act of 1923 applied only to cases where the wakf was admitted and that in cases where it was denied that such a wakf did exist there was no remedy open to a person interested in the said wakf to take action under the provisions of the said Act On reading the provisions of the Mussalman Wakf Act (Act 42 of 1923), it appears to me that under S 3 of that Act an obligation has been laid upon every mutwalli of a wakf covered by the said Act to furnish to the Court within the local limits of whose jurisdiction the property of the wakf of which he is the mutwalli is situated, a statement containing the particulars relating to the wakf property and other matters mentioned in the said section. Where no such statement is filed by a mutwalli or when an incorrect statement has been filed by him or where he has omitted to enter in the statement matters mentioned in the said section, an application can be made to the Court of the District Judge seeking relief in regard to these matters and the Court is directed to make an inquiry into the matter in order to enable it to pass a suitable order in connexion therewith. The Court has also been given power by the legislature to inflict penalty upon the person found to be guilty of having not complied with the provisions of the Act. This will be clear from S. 10 of the said Act. If, therefore, a mutwalli of a wakf which is a mixed wakf, that is, where a portion of the benefit is allotted for private purposes and a portion for public purposes has not chosen to file a statement on the ground that he does not admit the wakf of which he happens to be a mutwalli to be a wakf at all, an interested person can seek the assistance of the Court, and if the mutwalli does not satisfy the Court after due proof that the trust of which he happens to be a mutwalli is not a wakf within the provisions of the Mahomedan law, he will be liable to punishment under S. 10 of the said Act. The provisions of that section also declare that he will have to show a reasonable cause for his default This reasonable cause can only be determined after inquiry has been made by the Court.

If on inquiry he is found that he was a mutwalli of a wakf as defined in the said Act and, therefore, bound to file a statement as required by S. 3 of the said Act, he will be liable to be punished under the said section. I may also point out that under S 11, Mussalman Wakf Acts, 1923, the Local Government has been given power to frame rules to carry into effect the purposes of the said Act. The mere fact, therefore, that there is no express provision in the Act itself for a regular procedure in respect of an inquiry to be made into an alleged reasonable cause under S. 10 is no ground for holding that there can be no inquiry It was also urged that there is no provision in the Act for any appeal. To that the obvious reply is that the legislature might have intended that a person who is punished under S. 10 shall not be given any further remedy. The intention may well have been to treat the inquiry as purely a summary inquiry, and not one open to appeal. I am, therefore, of opinion that

the objection of the learned advocate for the respondent cannot be sustained.

I am also in agreement with the learned Acting Chief Judge that in determining the question whether a trust is one intended purely for a public purpose, the substance of the trust and the real intention of the author of the trust have to be looked into In cases where substantial portion of the property is dedicated for a private purpose, it cannot be said that the dedication is one for public purpose simply because a portion of the property is given for public purposes.

As regards the second question I am also of the same opinion as the learned Acting Chief Judge that a person who is interested in a public, religious or charitable wakf is entitled to make an application under S 3 of the Charitable and Religious Trust Act (Act 14 of 1920) and that his right to apply is not taken away simply because the trustee has filed particulars and accounts relating to the wakf under Ss 3 and 5, Mussalman Wakf Act (Act 42 of 1923) It would be open to the Court in such a case to direct the applicant to refer to and inspect the statement and the accounts already filed by the trustee under the provisions of the Mussalman Wakf Act of 1923.

Raza, J. (18*th February* 1929)—I would also answer the two questions which have been referred to the Full Bench for decision in the way in which they have been answered by the Hon'ble Acting Chief Judge. I have very few words to add to the judgments that have been already delivered in this case. I think " wakf " as defined in the Mussalman Wakf Act of 1923 includes wakfs of all kinds except such wakf as is described in S 3 of the Mussalman wakf Validating Act of 1913 under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants. Act 14 of 1920 was enacted to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature. In my opinion Act 14 of 1920 does not apply to a wakf which is partly a private endowment and partly a public endowment The Act which applies to such a wakf is Act 42 of 1923. In this case the wakf is not denied. The mutwalli admits the wakf and he has duly complied with the provisions of the Mussalman Wakf Act of 1923. It need not be decided in this case whether under the Musalman Wakf Act of 1923 the "Court" has power to determine as to whether any property which is denied to be wakf property, is wakf property within the meaning of the Act. That question does not arise in this case and may be left out of consideration

By Court (18*th February* 1929).—The reference is returned to the Bench concerned with the judgments of the members of the Full Bench.

Misra and Raza, JJ. (27*th February* 1929.)—The facts of the case are given at length in our referring order dated 8th January 1929 The following questions were referred to the Full Bench for decision .

1. " Whether the Charitable and Religious Trusts Act (Act 14 of 1920) applies to the cases of mixed wakfs or trusts, where a portion of the benefit is allotted for private purposes and a portion for public purposes, so far as the latter portion is concerned, or, whether it applies only to those cases where the entire benefit under the wakf or trust is allotted for public purposes ?"

2. " Whether a person interested in a public, religious or charitable wakf is entitled to make an application under S. 3, Charitable and Religious Trusts Act (Act 14 of 1920), when the trustee of the said wakf has already furnished to the Court all the particulars and accounts, relating to the wakf under Ss. 3 and 5, Mussalman Wakf Act (Act 42 of 1923)?"

The Full Bench has answered the questions thus :

(1) The Act of 1920 applies only to those cases where the entire benefit under the wakf or trust is allotted for public purposes."

(2) " Where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S. 3 of the Act of 1920, but that he is not so entitled if the purpose of the trust is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923."

The result is that the application filed by Sheikh Ashiq Husain in the Court of the District Judge, Lucknow, is not maintainable. We, therefore, accept this application for revision and dismiss the application of Ashiq Husain with costs in both the Courts.

M.N./R.K. *Revision accepted.*

A. I. R. 1929 Oudh 231
Full Bench

WAZIR HASAN, AG. C. J., AND MISRA AND RAZA, JJ.

Jai Indar Bahadur Singh—Appellant.

v.

Brij Indar Kuar—Respondent.

Execution Decree Appeal No. 54 of 1928, Decided on 1st March 1929, against order of Dist. Judge, Lucknow, D/. 4th July 1928.

(a) Civil P. C., O. 21, R. 1—Judgment-debtor paying decretal amount to receiver appointed for the purpose—Loss due to misappropriation by receiver must fall on judgment-creditor.

Where the judgment-debtor is proved to have paid money due from him under a decree passed by the Court to the receiver appointed by the Court for realizing sums of money and making payment to the decree-holder, and the receiver is found subsequently to have misappropriated the money, the judgment-debtor should be absolved from his liability and the loss should not fall upon him. The loss in such a case must fall on the judgment-creditor to whom it would be open to sue the receiver or to take such other remedy as he may be advised to take but he cannot be allowed to recover the said money again from the judgment-debtor 20 *Mad.* 224 (*F. B.*) *Disc.* [P 233 C 2]

(b) Civil P. C., O. 40, R. 3—Receiver misappropriating property meant for paying off decree-holders—They must bear loss rateably.

If the property which came into the hands of a receiver appointed by the Court and which was to be sold by him for the purpose of making payments awarded to the different decree-holders, has been misappropriated by him, the loss must be borne rateably by the decree-holders in proportion to the amount of their decrees. The loss must fall on all the judgment-creditors and not upon one of them. [P 233 C 2]

(c) Interpretation of Statutes—An enactment includes all necessary incidents and consequences of it—Payment under Civil P. C., O. 21, R. 1 according to Court's direction absolves judgment-debtor—Civil P C., O. 21, R. 1.

It is a well accepted maxim of interpretation that an enactment includes all the incidents or consequences necessarily resulting from it. Thus when money payable under a decree is paid by a judgment-debtor in accordance with the direction of the Court which made the decree the act of payment must involve, to save itself from utter futility, the necessary consequence of freedom of the judgment debtor from his liability under the decree : (1894) *A. C.* 248, *Ref.* [P 235 C 1]

Ali Zaheer, Salig Ram and *Narayan Lal*—for Appellant

J. Jackson—for Respondent.

Opinion

Misra, J.—(*8th December* 1928). The question which has been referred to the Full Bench for decision is as follows :

"Where the judgment-debtor is proved to have paid money due from him under a decree passed by the Court, to the receiver appointed by the Court for realizing certain sums of money and making payments to the decree-holder or decree-holders, or other money or property is proved to have come to his hands and the receiver is found to have misappropriated the money and the property on whom should the loss fall ? Should the loss fall on the judgment-debtor or on the judgment-creditor ?"

The facts of the case are sufficiently stated in the order of reference. For our purposes it is only necessary to state that in an administration suit brought by the respondent, Mt. Brij Indra Kunwar, it was decided that she, along with certain other persons, was entitled to a particular sum as annuity as provided in the will of her father, Thakur Rajendra Bahadur Singh and a decree for the amount due to her was passed. Certain property moveable and immovable, was held liable for the payment of these annuities The moveable property consisted of cash, Government securities and certain debts The immovable property consisted of certain villages situate in the Kheri District The first Court directed the sale of the Government securities as well as of the immovable property and also the realization of the debts the proceeds whereof was to be spent in paying the annuities both past and future. It also appointed a receiver authorizing him to realize the debts and to sell the properties if necessary and to pay therefrom to the annuitants their past arrears as well as the sums that were to accrue due in future.

On appeal the Court of the late Judicial Commissioner modified the decree only to this extent that it held that if the defendant judgment-debtor deposited a certain amount of money the immovable property should not be sold. It calculated the amount of money which the judgment-debtor should deposit in order to prevent the sale of the immovable property We may also indicate that the annuitants were only to enjoy the amounts of their annuities for their lives and the property moveable and immovable which was charged with the payment of the said annuities was to go to the judgment-debtor to the extent of what

remained available after the payment of the said annuities.

The receiver appointed by the first Court did not furnish any security. He, however, realized certain debts and the Government securities were also handed over to him. Besides, the judgment-debtor paid to him certain sums of money which he was liable to pay to the various annuitants of whom the plaintiff respondent was one. The receiver has misappropriated the securities and has also embezzled the sums of money paid to him by the judgment-debtor as well as realized by him on account of debts, He has absconded and no trace of him can now be found

The question which has now been referred to us is regarding the sums paid to the receiver by the judgment-debtor or realized by him, and the securities that came into his hands and which he has either embezzled or misappropriated. As to the sums of money paid to the receiver by the judgment-debtor or realized by him I am of opinion that the judgment-debtor must be considered as absolved from the liability of the payment of the said sum and I proceed to give my reasons for arriving at this conclusion.

Under O. 21, R. 2, it is provided that all money payable under a decree shall be paid as follows namely:

(a) into the Court whose duty it is to execute the decree ; or,

(b) out of Court to the decree-holder; or,

(c) otherwise as the Court which made the decree directs.

The rule further provides that where any payment is made under Cl. (a), sub-R. 1, notice of such payment shall be given to the decree-holder. It appears to me to be clear from the above provisions that where a judgment-debtor pays money either into the Court whose duty it is to execute the decree or in a manner directed by the Court, the payment is considered to be as good a payment as one made by the judgment-debtor out of Court to the decree-holder himself. Where the payment is made in accordance with the direction of the Court it is not necessary to give any notice of such payment to the decree-holder The judgment-debtor if he makes such payment is absolved from his liability. To illustrate my meaning I would take the case where a warrant of attachment of the property of a judgment-debtor is issued and handed over for execution to the bailiff of the Court under the provisions of O 21, R 30, Civil P. C., or where a warrant for the arrest of the judgment-debtor is similarly handed over to the bailiff for execution under the provisions of O. 21, R 38 of the Code. The form of the warrant of attachment will be found on No 8 of Appendix B attached to the Civil Procedure Code and the form of the warrant for arrest in execution will be found on No. 13 of the same Appendix It will appear from those two forms of warrant that the execution is deemed complete when the amount of money entered in the warrant is paid by the judgment-debtor to the bailiff of the Court. On the payment of the said sum by the judgment-debtor, the bailiff is to return the warrant with a report that it has been carried into effect If then the money paid by the judgment-debtor to the bailiff is embezzled by the latter the judgment-debtor cannot be considered to be liable to pay the said sum a second time. The bailiff of the Court is an officer of the Court and the payment to him is in accordance with the direction of the Court entered in the warrant The conclusion therefore to which I have arrived is that if the money is paid by the judgment-debtor either into the hands of the decree-holder or to an officer of the Court in accordance with the directions of the Court he must be deemed to be absolved from all future liability of making another payment.

It is clear from the facts stated in the order of reference that the Court of the Second Additional District Judge of Lucknow gave to the receiver appointed in this case directions to realize the money both from the judgment-debtor and from other sources mentioned in the judgment. If the judgment-debtor therefore made payments to the receiver his payments will be considered to have been made to an officer of the Court in accordance with the directions of the Court and the payments so made must be considered to be good so far as he (the judgment-debtor) is concerned.

As remarked in the order of reference there are not many cases on the subject The matter seems to have come up before the Madras High Court in a case re-

ported in *Orr* v *Muthia Chetti* (1) and in an appeal from that very decision which will be found reported in *Muthia Chetti* v. *Orr* (2). This was a case in which a receiver had been appointed at the instance of the judgment-creditor under S 503, Civil P. C., 1882, for the purpose of realizing money due to the judgment-debtor from certain tenants The money was collected by the receiver but was subsequently misappropriated by him. The question for decision was whether the collection of the amount by the receiver had discharged the judgmeut-debtor from his liability. Muttusami Ayyar J., held that the receiver though appointed at the instance of the decree-holder could not be considered to be his agent but must be deemed to be a custodian of the property on behalf of the parties to the case, and such being the case if there occurred a loss from the default of the receiver, the estate must bear the loss. In the appellate Court the case was heard by a Bench of two Judges consisting of Shephard and Davies, JJ , Shephard, J , took the same view as had been taken by Muthusami Ayyar, J. Davies, J , however, took a different view His opinion was that when a judgment-debtor paid the money into Court or otherwise as directed by the Court the judgment-debtor must be considered as having discharged the decretal debt He was of opinion that a receiver ought to be considered as an officer of the Court and any payment made to such officer should be treated as effectual as a payment made directly into Court. I am in entire agreement with the opinion of Davies, J., and the analysis of O. 21, R. 1, given in the earlier portion of this judgment satisfies me that the view taken by Davies, J., is correct.

The same conclusion appears to me to be deducible if we look at the case from another aspect. Reading Rr. 1 and 2, O. 21, together it would appear that where a payment is made out of Court to a decree-holder it is necessary that such payment should be certified to the Court in order that the judgment-debtor may be exonerated from the liability of making the payment again The payment may be certified either on the application of the judgment-debtor or that of the decree-holder. No such certification is provided for in the case where the money is paid into Court or where the money is paid according to the direction of the Court. Where money is paid into Court under Cl (a), sub-R. (1) or according to the direction of the Court under Cl (c), sub-R (1) the obvious reason for not requiring certification in these cases is that the payment is considered to be effective. I would therefore answer the first portion of the reference in this way that where the judgment-debtor is proved to have paid money due from him under a decree passed by the Court to the receiver appointed by the Court for realizing sums of money and making payment to the decree-holder and the receiver is found subsequently to have misappropriated the money, the judgment-debtor should be absolved from his liability and the loss should not fall upon him The loss in such a case must fall on the judgment-creditor to whom it would be open to sue the receiver or to take such other remedy as he may be advised to take but he cannot be allowed to recover the said money again from the judgment-debtor

As to the property which is proved to have come to the hands of the receiver and which he has misappropriated, my answer would similarly be that if the property which came into the hands of the receiver and was to be sold by him for the purpose of making payments awarded to the different decree-holders, the loss must be borne rateably by the decree-holders, in proportion to the amount of their decrees The loss must fall on all the judgment-creditors and not upon one of them I am clear in my mind that the Government securities, which were to go into the hands of the receiver and which actually did come into his hands but were subsequently misappropriated by him, were directed by the Court to be sold and the sale proceeds were to be appropriated in making payments to the different annuitants including the plaintiff-respondent in whose favour the decrees had been passed in the administration suit

The judgment-debtor for the reason stated above cannot be made to suffer the loss since the property which had to come into the hands of the receiver did actually reach his hands. My answer to the second part of the reference there-

(1) [1894] 17 Mad. 501.
(2) [1897] 20 Mad. 224 (F. B.).

fore is that in such a case the loss should not fall on the judgment-debtor but should fall on all the judgment-creditors rateably in proportion to the amount of their decrees.

With these two answers I would return the record to the Bench concerned

Raza, J—(*17th December* 1928). I am in entire agreement with the opinion expressed by my learned brother Gokaran Nath Misra, J In my opinion also the receiver should be considered to be an officer of the Court and any payments made to such officer should be treated as effectual as payments made directly into Court I see no reason why should the judgment-debtor suffer when he paid the money into Court or out of the Court to the decree-holder or otherwise as directed by the Court I would also answer the question referred to the Full Bench for decision in the manner in which it has been answered by my learned brother Gokaran Nath Misra, J

Wazir Hssan, Ag C. J.—(*22nd December* 1928). This is a reference to the Full Bench for decision of the following question :

" Where the judgment-debtor is proved to have paid money, due from him under a decree passed by the Court, to the receiver appointed by the Court for realizing certain sums of money and making payments to the decree-holder or decree-holders, or other money or property is proved to have come to his hands and the receiver is found to have misappropriated the money and the property, on whom should the loss fall ? Should the loss fall on the judgment-debtor or on the judgment-creditor ? "

The question stated above clearly assumes the fact that a judgment-debtor has in satisfaction of a decree and a claim against him paid money or delivered property but that he has done so not directly to the decree-holder but to a receiver appointed by the Court. On that fact it must be held that the act of the judgment-debtor is accepted as referable only to his liability under the decree and to the other claim of the same decree-holder and to no other liability It is admitted that the judgment-debtor's discharge of the liability under the decree or the claim would have been complete had he paid the money or delivered the property to the decree-holder. The controversy, therefore, centres round the question as to whether the payment of the money or the delivery of property not to the decree-holder but to the receiver gives in law the same result or not. This brings me at once to the consideration of the circumstances in which and the objects for which the receiver was appointed by the Court in this particular case. According to the order of reference the receiver was appointed by the same Court which had passed the decree and which was seised with a suit for the administration of the judgment-debtor's assets and was appointed for the purpose of realizing debts that might be due to the estate of the judgment-debtor and also to sell his properties, if necessary, with directions as to the ultimate destination of the proceeds and that was to pay the decree-holder in satisfaction of the decree and also in satisfaction of a future claim of annuity If such were the directions and the object of the Court in making the appointment of the receiver it follows that he had the authority of the Court to receive the judgment-debtor's money and property in satisfaction of the decree and the claim of the annuitants That the Court could in exercise of its powers with which it is invested by law prescribe a mode for satisfaction of the decree by the judgment-debter is beyond doubt—see Cl (c), sub-R 1, R 1, O. 21, Civil P C In this particular case the mode prescribed was payment to the receiver I hold, therefore, that when the judgment-debtor paid money to the receiver with the object of satisfying the decree or the claim against him and also delivered property to him for the same object his act in doing so was an act in accordance with the directions of the Court and, therefore, valid. The same conclusion is reached by considering the effect of the provisions of S. 51, Civil P. C. Those provisions authorize the Court to order execution of the decree :

(a) by delivery of any property specifically decreed,
(b) .....
(c) .....
(d) by appointing a receiver,
(e) in such other manner as the nature of the relief granted may require.

In arriving at the result mentioned above I have not felt much difficulty but my difficulty arises now. R. 1, O. 21, Civil P. C , says that all money payable under a decree shall be paid in any of the three ways mentioned in Cls. (a), (b) and sub-R (1) respectively. The rule does not proceed to state that if money is paid

in accordance with any of the three modes the decree shall stand satisfied and the judgment-debtor absolved of his liability under the decree in its entirety or proportionately as the case may be. But if this is not so expressed in words can it be said that the same is not intended by necessary implication? I think not. In my opinion that rule must mean two things: (1) The mode in which a judgment-debtor must pay money under a decree and that he shall not pay in any other mode and (2) that if he has so paid he has discharged his liability under the decree.

Perhaps the implication is clearer in cases where the Court is to certify payment or adjustment of a decree and the certificate has been recorded. On the circumstances it must be held that the present case is not a case of that nature. The payment or an act done in accordance with the rule will become wholly illusory unless it be held that the rule impliedly includes all the incidents or consequences strictly resulting from it When money payable under a decree is paid by a judgment-debtor in accordance with the direction of the Court which made the decree the act of payment must involve to save itself from utter futility the necessary consequence of freedom of the judgment-debtor from his liability under the decree. It is a well accepted maxim of interpretation that an enactment includes all the incidents or consequences necessarily resulting from it. An illustration of this maxim will be found in the case of *West India Improvement Co* v *Attorney-General of Jamaica and Fraser* (3). On these grounds my answer to the question is the same as given by my learned brother Misra, J.

By Court —(22*nd December* 1928), The answer to the question is that the loss should fall on the judgment-creditor

M N /R K. *Reference answered.*

(3) [1894] A. C. 243=70 L. T. 80.

A. I. R. 1929 Oudh 235

WAZIR HASAN, AG. C. J. AND MISRA, J.

Kamakhya Dutt Ram—Appellant.

v.

Shyam Lal and *others*—Respondents.

First Civil Appeal No. 77 of 1928, Decided on 29th January 1929, against decree of Sub-Judge, Fyzabad, D/- 25th February 1928.

(a) Civil P. C., S. 69—Decree transferred to Collector—Injunction to Court passing decree is futile—Civil P. C., S. 38.

Where the execution proceedings have gone into the hands of the Deputy Commissioner the issue of an injunction to the Court which passed the decree originally, is obviously futile. [P 236 C 2]

(b) Civil P. C., O. 39, R. 1—Sale in teeth of injnction is not void.

Sale held in execution of a decree in spite of an injunction is not void merely on that ground 9 *All.* 497 ; 25 *All.* 431 ; 35 *M. L. J.* 96 and *A. I. R.* 1925 *Lah.* 644, *Rel. on.* [P 237 C 1]

(c) Civil P. C., O. 21, R. 92—Sale in judgment-debtor's lifetime confirmed without his legal representatives on record is not void.

Where the sale has taken place in the lifetime of the judgment-debtor and is confirmed after his death without bringing the legal representatives of the deceased judgment-debtor, on the record of the execution case and without notice to them, the sale is not void. [P 237 C 1]

(d) Civil P. C., O. 21, Rr. 72 and 73—Pleader for decree-holder purchasing property—Sale is not invalid —Legal Practitioner.

Although a pleader purchasing property at an auction sale in execution of a decree in which he was professionally engaged on behalf of the decree-holders infringes certain rules of conduct, the sale does not thereby become invalid. [P 237 C 2]

(e) Civil P. C., O. 21, R. 70—Decree transferred to Collector—Sale in its execution postponed sine die—No fresh proclmation—Sale is irregular although Rr. 66 to 69 do not strictly apply.

Although under R. 70 the provisions of Rr. 66 to 69 are inapplicable to a case in which the execution of a decree has been transferred to the Collector still the same rule having been made by the Local Government in exercise of its powers under S. 70, a sale in execution of a decree so transferred after the same was postponed sine die is irregular if no fresh proclamation was issued. [P 237 C 2]

Ali Zaheer, K. P. Misra, Ali Mohammed and *A. C. Mukerji*—for Appellant.

M. Wasim and *P. D. Rastogi*—for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Fyzabad, dated 25th February 1928.

The facts are as follows: Shyam Lal, respondent 1 and others held a decree passed by the Court of the Subordinate Judge of Fyzabad for a sum of Rs. 16,600 and odd against one B Sitaput Ram, now deceased. Under the provisions of S. 68, Civil P C, proceedings in relation of the execution of this decree were transmitted to the Deputy Commissioner of Fyzabad and on 27th October 1925 the property

in suit was purchased by the respondent Lala Shyam Behari Lal, respondent 4 for a sum of Rs 8,000 at a public auction held by the Deputy Commissioner. B Sitapat Ram died on 3rd November 1925 and on 4th December 1925 the Deputy Commissioner confirmed the sale The appellant is the son of B. Sitapat Ram and the object of the suit out of which this appeal has arisen is to avoid the sale of 27th October 1925 The suit has been dismissed by the Court below as we have already said In support of the prayer for the declaration that the sale was void several grounds were urged before the lower Court, but at the hearing of the appeal before us only such of the grounds were reiterated as we shall state in this judgment.

The property in suit previous to its devolution upon B. Sitapat Ram belonged to Rai Bahadur B Sri Ram, C. I. E., who made a testamentary disposition in respect thereof on 22nd May 1912. On the death of the testator this property together with other properties passed to B. Sitapat Ram under the provisions of the said will and the first ground of the claim is that under those provisions B Sitapat Ram had only a life interest and the remainder came to be vested in the appellant. The learned Subordinate Judge has interpreted the will in question and come to the conclusion that the property in suit devolved on B. Sitapat Ram in absolute estate We agree with the learned Subordinate Judge. A Bench of this Court consisting of one of us and Raza, J., had, in a previous case, an occasion to decide this question of the interpretation of the will of Rai Bahadur B Sri Ram. The Bench decided that B. Sitapat Ram acquired proprietary interest under the provisions of Cl. 4 of that will in the properties mentioned in Sch. 4 of the schedule attached to the will. Admittedly the property now in suit is entered in the said schedule. A copy of the judgment dated 9th March 1928, *Kamakhya Dat Ram* v. *Khushal Chand* (1), will be attached to this judgment. The will was similarly interpreted in another judgment of this Court dated 9th November 1926, a copy of which is filed on the record of this case (Ex. A-1).

The second argument in support of the appeal is that the sale in question was held in spite of an injunction issued by the Court of the Subordinate Judge of Benares. The facts bearing on this part of the case are that a brother of the appellant, namely, Viddyadat Ram, had filed a suit for partition of the family property including the property now in suit in the Court of the Subordinate Judge of Benares To this suit his father Sitapat Ram and his brother, the present appellant and other members of the family were made party defendants. Viddyadat Ram during the pendency of the partition suit moved the Court of the Subordinate Judge of Benares for issue of an injunction to restrain the sale which was being held at Fyzabad in execution of the decree held by respondents 1 to 3 The Subordinate Judge of Benares ordered the desired injunction to issue on 2nd October 1925 (Ex. 11) after due service of notice on the decree-holders, and a copy of the order was also transmitted by means of a letter dated 21st October 1925 to the Court of the Subordinate Judge of Fyzabad (Ex. 10) as also to the Deputy Commissioner of Fyzabad (Ex 21). The last-mentioned letter with a copy of the order passed by the Subordinate Judge of Benares on 2nd October 1925 reached the hands of the officer in charge of the sale on 26th October 1925 Thereupon the said officer passed the following order

"After a perusal of the said letter and the order passed by the Deputy Commissioner of this District it is ordered that this sale be postponed till further order and the case be laid before this Court tomorrow (Ex 2)."

On the following day, that is 27th October 1925 the sale officer recorded the following order

"This case came up today. As no order for postponement of the sale has been passed by the Subordinate Judge, Fyzabad, it is ordered that the order dated 26th October 1925 be cancelled and the sale proceedings be resumed."

The result was that the sale was held and concluded on 27th October 1925 as already stated It is not necessary to decide as to whether Court of the Subordinate Judge of Benares had jurisdiction to issue the injunction which he had issued We will assume that he had The execution proceedings having gone into the hands of the Deputy Commissioner, of the District the issue of an injunction to the Court of the Subordinate Judge, Fyzabad which had passed the decree originally, was obviously futile. There can be no doubt, however, as the facts stand that the sale was held in teeth of the injunction. The question, therefore

(1) A. I. R. 1928 Oudh 340=3 Luck. 591.

is as to whether the sale is void for that reason. We are of opinion that it is not. The matter is wholly covered by two decisions of the Allahabad High Court: The *Delhi & London Bank, Ltd.* v. *Ram Narain* (2), *Manoher Das* v. *Ram Autar Pande* (3), one decision of the High Court at Madras : *Puzhakkal Edom* v. *Mahadeva Pattar* (4), and one decision of the High Court at Lahore: *Beli Ram* v *Ram Lal* (5) We are in entire agreement with those decisions. We therefore reject this ground also

The third ground of attack is that the auction sale of 27th October 1925 was confirmed by the Deputy Commissioner on 4th December 1925 without bringing the legal representatives of the deceased judgment-debtor B Sitapat Ram on the record of the execution case and without notice to them and that therefore the sale is void In agreement with the Court below we are unable to accept this argument. The sale had taken place in the lifetime of the judgment-debtor and there are no provisions in the Civil Procedure Code which require legal rspresentatives of a judgment-debtor, who has died after the sale, to be brought on the record for the purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale takes place behind the back of his representatives, but we express no opinion on that point. It may be mentioned that the Deputy Commissioner had directed the issue of notice to the representatives of the deceased judgment-debtor under his order dated 11th November 1925 (Ex. 6). Unfortunately notice was not served This fact, however, does not affect the validity of the confirmation.

Another objection urged upon us against the vaidity of the sale is that the defendant-respondent, Lala Shyam Behari Lal, being a pleader of the Court, was prohibited by law from purchasing the property in suit at a public auction. B. Shyam Behari Lal was the pleader in the case both of the decree-holders, Lala Shyam Lal and others and also of his father Lala Gopal Das who was also a decree-holder in whose favour an order for rateable distribution of the proceeds of the sale had been made. He was never a pleader of the judgment-debtor. On these facts alone we are not prepared to hold that the sale in question is void. It may be that the pleader in question by purchasing property at an auction sale in execution of a decree in which he was professionally engaged on behalf of the decree-holders, has infringed certain rules of conduct, for instance Rule No 275 of the Oudh Civil Digest. But this cannot be given the effect of invalidating the sale. Our attention was drawn to R. 73, O 21, Civil P. C , in this connexion. We are of opinion that that rule has no application to this case Accordingly, we reject this argument also.

It is contended that the sale in question was conducted with material irregularity which has resulted in substantial injury to the judgment-debtor. This argument is founded on the following facts The sale was originally fixed to be held on 20th October 1925. On that date the officer-in-charge of the sale postponed it for 22nd October 1925 on the ground that no bidders had come (Ex. 13). The proceedings were again placed before the said officer on 26th October 1925 and having regard to the injunction issued by the Subordinate Judge of Benares the said officer passed the following order :

"This sale be postponed till further order and the case be laid before this Court tomorrow" (Ex. 2).

To this order we have already referred. On the following day, that is, on 27th October the sale was resumed and concluded (Ex. 3). It is argued that by the order of 26th October 1925 the sale having been postponed sine die it could not be held on the day following and a fresh proclamation of sale became necessary In support of this argument reliance is placed upon the provisions of O. 21, R 69, Civil P. C.

We accept the argument in so far that the order passed on 26th October 1925 had the effect of postponing the sale sine die ; but under R. 70 the provisions of Rr. 66 to 69 are inapplicable to a case in which the execution of a decree has been transferred to the Collector and the present case is one in which such a transfer had taken place. This, however, is not conclusive because the same rule has been made by the Local Government in exercise of its powers under S. 70, Civil

(2) [1887] 9 All. 497=(1887) A. W. N. 107.
(3) [1903] 25 All. 431=(1903) A. W. N. 92.
(4) [1918] 35 M. L. J. 96=47 I. C. 778.
(5) A. I. R. 1925 Lah. 644=6 Lah. 380.

P. C. The rule is R. 986, Government Rule Manual We therefore hold that there was a material irregularity in publishing the sale. But we are not satisfied that the appellant has sustained substantial injury by reason of such an irregularity. An elaborate calculation of the value of the ten items of immovable property sold was made by the learned counsel for the appellant in the course of his argument before us and it was pointed out as against the opinion of the Court below that though portions of the property sold were subject to an encumbrance of over Rs 23,000 every item of the property sold was not so encumbered. But the result of elimination of the unencumbered portions of the property sold leads us to the conclusion that, having regard to the total value of the property sold, appellant might have suffered a loss of Rs. 3,000 on the whole This is a very strict test for judging injury It might be that the property could have fetched Rs. 3,000 more had it been sold privately after prolonged negotiation. In the circumstances we cannot hold that the irregularity has caused any substantial injury.

This disposes of the grounds on which the suit, out of which this appeal arises, is found We will now notice but not decide a plea raised in defence to the effect that the suit was barred by S. 47, Civil P. C. As we are going to dismiss the appeal on merits we refrain from deciding the point raised by this plea.

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

R.K. *Appeal dismissed*

A. I. R. 1929 Oudh 238

PULLAN, J

E. A Wylie—Petitioner.

v.

R. S. Wylie—Respondent.

Divorce Case No. 1 of 1929, Decided on 15th February 1929.

Divorce Act, S. 19 (1)—Incurable syphilis amounts to impotence—But where woman is discharged from hospital as cured with negative blood test the syphilis is not incurable and her marriage cannot be dissolved.

Incurable syphilis is equivalent to impotence, and that a decree of nullity can be granted to a petitioner who proves that the husband or wife, as the case may be, was suffering from such a disease at the time of marriage, even though the disease is not an absolute bar to copulation. Where a woman is discharged from hospital as cured and her blood test was negative it is much more likely that she was suffering from some curable form of venereal disease than that she was suffering from an incurable form. Syphilis in its early stage is not incurable and, therefore, it cannot be said that she is impotent and that her marriage cannot be set aside on that account 48 *Cal.* 283, *Rel. on* [P 239 C 1, 2]

R. I. Waheed—for Applicant.

Moti Lal Saksena—for Respondent.

Judgment —This is a petition brought by Earnest Arthur Wylie who described himself as an Anglo-Indian, in the alternative either for the nullity of his marriage under S 19, Divorce Act, or for dissolution of the same marriage under S. 10 of the same Act The respondent is his wife Mrs. Ruth Shanti Wylie, and it is admitted that the marriage took place on 9th July 1928 in the Methodist Episcopal Church, Lucknow. The petition is contested and there is no question of collusion

In the petition the case set up was that after the respondent came to live with the petitioner the latter discovered that she was suffering from venereal disease, that he did his best to have her treated but in vain and that about the middle of October 1928 she left his house for the hospital and has ever since lived separate from the petitioner. The ground on which the petitioner based his claim for nullity was that the girl was suffering from venereal disease at the time of marriage whereas she and her people had fraudulently given the petitioner to understand that she was "a virgin and healthy and clean," and the petitioner must therefore be held to rely on S 19, Cl. (1), Divorce Act, read with the proviso relating to fraud contained in the same section. It was nowhere alleged in the petition that the petitioner had never cohabited with his wife, nor was this point raised at the time when the issues were framed when the respondent by her written statement had given notice to the petitioner that she herself pleaded continuous cohabitation and suggested that the petitioner himself was suffering from some form of venereal disease.

When the petitioner came into Court he then for the first time stated that immediately after marriage he found in his bride's box a small phial containing

pills bearing a label "For Syphilis" and also a bottle of ointment. He at once informed his father who informed his wife, and the girl was taken to one Dr. Padam Singh for examination. The petitioner has stated on oath that owing to the suspicion raised by the finding of the pills and also by the opinion expressd by Dr. Padam Singh he never had any connexion with his wife, although he lived with her in the same room, if not in his father's house, at any rate in a house of which they were the only occupants during the month of September. Naturally there can be no evidence to corroborate either the statement of the petitioner or the respondent on this point. But in my opinion the mere fact that the parties left the petitioner's father's house and went to live together in a house of their own in the city, and stayed there alone for a month renders the petitioner's story incredible. In my opinion this is a mere afterthought based upon a ruling of the Calcutta High Court to which I shall refer later. It is no part of the petitioner's original case and it is untrue (His Lordship then discussed evidence and after concluding that the respondent was suffering from veneral disease and that the same was not purposely concealed from her husband proceeded.) I have now to consider to what relief, if any, the petitioner is entitled. He cannot obtain a divorce because the evidence of adultery is quite unsatisfactory, and that part of his case is not proved.

The question is whether he can obtain a decree of nullity either on the ground that his wife is impotent or on the ground that she was married to him fraudulently. The only ruling of Indian Courts to which I have been referred is that reported in *Birendra Kumar* v. *Hemlata Kumar* (1). It is not a judgment which definitely decides any question because the case was remanded in order to ascertain whether the condition of the respondent amounted to impotence There are some observations in the judgment which indicate that in the opinion of the Judges syphilis, at any rate incurable syphilis, amounts to impotence because it is a bar to sexual intercourse This opinion is based upon grounds of public policy and in my opinion it would be proper to hold that incurable syphilis is equivalent to impotence, and that a decree of nullity can be granted to a petitioner who proves that the husband or wife, as the case may be, was suffering from such a disease at the time of marriage, even though the disease is not an absolute bar to copulation. The judgment relies almost exclusively on American rulings and it is not shown that there is any ruling of English Courts which would support the proposition that syphilis is tantamount to impotence, but on this point I am prepared to follow the Calcutta authority which has been brought to my notice. On the other hand I cannot find that the respondent is suffering from an incurable form of syphilis She was discharged from hospital as cured her blood test was negative, and it is much more likely that she was suffering from some curable form of venereal disease than that she was suffering from an incurable form. Indeed it is now not generally supposed that syphilis in its early stage is incurable, though this may not have been known in the year 1920 when the Calcutta Court decided the case of *Birendra Kumar* v. *Hemlata Kumar* (1) but it is a fact which must be taken into consideration now. I am therefore not prepared to say that the respondent is impotent and that her marriage can be set aside on that account. As to the allegation of fraud this would depend on proof. The fraud alleged in the petition is that the respondent and her parents gave out that ths girl was "a virgin, healthy and clean." There is no evidence that they did so, although it must be presumed that the petitioner was under the impression that the girl was not diseased when he married her. Something more than this is required to prove a fraud As I have stated above, there is no reason to suppose that the girl's parents had any idea that she was suffering from any venereal disease and she herself may very well have been ignorant as to what her symptoms denoted I cannot therefore find either that the respondent is impotent or that her marriage with the petitioner was obtained by means of fraud, and I am therefore unable, as the law stands, to pass a decree of nullity of marriage I therefore dismiss the suit with costs.

R.K. *Petition dismissed.*

(1) A. I. R. 1921 Cal. 459=48 Cal. 288.

A. I R. 1929 Oudh 240 (1)

STUART, C. J.

Mohammad Ali—Accused—Applicant.

v.

Bhagwan Din—Complainant — Opposite Party

Criminal Revn. No 79 of 1928, Decided on 18th October 1928, against order of Magistrate, 1st Class, Sultanpur, D/- 16th June 1928.

Criminal P. C., S. 439—Power of revision is discretionary and should not be used on trifling occasions.

Where accused were bound under Criminal P. C., S. 562, for an offence under S, 323, and where revision was sought for a retrial,

Held . that the revisional powers were discretionary and not meant to be exercised on trifling occasions. [P 240 C 2]

Ghulam Hasan—for Applicant.

Judgment.—In this case the applicants in revision were convicted of causing simple hurt on the following evidence : It was found on the facts that they were accompanying a cart loaded with bones and that some of the bones fell out of the cart They thereupon directed the complainant to help to pick up the bones. He refused to do so. Sattar Khan then seized him and Abdul Hamid Khan and Mohammad Ali Khan beat him with the effect that in addition to other injuries, his nose began to bleed There was evidence of two witnesses to support this story and those witnesses were believed by the Bench of Magistrates On the other side the accused persons told a counter story that the complainant was to blame. Abdul Hamid Khan admitted that he was present. The other two men stated that they were not present. The Bench of Magistrates, who heard the evidence, believed the evidence for the prosecution and disbelieved the evidence for the defence. The Bench convicted these persons but dealt with them only under the provisions of S 560, Criminal P. C. and bound them over to be of good behaviour. They appealed to a Magistrate who dismissed their appeal. The appeal was dismissed on 16th June 1928. The applicants took no further action until 11th October 1928, when they applied to this Court in revision. The revision application requested this Court to re-examine the evidence, to reject the evidence for the prosecution and to accept the evidence for the defence ; in other words to retry this elementary case. I am not of opinion that the revisional powers of this Court are intended to be used in this manner. If they are to be used in this manner it would appear to follow as a logical consequence that every trivial case heard by every Magistrate in which a conviction has taken place should be reheard by the Chief Court. I see no reason to believe that the Bench of Magistrates arrived at a wrong conclusion and I reject this application.

P.R./R.K *Application rejected.*

A. I. R. 1929 Oudh 240 (2)

RAZA AND PULLAN, JJ.

Mathura Prasad—Appellant

v.

Karam Singh—Respondent.

First Appeal No 97 of 1928, Decided on 4th January 1929.

Court-fees Act, S. 7 (vi)—Pre-emption—Appeal—Court-fee should be paid on difference of sale price alleged by parties.

Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee should be calculated ad valorem on the difference between ths amounts alleged as the sale price on the one side and the other : 6 *All.* 488, *Foll.* [P 240 C 2]

K. N. Tandon—for Appellant.

Judgment.—We have heard the appellant's learned counsel. We think the office report is correct. It is supported by a ruling of the Allahabad High Court *Hafiz Ahmad* v. *Sobha Ram* (1):

"Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court-fee should be calculated ad valorem on the difference between the amounts alleged as the sale-price on the one side and the other."

Thus there is a deficiency of Rs. 485-8-0 in Court-fee. The appellant should make up the deficiency within a month hence.

R.K. *Order accordingly.*

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(1) [1884] 6 All. 488.

A. I. R. 1929 Oudh 241

STUART, C. J. AND MISRA, J.

Faqir Bakhsh—Plaintiff—Appellant.

v.

Ghirraon and *others*—Defendants—Respondents.

Second Appeal No 120 of 1928, Decided on 28th August 1928, against decree of Addl. Dist. Judge, Gonda, D/- 28th March 1928.

(a) Wajib-ul arz—Construction—Brothers and nephews to succeed means they succeed as collaterals but not together.

A village wajib-ul-arz recited that if a brother died childless leaving a widow, she would be entitled to succeed to the entire property for her lifetime without any power of alienation and on her death the brothers and nephews of her husband would succeed to the said property.

Held, that the words brothers and nephews "bhai bhatija" used in the wajib-ul-arz meant only collaterals of the deceased. They indicate only a class of persons, that is, the collaterals of the husband who were to succeed after the death of the widow. They did not mean that brothers and nephews would succeed together: 24 *All.* 273, (*P.C.*) *Ref.*

[P 242 C 1]

(b) Civil P. C., S. 100—Finding based on wrong interpretation is not binding.

A finding based upon a wrong interpretation of a document is not binding in second appeal. [P 243 C 1]

Khaliq-uz-zaman—for Appellant.

H. Husain and *Ali Jawad*—for Respondents.

Judgment.—This second appeal arises out of a suit for possession brought by the plaintiff appellant against the defendants-respondents.

The facts of the case are that one Amir, brother of the plaintiff-appellant, was possessed of a 6-pies share in mahal mafi and a 2-annas share in mahal Chhangur, both these mahals being situate in village Baizpur, District Gonda, and a residential house situate in the same village. Amir died in 1912 and according to the custom of the family was succeeded by his widow Mt. Dilasi who died in November 1926. Among the defendants, defendant 1 is the son of one of the brothers of Amir named Wazir who predeceased him, defendants 3, 4 and 5 are his grandnephews being the sons of his nephew Sultan who also predeceased Amir. After the death of Mt Dilasi the revenue Courts ordered mutation in favour of the plaintiff in respect of one-eighth share in the property of Amir and ordered mutation in favour of the defendants to the extent of seven-eighth share in the property in dispute. The present suit has been brought by the plaintiff-appellant for recovery of this seven-eighth share in respect of which the mutation has been made by the revenue Court in favour of the defendants-respondents. The plaintiff-appellant's case is that under the Mahomedan law he, being the brother of Amir, is solely entitled to the entire property left by the deceased and the defendants are not entitled to succeed to it in preference to him.

The only defence that was put forward by the defendants was that under a family and local custom the defendants were entitled to succeed to the property left by Amir along with the plaintiff, the custom set up being that according to it nephews succeed along with the brothers. It was, however, admitted by the defendants that under the Mahomedan law plaintiff would be entitled to the entire property left by Amir.

The sole point for decision before the trial Court, the Subordinate Judge of Gonda, was, therefore, one of custom. The defendants produced both oral and documentary evidence in support of the custom but the learned Subordinate Judge decided the issue against them and held that the custom was not established and on this finding he gave a decree to the plaintiff for seven eighth share in the property left by Amir regarding which mutation had been effected by the revenue Courts in favour of the defendants.

On appeal the learned Additional District Judge of Gonda came to a different conclusion and though he did not believe the oral evidence yet on the interpretation of the documentary evidence in the case decided the question of custom in favour of the defendants and in that view of the case he allowed the appeal and dismissed the plaintiff's suit.

The plaintiff-appellant has now appealed to this Court and the sole contention urged on his behalf before us is that the finding of the learned Additional District Judge that the custom is established cannot be maintained.

We have heard the arguments in this case at great length and we have also gone through the oral and documentary evidence produced by the defendants and have come to the conclusion that the decree of the learned Additional District Judge cannot be maintained and that this appeal must be allowed. We now

proceed to give our reasons for the said conclusion. The defendants-respondents produced the village wajib-ul-arz (Ex A-9) and several khewats (Exs A-1 to A-7) in proof of the alleged custom They also examined five witnesses in support of the custom We might also mention that the defendants-respondents filed a long pedigree, attached along with their written statement, showing those members of the family on whose deaths succession had occurred according to the custom alleged.

We first proceed to discuss the documentary evidence The wazib-ul-arz (Ex A-9, recites that if a brother died childless leaving a widow, she would be entitled to succeed to the entire property for her lifetime without any power of alienation and on her death the brothers and nephews of her husband would succeed to the said property (*bad wafat uske bhai bhatija uske shohar ke malik honge*) The learned Additional District Judge had interpreted this document to mean that the brothers and nephews would succeed together We are unable to accept this interpretation. In our opinion the words "*bhai bhatija*" used in the wajib-ul-arz mean only collaterals of the deceased They indicate only a class of persons, that is, the collaterals of the husband who were to succeed after the death of the widow. They do not mean that brothers and nephews would succeed together. In our opinion the interpretation put upon this document by the learned Subordinate Judge is a correct one. According to him these words do not mean that brothers and nephews would inherit together and that no regard should be paid to the nearness of degree According to this view the words only mean that brothers and nephews, whoever might be in existence, would succeed and that these words colloquially mean near relations of the deceased. We are in entire agreement with that interpretation It appears to us, as remarked by the learned Subordinate Judge, that if the intention of the framers of the wajib-ul-arz had been that brothers and nephews should inherit together it would have been clearly stated in the wajib-ul-arz that brothers and nephews would inherit together. (*bhai bhatije eksath malik honge*) In the absence of any such express and definite provision, the clause in the wajib-ul-arz cannot, in our opinion be interpreted as one in support of the alleged custom.

In a case which went up to the Lordships of the Privy Council from this very Province and which will be found reported as *Chandika Bakhsh* v. *Muna Kunwar* (1) wajib-ul-araiz of a similar character were produced in support of a similar custom The learned Judges of the late Court of the Judicial Commissioner of Oudh held that the interpretation which was attempted to be put on those documents, and which was of the same character as now put upon Ex. A-9 by the learned Additional District Judge could not be justified According to them this would be a forced construction vide p 276 They were of opinion that such language only denotes that brothers, and in default nephews, were to succeed We are in entire agreement with the interpretation put upon these words by the learned Judges of the said Court. The matter is not, however, discussed anywhere in the judgment of their Lordships of the Privy Council and we have not been able to follow the statement of either the learned Additional District Judge or of the Subordinate Judge that the Privy Council put any interpretation whatever upon the said documents. We only find on p 280 the remark of their Lordships that the wajib ul-arz on examination were found to prove nothing This might have been held by the Courts below to mean that their Lordships accepted the interpretation put upon the wajib-ul-araiz on examination were found to prove nothing. This might have been held by the Courts below to mean that their Lordships accepted the interpretation put upon the wajib-ul-araiz by the Court of appeal. Be that as it may, we are clearly of opinion that the interpretation put upon the wajib-ul-arz (Ex A-9) by the Additional District Judge cannot be supported. (The judgment then discussed other evidence and after holding that the defendants had failed to prove the custom proceeded) The learned counsel who appeared on behalf of the defendants-respondents argued that the finding as to custom being one of fact could not be set aside by this Court in second appeal. We regret we are unable to accept this contention. The learned Additional District Judge gave his find-

(1) [1902] 24 All. 273=29 I. A. 70=8 Sar. 293 (P.C.).

ing in support of the custom not upon the oral evidence produced by the defendants-respondents but upon the wajib-ul-arz as interpreted by him As to the oral evidence he has not anywhere stated in his judgment that he is in a position to believe it. Indeed he has clearly stated in his judgment that the instances attempted to be proved by the defendants-respondents as to the succession of sons along with grandsons were irrelevant to prove the custom alleged in the present case He has also remarked in his judgment that on the strength of the two instances which we have discussed above in detail he was not prepared to hold the custom established. He has only relied on these instances in support of the interpretation which he has placed on the wajib-ul-arz filed in the case Regarding that, we may observe that the learned Additional District Judge was not justified in relying on those instances when they had not been satisfactorily established We have also differed from the learned Judge in respect of the interpretation which he has chosen to put on the wajib-ul-arz Under those circumstances the finding of the learned Judge, which is chiefly based upon the interpretation of the wajib-ul-arz cannot be maintained. It is a finding based upon a wrong interpretation of a document and cannot be considered to be one which may be held to be binding on us in second appeal.

We, therefore, allow the appeal, set aside the decree of the learned Additional District Judge and restore that of the Subordinate Judge with costs in this Court and in the Courts below. The plaintiff's suit will stand decreed with costs in all the three Courts.

R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 243

RAZA AND PULLAN, JJ.

Udwat Singh and *others*—Applicants.

v.

Sarfaraz Singh—Opposite Party.

Privy Council Appeal No 27 of 1928, Decided on 19th January 1929, for leave to appeal in Privy Council, against judgment and decree in Second Appeal No. 130 of 1928, reported as *A. I. R.* 1929 *Oudh* 30.

Civil P. C., S. 109 (c) — Value of claim less than Rs. 10,000—No question of general principle involved — Certificate should not be granted unless justified by exceptional circumstances — Civil P. C., O. 45, R. 3.

The High Court may be able to certify, in exceptional circumstances, under O. 45, R. 3 appeals from its final decision which are of value less than Rs. 10,000. But in an ordinary case of redemption involving a question of no general principle, as to whether certain terms of a mortgage-deed constituted a clog on the equity of redemption a certificate cannot be granted there being no exceptional circumstances to justify it. [P 244 C 1]

Aditya Prasad—for Applicants.

Niamullah for *Hyder Hussein*—for Opposite Party.

Judgment —This is an application for leave to appeal to His Majesty in Council against a decision of a Bench of this Court dated 13th September 1928. The application is based upon two alternative pleas. The first is that the suit was one which involves a claim for over Rs. 10,000 as required by S 110, Civil P C., and the second is that even if the valuation is held to be less than Rs 10,000, the appeal might be certified under S 109, Cl (c), Civil P. C. The suit was one brought for redemption of a mortgage for Rs 1,600 executed on 14th October 1925 and the suit was valued at Rs 1,600. The property mortgaged is admitted by the applicants to be not worth more than Rs 2,000, and the only way in which it is possible to find a valuation of upwards of Rs. 10,000 is to assess it on the value of the property at the time of redemption. One of the conditions of the mortgage was that it should not be redeemed for 35 years and six months and undoubtedly if the mortgagor consistently fails to pay interest during that period, he will not be able to redeem on the expiry of the period fixed without paying a very large sum of money But that does not affect the valuation of the subject-matter of the suit either in the Court of first instance or at the present time Even now if the mortgagor is able to redeem, he will be able to do so on payment of a sum much less than Rs. 10,000 and we are unable to find for the purposes of S 110, Civil P C., either that the subject-matter of the property is Rs 10,000 or that the decree or final order must involve a claim to or question relating to a property of a like amount

It does not appear to us that in ordinary circumstances an appeal which prima facie falls under S 109 (a), Civil P. C., can be converted into one under

S. 109, (c) of the same Code merely because it fails to reach the money value required by S. 110. It may be that in special cases this Court may be able to certify under O. 45, R. 3 appeals from its own final decision which are of value less than Rs. 10,000, but clearly such exceptional procedure could only be justified by exceptional circumstances This is an ordinary case of redemption, and the only question is whether the terms of the mortgage-deed constitute a clog on the equity of redemption. It is a question which has been frequently decided and is not one which involves any general principle. In our opinion this is not a fit case to certify, and we therefore dismiss the application with costs.

P D/R K. *Application dismissed*

A. I R. 1929 Oudh 214

MISRA AND RAZA, JJ

Zahir-ud-din—Plaintiff—Appellant.

v.

Ali Husain—Defendant—Respondent.

Second Appeal No. 260 of 1928, Decided on 30th January 1929, against decree of Dist Judge, Fyzabad, D/- 30th April 1928.

(a) Oudh Laws Act (1876), S. 13—Price in the deed found to be fictitious — Court should determine fair value—Price paid, though fair indication of market value, is not conclusive—Price determined, however, must not exceed price in deed—Pre-emption.

Where the Court arrives at a finding that the price fixed in the deed has not been fixed in good faith it is its duty to determine what is the fair market value of the property sold. No doubt in many cases the price actually paid is a very good indication for determining the fair market value of the property sold, and that it is an element which the Courts must consider in determining the market value but the Court must not treat the money actually paid as conclusive evidence of the market value. The market value, however, so determined should not exceed the sale price mentioned in the deed: 4 *O. C.* 158, *A. I. R.* 1926 *Oudh* 68 and 101 *P.R.* 1887, *Rel. on* [P 245 C 2]

(b) Civil P. C., S. 100—Market value is question of fact.

Market value of a property is a question of fact unless an error of law in determining the market value is pointed out. [P 246 C 1]

Ghulam Hasan—for Appellant.

Wasim—for Respondent.

Judgment. — This judgment will govern the two appeals Nos. 260 and 261 of 1928. The two appeals arise out of a pre-emption suit. One Abdul Ghafoor sold one-third of his share in khata khewat No. 10 amounting to 4-pies and 24-decimals share and situate in village Tiari Machrouli, District Sultanpur. The sale-deed was executed on 9th November 1926, in favour of the defendant-respondent, Khan Bahadur Ali Husain for a sum of Rs. 4,000. On 1st June 1927, the appellant, Zahir-ud-din, brought a suit for pre-emption in the Court of the Subordinate Judge of Sultanpur against the defendant-respondent on the ground that he was a cosharer in this khata, being the own brother of the vendor, and was, therefore, entitled to pre-empt the property sold, against the defendant-respondent who was a stranger to the said village. He also alleged that the price entered in the deed was fictitious, that the money actually paid consisted of Rs. 3,000 which was also the market value of the property sold He, therefore, asked for pre-emption decree on the payment of Rs. 3,000.

The defendant-respondent admitted that he was a stranger to the village. but denied that the price entered in the deed was fictitious and alleged that it was the market value of the property sold. He contended that the price entered in the deed was the genuine price, for which he had purchased the property and asserted that it was also the market value thereof.

The learned Additional Subordinate Judge of Fyzabad, to whose Court the suit had been transferred for trial, came to the findings that the price entered in the deed was fictitious and that the market value of the property sold was Rs. 3,572-8-0. He, therefore, passed a decree for pre-emption in favour of the plaintiff-appellant directing him to deposit in Court within three months from the date of the decree the said sum of Rs. 3,572-8-0.

On appeal the learned District Judge of Fyzabad affirmed the finding of the learned Subordinate Judge on the question of the fictitious nature of the price entered in the sale-deed, but held that the market value of the property sold was Rs. 4,000, and he, therefore, directed the plaintiff-appellant to pay the said sum instead of that fixed by the first Court.

In second appeal two points were urged before us, firstly that the Courts below

having found that the price entered in the sale-deed was fictitious and having further found that the price actually paid was Rs. 3,000, it was not open to them to declare any sum more than Rs. 3,000 as the market value of the property sold and secondly, that the market value determined by the learned District Judge was not correct.

We are of opinion that none of these points can be sustained.

As to the first point it appears to us that the law is quite clear on the question. It is provided in S 13, Oudh Laws Act, 1876, that if in the case of a sale the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market value of the property sold. On the language of the section, therefore, there can be no doubt that where the Court arrives at a finding that the price fixed in the deed has not been fixed in good faith it is its duty to determine what is the fair market value of the property sold Indeed this point was conceded in arguments by the learned advocate for the plaintiff-appellant. The main point which he argued was to the effect that because in the present case it had been found by both the Courts that the price actually paid was Rs 3,000 it was not open to the Courts below to find any other sum as the market value of the property sold. We regret we cannot accept this contention It may be that the market value that the Court may determine in a particular case may be less than the price actually paid or may be more than the price so paid We are fully aware that in many cases the price actually paid is a very good indication for determing the fair market value of the property sold, and that it is an element which the Courts must consider in determining the market value. We are, however, unable to lay down a broad rule like the one contended for by the learned advocate for the plaintiff-appellant that in all cases the Court in determining the market value of the property sold must treat the money actually paid as conclusive evidence of the market value If there is no evidence given by the parties during the trial of the case which may enable the Court to determine the market value of the property sold it would be perfectly open in such a case to the Court to consider the price paid as a far indication of the market value.

We must point out that this view has been consistently followed in Oudh and would mention the case reported in *Mt. Wazir Begam* v. *Mohammad Ishaq* (1). The case was decided by a Bench of two Judges of the late Court of the Judicial Commissioner of Oudh, they being Messrs. Scott and Spankie Mr Spankie observed on p. 162 that in his opinion if the plaintiff in a suit to enforce the right of pre-emption under the Oudh Laws Act succeeds in showing that the price stated in the sale-deed is fictitious he is not entitled to acquire the property for the price actually paid, but must pay for it a price equivalent to the fair market value We are in entire agreement with the above observation of the learned Judge of the late Court, though we must further add that the market value so determined should not exceed the sale price mentioned in the deed. The same view was taken by Mr Dalal, J. C (now Mr. Justice Dalal) in a case reported in *Har Pershad* v. *Sheo Shankar* (2)

In the Punjab Chief Court the same view has been taken S. 17, Act 4 of 1872 laid down a similar rule that in case the Court was of opinion that the price had not been fixed in good faith, it should make a decree directing the defendant to sell such property to the plaintiff on such a price as appeared to it to be the fair market value of the property sold. The same rule exists in the pre-emption law, which is now in force in the Punjab, it being S. 26 of Act 1 of 1913. The matter came up for decision before the Chief Court of the Punjab in a case reported in *Mehtab Khan* v. *Mustafa Beg* (3) The case was decided by a Bench of the said Court consisting of Plowden and Roe, JJ. We should like to quote the following passage from their judgment:

"To come to plaintiff's appeal, the contention that the sum actually paid can alone be taken as the basis of a pre-emption decree is quite untenable. What is to be the basis is settled beyond doubt by S. 16 (17), Act 4 of 1872. No doubt the legislature might, if it had thought fit, have directed the Courts merely to look to the price actually paid or intended to be paid, and to decree pre-emption on payment of this sum. But it has not done so; it has most clearly laid down that where the price entered in the deed, or otherwise alleged by

(1) [1901] 4 O. C 158.
(2) A. I. R. 1926 Oudh 68.
(3) [1887] 101 P. R. 1887.

the parties, has been found not to have been fixed in good faith, the price at which the plaintiff can claim pre-emption is the fair market value alone. No doubt the price actually paid is always an important fact to be duly considered in forming an estimate of the market value, but it must be considered in connexion with other facts."

We are entirely in agreement with the above observations. Our finding, therefore, on the first point is that the action of the Courts below in determining the market value of the property sold was in this case perfectly justified.

As to the second question of market value we must point out that it is a question of fact and unless the learned advocate for the appellant succeeded in pointing out to us an error of law in determining the market value the finding of the lower appellate Court could not be disturbed. The contention of the learned advocate who appeared for the plaintiff-appellant was that the finding of the learned District Judge on this point was not binding on this Court because in determining the market value the learned Judge relied principally on a sale-deed of a plot of land situate in this very village, which had been executed by one Hakimmuddin Ahmed in favour of Sheikh Saadat Ali on 19th May 1927 (Ex A-3), and that he was not justified in doing so because there was no proof on record to show that the lands covered by the said sale deed were of the same quality as the lands in dispute. There is no doubt that this contention is true The learned counsel for the respondent has not been able to point to us any evidence on the record to show that the two kinds of lands are the same. We feel that without that evidence the relevancy of Ex. A-3 would not be established We must, however, point out that if we look at the amount of profits arising out of the land sold under Ex A-3 and the price entered therein, we would get a fair indication of the rate on which the property is sold in this village at the present time.

The profits of the land covered by the sale-deed Ex. A-3 on our calculation come to about Rs 5-8-0 and the profits of the share in dispute come to about Rs. 75. The price at which the property was sold under Ex A-3 was Rs 300. According to this rate the market value of the property in dispute would come to a little over Rs. 4,000. Under these circumstances we hold that the market value fixed by the learned District Judge was correct and must be maintained.

We, therefore, dismiss these appeals with costs.

R.K. *Appeals dismissed.*

A. I. R. 1929 Oudh 246

RAZA AND MISRA, JJ.

Thakur Ram Janki—Plaintiff—Appellant

v.

Mohan Lal—Defendant—Respondent.

Second Appeal No 403 of 1927, Decided on 26th September 1928, against decree of Addl. Sub-Judge, Fyzabad, D/- 8th November 1927.

Religious endowment — Judgment-debtor dedicating property after it was attached by the decree-holder — Conduct inconsistent with intention to dedicate—Dedication was not genuine.

A judgment-debtor made a dedication of attached property along with other property, in favour of an idol. No mutation of the property was effected in favour of the idol. There was no evidence showing that the income of the property was spent for the expenses of the idols or to show that the installation of the idol took place as provided for in the deed of endowment. Further the judgment-debtor subsequent to the execution of the endowment deed mortgaged the property to another without making any mention in the mortgage deed of the previous endowment deed.

Held that the transaction evidenced by the deed of endowment was not a genuine transaction. [P 247 C 2]

Bhagwati Nath and *Bishembhar Nath*—for Appellant

Naimullah—for Respondent

Judgment—This second appeal arises out of a suit for a declaration to the effect that the plaintiff-appellant Sri Thakur Ram Janki, an idol installed in a temple situate in Ajudhia, is the proprietor of certain Chowkis on the banks of the river Sarju and that the said property is not liable to sale in execution of the decree obtained by the respondent Mohan Lal against one Ganpat Prasad. The facts of the case are given in the order of reference and shortly stated they are that the Chowkis in suit originally belonged to one Ganpat Prasad who owned a temple in Ajudhia. Ganpat Prasad executed a deed of trust dated 3rd August 1920 in favour of the plaintiff appellant, Sri Thakur Ram Janki, making an endowment of the property in suit as well as other property. It is on the basis of

this deed of trust that the plaintiff-appellant has brought the present declaratory suit. The relief claimed by him in the plaint is to the effect that a declaratory decree be passed in his favour against the defendant to the effect that the property in suit attached in execution of decree is the property of the plaintiff and that it is not legally liable to attachment and sale in execution of the decree obtained by the defendant against the aforesaid Ganpat Prasad We may also state that the suit has been instituted by the plaintiff through Ganpat Prasad, who is said to be trustee of the endowment alleged to have been created on 3rd August 1920.

The suit was contested by the defendant on two main grounds: firstly, that the deed of endowment dated 3rd August 1920 was a ficititious transaction and did not create any bona fide waqf in favour of the plaintiff and secondly that the property which had been attached by the defendant was alienable and could be sold in execution of the decree

The trial Court decreed the suit, but the learned Subordinate Judge in appeal took a different view. He held that the waqf was not a genuine transaction and consequently the plaintiff was not entitled to maintain the suit He also held that the Chowkis in Ajudhia could be attached and sold in execution of the decree. The plaintiff-appellant has now come to this Court in second appeal. The appeal was originally set down for hearing before one of us but as it appeared to involve an important question of law it was referred to a Bench of two Judges.

On behalf of the appellant it has been contended that the property in suit is merely a personal right of service and is exempted from attachment and sale under S. 60, Cl. (f), Civil P C. It is further contended that the finding of the learned Subordinate Judge as to the genuineness of the deed of waqf dated 3rd August 1920 should not be accepted because it was based purely on conjectures and surmises and not on any evidence on the record

We have heard the parties at great length and have come to the conclusion that in view of our decision which we are going to mention presently, it is not necessary for us to enter into the important question of law which had necessitated the reference of this case to a Bench of two Judges. We find from the facts on the record that on 25th November 1919 a decree was passed for Rs. 344 and odd plus costs in favour of Kashmiri Bank against Ganpat Prasad. We also find that this decree was put into execution on 29th January 1920. It will appear from Ex. 15, which is a certified copy of the application for execution, that the bank had applied for attachment of a kacchha chabutra and the courtyard of a house situate in Mohalla Saragaddwar city Ajudhia. We further find that the deed of waqf was executed by Ganpat Prasad on 3rd August 1920 in which the property attached by the bank was made the subject of endowment along with other property including the property in suit in favour of the plaintiff-appellant. These facts speak for themselves. We also find that the mutation of the property in suit has not been effected in favour of the plaintiff-appellant. We further find that no evidence was given in the trial Court that the income of the property, which was the subject of the deed of endowment dated 3rd August 1920, was actually spent towards the expenses of the temple in which the plaintiff-appellant, the idol was to be installed as provided by the deed We further find that there is no evidence on the record showing that the asthapana ceremony (installation ceremony) of the idol was duly performed as provided in the deed of endowment. We further find that on 25th April 1923 a deed of possessory mortgage was executed in favour of the respondent Mohan Lal by Ganpat Prasad himself in respect of one of the Chowkis in suit No. 350 In this deed of mortgage Ganpat Prasad does not make any mention of deed of endowment dated 3rd August 1920 previously executed by him but transfers the property as full owner. All these circumstance indicate clearly that the transaction evidenced by the deed of endowment dated 3rd August 1920 is not a genuine transaction and that the finding of the learned Subordinate Judge on thi points must be maintained

We are therefore driven to this conclusion that the plaintiff-appellant is not the owner of the property in suit and is not, therefore, in a position to maintain the present suit. The obvious difficulty in our way is how to pass a decree in favour of a person who has been found to have no title In this view of the case it is not necessary for us to decide the

other question which has been argued before us namely, whether the Chowkis in suit are liable to attachment and sale in execution of the decree. It would be open to Ganpat Prasad to take this objection, if he be so advised, in execution of the decree in the manner provided by law In these circumstances we dismiss this appeal with costs.

S N./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 248

RAZA AND PULLAN, JJ.

Dwarka—Appellant

v.

Emperor—Opposite Party.

Criminal Appeal No. 58 of 1929, Decided on 22nd February 1929, against order of First Addl. Sess Judge, Lucknow, D/- 12th January 1929

(a) Criminal Trial—Evidence—Witnesses altering statements in Sessions Court to fit evidence in Magistrate's Court — Evidence must be carefully scrutinized.

Where witnesses alter their statements in the Court of Session in order to make them fit in with the medical or other evidence which has been brought forward in the Magistrate's Court, their statements must receive very careful scrutiny. [P 250 C 1]

(b) Criminal Trial—Medical evidence, if merely opinion of expert and capable of two explanations, is not of first importance—But if it is merely statement of facts it is entitled to great weight even as against eyewitnesses.

It cannot be laid down as a general proposition that medical evidence is of less value than the evidence of eyewitnesses. No doubt where the medical evidence is merely an opinion of an expert on a question which may admit of two explanations it is not always of first importance. But that is not correct when what the doctor has done is to lay before the Court certain definite facts. When the doctor states what he saw as to the contents of the stomach and the food regurgitated into the larynx, it requires no expert to draw conclusions from those facts. The Judge himself can in such case draw those conclusions as well as the doctor as to the cause of death.

[P 250 C 2]

St. George Jackson—for Appellant.

P. K. Ghose—for the Crown

Judgment — The seven appellants were convicted by the Additional Sessions Judge of Lucknow at Bara Banki of the offence of murder under S. 302, I. P. C, and were sentenced to transportation for life They have also been convicted and sentenced on a charge of riot. The person who was killed was a young Bania named Baboo, aged 17 years. His death was reported by his uncle Ram Dhani, who had, as he says, brought the youth up from childhood, after 7 a. m on 18th July. The story told in the first report is that shortly before sunrise Baboo went to ease himself according to his daily practice. Shortly afterwards Jeo Ram Lonia raised an alarm saying:

"Run up, Baboo is shouting that he is being killed."

Thereupon Ram Dhani, his brother Ram Sarup, his nephew Gur Dayal, a relation named Bihari and a Kalwar named Raghubar ran up to the grove which lies close to the village tank and there, according to Ram Dhani's report, they saw the seven accused persons striking Baboo In the report it is not said how they were striking Baboo but it is clearly stated that on seeing the witnesses they all made off leaving Baboo lying on the ground The only injury mentioned in the report is a wound on the neck which was thought to have been inflicted by a knife or a spear. The police investigation obtained the necessary evidence to bear out the first report and it was also ascertained that the accused persons had some previous enmity with Ram Dhani, and it was supposed that on account of this enmity and in order to annoy Ram Dhani they had combined to kill Baboo.

The body was sent for post-mortem examination and as the result of that examination some remarkable facts came to light In the first place the doctor gave as the probable time since death 30 or 36 hours He made his examination at 11 15 on 19th July. Consequently the time of death must have been between 11 15 on the night of the 17th and 5 15 on the morning of the 18th. When the period after death is so short the medical evidence can be relied upon to be accurate with a few hours The doctor found that the cause of death was suffocation due to injury to the wind-pipe and pressure over the chest He did not find that the wound on the neck had caused death, but that some pressure on the chest was the actual cause This pressure must have been very heavy, for the third, fourth and fifth ribs on the right side and the third, fourth, fifth and sixth ribs on the left side were separated from their cartileges. The larynx was found full of food-stuff, rice and vegetables, and the stomach con-

tained six chhataks of undigested food, rice and dal. The doctor made the necessary deduction that death ensued a very short time after the deceased ate his last meal We do not say that there have not been strange cases where the digestive process has been unduly delayed, and that these cases are not more common in India than in western countries ; but as a general rule we must assume, failing evidence to the contrary, that the murdered person was a normal person, and we consider that the deduction made by the doctor was justified by the facts which he observed. We then turn to the injury report

The only injury which the body received was the knife wound on the neck We cannot class as injuries the large number of small abrasions which were also found. It is possible that an abrasion can be caused by a blow, but when we find that there were two dozen abrasions in front of the right wrist and forearm, seven abrasions in front of the left wrist and seven more in an area of $1\frac{1}{2}'' \times 1''$ in front of the left elbow, two dozen abrasions on the outer side of the left thigh, 15 abrasions in front of the left thigh, five abrasions on the outer side of the left leg, other unnumbered abrasions just below the left knee, six abrasions on the left knee and six abrasions just below the right knee (these being the only marks on the body apart from the knife wound on the neck) we conclude without any hesitation that all these injuries were caused by the deceased being dragged along the ground. It would appear that he was dragged by some one holding his feet and possibly by somebody else holding his body from the ground. We do not consider that there is any other manner in which these abrasions can have been caused. Thus we conclude from the medical evidence, quite apart from any of the depositions made by the witnesses, that Baboo met his death owing to the pressure of a heavy weight on his chest. He was then possibly stabbed in the neck, as this injury was effected during his life, and he was then dragged to the place where he was found, namely a heap of rubbish near a village tank. It is obvious that this does not coincide in any way with the story told by Ram Dhani and his witnesses all of whom produced identical statements. The man was not kicked and he was not hit. We need not enlarge on the absurdities of the prosecution story which intends us to believe that seven persons armed with lathis lay in wait for a youth just outside a village at the time when he and all the members of the village were certain to go out to relieve nature, close to the village tank, and then laying aside their lathis sat upon him or in some other way caused his death by pressure, and then kicked and struck him in the presence of the witnesses in such a manner that they left no marks The story is so incredible in itself that even apart from the medical evidence we think it strange that the learned Sessions Judge believed it.

Again much stress was laid by Ram Dhani and his friends on the motive. These persons, one of whom is a Kalwar, two are Jolahas and four Behnas are said to have banded together to kill Baboo because of their enmity against his uncle No doubt Ram Dhani had given evidence against one of these men in a Badmashi case ten years before, and he had some trouble with four others shortly before the murder, but we cannot find that there was any direct enmity on the part of either Ehsan or his son Bashir, though they were related to the other two Behnas. But even supposing the enmity to be proved we are unable to see why these men selected Baboo for their attack No doubt Ram Dhani may have liked Baboo, but since the birth of his own son a year ago he had a much nearer interest in the latter; and any one wishing to hurt him would surely have killed the child and not the nephew. Possibly seeing this difficulty Ram Dhani pretended that he took the advice of Baboo aged 17 in all his affairs, and in particular in the purchase of a decree against one of the accused Dwarka Kalwar.

There is also much in the statements of the prosecution witnesses in the Sessions Court which might have given the learned Judge pause in believing their statements It will be seen that in the first report nothing was said about the dragging of the body. This story came into existence when the police found the marks of dragging in the grove and the separate stains of blood. When he appeared in the Sessions Court Ram Dhani was evidently cognizant of the medical evidence, and for the first time there he

stated that he saw the accused pressing Baboo down and inventing an entirely new story to account for the presence of undigested food in his stomach. In this story he was borne out by his brother Ram Sarup, who, after definitely stating in the Court below that he had dinner on the night before the murder at 10 o'clock, and that probably his brother had his between 8 and 10, suddenly remembered that they had all been to a Katha or religious reading on that night and got home very late. Ram Sarup says that he had his dinner as late as 2 a. m , but Ram Dhani would not go so far. According to his statement Baboo must have had his dinner at about 1 o'clock. Where witnesses alter their statements in the Court of Session in order to make them fit in with the medical or other evidence which has been brought forward in the Magistrate's Court, their statements must receive very careful scrutiny, and here we have a case where the witnesses have boldly altered their statements to suit the medical evidence, have told a story, which is on the face of it improbable, and have given an account of an assault which they say they saw which is entirely different to the true manner in which the deceased met his death.

All the assessors found all the accused not guilty, but the learned Judge has thought fit by adopting some special pleading to disagree with them. He makes much of the fact that the defence witnesses were not produced before him, though he examined two of them under S. 540, Criminal P. C We have read the statements of these witnesses. One of them was a village chaukidar who was obviously afraid to go against the police, and the other was Kesho, the father-in-law of Baboo. This man does not go as far perhaps as the accused might have wished in his statement, but he brings to light two curious facts One is that he himself went to the village on the day of the murder and stayed there the whole night, but he denies that he ever learnt during that time that the accused had committed the crime He also says that his daughter was forcibly detained in the village for two months by her father-in-law, and he could only recover her by making an application to the Magistrate. Different explanations may perhaps be given as to why the girl was detained in this manner, but the obvious one is that she was not prepared to agree in the story told as to her husband's death, and moreover there was a danger that she would not keep silent. It is significant that her father-in-law Ram Sarup in his evidence says that he thought it proper to detain her till the end of the case. We consider that the evidence of Kesho is a strong indication that there was something not straightforward in the preparation of this case, in fact that the accused persons have been named to save some one else. They are persons who are disliked by Ram Dhani and, therefore, by his brother and nephew, and the other three eyewitnesses have all some reason for being hostile to one or other of them Raghubar is the partner with Ram Dhani in purchasing the decree against Dwarka, and both the others have suspected one or other of the Muhammadan accused of theft. In fact these accused persons are men of bad character who are unpopular in the village and they have been chosen as scapegoats in this affair.

We feel that we must pass some comments on the manner in which the learned Sessions Judge has dealt with the medical evidence. He considers that medical evidence is of less value than the evidence of eyewitnesses. Apart from the criticisms which we have already passed on the alleged eyewitnesses in the case we would find difficulty in agreeing with the learned Sessions Judge in this view of his as to medical evidence as a general proposition. Where the medical evidence is merely an opinion of an expert on a question which may admit of two explanations it is not always of first importance But, here all that the doctor has done is to lay before the Court certain definite facts. There is no question that the doctor's report as to the nature of the injuries is correct He must be right as to the cause of death and he has stated what he saw as to the contents of the stomach and the food regurgitated into the larynx. It requires no expert to draw conclusions from those facts. The Judge himself was able to draw those conclusions as well as the doctor Therefore, this is not a case where the Judge has had on the one side the reliable evidence of uncontradicted eyewitnesses, and on the other medical theories. It appears to us that he has

had on the one side facts and on the other mere words. We do not know why Baboo may have been killed ; we do not know where he was killed and we do not know what reason the witnesses for the prosecution may have had before attempting to saddle the accused with the crime ; but we are certain that the guilt of the accused has not been proved. Even it would appear that the Judge himself had some little doubt in this matter ; otherwise it is difficult to see how he could have failed to pass a sentence of death on the seven persons who waylaid a youth of 17 and deliberately murdered him in order to spite his uncle We allow these appeals, set aside the convictions and sentences and direct that the appellants be acquitted and forthwith released

R.K. *Accused acquitted.*

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* * A. I. R. 1929 Oudh 251
Full Bench

WAZIR HASAN, AG. C. J., MISRA AND PULLAN, JJ.

Jai Nand and *others*—Defendants—Appellants.

v.

Mt. Parandei—Plaintiff—Respondent.

Second Appeal No. 253 of 1928, Decided on 12th March 1929, against decree of Dist. Judge, Gonda, D/- 18th April 1928.

*** * Hindu Law — Maintenance — Joint family having no property—Widow of predeceased son is entitled to maintenance from the self-acquired property of the father-in-law coming in the hands of other son or grandson by inheritance or by survivorship.**

When a Hindu joint family consists of a father and sons but is possessed of no family property, the widow of one of the sons, dying in the lifetime of his father and brother, is entitled to maintenance as against the property which the father acquires after the death of her husband and which on the death of the father comes into the possession and enjoyment of the surviving son and the son of the latter, whether such possession is in the right of an heir or in the right of a survivor: 11 *All.* 194 (*F. B.*) ; *Foll.* 17 *Cal.* 973 ; 22 *Cal.* 410 ; 23 *Cal.* 557 ; 11 *Bom.* 193 ; 23 *Bom.* 608 ; 22 *Mad.* 305 ; 31 *Mad.* 398, *Rel. on.* [P 254 C 2]

S. N. Roy—for Appellants.

Kashi Prasad—for Respondent.

Misra, J—The question referred to the Full Bench is as follows :

" When a joint Hindu family consists of a father and sons but is possessed of no family property, is the widow of one of the sons, who died in the lifetime of his father and brother, entitled to maintenance as against the property which the father had acquired after the death of her husband, and which on the death of the father came into the possession and enjoyment of the surviving son and the son of the latter, when such possession was (a) in the right of an heir and (b) in the right of a survivor ?

After a consideration of the original texts of the Hindu law and of the case law on the subject I have come to the conclusion that the question referred to us must be answered in the affirmative.

In Smritis the Hindu jurists have always considered it a duty to maintain the female members of the family Manu in Chap 8, Sloka 389, lays down that a mother, a father, a wife and a son shall not be forsaken. He who forsakes either of them, unless guilty of a deadly sin, shall pay 600 panas to the king. The word " forsakes " means " does not maintain. " Narada says :

" A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant, and fruitful, shall be brought to his duty by the king with a severe chastisement. "

Yajnyavalkya similarly says :

" He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part of his wealth , or if poor, to provide a maintenance for that wife. "

It will thus appear that the Hindu lawyers have made it a duty to support one's wife. This is not only found in Hindu law but in all systems of civilized law in the world.

Regarding the females of the family at large Manu lays down in Chap. 3, Slokas 55, 56, 57, 58 and 59 as follows :

" 55. Married women must be honoured and adorned by their fathers and brethren, by their husbands and by the brethren of their husbands, if they seek abundant prosperity. "

" 56. Where females are honoured, there the deities are pleased ; but where they are dishonoured, there all religious acts become fruitless. "

" 57. Where female relations are made miserable, the family of him who makes them so very soon wholly perishes ; but where they are not unhappy, the family always increases. "

" 58. On whatever houses the women of a family, not being duly honoured, pronounce an imprecation, those houses, with all that belong to them, utterly perish, as if destroyed by a sacrifice for the death of an enemy. "

" 59. Let these women, therefore, be continually supplied with ornaments, apparel, and food, at festivals and at jubilees, by men desirous of wealth. "

In another part of his Smriti Manu says that ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect; therefore, "let him maintain his family with the utmost care."

Yajnyavalkya says:

"Females must be honoured by their husbands, brothers, fathers, and paternal kinsmen; by the fathers, mothers, and brethren of their husbands; and by all kinsmen; with gifts of ornaments, apparel and food."

From the above texts it will be clear that in a Hindu family it is incumbent upon the male members of that family to support the females. Dr. Guru Das Banerjee in the Tagore Law Lectures, 1878, observes on. p. 213 as follows:

"Considering the constitution of Hindu society, considering the extremely helpless condition of the Hindu widow, and considering that the obligation of the father-in-law or other near relation to give her food and raiment if she resides in his house, is not only enjoined by precepts, but is also confirmed by invariable usage."

It has, however, been ruled that in some cases it amounts to a legal duty while in other it only amounts to a moral duty, for instance, in the case of a husband it is his legal duty to support and maintain his wife, while in the case of a father-in-law possessed of no ancestral property it is only a moral duty. In the case of a joint family, however, which is possessed of a joint property in which every member of that family has an interest it is the legal duty of the family to support the wife of a member of that family. It has also been held that in the case of a joint family although the husband of a particular woman may die, a legal duty is cast upon the other members of the family to maintain her, and the reason is assigned that those who take the husband's share by survivorship must support after his death his wife

The leading case on the subject in the United Provinces is a Full Bench decision of the Allahabad High Court reported in *Janki* v. *Nand Ram* (1) decided by Sir John Edge, Kt., Chief Justice, Tyrell, and Mahmood, JJ. The whole law on the subject has been so exhaustively dealt with in that case by Mahmood, J., that one feels it unnecessary to quote other authorities. The several propositions laid down by Mahmood, J., in that case are that though a widowed daughter-in-law has no legal right to claim maintenance from her father-in-law, who has only self-acquired properties in his hands and though the obligation to maintain her out of such property is merely moral, yet the obligation becomes a legal obligation when the property possessed by the father is inherited by his sons. The reason why a moral obligation becomes a legal obligation is pointed out by Mahmood, J., on p. 208 of the report, it being that those who inherit the self-acquired property of the father take that property subject to such moral obligations as are conducive to the spiritual benefit of the father. This is quite in accordance with the spirit of the Hindu law. It is for instance the moral duty of the Hindu father to marry his daughter and to give her a suitable dowry at the time of the marriage If the father dies and the property goes to his sons it becomes the legal duty of the sons who take the property of the father to provide for a suitable dowry for their sister out of the estate of the father inherited by them The whole thing is discussed so clearly and dealt with so lucidly in that judgment that I need not repeat the same arguments It is needless for me to say that I entirely agree with those observations

This case has been followed by almost all the High Courts in India as would appear from the decisions which are quoted below.

In the Calcutta High Court this decision was followed in *Kamini Dassee* v. *Chandra Pode Mondle* (2), *Devi Persad* v *Gunwanti Koer* (3) and *Siddessury Dassee* v. *Janardan Sarkar* (4).

In *Kamini Dassee* v. *Chandra Pode Mondle* (2) it was held that the principle that an heir succeeding to property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, had ample basis in the Hindu law of the Bengal School and that it was immaterial whether the property so inherited was moveable or immovable. It was further held in this case by Banerjee J., that the above principle was appli-

(1) [1889] 11 All. 194=(1889) A. W. N. 30 (F.B.).

(2) [1890] 17 Cal. 873.
(3) [1895] 22 Cal. 410.
(4) [1902] 29 Cal. 557=6 C.W.N. 530.

cable to the case of a widow claiming maintenance from her husband's brothers, who had inherited her father-in-law's property her own husband having predeceased his father. The case of *Janki* v. *Nand Ram* (1) was followed in that case. This case was decided by Guru Das Banerjee, J

In *Devi Persad* v. *Gunwanti Koer* (3) it was decided by Macpherson, J , and Guru Das Banerjee, J . that in the case of a joint family governed by the Mitakshara law where a family was possessed of an ancestral property and a member of that family died there could be no question that his wife was entitled to being maintained out of the said property. It was pointed out that the reason for this was that since the husband of the lady had a vested interest in the ancestral property, and could have, even during his father's lifetime, enforced partition of that property, and since the Hindu law provided that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff (lady) was entitled to maintenance. The case of *Janki* v *Nand Ram* (1) was referred to with approval in that case

In *Siddessury Dassee* v. *Janardan Sarkar* (4), a Full Bench of the Calcutta High Court consisting of Sir Francis Maclean, K.C.I.E. C.J , Prinsep and Hill, JJ., held that by the fact that a widowed daughter in-law had taken up her residence apart from relations of her husband, she did not forfeit her right to a separate maintenance out of the property inherited from her father-in-law by reason of such non residence with the family of her deceased husband unless such non-residence be for unchaste or immoral purpose The case of *Janki* v. *Nand Ram* (1), was again quoted with approval.

Referring to the Bombay High Court we find that the question of maintenance was considered by Farran, J., in an original case decided by him and which will be found to be reported in *Adhibai* v *Gursandas Nathu* (5). On p 209 he quoted a passage from *Khetramani Dasi* v. *Kashinath Das* (6) that the obligation of an heir to provide, out of an estate which descends to him, maintenance for certain persons, whom the ancestor was legally or morally bound to maintain was a legal as well as a moral obligation, for the estate was inherited subject to the obligation of providing such maintenance. The learned Judge observed that the authorities justified him in holding that the defendant in that case was legally bound to provide the plaintiff, who was the widow of a deceased member of the family, with maintenance out of the property which he had inherited from his father. He further held that in such a case the widow would be entitled to a separate maintenance and that the defendant could not insist upon her living with him in the same house.

In *Yamunabai* v. *Manubai* (7), decided by Parsons and Ranade, JJ., it was held that the widow of a predeceased son, who lived in union with his father, had a legal right to maintenance from her mother-in-law out of the self-acquired property of father-in-law to which his widow had succeeded as his heir. It was pointed out that although a son's widow had no legal claim for maintenance against the self-acquired property in the hands of her father-in-law, but when such property devolved upon his heirs the daughter-in law had a claim against it in their hands for maintenance if her husband had lived in union with his father. I would like to quote the following passage from the decision of Ranade, J., with which I am in entire agreement:

"The principle that a son's widow has no legal claim for maintenance against the self-acquired property in the hands of her father in-law, has been affirmed in a series of decisions by this Court, as also by the other High Courts of Bengal, Madras and Allahabad: *Savitribai* v. *Luxmibai* (8), *Khetramani Dasi* v. *Kashinath Das* (6); *Ganga Bai* v. *Sita Ram* (9), *Janki* v. *Nand Ram* (1) and *Kalu* v. *Kashibai* (10). The obligation to maintain the widowed daughter-in law in such cases has been held to be only a moral and imperfect obligation, not enforceable in law. As against the father-in-law the right of the son's widow to be maintained rests, not on her husband being a co-member of a joint family, but on being a joint owner of ancestral property with his father: *Mt. Hema Kooeree* v. *Ajodhya Pershad* (11); *Savitribai* v. *Luxmibai* (8); *Mt. Lalti Kuar* v. *Ganga Bishan* (12) and *Devi Pershad* v. *Gunwanti Koer* (3).

"While the nature of the claim of a widowed daughter-in-law for maintenance by the

(5) [1887] 11 Bom. 199.
(6) 2 B. L. R. 15=10 W. R. 89 (F.B.).
(7) [1899] 23 Bom. 608=1 Bom. L. R. 95.
(8) [1877] 2 Bom. 573 (F.B.).
(9) [1876] 1 All. 170 (F.B.).
(10) [1898] 7 Bom. 127.
(11) 24 W. R. 474.
(12) 7 N. W. P. 261 (F.B.).

father-in-law has been thus clearly defined, a distinction has been recognized by the High Courts of Bengal and Allahabad between the position of the father-in-law and those who succeed him as heir to his separate or self-acquired estate. The moral obligation of the father-in-law is held to be converted into a legal obligation when his self-acquired property devolves upon his heirs. Under certain circumstances and in the hands of such heirs, such property is held liable to provide maintenance to the widow of a predeceased son of the person who acquired the property when such son lived in union with him. This principle was first laid down in Bengal, and has been more recently affirmed by the Allahabad High Court *Rajjomoney Dossee* v. *Sibchunder Mullick* (13), *Janki* v *Nand Ram* (1); *Kamini Dassee* v. *Chandra Pode Mondle* (2); *Devi Persad* v. *Gunwanti Koer* (3). The same distinction was recognized and given effect to in this Court in *Adhibai* v. *Cursandas* (5), where it was held that the self-acquired property of the father, when it descended to one of his surviving sons, was to be regarded as ancestral property, and as such subject to the obligations of ancestral property to provide maintenance to the widow of a predeceased son living in union with his father. The Allahabad High Court in *Janki* v. *Nand Ram* (1), declined to subscribe to the view that such self-acquired property became ancestral in the hands of the original owner's heir, but rested the liability on the ground that the heir in such cases took the property for the spiritual benefit of the deceased owner, and so taking it, the old moral obligation was turned into a legal obligation which could be enforced. The Calcutta High Court rested this distinction on the ground that the heir in such cases is under a legal obligation to provide, out of the estate which descends to him, maintenance for the persons whom the ancestor was bound legally or morally to maintain, and the heir takes the estate, not for his benefit, but for the spiritual benefit of his ancestor. *Khetramani Dasi* v. *Kashinath Das* (6); *Devi Persad* v. *Gunwanti Koer* (3); *Kamini Dassee* v *Chandra Pode Mondle* (2). Though there is thus a divergence in the reasons given by this Court and by the Calcutta and Allahabad High Courts, the conclusion they arrive at is identical"

Turning to the Madras High Court we find that in *Rangammal* v *Echammal* (14) decided by Subramania Ayyar, and Moore, JJ., it was held, following *Janki* v *Nand Ram* (1); *Kamini Dassee* v *Chandra Pode Mondle* (2) and *Devi Persad* v. *Gunwanti Koer* (3), that according to these cases the correct view of law was that the moral obligation to support a son's widow, to which her father-in-law was subject, would, on his death, acquire the force of a legal obligation as against his assets in the hands of his heir.

In *Surampalli Bangaramma* v. *Surampalli Brambaze* (15), decided by Wallis, and Sankaran Nair, JJ., it was held that a father-in-law was under a moral obligation to maintain his daughter-in-law and this obligation ripened into a legal obligation against the assets in the hands of his heirs.

It would, therefore, be clear from the authorities which I have quoted above that it is now the accepted principle of the Hindu law that where a self-acquired property of a father has been inherited by his sons it becomes their duty to support the widow of one of their brothers who has died in the lifetime of the father, and that this liability exists where the property goes into the hands of the sons either by inheritance or by survivorship. The question is discussed by Mr Mayne in his well-known work on Hindu law in Ch. 14, which deals with maintenance (pp 645 to 649, Edn 9), where the learned author has reviewed the decisions of the various High Courts and has come to the same conclusion.

My answer, therefore, to the question referred to the Full Bench is in the affirmative

Wazir Hasan, Ag.C.J.—I concur and would answer the question in the affirmative.

Pullan, J—I also concur and agree in the reply proposed.

R K. *Reference answered in affirmative.*

(13) 2 Hyde. 103.
(14) [1899] 22 Mad. 305=9 M.L.J. 14.
(15) 1909] 31 Mad. 338=18 M.L J. 254.

A. I. R. 1929 Oudh 254

WAZIR HASAN, AG. C. J. AND RAZA, J.

Gopal Das—Plaintiff—Appellant.

v.

Ratan Lal and *another*—Defendants—Respondents.

Second Appeal No. 393 of 1928, Decided on 13th February 1929, against decree of 3rd Addl. Dist. Judge, Lucknow, D/- 14th August 1928.

Vendor and Purchaser—Contract of sale—Payment of part of purchase money as security for due performance—Vendee, committing default, is not entitled to recover the money.

Where a purchaser pays money to the vendor as a security for the due performance of the contract of sale, he cannot recover the same from the vendor when the contract fails on account of the purchaser's default: *Howe* v.

Smith, (1884) 27 *Ch. D.* 89; *A. I. R.* 1925 *P. C.* 1 and *Mayson* v. *Clouet*, (1924) *A. C.* 980, *Foll.*
[P 255 C 2]

Ram Prasad Varma—for Appellant.

Ali Zaheer, *Jagat Narain*, *Hakimuddin* and *Brijmohan Nath Chak*—for Respondents.

Judgment—This is the plaintiff's appeal from the decree of the Third Additional District Judge of Lucknow, dated 14th August 1928, reversing the decree of the Subordinate Judge of Malihabad dated 26th September 1927.

The facts of the case are as follows:

The respondents held a decree against one Suraj Kumar and the sum of money due to them under that decree approximately amounted to Rs 17,000 The plaintiff-appellant agreed to purchase this decree at a value less by Rs 2,000 It is agreed that the contract for sale was complete and it is also agreed that within a month from 15th March 1926 the sale was to be completed It is further agreed that on 15th March 1926 a sum of Rs. 100 was paid by the appellant to the respondents and it is no longer disputed that the character of this payment was as earnest money for the due performance of the contract of sale.

From what has been stated above it follows that the completion of the sale was to take place on or before 15th April 1926 A further point on which the parties are now agreed is that on 16th April 1926 one Lala Indar Prasad paid a sum of Rs 1,000 to the respondents on behalf of the appellant

There is controversy between the parties as to the nature of the second payment of Rs 1,000 made on 16th April 1926 but the controversy is settled by the finding arrived at in the Court below. That Court has held on evidence that this payment was made as security money for the due performance of the contract of sale A good deal of argument was addressed to us to induce us to go behind this finding but we have not been so induced. We hold that the finding is valid, not vitiated by any error of law or procedure and is therefore conclusive This being so, it seems to us that the plaintiff's case, out of which this appeal arises, for the refund of Rs 1,000 which he paid to the respondents as specified above and having regard to the finding which was not challenged that the contract of sale fell through because of the fault of the appellant is wholly untenable.

It is settled law that money paid by an intending purchaser under a perfected contract of sale as a guarantee that the sale shall be performed remains with the vendor if the contract fails by reason of default on the part of the purchaser. In the case of *Howe* v *Smith* (1) the law on the subject of deposit under a contract of sale and its forfeiture is exhaustively considered and stated. Cotton, L. J, in his judgment quotes the following passage from Sugden's Vendors and Purchasers, 14th Edn.:

"Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit, for he cannot, by his own default, acquire a right to rescind the contract."

After referring to the cases of *Collins* v *Stimson* (2), *Depree* v *Bedborough* (3) and *Ex-parte Barrell* (4) and quoting a passage from the judgment of James, L. J, in the last mentioned case Cotton, L. J., says:

"What is the deposit? The deposit, as I understand it, and using the words of James, L. J., is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited, but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to James, L. J, he can have no right to recover the deposit."

In the same case Bowen, L. J., said:

"A deposit if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase. It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

Fry, L. J., in his judgment in the case said:

"Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money

(1) [1884] 27 Ch. D. 89=53 L. J. Ch. 1055=32 W. R. 802=48 J. P. 773.
(2) [1883] 11 Q. B D. 142=52 L. J. Q. B. 440=47 J. P. 439=31 W. R. 920=48 L. T. 828.
(3) [1864] 4 Giff. 479=33 L. J. Ch. 134=3 N. R. 187=9 L. T. 533=9 Jur. (n.s.) 1317=12 W. R. 191.
(4) [1875] 10 Ch. 512=44 L. J. B. K. 138=33 L. T. 115=23 W. R. 846.

paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

The above being the state of law it is not necessary to enter into the question as to whether Lala Inder Prasad, when he paid the sum of Rs. 1,000 to the respondents on behalf of the appellant, had or had not the authority to enter into an express contract on behalf of the appellant as to the forfeiture of the deposit in the event of the contract failing by reason of the default on the part of the appellant. It is agreed that Lala Inder Prasad made this deposit on behalf of the appellant. This is enough for the disposal of the appeal. But there is a conclusive finding of the lower appellate Court that the deposit was by way of security for the due performance of the contract.

Before we take leave of this case we may refer to a recent decision of their Lordships of the Judicial Committee in the case of *Chiranjit Singh* v. *Har Swarup* (5) The law was stated by Lord Shaw in the following words :

"Earnest money is part of the purchase price when the transaction goes forward. It is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

Another recent decision of the same tribunal and to the same effect is to be found in *Mayson* v. *Clouet* (6).

We dismiss this appeal with costs.

D.S./R K. *Appeal dismissed.*

(5) A. I. R. 1926 P. C. 1.
(6) [1924] A. C. 980.

A. I. R. 1929 Oudh 256

RAZA AND PULLAN, JJ.

Itwari—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No 488 of 1898, Decided on 6th December 1928, against order of Addl. Sess. Judge, Kheri, D/- 10th November 1928.

Criminal P. C., S. 339—Non compliance with the provisions by the Court vitiates the trial.

The provisions of S. 339, Criminal P. C. are compulsory, and the accused cannot be properly tried and convicted of the offence of murder until the Court trying him has recorded a finding that he had forfeited the pardon which had been offered to him owing to non compliance with its conditions: 5 *Lah.* 379, *Foll.* [P 256 C 2]

Bhawani Shankar—for Appellant.

Government Advocate—for the Crown.

Judgment.—This is a reference made by the Additional Sessions Judge of Kheri in the case of one Itwari Lodh who has been convicted of the offence of murder under S. 302, I. P. C. and sentenced to death. Itwari also has submitted an appeal from jail.

A preliminary objection has been raised before us that this trial was vitiated through non-compliance on the part of the Court below with the provisions of S 339-A, Criminal P. C. Itwari was offered a pardon by the Magistrate but when he came before the same Magistrate in Court he stated that he knew nothing about the case. It was therefore decided to proceed against him on the original charge of murder. The Committing Magistrate asked him whether he pleaded that he complied with the conditions on which the tender of pardon was made and he said that he had complied with them. This question was not repeated in the Sessions Court and no plea was there recorded It was the duty of the Court, that is to say, the Sessions Court to put this question to the accused and to record his plea and if he pleaded that he had complied with the conditions of his pardon the Court had to make a finding as to whether or not he had complied with the conditions of the pardon. These provisions of the code are compulsory, and the accused could not be properly tried and convicted of the offence of murder until the Court trying him had recorded a finding that he had forfeited the pardon which had been offered to him owing to non-compliance with its conditions. This view was taken by the Lahore High Court in *Ali* v. *Emperor* (1) and we are of opinion that the failure of the Court to comply with the conditions of the section vitiates the trial.

We therefore direct that the proceedings be quashed, but under the circumstances of the case we order that the accused shall be again tried according to law.

P.R./R.K. *Retrial ordered.*

(1) A. I. R. 1925 Lah. 15=5 Lah. 379.

A. I. R. 1929 Oudh 257

MISRA AND RAZA, JJ.

Gaya Din—Plaintiff—Appellant.

v.

Gur Din and *others*—Defendants—Respondents.

Second Appeal No. 343 of 1928, Decided on 12th February 1929, against order of Sub-Judge, Bara Banki, D/- 2nd July 1928.

(a) Cosharer — Adverse possession — Extent.

The mere fact that one of the cosharers was not in actual possession and resided elsewhere, would not make the possession of other cosharers adverse: *Corea* v. *Appuhamy*, (1912) *A. C.* 230 ; *A. I. R.* 1926 *Oudh* 141 ; 35 *Cal.* 961 ; *A. I. R.* 1926 *Oudh* 258, *Foll.* [P 259 C 1]

(b) Hindu Law — Brit Mahabrahmani — Ancestral property—Property acquired out of its savings by one member of the family is joint family property.

Where Brit Mahabrahmani is ancestral property and the income derived therefrom goes to support the entire family, the income derived by any member of the family therefrom is not his exclusive property and therefore any property acquired or built upon such fund forms joint family property. [P 259 C 1,2]

(c) Hindu Law — Religious office—Brit Mahabrahmani is heritable, partible immovable property.

Under Hindu Law Brit Mahabrahmani (the right to receive offerings from jajmans) is considered as immovable property and therefore heritable and partible : 1 *O. D.* 2 ; 5 *O. C.* 255, *Dist.*; 11 *O. C.* 212 and 23 *O. C.* 252, *Diss. from* ; 8 *O. C.* 339 ; *A.I.R.* 1924 *Oudh* 252; *A. I. R.* 1923 *All.* 350 ; *A I. R.* 1921 *All.* 286 ; 15 *C. L. J.* 376 ; 36 *Bom.* 94 ; *A. I. R.* 1921 *Bom.* 209, *Foll.* ; *A. I. R.* 1921 *All.* 316 ; 20 *O.C.* 265, *Ref.* [P 262 C 1]

(d) Hindu Law—Partition—Practice.

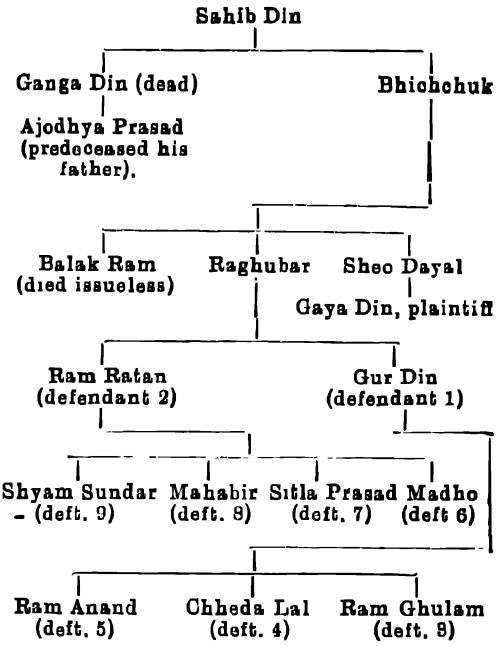
Where defendant in a partition suit has only pleaded that plaintiff did not bring into hotchpot a certain property but did not file a list of such properties, the objection should not be entertained. [P 263 C 1]

R. B. Lal and *R. N. Shukla*—for Appellant.

Ali Zaheer—for Respondents.

Judgment.—This is a second appeal arising out of a partition suit, which was partially decreed by the learned Munsif of Ramsanehighat but has been totally dismissed by the learned Subordinate Judge of Bara Banki.

The facts of the case are that the parties to this suit are descendants of one Sahib Din as will appear from the following pedigree :



They constituted a joint family and the plaintiff Gaya Din, who is the son of Sheo Dayal in Bhichchuk's branch, claims by partition a half share in the properties in suit against the defendants, who are descended from Raghubar, brother of Sheo Dayal, in the same branch. The properties sought to be partitioned are detailed below :

1. The grove standing on plot No. 518 situate in village Barethi, district Bara Banki. 2. The grove standing on plot No 632 situate in village Tanda, district Bara Banki. 3. The grove standing on plot No. 499 situate in the same village Tanda. 4 The muafi plots Nos. 140, 384, 908 also situate in village Tanda. 5. The house standing on plots Nos 117 and 118 also situate in village Tanda. 6. The ahata (compound), which is now a phulwari (orchard) also situate in village Tanda, and 7. The Brit Mahabrahmani relating to villages Tanda and Mohammadpur and exerciseable for the full month of Katik, the latter halves of the months of Phagun and Asarh and the first half of the month of Sawan.

The case for the plaintiffs shortly stated was that the descendants of Saheb Din never separated from each other and that the properties mentioned above were their joint family properties, and therefore liable to partition. The share claimed by the plaintiff as stated above

was a moiety in the said properties. The suit was mainly contested by defendant 1 Gur Din, whose contention was that Ganga Din and Bhichchuk, the sons of Saheb Din, had separated from each other, that properties 1, 2, 3 and 5 belonged exclusively to his father Raghubar and that properties 4 and 6 belonged to Ganga Din and after his death had come exclusively in the possession of his father, and that therefore the plaintiffs were not entitled to any share in these properties. Regarding property No. 7 it was contended that it could not be partitioned in law because it consisted merely of such fee as the jajmans (clients) gave at the time of the funeral ceremonies performed on the occasion of deaths in their families. There were other contentions raised in the case, but it is not necessary to mention them for the purpose of this appeal.

The learned Munsif of Ramsanehighat, who tried the suit, we should like to state, with great care and attention, found that property No. 1 was the ancestral property of the parties, having been recorded at the time of the first regular settlement in the name of Bhichchuk; that Ganga Din and Bhichchuk had separated from each other; that Ganga Din was the owner of the properties Nos. 4, 5 and 6 and that property No. 2 was acquired by Raghubar, father of the defendant, out of the income of Brit Mahabrahmani and was, therefore, the joint property of the family. Regarding property No. 7 which as stated above was the Brit Mahabrahmani he found that as the parties were Mahabrahmans it belonged to them and their family from times immemorial, and was liable to be partitioned amongst them. As to property No. 3 he found that it never belonged to the parties' family, nor could it be considered to belong to it even now. The result was that he decreed the plaintiff's suit for partition in respect of all the properties in suit except property No. 3.

The defendants appealed to the learned Subordinate Judge of Bara Banki and he agreed with the finding of the learned Munsif relating to property No. 1 but disagreed with regard to other items of property in respect of which the suit had been decreed by the learned Munsif. Regarding properties Nos. 4 and 5 he came to the conclusion that they were properties of Ganga Din and although Sheo Dayal, father of the plaintiff, was an heir to Ganga Din, yet because he and the plaintiff had gone away to Secundrabad (Deccan) they had never been in possession of the said properties and the plaintiff's claim in regard thereto could not be maintained. As to item 6 he further found that it was an ahata or compound, which Raghubar, the father of the defendants, had purchased at an auction sale and it was consequently his own property. As to item 2 he took the same view that because it had been acquired by Raghubar, father of the defendants, it was also his exclusive property and could not be considered to be the joint family property. The view which he took regarding the income of Mahabrahmani dues was that it was the personal property of Mahabrahman to whom it was offered. Lastly, he said regarding property No. 7 that it was not such as could be partitioned in law. The result was that except item 1 he accepted the appeal and dismissed the plaintiff's claim in regard to all the items in suit.

The plaintiff-appellant has now appealed to this Court and in second appeal it is contended by the learned advocate on his behalf, firstly, that regarding properties Nos. 4 and 5 which had been found to be the properties of Ganga Din it was admitted that they passed by inheritance in equal shares to Raghubar, the ancestor of the defendants and Sheo Dayal, father of the plaintiff, and the mere fact that Raghubar alone was in possession of the said properties would not make him exclusive owner thereof; secondly, that regarding items 2 and 6 it having been found by the Courts below that they were built or acquired out of the Mahabrahmani income which was admittedly the joint family income of the parties, the said properties must also be deemed to be the properties belonging to the joint family and, therefore, liable to partition: thirdly, that the Brit Mahabrahmani ought to be treated as property capable of partition among the members of the family belonging to the parties. The case was argued at great length and we have taken time to consider our judgment. We now proceed to give our findings regarding each of these points.

First point:—As regards the first point it appears to us that the learned Subordinate Judge has taken an erroneous view. It is admitted by the parties that properties Nos. 4 and 5 belonged to Ganga Din and that after his death they passed by inheritance in equal shares to Raghubar and Sheo Dayal. Half the property would, therefore, go to Raghubar and his descendants and the other half would go to Sheo Dayal and his son, the plaintiff. This means that Raghubar and Sheo Dayal became cosharers in these properties and the mere fact, that Sheo Dayal, father of the plaintiff, or that the plaintiff himself did not take actual possession of the property, since they were absent from the village and resided in Secundrabad, would not make the possession of the other cosharer named Raghubar adverse. This has been held in a large number of cases both by their Lordships of the Privy Council as well as by this Court and other High Courts. We would only refer to a few decisions on the point because in our opinion the rule is so settled that it is not necessary for us to quote many authorities in support of the proposition or to discuss it in detail. We would mention *Corea* v. *Appuhamy* (1), *Jogendranath Rai* v. *Baldeo Das* (2), *Mahipal Singh* v. *Sarju Prasad* (3), *Mahadeo Prasad* v. *Ram Lal* (4). We, therefore, hold that the plaintiff-appellant is entitled to a decree for a half share in properties Nos. 4 and 5.

Second point :—The second point relates to items 2 and 6. Item 2 is a grove situate in village Tanda and item 6 is an ahata (compound) in which now stands a phulwari (orchard). It was admitted by the parties before us that these items were acquired by Raghubar, father of defendant-respondent 1, out of the income of the joint family consisting of Mahabramani dues. It was admitted by the parties that the Brit Mahabrahmani was their ancestral property since they are Mahabrahmans and that the income derived therefrom went to support the entire family. Under these circumstances it appears to us to be clear that the properties Nos. 2 and 6, which were either acquired or built out of joint funds should also constitute joint family property. We are unable to treat the Mahabrahmani income as the exclusive property of Raghubar, father of the defendants. We, therefore, cannot accept the finding of the learned Subordinate Judge on this point and must hold that properties Nos. 2 and 6 also constitute joint family property and the plaintiff-appellant is entitled to a half share therein.

Third point :—The next point that was argued before us was that Brit Mahabrahamani was "property" capable of partition among the members of the family, to which the said Brit appertained This was the position taken up by the learned advocate for the plaintiff-appellant, whereas the argument of the learned counsel for the defendants-respondents was to the effect that the Brit could not be considered as "property" since it was at the option of jajmans (clients) to give or not to the defendants offerings on the occasion of funeral ceremonies occurring in their family.

The learned advocate for the appellant relied upon the following rulings :

Three cases decided by the late Court of the Judicial Commissioner of Oudh. *Badri* v. *Mulloo* (5), decided by Messrs., Ryves and Wells, *Raghubar* v. *Mt. Rukmin* (6), decided by Pandit Kanhiaya Lal, *Mt. Rachhpali* v. *Mt. Chandresar Dei* (7) decided by Syed Wazir Hasan, (now Mr. Wazir Hasan, J.,) and Mr. Neave, A. J. C.

Three cases decided by the Allahabad High Court : *Beni Madho* v. *Hira Lal* (8), decided by Piggott (now Sir Theodore Piggott) and Kanhaiya Lal, JJ , *Ram Chander* v. *Channu Lal* (9), decided by Ryves and Daniels, JJ., *Lokya* v. *Sulli* (10) decided by Tudball and Kanhaiya Lal, JJ

One case decided by the Calcutta High Court :

Narayan Lal Gupta v. *Chullhan Lal Gupta* (11), decided by Mukerjee and Woodroffe, JJ., and,

Two cases decided by the Bombay High Court :

(1) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.
(2) [1908] 35 Cal. 961=6 C. L. J. 735=12 C. W. N. 127.
(3) A. I. R. 1926 Oudh 141.
(4) A. I. R. 1926 Oudh 258=1 Luck. 62.
(5) [1905] 8 O. C. 339.
(6) [1917] 20 O. C. 265=42 I. C. 794.
(7) A. I. R. 1924 Oudh 252=27 O. C. 114.
(8) A. I. R. 1921 All. 916=43 All. 20.
(9) A. I. R. 1923 All. 350=45 All. 445.
(10) A. I. R. 1921 All. 286=43 All. 35.
(11) [1912] 15 C. L. J. 876=14 I. C. 677.

Ghelabhai Gaurishankar v. *Hargowan Ramji* (12) decided by Chandavarkar and Hayward, JJ.: *Girjashankar Daji Bhat* v. *Murli Dhar Narain* (13) decided by Sir Norman Macleod, Kt., C. J., and Fawcett, J.

The learned counsel for the defendants-respondents relied upon the following rulings :

Seeta Ram v. *Sheodas* (14) decided by Campbell, J. C., *Bhagwan Din* v. *Mani Ram* (15) decided by Mr. Macleod, O. J. C., *Baddu* v. *Babu Lal* (16) decided by Messrs. Evans and Greevan, *Mahesh Prasad* v. *Bharath* (17) decided by Mr. Lindsay (now Sir B Lindsay). We first proceed to discuss the authorities quoted on behalf of the respondents.

In *Seeta Ram* v. *Sheodas* (14) it was held by Campbell, J. C., that no one was entitled to a monopoly to make certain collections or from certain classes, and that the jajmans who paid the fee were perfectly free to employ whom they liked. There is no doubt as to the correctness of this proposition. Nobody can compel a particular person to make offerings on a particular occasion to him and him alone The matter must be left to the pleasure of the person making the offerings. This does not, however, touch the point, since what we have to decide is whether the right to receive such offerings can be considered as "property" or not. We do not agree with the argument advanced by the learned counsel for the respondents that since it is optional with the jajmans to pay the fee, it should not be considered to be any valuable right whatsoever. The right may not be capable of being enforced against strangers against their will but there can be no doubt that so far as the members of a particular family are concerned the right to receive such offerings must be a right and a very valuable one. Indeed it is within our experience that in pursuance of the exercise of such a right a large income is made by families whose profession is to deal with jajmans (clients)

In *Bhagwan Din* v. *Mani Ram* (15) the point to be decided in the case was whether in a case, where a third person had made a voluntary offering to one of the parties, it was not open to the other party to claim a share in it unless an agreement to that effect between the parties had been established. The view of law taken in that case was to the effect that no suit would lie by one Mahabrahman against another for recovery of the whole or a portion of such offerings unless on the basis of an agreement between the parties. We are not called upon to discuss the accuracy or otherwise of this proposition. It is enough for us to observe that when the right to receive Mahabrahmani dues is enjoyed by a Mahabrahman and after his death if the right devolves, in case such right is held to be capable of devolving upon his sons, there would be impliedly an agreement between them to participate in that right in equal shares. The point decided in this case does not, therefore, touch the point which is actually before us for decision. In *Baddu* v. *Babu Lal* (16) the point decided was that a contract amongst Mahabrahmans with respect to the distribution of alms to be received in the future by exercise of voluntary charges is not enforcible against the heirs or representatives of the parties to the agreement. If the right to receive alms be considered to be included within the definition of the word "property" the view taken in this case would be open to grave doubt.

It would thus appear that except the last case the other two cases referred to by the learned advocate for the defendants-respondents do not touch the point. As to the third case though the question for decision now before us was not directly in question in that case, yet the view of law propounded in that case would certainly support the contention raised by the learned counsel for the defendants.

In *Mahesh Prasad* v. *Bharathi* (17), it was held by Mr. Lindsay, J. C., that no contract for the division of money or other articles received by Mahabrahmans in the way of charity could be enforced except as between the immediate parties to the agreement. He followed the case quoted above, namely, *Baddu* v. *Babu Lal* (16).

We now turn to discuss the rulings relied upon by the learned advocate for the plaintiff-appellant.

(12) [1912] 36 Bom. 94=12 I. C. 928=13 Bom. L. R. 1171.
(13) A. I. R. 1921 Bom. 209=45 Bom. 234.
(14) 1 O. D. 2.
(15) [1902] 5 O. C. 225.
(16) [1908] 11 O. C. 212.
(17) [1920] 23 O. C. 252=59 I. C. 677.

In *Badri* v. *Mulloo* (5) it was held that the right to receive offerings as malis (gardners) attached to a particular temple situate in the city of Lucknow was a right of property and a suit for declaration and perpetual injunction with respect thereto would lie in a civil Court.

This case has no doubt supports the view urged by the learned advocate for the plaintiff-appellant.

In *Raghubar* v. *Mt. Rukmin* (6), the view taken was to the effect that an arrangement among Mahabrahmans of the place regulating the terms in which they should act or the method in which the offerings should be collected or divided and which does not control or restrict the discretion of the persons to whom the services are to be rendered by whom the offerings or gifts are to be made, is valid and binding between the parties to that agreement.

In *Bachhpali* v. *Chandresar Dei* (7) the chaukis at Ajudhya "were the subject-matter of partition." These chaukis are well understood spots on the banks of the river Sarju, where one or the other member of the family of pandas sits, receives his clients, and helps them in the observance of their religious ceremonies connected with the river such as bathing, offering flowers, etc., for which services remuneration is usually paid by the clients, who choose to avail themselves of those services. It was held that such a right constituted property in law and a suit for a share in the business resulting in such gains was maintainable. This case also supports the view urged before us by the learned advocate for the appellant to a great extent.

In *Beni Madho* v. *Hira Lal* (8), it was held that the rights of a Pragwal who used a particular kind of flag to attract the notice of pilgrims, who wanted to find him out, could devolve by a right of inheritance to his widow and if any other person put up a flag similar to the one used by him so as to mislead the pilgrims into the belief that he was the representative of the Pragwal, an action could be maintained by the widow to prevent such persons from using the flag since his action in doing so was unlawful. It was observed in that case by Piggott, J., that in such a case the question to be determined was whether the plaintiff had or had not a right to carry on certain business in or about a particular locality and if any stranger interfered with such exercises of the right, it was to be considered as an unlawful interference with the conduct of that business. It would thus appear that in the opinion of their Lordships the right to carry on the business as a Pragwal in a particular locality was a right which could be enforced in the Court of law.

In *Ram Chander* v. *Channu Lal* (9), it was held that where the "brit jajmani" consisted of offerings given to a Pragwal by pilgrims when they came to bathe in the Ganges the division of the brit could not be carried out by allotting clients to one party or the other but only by the division of the books in which pilgrims entered their names We are unable to follow this ruling. If "brit jajmani" is divisible, the division can take place by allotting clients or allotting localities. The division so made, it is obvious, would not be any ground for the person in whose share a particular jajman (client) had fallen to compel that jajman to make offerings to him. The effect of such an allotment would only be that if offerings were willingly made by such jajmans they would go to one member of the family in preference to another.

In *Lokya* v. *Sulli* (10), it was held that the right known as "brit jajmani" was heritable The head-note says that they are also transferable, but the judgment itself does not go to that extent. This case is no doubt in favour of the contention put forward by the plaintiff-appellant.

In *Narayan Lal* v. *Chullan Lal* (11), it was held by their Lordships of the Calcutta High Court that although prima facie when a gift is made to a priest by a pilgrim the money belongs to him in his personal capacity, yet members of the family may agree amongst themselves that whoever amongst them may earn anything by officiating as a priest, the income is to be brought into a common fund and divided in certain proportions amongst them. This was also a suit for partition and the parties to the case were members of a family of Gayawals. The partition of "brit jajmani" was allowed by allotting books to the different members of the family, which indicates that the persons to whom such books were allotted would approach the clients whose names were entered therein. It was indicated by their Lordships that where

such a property was saleable and did not admit of a physical division partition could be effected by declaring that the enjoyment of the property was to be in turns as in a case of right to worship. It was also observed in that case that no Court should be inclined to accede to the contention that the property was indivisible or impartible unless it could be shown that the division thereof would be against public right or policy or would tend to impair some paramount right existing in a stranger to the co-tenancy or would outrage the public sense of propriety, decency and good morals. We need not state that the partition of "brit Mahabrahmani" cannot in any case be considered to be against the public right or policy or against the good sense of propriety, decency and good morals.

In *Ghelabhai Gavrishankar* v. *Hargowan Ramji* (12), it was held that under Hindu law the office of the hereditary priest (yajman vritti) was a nibandha and ranked among the hereditary rights to the immovable property. The argument advanced by the learned advocate for the plaintiff-appellant was that "brit Mahabrahmans" was also similarly to be considered as immovable property under the Hindu law and therefore capable of inheritance and partition by the descendants of a particular Hindu in enjoyment thereof.

In *Girjashankar Daji* v. *Murlidhar Narain* (13), it was again held that an hereditary office of a priest was in the nature of immovable property and a plaintiff would ordinarily be entitled to an injunction restraining the defendants from interfering with that immovable property. The case quoted above, namely, *Ghelabhai Gavrishankar* v. *Hargowan Ramji* (12) was relied upon. It would appear from the two rulings of the Bombay High Court quoted above that a jajmani brit (right to receive offerings) is considered in Hindu law as immovable property and if this is the case, it would clearly be heritable and partible. We do not enter into the vexed question whether such a right is transferable or not. It is not necessary for us to do so in the present case. The point which we have to decide is whether this right can be considered to be included within the definition of the word "property" as understood in Hindu law.

In *Ragghoo Pandey* v. *Kassy Parey* (18) Mitter and Tottenham, JJ. held that a right to officiate as a priest at funeral ceremonies of Hindus was in the nature of immovable property. Two previous decisions of the Bombay High Court reported in *Krishna Bhat* v. *Kapabhat* (19) and *Balvantrav* v. *Purshotam Sidheshvar* (20) were relied upon by their Lordships in support of the decision. The texts of the Hindu law appearing upon this question, it was observed by their Lordships, are all collected in these two judgments of the Bombay High Court. A decision of their Lordships of the Privy Council reported in *Fatteh Singhji Jaswant Sangji* v. *Killian Kaiji Hekormutt Raiji* (21) was also relied upon where their Lordships had held that an hereditary right to receive certain payments payable by an inamdar out of rents of a village was to be considered as an interest in the immovable property.

In *Sukh Lal* v. *Bishambhar* (22) their Lordships of the Allahabad High Court consisting of Richards, C. J., and Banerji, J., approved of the ruling of the Calcutta High Court reported in *Ragghoo Pandey* v *Kassy Parey* (18) and held that Mahabrahmani dues could be considered as property capable of being transferred and that a mortgage of the same was permissible. We do not see, as stated above, the necessity to decide the question of transferability of such rights, since it is not at all necessary to do so for our purposes. It is sufficient for us to decide that the right is considered by the Hindu law as immovable property and if so it would be clearly heritable and partible.

In English Treatises on Inheritance S. 206, para. 96, the rule is quoted as follows:

"The right of performing religious ceremonies of certain classes of people as Poorohit, is by custom considered analogous to real property. The ancestral priest, that is, he who has been honoured by former generations with employment of officiating priest, and the priest appointed by the party himself, cannot be discarded without good and sufficient cause; but there is no legal authority for establishing the right of the heirs to officiate. The male heir of an hereditary poorohit is, however, by custom considered entitled thereto,

(18) [1884] 10 Cal. 73=13 C. L. R. 263.
(19) 6 Bom. H. C. A. C. 137.
(20) 9 Bom. H. C. 99.
(21) [1873] 1 I. A. 34=21 W. R. 178=13 B. L. R. 254=3 Sar. 306 (P.C.).
(22) [1917] 39 All. 196=37 I. C. 661=15 A. L. J. 41.

but not the heirs of an appointed priest. A female cannot succeed to such right and perform the ceremonies by a substitute, because she can appoint a substitute only for worldly affairs, not for solemn acts for the performance of which she herself is disqualified. Several male heirs share the fees according to their respective portions, and if they have divided the jajmans among them, each one will take the fees from his respective jajmans."

On a view of the authorities quoted above we have come to the conclusion that under Hindu law the right to receive offerings from jajmans is considered as immovable property and, therefore, capable of passing by inheritance to the heirs of the person in enjoyment of such rights and is, therefore, divisible among the heirs.

We would, therefore, declare that property No. 7 which consists of brit Mahabrahmini should also be declared as capable of being divided among the parties to this case and the plaintiff should be allowed a half-share therein. This division can be conveniently made by allotting particular days or periods to the parties according to their shares. The result is that the plaintiff will be entitled to a decree in respect of the properties Nos. 1, 2, 4, 5, 6 and 7. There is no dispute regarding property No. 3 in respect of which the plaintiff's claim has been dismissed by the two Courts below.

Another point was raised on behalf of the defendants-respondents in the cross-objections. It was to the effect that the suit brought by the plaintiff-appellant for partition should be dismissed since he had not brought into hotchpot the property acquired by him and his father at Secundrabad (Deccan). The defendants, however, did not file any list showing such properties and the objection raised by them is under the circumstances a futile one. We, therefore, allow the appeal, set aside the decree of the Subordinate Judge, and restore the decree passed by the learned Munsif with costs in this and the Courts below. The cross-objections filed by the defendants-respondents will also stand dismissed with costs.

P.D./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 263

RAZA AND MISRA, JJ.

Ganga Baksh Singh—Decree-holder—Appellant.

v.

Sheo Baksh Singh and *another*—Judgment-debtors—Respondents.

Appeal No. 4 of 1928, Decided on 27th August 1928, against order of Dist. Judge, Sitapur, D/- 24th October 1927.

Civil P. C., S. 47—In execution the decree-holder can be put in possession of the specific lands substituted for his share on partition.

Where a decree gives a right to possession of a share in any land which has already been partitioned the Court in proceedings for execution of the decree has power under S. 47, to put the decree-holder in possession of the specific lands substituted for his share on partition : *A. I. R.* 1922 *P. C.* 54, *Appl.*

[P 264 C 2 ; P 265 C 1]

Radha Kishan and *S. N. Srivastava*—for Appellant.

H. Qidwai for *A. P. Sen* and *Sailen Roy* for *S. N. Roy*—for Respondents.

Judgment.—This is an appeal from an order of the District Judge of Sitapur, dated 24th November 1927, setting aside the order of the Additional Subordinate Judge of Sitapur, dated 20th July 1927 in an execution case.

The following facts are no longer in controversy. One Nawab Singh was the owner of a ⅛th share in khata No. 18/8 in village Kachuri in the district of Gonda. That share was equivalent to 16 bighas 4 biswas 2½ biswansis. It appears that the tenure of the village is bhayachari. Nawab Singh sold 1 bigha 17 biswas to Sheo Bakhsh Singh and then he mortgaged his remaining 14 bighas 7 biswas 2½ biswansis share to Ganga Bakhsh Singh on 2nd June 1919. It was a simple mortgage. He then made a gift of 2 biswas 2½ biswansis share in favour of Bhola Singh. Subsequently, on 1st February 1920 he executed another mortgage in respect of his 14 bighas 5 biswas share in favour of Sheo Bakhsh Singh. This mortgage was a possessory mortgage. Sheo Bakhsh Singh was directed to pay off Ganga Bakhsh Singh's mortgage of 2nd June 1919. However he failed to pay off that mortgage. As the money due to Ganga Bakhsh was never paid, he brought a suit for sale of the mortgage property in March 1925 against Bhola Singh and Sheo Bakhsh Singh. It

should be noted that Bhola Singh was impleaded as the heir of Nawab Singh who had died in the meanwhile. Ganga Bakhsh's claim was decreed by the Court in respect of the property comprised in his mortgage. The preliminary decree was passed on 24th November 1925 and the final decree, on 24th September 1926. It so happened that the village was partitioned by order of the revenue Court in the meantime but this fact was not brought by any of the parties to the notice of the Court. All the parties who are parties to this litigation were parties to the partition case also. The result of the partition was that two biswas 2½ biswansis share of Nawab Singh in khata No. 18/8 was allotted to khata No. 8 which was named after Bhola Singh and the share of 14 bighas 5 biswas was allotted to khata No. 11 named after Sheo Bakhsh Singh. It was expressly stated in the tarz taqsim that the land allotted to khata No. 11 is both proprietary as well as mortgage land of Sheo Bakhsh Singh. It is not denied that the mortgage land was that very land which was comprised in the possessory mortgage of Sheo Bakhsh Singh dated 1st February 1920.

Ganga Bakhsh Singh applied for execution of the decree. His application was opposed by Bhola Singh and Sheo Bakhsh Singh. Bhola Singh had no objection to the sale of 2 biswas 2½ biswansis gifted land that had been allotted to his khata No. 8. Sheo Bakhsh's contention was that he had become the owner of all the lands in khata No. 11 by virtue of partition and therefore Ganga Bakhsh Singh had no right to proceed against any land of that khata. There is no doubt that he had raised this objection dishonestly. The fact is that the property which had been mortgaged to him by Nawab Singh had been allotted to his khata as mortgagee and not as proprietor It was also contended on behalf of Sheo Bakhsh Singh that the question as to the property against which execution was to be taken out could not be determined or decided in the execution proceedings.

The learned Subordinate Judge disallowed the objection of Sheo Bakhsh Singh. He directed that the execution application should be amended so as to enable the decree-holder to execute the decree in respect of 2 biswas 2½ biswansis out of khata No. 8 and 14 bighas 5 biswas out of khata No. 11.

Sheo Bakhsh Singh appealed and his appeal was allowed by the learned District Judge of Sitapur. The learned District Judge was of opinion that the decree-holder could not claim to execute his decree against a khata different to that specified in the decree, and that the decree-holder should apply for a formal amendment of the decree

Ganga Bakhsh Singh has now come to this Court in second appeal.

We think this appeal should be allowed. The only point for determination in this appeal is whether the share of 14 bighas 5 biswas land which was allotted to Sheo Bakhsh Singh's khata No. 11 and was shown therein as mortgage land can be sold in execution of Ganga Bakhsh's decree. In our opinion this question must be answered in the affirmative. It is clear that the lands of the entire khata No. 11 have not been allotted to Sheo Bakhsh Singh as a proprietor and lands representing the share of 14 bighas 5 biswas have been allotted to him as a mortgagee from Nawab Singh. There is no reason why the decree obtained by Ganga Bakhsh Singh should not be executed against the said share which has been allotted to Sheo Bakhsh Singh's khata No. 11. The learned counsel for the respondents has argued before us that there was no specification of lands and so the decree could not be executed against any land of Sheo Bakhsh Singh' khata No. 11 We think this contention is not well founded. The property in respect of which the decree was passed represented the share of the mortgagor in a bhayachari village.

Mutation was effected in favour of Sheo Bakhsh Singh in respect of that very share as evidenced by Ex. 1. Lands to the extent of 14 bighas 5 biswas which have been allotted to khata No. 11 as mortgage lands must be held to represent the property in respect of which the decree was passed, and this is a sufficient specification of the mortgaged property which is to be sold in execution of the decree. We think the principle of decision in the case of *Baijnath Goenka* v. *Ravaneshwar Prasad Singh* (1) helps the appellant's case. It was held in that case that where a decree gives a right to

(1) A.I.R. 1922 P.C. 54=1 Pat. 378=49 I.A. 139 (P.C.).

possession of a share in any land in ijmali mahal which has already been partitioned under the Estates Partition Act, the Court in proceedings for execution of the decree has power under S. 47, Civil P. C., 1908, to put the decree-holder in possession of the specific lands substituted for his share on partition. No difficulty arises in this case so far as identification of the mortgaged property is concerned. The property in dispute which formerly belonged to khata No. 18/8 now belongs to khata No. 11 and Sheo Bakhsh Singh held the same under the mortgage of 1st February 1920. We are not prepared to grant the request made by the learned counsel for the respondent that the case should be remanded to ascertain what lands out of khata No. 11 represent the mortgaged property It is unnecessary in this case to make any inquiry as to the identity of the property when the extent of the share representing the mortgaged property is sufficiently clear.

The result is that we allow the appeal, set aside the decree of the learned District Judge and restore that of the learned Subordinate Judge. The appellant will get his costs from the respondent Sheo Bakhsh Singh in all the three Courts.

P.R./R.K. *Appeal allowed.*

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* A. I. R. 1929 Oudh 265

Full Bench

WAZIR HASAN, Ag C. J., AND MISRA AND PULLAN, JJ

Hiwanchal Singh — Defendant—Appellant.

v.

Ajodhya Singh and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 180 of 1928, Decided on 25th February 1929, against decree of Sub-Judge, Sitapur, D/- 28th January 1928.

*** (a) Oudh Laws Act (18 of 1876), S. 9—Manager of joint Hindu family selling portion of family property—Other member of family can sue to pre-empt that portion as question whether sale was for legal necessity cannot arise.**

It is open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be a member, when the said property has been sold by the manager of the family. The question of family property is immaterial, because by making a claim for pre-emption the cosharer is precluded from disputing the validity of the sale on the ground that it was not for family necessity: 67 *I. C.* 76; 42 *All.* 264 and *A. I. R.* 1925 *Oudh.* 352, *not Foll.*; *A. I. R.* 1922 *Oudh* 115; 1 *O. C.* 252; 7 *O. C.* 61 *Foll.*; *A. I. R.* 1918 *P. C.* 196; 19 *O. C.* 306 and 7 *All.* 184 (*F.B.*), *Ref.* [P 267 C 1]

(b) Oudh Laws Act (18 of 1876), S. 9—To be cosharer person need not be so recorded.

In order to determine whether a person is a cosharer in the village or not it is not necessary that he should be a recorded cosharer: 19 *O. C.* 306 and 7 *All.* 184 (*F.B.*), *Rel. on.* [P 268 C 1]

*** (c) Hindu Law — Joint family — One member consenting to sale of family property by another does not make former vendor.**

A member of a joint Hindu family who consents to the sale of a portion of the family property by another member of the same family cannot be called a vendor: 42 *All.* 264, *not Appr.*; 21 *Cal.* 496, (*P.C.*), *Ref.* [P 271 C 2]

Mohd. Ayub Quraishi for *Ghulam Hasan*—for Appellant.

M. H. Kidwai—for Respondent 1.

P. N. Chaudhri for *A. P. Sen*—for Respondent 2.

Opinion.

Pullan, J.—The question referred to this Full Bench is as follows:

"Is it open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be a member, when the said property has been sold by the manager of the family, for family necessity or otherwise."

We are not concerned with the case where the whole of a joint family property has been sold, but only with the case where a portion of the property has been sold, and therefore every member of the joint family still possesses in virtue of his position as a joint owner an interest in that portion of the family property which has not been sold. The right of any person to pre-empt depends on his fulfilling the requirements of S. 9, Oudh Laws Act. It appears to me that every member of a joint Hindu family owning joint family property is a cosharer in the family property and is therefore prima facie a person entitled to pre-empt the property of another cosharer in the same mahal or khata as the case may be. The difficulty which arises in the case of a cosharer in the property which is being sold is due to the objection that a man cannot, ordinarily speaking, buy his own property which is the principle

underlying the rulings which have induced us to refer this case for decision of a Full Bench. It is said that:

"A man cannot successively occupy the position of vendor and pre-emptor in respect of the same transaction."

This is the view taken of a case such as we have before us by Mr. Daniels, J. C. in the case of *Gajadhar* v. *Lal Behari* (1). It is also the view taken by the Allahabad High Court in the case of *Partap Narain Singh* v. *Shiam Lal* (2) In that case the Judges described the cosharer who wished to pre-empt that sale as being "practically" a vendor. In my opinion it is not correct to regard other members of a family who have taken no part in the sale of a portion of the family property as vendors. The vendor is the person who executes the sale, and it is clear that although he is in the position of being able to dispose of the family property and thereby the interests of persons other than himself by means of sale, they may take no part in the transaction, and may even contest it by means of suit. They are not therefore properly described as vendors although the property sold belongs partly to them. Nor do they become vendors merely because in order to bring a suit for pre-emption they must admit the validity of the sale. This admission of the validity of the sale was insisted upon by their Lordships of the Privy Council in the case of *Abdul Wahab Khan* v. *Shaluka Bibi* (3) but the only effect of this admission is to deprive the cosharer of his right to dispute the legal necessity of the sale, that is to say he cannot seek to pre-empt the sale and at the same time say that the sale is not for legal necessity. By offering to buy the property himself, he admits not only that the property can be legally sold, but that he wishes it to be sold. On the other hand, I am not prepared to say that he has deprived himself of his right to object to the sale in favour of a certain vendee if that vendee is not acceptable to him. It is not the case that a member of the joint Hindu family cannot acquire by purchase the interest of another member of the family, and where a sale has been effected by one member and the sale is such that it cannot be successfully disputed under the terms of Hindu law, I see no reason why a cosharer, who owns an interest in the property sold, should not come forward and buy the property rather than allow it to pass into the hands of strangers. I can see nothing in the transaction which is contrary even to the terms of Hindu law. but the only question which is to be decided is whether the cosharer, in a case such as has been propounded to us, is entitled to bring a suit for pre-emption under S. 9, Oudh Laws Act, and there is nothing in the definition contained in that section which prohibits the cosharer from bringing such a suit. This view, although it did not find favour with two Judges of the Judicial Commissioner's Court in the case cited above *Gajadhar* v. *Lal Behari* (1) had been taken more than once by other Judges of the same Court. In particular, I would refer to the decision of Mr. Wazir Hasan, Additional Judicial Commissioner (now Mr. Hasan, J.) in *Ramadhin Singh* v. *Surajpal Singh* (4). This judgment follows one of the earliest reported decisions of the Judicial Commissioner's Court, viz., *Hazari Singh* v. *Joot Singh* (5). Mr. Daniels was of opinion that Mr Wazir Hasan was wrong in distinguishing the case which he was trying from the case reported in the case of *Ram Dayal* v. *Bhajju Lal* (6). The same passage in that judgment has been quoted both in the case of *Gajadhar* v. *Lal Behari* (1) and *Ramadhin Singh* v. *Surajpal Singh* (4) and in my opinion, the distinction drawn in the latter case was a very real distinction.

In the case of *Ram Dayal* v. *Bhajju Lal* (6), the sale transferred all the interest in the property on which the cosharers could base a suit for pre-emption. Thus when they had admitted the sale they had admitted that all their rights had passed by that sale, and at the moment when they came into the Court they were not cosharers; and they were therefore deprived by S 9, Oudh Laws Act, from bringing a suit for pre-emption. On this account the Judicial

(1) A. I. R. 1925 Oudh 352.
(2) [1920] 42 All. 264 = 55 I. C. 97 = 18 A L. J. 116.
(3) [1894] 21 Cal. 496=21 I. A. 26, (P.C.).
(4) A. I. R. 1922 Oudh 115=25 O. C. 57.
(5) [1898] 1 O. C. 252.
(6) [1904] 7 O. C. 61.

Commissioners observed that the proper course would appear to have been to attack the sale itself. But I am not prepared to hold that the cosharers, as long as they possess some other interest in the property which has not been sold, and are therefore persons entitled to pre-empt under the Oudh Laws Act, are debarred from exercising this right merely because a part of their own interest has been transferred along with the interest of others by the sale which they wish to pre-empt. I would therefore reply to the question referred to us as follows: It is open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be a member, when the said property has been sold by the manager of the family. The question of family property is immaterial, because by making a claim for pre-emption the cosharer is precluded from disputing the validity of the sale on the ground that it was not for family necessity.

Misra, J.—The question referred to us is as follows :

"Is it open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be a member when the said property has been sold by the manager of the family for family necessity or otherwise?"

The facts of the case are that one Chhattar Singh, who owned certain land situate in village Harnathpur, district Sitapur, sold a portion of the said land to one Gur Bakhsh Singh for Rupees 1,978-13-0. Gur Bakhsh Singh is admittedly a stranger to the village. Two suits for pre-emption were brought, one by his son Ajodhya Singh and the other by Hewanchal Singh, who was also a cosharer in the village. The suit of Ajodhya Singh was contested by Hewanchal Singh on the ground that inasmuch as the property sold belonged to the joint family consisting of Ajodhya Singh and his father Chattar Singh, it was not open to him to bring a suit for pre-emption in respect of the property sold by his own father, who was the head and the manager of the family. This contention has been overruled by both the Courts below who have held that Ajodhya Singh, being the son of Chattar Singh, is more nearly related to the vendor than Hewanchal Singh. They have, therefore, passed a decree to the effect that Ajodhya Singh should be given a preferential right to pre-empt the property in suit and failing him the right should be given to Hewanchal Singh. The Courts below are of opinion that since a portion of the family property has still remained undisposed of Ajodhya Singh must be treated to be still a cosharer in the village on the strength of that property and the fact that the property sold consisted of the joint family property should not stand in the way of his getting a decree for pre-emption. The reference before us is in connexion with the two appeals, which have arisen out of these rival suits for pre-emption.

On behalf of the appellant reliance has been placed upon the two rulings of the late Court of the Judicial Commissioner of Oudh, one reported in *Ram Dayal* v. *Bhajju Lal* (6) and the other reported in *Gajadhar* v. *Lal Behari* (1) and a decision of the Allahabad High Court reported in *Pratap Narain Singh* v. *Shiam Lal* (2).

On behalf of the respondents reliance has, however, been placed upon two other cases decided by the late Court of the the Judicial Commissioner of Oudh, one reported in *Hazari Singh* v. *Joot Singh* (5) and *Ram Adhin Singh* v. *Surajpal Singh* (4).

In the cases relied upon by the appellant it has been held that where a sale-deed has been executed in regard to the property owned by a joint family, a member of that family cannot be allowed to pre-empt the property sold, whereas in the case relied upon by the respondents a contrary view has been taken.

We have to decide which view we ought to hold as the correct view with reference to the pre-emption law embodied in the Oudh Laws Act, 18 of 1876. After carefully studying those provisions it appears to me that if the right of a party to claim pre-emption in Oudh is to be, as it must be, determined in accordance with the said Act the view urged by the respondent must be accepted. Under S. 13, Oudh Laws Act, any person entitled to a right of pre-emption is given a right to bring his suit to enforce such right in case the sale made in favour of the person, against whom he wishes to exercise the right, has been effected without his having

been given a due notice of the proposal in respect of the said sale. The persons, who are entitled to a right of pre-emption, are enumerated in S. 9 of the said Act. According to that section the right to pre-empt is given first to cosharers of the subdivision of the tenure in which the property is comprised in order of their relationship to the vendor, then it is given to the cosharers of the whole mahal in the same order and lastly the right is given to any member of the village community. It is further declared that if two or more persons are equally entitled to such right the person to exercise the same shall be determined by lot. Looking to these provisions it appears to me to be clear that if Ajodhya Singh can be considered to be a cosharer in the village on the basis of property other than sold he would be entitled to exercise the right of pre-emption in respect of the sale in question. It is admitted by the parties in this case that no notice of the sale in dispute was given to him and under the circumstances he would be entitled to bring a suit in accordance with the provisions of S. 13.

It has been consistently ruled both in Oudh and in the Allahabad High Court that in order to determine whether a person is a cosharer in the village or not it is not necessary that he should be a recorded cosharer. If he is really entitled in law to certain proprietary rights in the village, he should be deemed a cosharer for the purposes of pre-emption, although his name is not recorded in the khewat. This position is obvious from the language used by the legislature in the Act itself. S 9 does not give the right to recorded cosharers only. It gives right to all cosharers irrespective of the fact whether they are recorded cosharers or not. In *Lalta Singh* v. *Chattar Singh* (7). Mr. Stuart (now Sir Louis Stuart) and Pt. K. Lall took the view that the entry of a person's name in the khewat was not a condition precedent to his being entitled to exercise the right of pre-emption. In the Allahabad High Court the said view was taken so far back as 1885 in a Full Bench decision reported in *Gandharp Singh* v. *Sahib Singh* (8). In that case the point decided by the Full Bench was to the effect that the members of a joint undivided Hindu family other than the member who was recorded in the village recorded as a cosharer in the mahal, were to be deemed as cosharers for the purpose of pre-emption. On the strength of these rulings there can be no doubt that Ajodhya Singh, the son of Chattar Singh, who was admittedly a member of the joint undivided family with his father Chattar Singh must be deemed to be a cosharer for the purpose of pre-emption, though his name was not recorded in the khewat Indeed this point was not seriously contested by the learned advocate for the appellant.

The main argument of the learned advocate for the appellant was that since the sale made by Chattar Singh was a sale of the joint family property justified by legal necessity it must be deemed to be a valid sale on behalf of all the members of the family includiug Ajodhya Singh The argument was that if it was a sale binding on all the members of the family it must be treated to be a sale on behalf of Ajodhya Singh also and if Ajodhya Singh was to be treated as a vendor, it was difficult for him to claim the right of pre-emption, since the vendor himself could not be allowed to exercise the right of pre-emption in respect of a sale effected by himself. The basis of this argument is obviously the fact that a member of the joint family claiming pre-emption is to be treated as a vendor. Although a member of the joint family whose property has been sold may loosely be described as a vendor, yet strictly speaking he cannot be in the eyes of law deemed as a vendor. This would be clear from the fact that he can in certain cases, for instance, where the sale is not justified by legal necessity, challenge the transaction. If in all cases a member of a joint Hindu family is to be treated as a vendor, it would not be possible for him to challenge the transaction in any case whatsoever. A vendor cannot obviously be allowed to challenge his own act. The real position seems to me to be that a member of a joint Hindu family is to be treated merely as a person upon whom the sale is to be binding if effected for legal necessity. It is not correct to describe him as a vendor but only as a person, who in certain circumstances is

(7) [1918] 19 O. C. 306=37 I. C. 188=3 O. L. J. 552.

(8) [1884] 7 All. 184=(1884) A. W. N. 326 (F.B.).

bound by the sale. If he is to be treated as a person bound by the sale, it would be perfectly open to him to treat the transaction as a valid sale and if there is still left a portion of the family property upon the strength of which he could still claim to be a cosharer, I do not think why he should not be allowed to exercise the right of pre-emption given to him by the statute law as indicated above.

In *Ram Dayal* v. *Bhajju Singh* (6), which was a case decided by a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Mr. Macleod and Mr Chamier (now Sir Edward Chamier), a case which was cited by the learned advocate for the appellant in his support, the following passage was relied upon :

"It seems to me that Ram Bharose and Mool Narain are on the horns of dilemma. They must either admit that the sale was a valid one or deny that it was so. If they admit that the sale was a valid one then any interest they had in the property before the sale must have been lost to them on the sale taking place, and therefore *they had no subsisting title at the date* of the institution of the suit ; while if they deny their father had power to transfer their interest they are precluded from claiming pre-emption."

I have underlined (italicised) the words in the above passage which in my opinion are a key to the whole situation. It appears to me from the facts given in the report that apart from the property sold, Ram Dayal the appellant pre-emptor, had no other property left, upon which he could claim a subsisting title at the date of the institution of the suit. In such a case indeed the position would be as observed in the passage quoted above. Where, however, there is still some joint property left unsold, on the basis of which the member of the family can base his title of being a cosharer or where he possesses his own separate property on the basis of which he can claim pre-emption, there is no reason why he should not be treated as a cosharer and entitled to exercise the right, which he is entitled to in law.

In *Pratap Narain Singh* v. *Shiam Lal* (2) the gist of the decision is embodied in the following passage to be found on page 265 :

"The interests of all were joint and to allow the plaintiffs to pre-empt would be tantamount to allowing a man to be both a vendor and a pre-emptor one after the other."

I have already tried to show in the previous portion of my judgment that a member of a joint Hindu family cannot in connexion with the sale of the joint family property which is to be held binding on him be treated as a vendor. There is no justification for holding him as such in the Hindu law. It is one thing to say that the sale is binding upon him and quite the other to say that he is to be treated as a vendor.

A case decided by the Lahore High Court was also quoted during the course of arguments. It will be found reported in *Sukha Ram* v. *Kotu Ram* (9). In that case the learned Judge of the Lahore High Court followed the case decided by the Allahabad High Court reported in *Pratap Narain Singh* v. *Shiam Lal* (2). The learned Judge has not given any reasons for treating a member of a joint Hindu family as a vendor other than those given in the decision relied upon by him

The conclusion to which I, therefore, arrive is that where a sale of a joint family property has been effected by the manager of the said family for family necessity, it would be open to a member of the said joint family to treat the sale as valid and to acquire by pre-emption the portion of the property sold. In the case where it is not effected for family necessity, it would be open to him to treat the sale as valid or otherwise. If he wishes to bring a suit for pre-emption he must treat it as a valid sale, without which no suit for pre-emption can be legally brought. If he wishes to treat the sale as invalid it would be open to him to attack it as such, but it would not be open to him in that case to acquire the property by pre-emption. If, however, the entire family property is sold for legal necessity and there is left no family property on which the member of the joint family can base his title as a cosharer or if he does not possess any separate property of his own he cannot be allowed to exercise the right of pre-emption. The very basis upon which such right could be exercised has been lost to him. In such a case he cannot be allowed to pre-empt the property. If the entire property has been sold not for family necessity, obviously the course open to him in law would be, if so advised, to attack the sale itself, I, therefore, answer the reference in the terms quoted above.

(9) [1921] 67 I. C. 76.

Wazir Hasan, Ag. C. J.—The question involved in this reference was considered and decided by me so far back as June 1921 in the case of *Ram Adhin Singh* v. *Surajpal Singh* (4). My learned brother, Pullan, J., has referred to this case in his judgment relating to this reference. To the view which I then held I still adhere and the contrary view taken in the case of *Gajadhar* v. *Lal Behari* (1), in express dissent from my opinion has failed to commend itself to me. In giving my answer to this reference I propose to reproduce mutatis mutandis my judgment in the aforementioned case.

To determine the right of a party to pre-emption we must primarily look to the provisions of the Oudh Laws Act (18 of 1876) by which the right is conferred upon persons residing in the territory of Oudh. S. 3, sub-section (c), of the Act says that the law to be administered by the Courts of Oudh shall be "the rules contained in this Act." S. 6 of the same Act is as follows :

"The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons."

Such persons are enumerated and classified in S 9. Where immovable property is owned by a joint Hindu family it must be admitted that every member of that family is a cosharer in that property in relation to every other member of the same family. S. 13 of the Act gives cause of action to an intending pre-emptor to bring a suit for pre-emption for the purpose of acquiring the property in preference to the person to whom it has been sold on breach of the terms laid down in Ss. 10, 11 and 12 and also on the ground that the price stated in the notice was not fixed in good faith. It would thus appear that on the terms of the enactment just now mentioned a member of a joint Hindu family when he is possessed of the status of a cosharer on the date of the sale on the basis of his interest in immovable property outside the subject-matter of the sale is entitled to bring a suit for pre-emption in respect of that sale by reason of the breach of the conditions which the law imposes on the intending vendor and on the fulfilment of which alone the cosharer's right to enforce his title to pre-empt is excluded. This to my mind is an irresistible conclusion which flows from the interpretation of the clear provisions of law. But it is argued that there is a general principle of the Hindu law which destroys the right of pre-emption existing on the terms of the statute in favour of a member of a joint Hindu family where the sale intended to be pre-empted is made by another member of the same family. The argument is that when one member of a joint Hindu family sells property to a stranger another member of the same family must be treated as also a vendor. In support of this appeal reference is made to the juristic conception of a joint Hindu family and the relations in which the members of the family stand to each other and the case of *Himmat Bahadur* v. *Bhawani Kunwar* (10) is cited. I accept the analysis of the concept of a joint Hindu family so elaborately made in that judgment but the conclusion which it is sought to be drawn from that analysis does not appear to me to follow, nor can it override the statutory law to which reference has already been made.

In the Full Bench case of *Gandharp Singh* v. *Saheb Singh* (8) it was held that the members of a joint and undivided Hindu family other than the member who is recorded in the Collector's book as a sharer in the mahal are "cosharers" for the purposes of pre-emption. In that case the vendees resisted the suit for pre-emption on the ground that they were cosharers in the village in the right of members of a joint and undivided Hindu family and the defence was upheld by the Full Bench. The effect of such a defence being recognized as valid logically leads to the conclusion that the vendees had a right to retain the property in preference to the pre-emptor and that they could equally well enforce their right of pre-emption as members of a joint Hindu family, being possessed of interest in the family property, a portion of which was sold, had they been plaintiffs and the vendee a stranger. This conclusion can only be avoided by taking the view that in the former case the vendees and in the latter case, the plaintiffs pre-emptors were also vendors. To my mind such a view is wholly untenable. The Full Bench decision has been admitted in the old Court of the Judicial Commissioner of Oudh as en-

(10) [1908] 30 All. 352=5 A. L. J. 339=(1908) A. W. N. 143.

unciating good law. In the case of *Hazari Singh* v. *Joot Singh* (5) Mr. Blennerhassett, J. C, referred to that case with approval and held that a suit for pre-emption by a member of a joint Hindu family, who happened to be the son of the vendor in that case, was maintainable in respect of a sale made by his father with whom he formed the joint Hindu family. In that judgment Mr. Blennerhassett referred to an earlier decision of the Judicial Commissioner's Court in the case of *Lachmi Narain* v. *Raghunath* (S. C A No. 652 of 1885, dated 16th September 1885) which had decided that the son was entitled to enforce his right of pre-emption in respect of the property sold by his father with whom he was joint and undivided. A reference was also made in this connexion to a decision of a Bench of the late Court of the Judicial Commissioner in the case of *Ram Dayal* v. *Bhajju Lal* (6). The ratio decidendi of that case may best be explained in the language of Macleod, A. J. C., who delivered the judgment of the Court.

"It seems to me that Ram Bharose and Mul Narain are on the horns of a dilemma. They must either admit that the sale was a valid one or deny that it was so. If they admit that the sale was a valid one, then any interest they had in the property before the sale must have been lost to them on the sale taking place, and therefore they had no subsisting title at the date of the institution of their suit, while if they deny that their father had power to transfer their interest they are precluded from claiming pre-emption."

Now it is perfectly clear that the title of Ram Bharose and Mul Narain to pre-empt rested on their interest in the property which was the subject matter of the sale and apparently there was no other property in which they had interest and upon which they could found their status of cosharers.

The argument that the intending pre-emptor is a vendor in a case where he is a member of a joint Hindu family and the sale is of a portion of the family property by another member is supported by the decision of the Allahabad High Court in the case of *Pratap Narain Singh* v *Shiam Lal* (2). With due respect I am not prepared to accept the decision as a sound one. A plaintiff in a suit for pre-emption must accept the validity of the sale he intends to pre-empt and of the vendor's title to affect it. If he denies either the one or the other according to the law in force in Oudh he is debarred from claiming a right of pre-emption. This view is founded upon a decision of their Lordships of the Judicial Committee in the case of *Abdul Wahid Khan* v. *Shaluka Bibi* (3). The plaintiff with a view to successfully exercise his right of pre-emption is therefore bound to accept the sale which has given rise to the cause of action. For the reason of this fact alone that he has accepted the sale as a valid sale I am unable to clothe such a plaintiff with the character of a vendor. I am of opinion that a member of a joint Hindu family who consents to the sale of a portion of the family property by another member of the same family is in no sense a vendor. His consent merely takes the place of legal necessity on proof of which the sale would be valid against every member of the family. Such a consent is a substitute for the evidence of legal necessity and when established merely works out as an estoppel by force of which the member giving the consent is debarred from challenging the sale on the ground open to him under the Hindu law. This I understand is the effect of the decision of their Lordships of the Judicial Committee in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (11).

Such an estoppel cannot in my opinion debar him of his right to exercise the claim of pre-emption which exists in his favour outside the transaction of sale and only arises subsequent to and after a valid sale has been proposed and carried through. One member of a family may sell a portion of the family property under pressure of legal necessity, yet it may be effected in teeth of protest by other members of the family. The sale will be binding on those members under the Hindu law and yet I hold that it is impossible to predicate of them as vendors. Take the case of a joint estate owned by two tenants in common. Having regard to the nature of the tenancy each tenant is seized *per my et per tout* and each is the owner of an undivided moiety. Assume further that a portion of this hereditament is sold by only one of the two tenants. Clearly it is open to the other tenant either to object to the sale and seek relief for its cancellation, or to waive his objection and accept the

(11) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P.C.).

sale as conveying his undivided interest also. Now having been faced with an election between consent and contest he elects the former course. Can it reasonably be said that having done so he becomes a vendor and is therefore precluded from exercising his right of pre-emption? I think not. My answer therefore to the reference is in the affirmative.

S.N./R.K. *Reference answered.*

A. I. R. 1929 Oudh 272

RAZA AND PULLAN, JJ.

Taule—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 65 of 1929, Decided on 1st March 1929, against order of Addl. Sess. Judge, Kheri, D/- 6th February 1929.

(a) Penal Code, S. 300—Evidence of admission to villagers, though sufficient to justify conviction, must be scrutinized as other evidence to prove murder—Evidence Act, S. 24.

Although the evidence of admission of guilt to villagers is sufficient to justify the conviction, still the evidence that such an admission was made must be closely scrutinized like all other evidence which is used to prove a case of murder: *A. I. R.* 1928 *Oudh* 393 and *A. I. R.* 1929 *Oudh* 167, *Ref.* [P 273 C 1]

(b) Evidence Act, S. 24—Ziladar serving under great estate is person in authority.

A Ziladar serving under a great estate (such as that of Kapurthala) is a person in authority and if such a person holds out inducement to the accused, the admissions made to him would not be admissible: *A. I. R.* 1926 *All.* 737, *Rel. on.* [P 273 C 2]

(c) Evidence Act, S. 24 — Extra-judicial confession is of great importance but it must not be one fabricated in order to provide additional evidence.

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigation officer considers to be a weak case. [P 274 C 1]

(d) Penal Code, Ss. 300 and 302—Evidence to prove murder.

In a case of murder there was no counter-story worth believing on behalf of the accused. The motive of the accused in committing the murder was evident. His conduct subsequent to the crime showed that, although he knew the truth he put forth numerous falsehoods. And further there was in evidence the statement of the accused's uncle that the accused confessed his crime to him.

Held; that the evidence was sufficient to prove that the accused was guilty of murder the only proper sentence for which was death. [P 275 C 1]

Kanhaiya Lal—for Appellant.

Govt. Advocate—for the Crown.

Judgment.—Taule Chamar has been convicted of the murder of his sister-in-law Mt. Bhajania and sentenced to death subject to confirmation by this Court. In this appeal he has re-stated the defence which he put up at the outset of the case namely, that Mt. Bhajania was killed by dacoits who carried off his entire belongings. There is no doubt that Mt. Bhajania was murdered. She received some seven injuries from a gandasa, mostly on the neck and head. No less than three of the injuries were on her face. There is also no reason to doubt that the murder was committed some time after midnight on 25th October 1928. The first report was made by Taule himself, who was accompanied by the village chaukidar and his own father Dujai and his uncle Puran. The report was not made till 10 a. m. at a police station, which is not more than 5½ miles from the village in which the crime was committed. There was therefore considerable delay in making the report and this delay has been accounted for by the fact that the father of the accused was absent on the night of the crime, and nothing was done until he returned in the morning. The report is in some ways a curious one. The first thing to be noticed is that there is no direct reference to the murder or the manner in which Mt. Bhajania met her death. The accused stated that two men, one of whom was a Mahomedan of Kauriya and the other was Baldeo Chamar, pressed down Mt Bhajania who was the wife of Taule's younger brother. He went on to say that Niranjan Chamar of the village, Bakkas Mussulman of Kauriya Kandhai, Arakh of Kauriya and a certain Natha, who was apparently a Teli by caste, came into the house and took the wristlets off both Taule's hands while he was sleeping. Then he woke up, saw them all and recognized them. They asked for the money and began striking him with the wrong, that is, blunt side of a knife. On this he gave up Rs. 25 in cash which were buried, and the thieves took him outside to his maize field and left him there. Later on in the report he mentioned certain articles which had been stolen and said that he had received in-

juries from the wrong side of the knife on the left side of his body. But he did not mention the two cuts which were found on the back of his left leg.

On investigation the report as to the dacoity was found to be untrue. There was no sign that any dacoity had been committed. The floor had not been dug up and there were numerous utensils lying by the bed of the murdered girl. Nor were her injuries such as could reasonably be expected to have been inflicted by dacoits. Such injuries, particularly cuts on the face inflicted upon a woman are generally the work of a disappointed lover; and it must have been evident to any one who saw the corpse that she had been murdered for some definite motive and not merely killed by dacoits in an attempt to rob the house.

The Sub-Inspector before proceeding to the village sent Taule for medical examination and he did not arrest him until the following morning. Before making his arrest it appears that he had investigated the state of affairs existing in this family and he had also heard the statement of Puran, the uncle of the accused, who has now stated in Court that immediately after the murder the accused confessed to him that he had himself committed the crime.

The lower Court has based the conviction largely upon the confession made to Puran and second confession said to have been made to one Thakur Karam Singh who is a ziladar of the Kapurthala estate. He has made mention of a judgment reported in *Emperor* v *Badal* (1), where it was held that the evidence of admission of guilt to villagers may be sufficient to justify the conviction of an accused person. This judgment has been re-affirmed lately by this Court in *Sheo Ratan* v. *Emperor* (2) and it is not necessary for us to state again our reasons for holding this view. At the same time it must be remembered that the evidence that such a confession has been made must be as closely scrutinized as all other evidence which is used to prove a case of murder. In the present case one of the so-called confessions is in our opinion inadmissible in evidence that is the one said to have been made to Thakur Karam Singh, Ziladar of the Landanpur Grant Circle of the Kapurthala estate in which the village of Pipra is situated. We consider that a ziladar serving under a great estate such as that of Kapurthala is a person of great importance in the villages which belong to that estate and he is a person who has authority over the villagers. Indeed it is he to whom they look in everything relating to their tenancy and all those matters which are important for their livelihood. In our opinion such a ziladar is a person in authority within the meaning of S. 24, Evidence Act. It was held by the Allahabad High Court in the case of *Emperor* v. *Har Piari* (3) that a village mukhia is a person in authority and various other village officials and persons in similar positions have from time to time been held by various Courts to come within that definition In our opinion a ziladar, such as this person Karam Singh is a person of more influence and more authority than a village mukhia. Holding that he was a person in authority it is clear from his own statement that he offered an inducement to the accused to confess. His own account of the affair is as follows:

"The accused met me at 4 or 4-30 p. m. on the 25th October and I asked him what was the matter and that no dacoity appeared to have taken place at his house and he should give a true account. The accused kept quiet and did not say anything. I asked him again but he kept quiet. When I asked him a third time he told me that if I helped him he would give me a correct account. I told him to give a true account and that I would help him so far as it lay in my power."

To such a person as the accused the ziladar had great power and could even save him from the police, if he were so minded. We consider, therefore, that this was an inducement given by a person in authority and as such must be ruled out of the evidence. But there is another point which we must consider in connexion with the statement of this witness and that is that in our opinion no such confession was ever made. We know that the accused was sent to the hospital by the Sub-Inspector before 1 o'clock. The hospital is at Gola and the Assistant Surgeon examined the injuries of the accused at 4-30 .p. m. It is therefore impossible that the accused can have reached the village before 6 p.m, at the earliest and as a matter of fact we find that, although the Sub-Inspector was in the village that evening he did

(1) A. I. R. 1928 Oudh 399.
(2) A. I. R. 1929 Oudh 167.
(3) A. I. R. 1926 All. 737=49 All. 57.

not see the accused at all until the following morning when he searched his person and arrested him But the zilladar said that he met the accused in the village at 5 or 4-30 p m on 25th October and that he then left the village but hearing that the Sub-Inspector had come he went to him in the village at 10 or 11 p m and told him what the accused had said We know that the Sub-Inspector was in the village at least till 4 p. m when he signed the punchayatnama and we must come to the conclusion that this whole statement is entirely false It is unfortunate that investigating officers should allow such evidence to be produced in a Court. No doubt the extra-judicial confession is of great importance, but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigating officer considers to be a weak case

The confession made to Puran stands on a different footing. We have read very carefully Puran's statement. He says that when he heard the cry raised by Taule he went and found him sitting outside his house. Taule then said to him that it was not a case of theft at all, that really he had tried to have sexual connexion with his sister-in-law, and he had killed her for fear that she would tell about the matter and there would be a punchayat. It is true that in the morning Puran went to the police station with the accused, but, although he went there, he was clearly uneasy. He left the police station while the report was being made and he returned, after first of all going to his father-in-law's house, to the village. As soon as he was sent for by the police he admitted that Taule had confessed to him. When we consider that no report was made until Taule's father returned from a fair, which he had been attending that day, we are of opinion that there must have been some considerable discussion in the family as to what report was to be made and it is most likely that Puran was partly persuaded by his brother and nephew to agree in their story about a dacoity. But he subsequently felt that he could not go on with this falsehood and told the truth The two witnesses who are said to have overheard the confession do not impress us favourably. We cannot resist the feeling that they have been brought in merely to corroborate the statement of Puran and to make it appear that, while Taule was ready to confess to his uncle, he remained silent when he discovered that he was being overheard by other persons Apart, however, from their evidence, we consider that the evidence of Puran is not to be disregarded

We must now consider the evidence apart from the so-called confession, and this evidence consists chiefly of the acts and statements of the accused himself together with the evidence as to the motive which he may have had for killing his sister-in-law. We would deal first with this motive. Mt. Bhajania was the wife of Taule's younger brother, a youth of about 16 years of age, whereas she was probably between 18 and 20. It is clear from the statement of her mother Mt. Basanti that this girl was pestered by the attentions of her brother-in-law, that she actually left her husband's house because of his behaviour, that she was ashamed of telling her mother what he had done to her, that she finally confessed that he had had forcible connexion with her, and it was only after great persuasion by Puran and her husband Churai that she consented to go back to her husband's house She even said to her mother that if she went she would be killed This evidence is fully corroborated by the statement of Puran and we have no doubt that it is true.

It is proved that on the night in question there was no body in the house of the accused except himself, Mt Bhajania, his youngest brother Budha who is a semi-insane and about 12 years of age and a little girl of three We see from the map that Mt. Bhajania had a room to herself while the accused slept on the other side of the house and the two children occupied a third room. This must have offered to the accused an opportunity for resuming his improper advances to his sister-in-law and it is certain that whatever happened he must have known very well what the events of the night were. We know that he was stained with blood in the middle of the night at the same time that his sister-in-law was murdered and he himself made a report as to a dacoity which is entirely and palpably false He also accounted for his own injuries by saying that they were caused with the blunt side of a

knife which is absurd, and he falsely named no less than five persons and gave a clue to a sixth who have all been examined as witnesses, and who had clearly nothing to do with the affair. But this is not all. He had previously told the chaukidar that the crime was committed by six Muhammadans whom he did not know, whereas, of the persons whom he named four were Hindus His next statement was that the dacoits thrust a knife into his left leg, of which he said nothing in his first report and he subsequently in the Court of Session produced an entirely new story There he said that the scratches on his body were caused by thorns in a tatti which he had put up in the southern wall of his house He had also then forgotten the story that the two dacoits had taken and placed him in a maize field; but he says that he ran out of the house raising an alarm He also raised the number of the dacoits to 15 or 16 and exaggerated the amount of the property stolen from Rs. 25 to Rs 225 When a person who is present at the commission of a crime chooses to make a number of different statements contradictory to each other and palpably false as to the manner in which the crime has been committed he brings suspicion upon himself, and in this case the suspicion is so strong that it seems impossible to resist the conclusion that Taule took this opportunity of making indecent advances to his sister-in-law who appears to have been a decent and respectable young woman and that he killed her because she refused to yield. We cannot say how his injuries were caused and we are not prepared to say that the cuts on his leg did not cause sufficient effusion of blood to account for the stains on his dhoti, but it is quite certain that he has never given a true account of those injuries and the medical opinion that the injuries on the leg may have been self-inflicted is probably correct.

We have then to consider whether this evidence is sufficient to justify a conviction. There is no counter story before us for we discard the alleged dacoity as a pure invention of Taule and we have a clear motive why Taule himself may have committed the crime. We then have his whole conduct from the time of the murder until the present which shows that, although he knows the truth he prefers to tell numerous falsehoods, and we also have the statement of Puran that at the very first he confessed the crime to his uncle. In our opinion the evidence is sufficient. It satisfied two of the assessors and the Sessions Judge and it satisfies us. As to the sentence there is only one sentence possible in a case of this kind, and that is the sentence of death. We, therefore, dismiss this appeal, uphold the conviction and sentence and order that Taule be hanged by the neck till he be dead.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 275

WAZIR HASAN, AG. C. J. AND PULLAN, J.

B. Rajendra Nath Sanyal—Defendant—Appellant.

v.

Mahabir Prasad and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 98 of 1928, Decided on 22nd February 1929, against decree of Sub-Judge, Lucknow, D/- 24th July 1928.

(a) Civil P. C., S. 11—Partition suit—Decision affecting right of one defendant against another is decision inter partes and will be res judicata.

As it is not possible in a suit for partition to make a hard and fast line between the plaintiffs and the defendants a decision affecting the right of one defendant as against another is a decision inter partes so as to be res judicata . *A.I.R.* 1914 *P.C.* 31, *Foll.* [P 277 C 1]

(b) Civil P. C., S. 11—Decision need not be on merits.

A decision to be final for the purpose of S. 11 need not be on the merits. [P 277 C 2]

(c) Civil P. C., S. 11—Father's mortgagee impleaded in sons' suit for partition to get sons' share released from mortgage—Point fought in appellate Court which reduced rate of interest and held whole family property liable for mortgage—Decision being final and complete will be res judicata in subsequent suit by mortgagee to recover disallowed interest from father's share.

In a sons' suit for partition against their father, the father's mortgagee also was impleaded as defendant the object being to get their share in the family property released from the burden of the mortgage. This point was fought out in the appellate Court though not in the trial Court, which reduced the rate of interest and held that the whole family property should be liable for the mortgage debt.

Held : that the decision of the appellate Court was complete and final and it would bar a subsequent suit by the mortgagee to recover from the separated property of the father the balance of interest disallowed in the previous suit : *A.I.R.* 1924 *P.C.* 144, *Rel. on.* [P 278 C 1]

M. Wasim, Ali Zaheer and *B. N. Roy* —for Appellant.

A. P. Sen and *Makund Behari Lal*— for Respondent 1.

Judgment.—The suit out of which this appeal arises was brought by the plaintiff to recover a sum of Rs. 21,000 which he claimed to be due on three mortgages dated 29th April 1918, the 7th June 1918 and 17th June 1920, alleging that the entire mortgaged property was liable for payment of the entire amount, but asking in the alternative that the Court might separate the liability holding the whole property to be liable for the sum of Rs. 13,871-8-0 and the share of defendant 1 alone to be liable for the remainder. The whole property has passed into the hands of defendant 5 who is the appellant before us. The lower Court (the Subordinate Judge of Lucknow) decreed the suit and the appellant has appealed mainly on the ground that in virtue of a decision of a Bench of the Judicial Commissioner's Court dated 27th February 1925, the whole amount due to the mortgagee at the time when the suit was brought was paid on 30th March 1928 and consequently nothing was due.

The question of res judicata arises in the following manner The mortgages were executed by one Jwala Prasad and they were declared to be binding on the joint family property. The three sons of Jwala Prasad brought a suit for partition against their father and impleaded the mortgagee. It is clear from their plaint that their object was to release their shares in the family property from the burden of these mortgages. The suit was defended by the mortgagee who pleaded that this was not joint family property, but if it were held that the property were joint property all the members of the family were liable to pay the debt. The suit was fought out on these pleas, and the mortgagee being dissatisfied with the decision of the Court of first instance appealed to the Judicial Commissioners of Oudh One of his grounds of appeal was as follows :

"That the Court below should have declared that in any event the 8 annas share belonging to the executants of the deeds in suit was liable for the entire amount due under terms of these deeds."

No objection was raised in the grounds of appeal to the partition. It was an appeal fought out by the mortgagee and the sons of the mortgagor in order to determine how much was due to the mortgagee and what property was liable for that amount. The Judicial Commissioners held that the family property should not be burdened with the mortgage at the high rate of interest of Rs. 1-9-0 per cent per month, and accordingly cut down the amount due to the mortgagee, declaring it to be Rs. 9,689-12 0 on which simple interest at 12 per cent. per annum would run from 17th June 1920 For this amount the Court found the entire property in suit to be liable.

The mortgagee now wishes to realize the whole amount which he claimed as due to him in the former suit. He claims from the shares of all the members of the family the sum decreed by the Judicial Commissioners with interest up to date, but he claims from the separated share of the father not only the balance which was disallowed by the Judicial Commissioners but also a large sum by way of interest representing the difference between the interest at Re 1 per mouth and the interest of Rs. 1-9-0 per month on the whole mortgage money. He does not however, claim compound interest.

It will be seen that his claim as against the property of defendant 1, namely, the father, reproduces the ground of appeal before the Judicial Commissioners which we have already quoted. It is this question which we are asked to find to have been decided by the judgment of the Judicial Commissioners. The lower Court has decided on this point in favour of the plaintiff, on the ground that the previous suit was between the sons on one side and the father and the mortgagee on the other. He says that the mortgagee in that case wanted the entire burden to be thrown on the entire property :

" There was no question at all of any claim being set up by the mortgagee as to the declaration of his rights against the separated share of the father."

He went on to say that this was purely a point between the defendants inter se, and the decision of the same was not required at all As to the judgment of the Judicial Commissioners he observed that they disallowed this contention because :

" They were not concerned with it, and as it was not raised in the first Court this was never a decision of the point on its intrinsic merit. The question was not a res judicata between the parties for those reasons."

In our opinion this finding of the learned Subordinate Judge is erroneous. It is not possible in a suit for partition

to make a hard and fast line between the plaintiffs and the defendants and to say that the decision is not inter partes because it is a decision affecting the right of one defendant as against another. In partition cases the defendants become decree-holders as much as the plaintiff and we are not prepared to say that there is no decision between the mortgagee and defendant 1 merely because for the purposes of the suit they were both impleaded as defendants. This principle has been laid down more than once, but we would refer only to the decision of their Lordships of the Judicial Committee in *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (1) The second point on which the lower Court has gone wrong is in his finding that the mortgagee did not set up any claim to a declaration of his rights against the separated share of the father. He did so in his grounds of appeal to the Court of the Judicial Commissioners, and this matter was argued in that Court as appears from the judgment Lastly the lower Court went wrong in saying that the learned Judges in appeal "disallowed this contention as they were not concerned with it." Nowhere in their judgment do the learned Judicial Commissioners state that they were not concerned with this question and we do not understand how any such meaning can be read into their judgment. The relevant passage appears on p 36 of part 3 of the printed book beginning at line 12. It runs as follows :

"The appellants' learned counsel argued that the father's separated property after partition should at least be made liable for payment of the compound interest and of the other items disallowed by this Court. We have read the written statement of the defendants-appellants and find no such plea raised therein. We have been told that the appellants will not be satisfied with a decree for their whole claim passed against the separated property of the father alone. The liability of the joint family property is to be considered in accordance with the circumstances existing at the time of each mortgage and not with reference to a future partition. This new plea of the appellants cannot be entertained. The question was not before the lower Court, so ground of appeal No. 4 that the lower Court should have declared the separated 8 annas share of the father liable for the entire amount due on the three deeds is without substance."

In view of these observations it is not open to the respondents to say that this plea was not raised in the previous suit. It does not matter whether the plea was raised in the Court of first instance or in the Court of appeal. We would refer to a case decided by their Lordships of the Judicial Committee : *Midnapur Zamindari Co. Ltd.* v *Naresh Narayan Roy* (2), in which a point was waived in the first Court but argued and decided in appeal and it was held that finding operated as res judicata , nor can the respondent plead that this was not a substantial issue It was an issue which he himself raised in appeal and considered necessary for the purposes of his case Lastly the respondent has failed to convince us that the issue was not heard and finally decided by a competent Court We have already quoted the observations of the Judicial Ccmmissioners which show that the point was argued before them, and we consider that the same passage shows that the matter was decided It is nowhere stated in S 11, Civil P. C., that a decision to be final for the purposes of that section must be on the merits But as a matter of fact we do not find that the Judicial Commissioners refused to entertain the ground of appeal before them because it had not been raised in the Court below. They clearly considered whether the mortgagee would accept a decree for the whole claim against the separated property of the father alone ; and they found that he would not. From this they proceeded to consider the claim as against the unseparated property and they found that the claim stood against the property as it was at the time when the mortgages were executed and not against the property after partition. It must be remembered that when the Judicial Commissioners decided the appeal the property had already been partitioned and so it was possible for them to state how much could be claimed from the separated properties But they did not do so. They found, first, that the joint family property was liable, not the separated property, and, secondly, that the liability of the joint family property was to be considered in accordance with the circumstances existing at the time of the mortgages. They followed up this finding by saying :

"In the result we modify the preliminary decree of the lower Court and declare the

(1) A. I. R. 1914 P. C. 81=41 I. A. 247 (P.C.).

(2) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293 (P.C.).

entire property in suit to be liable for the following payments to the defendants-appellants."

Thereafter follows the calculation on which the decree was based In our opinion this is a complete and final decision that the mortgagee had no claim against any property except the joint family property as it stood at the time of the mortgages and before the partition. This judgment therefore operates as res judicata in the present case, and the plaintiff cannot now claim to recover from the separated property of the father the balance of the money which was disallowed as against the family property.

An attempt was made to show that on the merits of the case the plaintiff should have been able to recover from the separated property of the father, but in view of the fact that the matter has in our opinion been finally decided on the merits by the Judicial Commissioners we are not prepared to enter into this question.

Having decided the question of res judicata in favour of the appellant we have only got to see whether the plaintiff-mortgagee has received the full amount due to him in the terms of the order of the Judicial Commissioners A calculation has been made in certain lists which have been appended to the amended plaint from which it appears that the total amount due in accordance with the findings of the Judicial Commissioners was Rs. 9,689-12-0 as principal and Rs 8,689-12-0 as interest. The total is Rs. 18,379-8-0 The payments prior to the suit were Rs. 4,661-0-0 shown in list B (1) and Rs 3,457-10-0 shown in list B (2) Subsequently the appellant deposited a sum of Rs. 10,513-4-8. The total of these amounts is Rs. 18,631-14-8 which represents the total amount due at the time when the payment was made on 30th March 1928, the suit having been filed on 26th January 1928. We understand that the sum of Rs 10,513-4-8, which was deposited on 30th March 1928, has already been paid to the plaintiff and there is therefore nothing due to him When however, the plaintiff filed his suit this sum was still due and we do not consider that he should have to pay the whole of the costs of the suit. We therefore allow this appeal with costs in this Court and set aside the order for a preliminary decree for sale passed by the lower appellate Court but order that the parties shall bear their own costs in the Court below.

S N./R.K. *Appeal allowed.*

A. I R. 1929 Oudh 278

PULLAN, J.

Mithan—Plaintiff—Appellant.

v.

Mahabir—Defendant—Respondent.

Second Appeal No, 373 of 1928, Decided on 27th February 1929, against the order of the Sub-Judge, Lucknow, D/- 16th July 1928

(a) Pre-emption—Custom of antiquity and certainty constitute title for legal recognition—Custom is applicable to property outside as well as within town.

The custom of pre-emption cannot be said to be a custom in contravention of the ordinary law of Oudh. It is the ordinary law as far as the village communities are concerned, but it can only be extended to towns, if there is proof that the custom is ancient and invariable. Such a custom must "possess that condition of antiquity and certainty on which alone their legal title to recognition depends. There can be no distinction drawn between the land lying outside the town and the land lying inside it; and if a special custom is proved appertaining to the inhabitants of a town in respect of their agricultural land that same custom must, failing strong evidence to the contrary, apply also to that portion of their property which is situated in the town itself. 14 *M. I. A.* 570, *Rel.on.* [P 279 C 1]

(b) Custom —Pre-emption—Custom dating from beginning of 19th century is sufficient to be immemorial.

A custom to have legal recognition ought to be immemorial. A custom might be considered to be immemorial if it went back as far as the beginning of the 19th century [P 280 C 2]

M. Wasim, H. N. Misra and *Mohammad Ayub*—for Appellant.

Salig Ram—for Respondent.

Judgment.—This second appeal arises out of a suit for pre-emption brought by one Mt. Mithan in respect of the sale of certain property in Amethi. The plaintiff stated that her right was based on the fact that she was a cosharer and that the vendee was a stranger. The Court below without deciding this question dismissed the plaintiff's suit on the ground that there was no custom of pre-emption in Amethi which could affect this particular property. At least this is the meaning which I place upon the judgment of the lower appellate Court. He does not say that there is no custom of pre-emption in respect of agricultural

lands appertaining to Amethi, but rather he finds that, even if there may be such a custom, there is no custom of pre-emption, as to a shop or site in the actual town.

In this Court it is not contested that Amethi is a town It is a very ancient town dating, I am informed, from the 11th century at least, and as such it cannot be presumed that any right of pre-emption exists there. It was therefore for the plaintiff to prove that there was a custom of pre-emption and that she was entitled to base a claim on that custom. The custom of pre-emption cannot be said to be a custom in contravention of the ordinary law of this province. It is the ordinary law as far as the village communities are concerned, but it can only be extended to towns, if there is proof that the custom is ancient and invariable As stated by their Lordships of the Privy Council in 1872 in the case of *Ramalakshmi Ammal* v *Shivanatha Perumal* (1) such a custom must

"possess that condition of antiquity and certainty on which alone their legal title to recognition depends."

The lower Courts have held that the proof of this custom fails in both particulars, but only, as far as I understand their judgments, because they have made a distinction between the property in the town and property in the surrounding aricultural land. Now Amethi being a town, the inhabitants thereof do not form a village community and any right of pre-emption which they may have belongs to them as a special custom and not as a matter of law. There can be no distinction drawn in my opinion between the land lying outside the town and the land lying inside it ; and if a special custom is proved appertaining to the inhabitants of this town in respect of their agricultural land that same custom must, failing strong evidence to the contrary, apply also to that portion of their property which is situated in the town itself. Curiously enough the one judgment of a Court which held that a custom of pre-emption was not proved to exist in Amethi came to the same conclusion on this point. I refer to a judgment of the Judicial Commissioner dated 1st November 1881, in the case of *Chhote* v. *Mirza Agha Ali Khan* (Special Appeal No. 238 of 1881) In that case the lower Courts decreed pre-emption in respect of a grove, but decided that the custom of pre-emption was not proved in the town. The Judicial Commissioner held that the custom does not apply to the territorial boundaries of the 'abadi', inhabited town, but to the residents thereof. So that there is no difference between the inhabited part and cultivated lands of the 'Qasba ' He allowed the appeal because the Courts below had tried to draw this distinction. Holding that the Judicial Commissioner was right in respect of his ratio decidendi and that there can be no proper distinction drawn between the land in the town and outside it. I have got to consider whether there is or is not sufficient evidence to support a custom of pre-emption as belonging to the inhabitants of this town of Amethi whether in respect of their agricultural or other property. The evidence of custom is divided into two portions. The first relates to the evidence prior to British occupation and the second shows instances of pre-emption under British rule The Courts below have gone at great length into the evidence and there is no question in my mind that from the year 1800, at least up till the date of the British occupation of Oudh, a custom of pre-emption existed in Amethi. There are several documents showing that the custom was acted upon and there is no reason whatever to doubt the validity of these documents They have indeed been accepted as genuine by the lower appellate Court and they have been held by that Court to prove the existence of a custom of pre-emption, although the learned Subordinate Judge is not prepared to find that a plot of land described as panj dukania or five shops was situated in the town. Then follows the evidence as to the custom being in existence during the British occupation.

The first case is that to which I have already referred in the year 1881 which tells against the plaintiff, because in that case, it was found that the existence of the right of pre-emption was not proved But in subsequent cases the existence of the right under precisely similar circumstances namely, in respect of goves and other outlying land has been proved to exist, and in some other cases also the right has been admitted The judgments

(1) [1871] 14 M. I. A. 570=I. A. Sup. Vol. 1=17 W. R. 552=3 Sar. 108 (P.C.).

of the Courts on this subject cover the years from 1909 to 1926 and the decisions have consistently been in favour of the existence of a custom of pre-emption in respect of land, groves and in one case at least the site of a house belonging to the inhabitants of Amethi.

The lower appellate Court has disposed of the evidence as to the existence of the custom prior to British occupation by holding that at that time the Mahomedan law prevailed, and the evidence that pre-emption had been allowed under the Muhammadan rule is merely equivalent to saying that the Mahomedan law was in vogue under Muhammadan rulers. On this point I do not agree with the Court below. There is nothing to show that the law of pre-emption as it existed in the town of Amethi was the strict Mahomedan law of pre-emption. It was undoubtedly adopted from the Mahomedan law of pre-emption. But there is nothing to show that it is not the same as the law of pre-emption which has become the general law of this province and which is applicable alike to Muhammadans and Hindus. It is true that Amethi is to a large extent a Muhammadan town and the parties in these cases were Muhammadans ; but in my opinion the law under which they claimed pre-emption was the law which had even then become the general law of the province ; and there is nothing to show that it was the strict Mahomedan law of pre-emption with all its attendant formulae.

Another point made by the lower appellate Court is that custom ought to be immemorial and he appears to consider that even if the custom prevailed throughout the time of the Muhammadan sway, this would not be long enough to make the custom immemorial. He says "It is after all not very long that Muhammadans had their sway over Amethi." Now the Muhammadans first captured Amethi in the year 1050 A. D. and although they may have lost it several times in the intervening centuries, there can be no doubt that Amethi was under Muhammadan rule throughout the major portion at least of the period covered by the Mughal Emperors. I cannot consider that the period of say 250 years is a short period. It was held by the Judicial Commissioner of Oudh in a case reported in *Manna Lal* v. *Jai Indra Bahadur Singh* (2) that a custom might be considered to be immemorial if it went back as far as living witnesses can remember and this view is based upon a passage in Halsbury's Laws of England, para. 442. I do not consider that the evidence as to the custom of pre-emption in Amethi fails on the score that it does not go back far enough. In spite of the decision of the Judicial commissioner in 1881. I consider that this custom has been invariable since at least the commencement of the 19th century and this is sufficient to establish the custom.

I therefore hold that the lower Courts were wrong in holding that there was no custom of pre-emption in existence in respect of property situated in the abadi of Amethi. The custom has been proved to exist in respect of the inhabitants of the town, and there is no reason for making a distinction between the property inside the abadi and the property outside the abadi. But this finding does not dispose of the case. There is no decision before me as to whether the plaintiff is or is not a cosharer, and it is only by virtue of being a cosharer or Sharik as stated in the old documents that the plaintiff can base a claim to pre-emption. An issue covering this point was framed in the Court of first instance and there were also other issues which have not been determined. I find that there were originally two pre-emptors, but one has filed no appeal and he has therefore dropped out of the case. This makes it unnecessary to determine issues 1 (a) and 1 (b) as they stand. Issue 1 (c) has been determined by me. The remaining issues 2, 3, 4 and 5 remain to be determined, but I must also in view of the pleadings frame another issue which can be substituted for issues 1 (a) and 1 (b) namely, "Has the plaintiff a right of pre-emption of the property in suit ?"

I remand this case to the Court of first instance for determination of these issues under O. 41, R. 23, Civil P. C.

P.R./R.K. *Case remanded.*

(2) A. I. R. 1924 Oudh. 157=26 O. C. 386.

A. I R. 1929 Oudh 280

RAZA AND PULLAN, JJ.

Emperor

v.

Bhagwan Din—Accused.

Jury Ref. No. 8 of 1928, Decided on 20th December 1928

(a) Criminal P. C., S. 307—Ground of reference that verdict is perverse and unreasonable not expressly stated—Ground can be presumed.

Where the Judge in his reference does not state in so many words that he considers that the verdict of the jury was perverse or unreasonable but this appears to be his opinion it must be taken that the Judge has only referred the case on the ground that in his opinion the verdict was perverse and unreasonable: *A.I.R.* 1928 *Mad.* 1186, *Rel. on.* [P 281 C 1]

(b) Criminal P. C., S. 307—Duty of High Court is to see whether verdict is unreasonable—Verdict contrary to or unjustified by evidence is unreasonable.

High Court has to consider not whether a verdict is wrong but whether it is unreasonable. An unreasonable verdict is one which is contrary to the evidence or at least totally unjustified by the evidence [P 281 C 2]

G H. Thomas—for the Crown.

S. M. Ahmed—for Accused.

Judgment.—This is a reference under S. 307, Criminal P. C., by the learned Sessions Judge of Lucknow who considers that the verdict given by a jury acquitting a certain Bhagwan Din, who was charged with the offence of dacoity, should not be allowed to stand. The Judge in his reference does not state in so many words that he considers that the verdict of the jury was perverse or unreasonable but this appears to be his opinion and we must take it on the authority of the Full Bench decision of the Madras High Court reported in *Veerappa Goundaun* v. *Emperor* (1) that the Judge has only referred the case on the ground that in his opinion the verdict was perverse and unreasonable.

In this case four persons were charged with dacoity and the jury acquitted two and convicted the other two. It is therefore evident that they believed that a dacoity was committed and they exercised their intelligence in ascertaining which of the accused persons were guilty and which were innocent. In his summing up the Judge indicated that in his opinion the case was weakest against one Ajodhia, who was acquitted by the jury, strongest against Bhagwandin. who was also acquitted by the jury, and that the case againt the other two men Durgadin and Gajadhar stood in the middle. These two men were convicted by the jury. Now if the Judge's view of the evidence is correct, it may well be that the view taken by the jury was wrong. But we have to consider not whether the verdict was wrong but whether it was unreasonable. An unreasonable verdict is one which is contrary to the evidence or at least totally unjustified by the evidence. We find that the evidence against this man Bhagwan Din was that he was identified at the time of dacoity by two witnesses Lachhminia and Maiku and that he was named by a coaccused named Naurang, who pleaded guilty, was convicted on his own plea and then gave evidence for the Crown. We find that the two men who have been convicted were named by Naurang and identified each by one witness, Durgadin by Thakur Prasad and Gajadhar by Dularey Consequently it cannot be said that the jury had disbelieved the evidence of the same identifying witness in the case of Bhagwan Din that they believed in the case of any other accused, For all we know the jury who saw these witnesses may have had good reasons for disbelieving their evidence against Bhagwan Din It does not follow that they took the same view of the witnesses as the Judge Nor were they bound to do so. Indeed the Judge in his summing up told the jury himself that he had merely stated his opinion and that they were in no way bound to accept his opinion. It is difficult to assess the value of any witness who merely states that he has recognized a person during the commission of a dacoity. It is difficult for the judge or jury who can see and hear that witness. It is more than difficult for a Court which has neither seen nor heard the witness, and has only a brief statement on paper from which to form an opinion Moreover we are not of opinion that it is our duty to retry the case and form an opinion to as the value of the evidence. All that we have to consider is whether the verdict of the jury is perverse or unreasonable Whether the the jury did or did not believe the alibi evidence set up by this Bhagwan Din, the discussion of which occupied the learned Judge nearly a page in his charge sheet, appears to us to be immaterial. The jury's first duty was to give an opinion as to the prosecution evidence. When we are unable to find that their opinion as to the prosecution evidence was perverse or unreasonable we cannot go on to consider what their opinion may have been as to the

(1) A. I. R. 1928 Mad. 1186=51 Mad. 956 (F.B.).

evidence for the defence. Thus we are unable to concur with the learned Judge when he says that the only reason he can suggest for the jury's verdict is that Bhagwan Din produced several witnesses in his defence and that the jury may have believed them. Even if they did believe these witnesses that again would not necessarily be unreasonable, and the jury themselves could rely on the warning given by the Judge himself that they need not accept his opinion In our opinion this is a reference which cannot be accepted We therefore return the record The accused Bhagwan Din shall be forthwith released

M.N /R K *Reference answered.*

* A. I R 1929 Oudh 282

STUART, C. J. AND RAZA, J.

(*Sardar*) *Nihal Singh*—Defendant—Appellant

v.

B Shishadhar Singh—Plaintiff—Respondent

First Appeal No. 163 of 1928, Decided on 12th September 1928, against decree of Sub-Judge, Rae Bareli, D/- 19th September 1927

*** (a) Transfer of Property Act, S. 98—Mortgagee entitled to sell or foreclose mortgaged property—Mortgage is anomalous.**

A mortgage containing a clause to the effect that after the expiry of the due date the mortgagee shall have power to realise the entire amount found due by sale of the mortgaged property or in lieu of the said amount he may enter into possession of the mortgaged property by having it foreclosed is clearly an anomalous mortgage. [P 282 C 1, 2]

*** (b) Civil P. C, O. 34, R. 4—Suit for foreclosure on anomalous mortgage is covered by R. 4**

A suit for foreclosure on an anomalous mortgage is covered by O. 34, R. 4 : 18 *I. C.* 24, *Diss. from.* [P 282 C 2]

M. Wasim and *Khaliq-uz-zaman*—for Appellant

Zahur Ahmad, *Ali Mohammad* and *Wajid Ali*—for Respondent.

Stuart, C J—This is a defendant's appeal The facts are these. The defendant executed a registered deed of mortgage in favour of the grandfather of the plaintiff on 8th January 1928 for Rs 50,000. The mortgage-deed contains these words:

"After the expiry of the due date the mortgagee shall have power to realize the entire amount, principal, interest and compound interest whatever may be found due to the mortgagee with costs out of the sale proceeds, by sale of the mortgaged property or in lieu of the said amount due he may enter into possession of the mortgaged property by having it foreclosed according to the law for the time being in force."

The plaintiff sued for foreclosure. The defendant did not contest as to execution or consideration but asked that the relief should take the form of a decree for sale. The learned trial Judge refused to grant his request, and gave a decree for foreclosure. The defendant appeals against this decree, asking that a decree for sale should be substituted. The learned counsel for the appellant has argued that the mortgage is a simple mortgage, and not an anomalous mortgage. We do not agree with him there We are of opinion that the mortgage is clearly an anomalous mortgage and as such governed by the provisions of S. 98 of Act 4 of 1882. The rights and liabilities of the parties have to be determined by their contract as evidenced in the mortgage deed. This, however, only goes to show that the mortgagee has a right to come to Court and ask for a decree for foreclosure or a decree for sale It does not follow from the words of the section that he has a right to direct the Court which relief to grant him, and the matter in my opinion is clearly covered by the provisions of O. 34, R. 4 (2), Civil P C. This was a suit for foreclosure. That rule states that in a suit for foreclosure if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may of its own motion (these words have been added as far as Oudh is concerned), and they have been added regularly by law, and are now a part of the law, pass a like decree, that is to say a sale decree in lieu of a decree for foreclosure on such terms as it thinks fit. Now this is a suit for foreclosure which is not a suit on a mortgage by conditional sale, and in my opinion the terms of this rule cover a suit on an anomalous mortgage It has been pointed out to me that in 1912 I did not hold this opinion This is perfectly true. I find that in that year I was on a Bench with Mr Piggott who was then Judicial Commissioner. He decided in *Baqar Husain* v *Balak Ram* (1), that there was nothing in Cl 2, O 34, R 4 which could override the provisions of S 98, T P Act. and further decided that, where a plaintiff, in the case of an anomalous

(1) [illegible] 18 I. C. 24.

nortgage providing both for foreclosure or sale at his option, sues for foreclosure only, the mortgagor cannot compel him to accept a decree for sale. This was the decision of Mr. Piggott and I concurred with it. That was my opinion in 1912 but it is not my opinion now.

I have looked since then again into the law on the subject. I find that O. 34, R. 4 (2) is based upon the procedure in the English Conveyancing Act of 1881 It is a procedure which was introduced in England to give a Court direction not to enforce a foreclosure in circumstances in which it was inequitable to foreclose Naturally as this was an English rule it applied in my land only to mortgages in the forms known in England but the conclusion drawn by certain commentators that therefore this rule can only apply to English mortgages as defined in S 58 of Act 4 of 1882 appears to me to be in no way justified. It was the opinion of these commentators that appears to have influenced Mr. Piggott and myself in arriving at our decision in 1912. But a subsequent examination of the question indicates to me that there is no justification for that view. The Indian Legislature clearly intended by the introduction of this provision to allow a Court discretion to substitute for a rigid foreclosure a sale, and in drafting the rule the legislature wished to make one exception and one exception only in the case of a suit on a mortgage by conditional sale. It was perfectly easy for the legislature, if it had wished also to make an exception in favour of a suit on an anomalous mortgage, to have said so, and the fact that the legislature did not say so convinces me that a suit on an anomalous mortgage is not excepted I now come to the next argument of the respondent which is to the effect that the Civil Procedure Code cannot override the substantive law contained in the Transfer of Property Act. I am not of opinion that it does override the substantive law contained in the Transfer of Property Act for there is nothing in S. 98, Act 4 of 1882 which says that where an anomalous mortgagor allows an option to the mortgagee to obtain foreclosure he can compel a Court to grant him foreclosure. All that the rule lays down is that in certain circumstances the Court can substitute for one relief another relief. I am thus of opinion that the Court below had a discretion to grant a decree for sale had it wished to do so It could not be compelled to grant that relief but it could grant that relief if it wished; similarly here we can if we wish to grant that relief. We cannot be compelled to do so. We have to look at the facts to see whether the defendant deserves that relief.

The facts are these. The property mortgaged is admittedly worth over Rs. 50,000. The annual income is over Rs. 15,000. Under the terms of the deed the amount due on 15th January 1927 was Rs. 69,941-4-7. It is obvious that, if the property is forcelosed, the plaintiff will gain an advantage to which he is in no way entitled, and in these circumstances I think that we are thoroughly justified in exercising our discretion in the defendant's favour. The terms of the deed were, however, far from onerous and the plaintiff has behaved in a most reasonable and obliging manner towards the defendant; therefore while granting the defendant this relief I consider that we should grant to the plaintiff all to which he is reasonably entitled. I therefore propose to substitute for the decree of the Court below the following decree. A decree shall be passed in favour of the plaintiff as against the defendant for Rs. 69,941-4-7 with interest at 4½ per cent. compoundable six monthly on 30th June and 31st December. If this amount be not paid on or before the 11th March 1929 the property mortgaged by the deed shall be sold and the proceeds of the sale, after defraying therefrom the expenses of the sale, shall be paid into Court and applied in payment to what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and the balance shall be paid to the defendant. I should add the following condition. The decree of the lower Court for costs shall stand and those costs with future interest at 6 per cent from the date of the decree of the lower Court shall also be recoverable from the sale proceeds. Further the defendant shall pay his own costs and the costs of the plaintiff in this appeal and those costs shall bear interest at 6 per cent. from today's date and shall also be recoverable from the sale proceeds and further the plaintiff shall be entitled to 9 per cent. simple interest as future interest on the total amount due, excluding costs from 11th March 1929 if the

decree be not satisfied on or before that date.

Raza, J.—I concur in the order proposed. In my opinion also the Court below had a discretion to grant a decree for sale in this case under O. 34, R. 4 (2), Sch. 1 Civil P. C. Having regard to the value of the property in suit I think the decree for sale should properly be passed in this case.

By Court:—The appeal is allowed to the extent stated and the decree will be prepared accordingly.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 284

WAZIR HASAN, AG. C. J., AND PULLAN, J.

Sheo Raj and *others*—Appellants.

v.

Ajudhiya and *others*—Respondents.

Second Appeal No. 335 of 1928, Decided on 8th January 1929, against decree of Dist. Judge, Gonda, D/- 11th August 1928.

(a) Limitation Act, Art. 44—Scope.

Article 44 has no application where the suit relates to a transaction entered into by an elder brother in his capacity as manager of a joint Hindu family. [P 284 C 2]

(b) Hindu Law—Joint family—Sale by manager without legal necessity is void.

A sale-deed by the manager of a joint Hindu family of ancestral property without any legal necessity is void from its inception. *A. I. R.* 1922 *Oudh* 257 ; *A. I. R.* 1923 *P. C.* 189, *Rel. on.* [P 284 C 2]

(c) Adverse possession—Cosharer's possession is not adverse—Cosharers.

Possession by a cosharer cannot be adverse unless it is coupled with some act which is equivalent to ouster of the other cosharer : *A. I. R.* 1924 *Oudh* 266, *Rel. on* ; 5 *O. W. N.* 85, *Dist.* [P 286 C 1]

M. Wasim and *Khaliq-uz-zaman*—for Appellants.

Bisheshwar Nath and *Bishambhar Nath*—for Respondents

Judgment.—This 2nd appeal arises out of a suit brought by one Ajudhia and his transferees for possession of a share in two mahals in the village of Baharwa, which were originally in possession of Dharmraj, who was the father of Ajudhia. In the plaint it was alleged that the cause of action had arisen when the defendants-appellants raised an objection in the revenue Court to the application made by the transferees of Ajudhia for entry of their names in respect of this share. It was also stated that Ajudhia brought the suit within three years of attaining his majority, and this allegation gave rise to a contest on the question of fact whether Ajudhia was less or more than twenty-four years of age when the suit was filed. The first Court found this issue against him and clearly deemed that it was the most important issue in the Court but it also found that the suit was barred by limitation on the ground that the appellants before us had attained a title by adverse possession. The District Judge found that Art. 44, Lim. Act, had no application because this suit did not relate to a transaction entered into by the guardian of the plaintiff, but by his elder brother in his capacity as manager of a joint Hindu family. This view is in our opinion correct ; and in any case the plaintiff was not required to challenge the sale deed on which the contesting appellants rely, because it was a sale deed by the manager of a joint Hindu family of ancestral property without any legal necessity and as such was void from its inception : see *Ram Narain* v. *Nand Kumar* (1) read with *Annada Mohan Roy* v. *Gour Mohan Mullick* (2).

Although this was the principal point raised in the Court of first instance and the appellants never specially pleaded title by adverse possession they raised that point in argument in both the Courts below and this is the main plea which has been argued before us. The appellants are transferees by virtue of a sale deed executed by Pateshar, the elder brother of Ajudhia, in the year 1907. They did not apply for mutation of names in respect of this property until they made their objection to the application brought by the transferees of Ajudhia They plead, however, that their possession must be held to date from the year 1907 and as the sale-deed by which they obtained possession is an invalid document their possession must therefore be held to be adverse to Ajudhiya and his brother Biddam deceased, whose share is now claimed by Ajudhia. The lower appellate Court has pointed

(1) A. I. R. 1922 Oudh 257=25 O. C. 164.
(2) A. I. R. 1923 P. C. 189=50 Cal. 929=50 I. A. 239 (P. C.).

out that the appellants or their predecessor-in-title in whose name the sale deed was executed were themselves co-sharers in the mahals in suit in their own right even before the sale deed was executed. As cosharers they were entitled to possession of the property and failing definite evidence that they asserted a different title than that of cosharers after the execution of their sale-deed, we are not prepared to find that their possession became adverse against the other cosharers The same question came up for decision before one of us when Additional Judicial Commissioner of Oudh in a case : *Indarpal Singh* v. *Thakur Din Singh* (3), and that judgment expresses the views which this Bench now holds. After finding that the plaintiffs and the defendants were co-owners in the property in suit the judgment proceeds as follows :

"This is a cardinal point in subordination to which the decision of the question of adverse possession should be approached. As Lord Buckmaster observed in the case of *Hardit Singh* v. *Gurmukh Singh* (4), possession may be either lawful or unlawful and in the absence of evidence it must be assumed to be the former, and possession is lawful when it is in virtue of a legal title. In the case of *Thomas* v. *Thomas* (5). Wood, Vice-Chancellor, said : Possession is never considered adverse if it can be referred to a lawful title. This dictum was quoted with approval by Lord Macnaghten in the case of *Corea* v. *Appuhamy* (6).In the case before me it is admitted that the defendants and before them their ancestor, Ochcha Singh, have all along been in possession of the whole of the property in suit and in enjoyment of the profits thereof. In the circumstances the question to be asked is : has one tenant-in-common legal title to the whole ? If he has, then the defendants'possession is lawful and therefore not adverse. It is well established that one tenant-in-common is not the agent of the other nor is there any fiduciary relation between them : *Kennedy* v. *De Trafford* (7). In a clash of self interest and duty to others the law will compel a person to do his duty : *Hardoon* v. *Belilios* (8). *In re Biss* (9) and *Griffith* v. *Owen* (10). But one tenant owes no duty to the other tenant-in-common in respect of the interest of the latter in the common property though he has a duty to share the advantages acquired in his character as such with the other tenant : White and Tudor's Leading cases, Vol. 2, *Keech* v. *Sandford* and the notes thereunder ; also see S. 90, Trust Act (2 of 1882). The presumption that the possession of one co tenant of the entire common property is lawful seems to be founded on the principle that between two tenants-in-common each has a title to the whole and also to his undivided moiety and each is said to be seized *per my et per tout*, that is each co-tenant has the entire possession as well of every parcel as of the whole.

In the case of *Kennedy* v. *De Trafford* (7). Lord Herschel, in speaking of a co-owner called Dodson, said : Dodson was an owner of his property the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner. I must therefore hold that prima facie the possession of the defendants of the common property in its entirety was not adverse to the plaintiffs. The defendants had to prove that the possession which was and is not prima facie adverse had or has become so in reality.This is heavy onus which the defendants have to discharge. It is clear on the authorities that the fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property in suit does not establish a title by adverse possession in the co-tenant, that is, the defendants, who have enjoyed such profits, the reason of the view being that it is consistent with the legal title in the co tenant in possession. It may be doubted whether the old rule of English law afterwards abrogated by the Statute 3 and 4, William 4, Ch. 27, S 12. that the possession of one of several coparceners, joint-tenants or tenants-in common is the possession of the others so as to prevent the statute of limitation from affecting them is applicable in India to "sharers in an unpartitioned agricultural village." See the decision of Viscount Cave in the case of *N. Varada Pillai* v. *Jeewarathnammal* (11). But one thing is perfectly clear that the co-tenant out of possession starts with the presumption in his favour that the possession of the other co-tenants is not adverse but lawful. This is well-established by a series of decisions of their Lordships of the Privy Council and further it is equally well established that nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to bring about the success of the plea of adverse possession: *Corea* v. *Appuhamy* (6), *Hardit Singh* v. *Gurmukh Singh* (4), *Muttunayagam* v. *Brito* (12) and the last decision of Viscount Cave in *N. Varada Pillai* v. *Jeewarathnammal* (11) already mentioned. In case of *Jogendra Nath Rai* v *Baldeo Das* (13) decided by the High Court of Calcutta a series of cases are noticed in support of the

(3) A. I. R. 1924 Oudh 266=27 O. C. 77.
(4) A. I. R. 1918 P. C. 1.
(5) [1856] 2 K. & J. 79=4 W. R. 135=1 Jur. (n. s.) 1160=25 L. J. Ch. 159.
(6) [1912] A. C. 230=105 L. T. 836=81 L. J. P. C. 151.
(7) [1897] A. C. 180=66 L. J. Ch. 413=45 W. R. 671=76 L. T. 427.
(8) [1901] A. C. 118=70 L. J. P. C. 9=49 W. R. 209=17 T. L. R. 126=83 L. T. 578.
(9) [1903] 2 Ch. 40=72 L. J. Ch. 473=51 W. R. 504 =88 L. T. 409.
(10) [1907] 1 Ch. 195=76 L. J. Ch. 92=23 T. L. R. 91=96 L. T. 5.
(11) A. I. R. 1919 P. C. 44=43 Mad. 244=46 I. A 285 (P. C.).
(12) [1918] A. C 895=87 L. J. P. C. 146.
(13) [1908] 35 Cal. 961=6 C. L. J. 795=12 C. W. N. 127.

opinion expressed above. From the same principle, it would seem to follow that such overt acts on the part of the tenant in possession as would ordinarily prove the adverse character of the possession as against a stranger will afford no evidence of such character as against the co-tenant, the reason being that those acts will be found to be consistent with the lawful title of the co-tenant in occupation."

In the present case we cannot find that there has been anything equivalent to ouster of the plaintiff. The appellants did nothing to assert their title and mere possession was not inconsistent with their position as cosharers in the mahals We have been referred to a decision of a Bench of this Court reported in *Ram Narain* v. *Mannu Lal* (14), in which it is alleged that a different view was taken. As will be seen from a perusal of that judgment the point on which it turned was that the cosharers had successfully asserted their rights to the sole enjoyment of the property and that there had been an ouster. In the present case we find no assertion and no ouster. We find therefore that the possession of the defendants-appellants was not adverse and the suit was not barred by limitation. The appeal is dismissed with costs

S.N./R.K. *Appeal dismissed.*

(14) [1928] 5 O. W. N. 85.

A. I. R. 1929 Oudh 286

SRIVASTAVA, J.

Panchu and *others*—Plaintiffs—Appellants

v.

Deputy Commissioner of Sultanpur and *others*—Defendants—Respondents.

Second Appeal No 157 of 1928, Decided on 8th August 1928, against decree of Addl. Sub-Judge, Sultanpur, D/- 31st January 1928.

(a) Jurisdiction—Principle of waiver ordinarily does not apply—But case is different when party does not appeal against the order about jurisdiction (*Obiter*).

Ordinarily it is no doubt true that there can be no waiver in respect of a plea of jurisdiction just as much as consent of parties cannot invest a Court with jurisdiction. But the position is somewhat altered where a party having a right of appeal against the order deciding the plea of jurisdiction has allowed that order to become final by not filing an appeal against it : *A. I. R.* 1914 *P. C.* 140, *Ref.* [P 287 C 1]

(b) Oudh Rent Act, S. 108 (10)—Cl. 10 does not apply to ejectment by third person.

Section 108, Cl. (10), applies only to those cases where the tenant has been illegally ejected by the landlord and not to ejectment by a third person. [P 287 C 1]

(c) Landlord and Tenant—Tenant not getting enjoyment for full term—Lease term is not extended.

The mere fact that the tenant has not been able to get full enjoyment under the terms of the lease for a fixed period has not the effect of extending the period of the lease as fixed under terms. [P 287 C 2]

Hyder Husein and *A. C Mukerji*—for Appellants.

H. K. Ghosh and *Naimullah*—for Respondents

Judgment.—The plaintiffs-appellants brought the present suit against the Deputy Commissioner of Sultanpur as representing the Court of Wards Deara estate and three others for possession of a few plots of land on the allegation that in the year 1919 ths Court of Wards after ejecting one Dawan Singh from those plots had given a lease in respect of them to the plaintiffs for a period of seven years. The plaintiffs had remained in possession of the holding only for one year when they were dispossessed by Dawan Singh who had been successful in appeal in his suit to contest the notice of ejectment and had obtained on order through Court, for delivery of possession in his favour. Dawan Singh remained in possession from 1920 until June 1926, when he was again ejected by the Court of Wards. The plaintiffs' grievance is that the Court of Wards instead of allowing them to hold them for six years, the balance of the period of the lease, had let out the lands to defendants 2 to 4 The plaintiffs, therefore, claimed to be entitled to possession to enable them to enjoy the lands for the unexpired period of the lease. The claim has been dismissed by both the lower Courts.

The learned counsel for the Court of Wards has raised a preliminary objection against the hearing of the appeal. The objection is based upon S. 108, Cl. (10), Oudh Rent Act

It appears that the defendants in their written statement raised a plea questioning the jurisdiction of the civil Court to entertain the suit. This plea was successful in the first Court but on appeal the Subordinate Judge held that the suit was cognizable by the civil Court and remanded the case for decision on the

merits under O. 41, R. 23, Civil P. C. The defendants submitted to this decision and did not appeal against it as they were entitled to do under O 43, R. 1, Cl. (u) of the Code The learned counsel for the defendants has relied on the observations of their Lordships of the Judicial Committee in *Maha Prasad Singh* v. *Ramani Mohan Singh* (1) in which a plea of jurisdiction which had been raised in the trial Court but abandoned in the High Court was allowed to be raised in appeal before their Lordships In dealing with the plea their Lordships remarked as follows :

" Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument."

Ordinarily it is no doubt true that there can be no waiver in respect of a jurisdiction just as much as consent of parties cannot invest a Court with jurisdiction. But the position in this case is somewhat altered by reason of the fact that the defendants had a right of appeal against the order of the learned Subordinate Judge and they have in a sense allowed that order to become final against them. However, it is not necessary for me to decide the question in the present case because I am satisfied that the plea must fail, on the merits. S. 108, Cl. (10), Oudh Rent Act, applies only to those cases where the tenant has been illegally ejected by the landlord. In this case it is admitted that the plaintiff had not been ejected by the landlord but by Dawan Singh. I, therefore, in agreement with the learned Subordinate Judge, hold that S. 108, Cl. (10), does not bar the claim.

To come to the merits of the appeal, the learned counsel for the plaintiffs has based his arguments on S. 43, T. P. Act, S. 94, Trusts Act and S. 18, Specific Relief Act. There is no evidence that at the time when the Court of Wards executed the lease in favour of the plaintiffs they made any erroneous representation to the plaintiffs. Further the lease distinctly lays down that it was a period of seven years from 1327 to 1333 Fasli. It is admitted that Dawan Singh was ejected at the end of 1333 Fasli. So it seems clear that at that time the contract of transfer relied upon by the plaintiffs did not subsist. The learned counsel for the plaintiffs has ingeniously argued that the lease was for a period of seven years and as the plaintiffs were deprived of enjoyment for a period of six years the lease must be held to subsist until the landlord has enabled them to have enjoyment for the full period of seven years irrespective of the years 1327 to 1333 Fasli mentioned in the lease.

I cannot agree with this contention If for any reason the plaintiffs have not been able to get full enjoyment under the terms of the lease they may or may not have their remedies against the landlord but that would not have the effect of extending the period of the lease as fixed under the terms. I am, therefore, of opinion that the necessary conditions requisite for the application of S. 43, T. P. Act have not been satisfied in this case

It follows from what I have stated above that S. 94, Trust Act and S 18, Specific Relief Act, also cannot help the plaintiffs. Assuming that other conditions necessary for the application of S 94 are satisfied it is not possible to say that when the Court of Wards obtained possession of the property in 1926 they did not possess the whole beneficial interest in it or that the plaintiffs had any such interest therein when the contract in their favour was no longer subsisting. Similarly other conditions being satisfied S. 18, Specific Relief Act, requires the lessor " to make good the contract " out of the interest subsequently acquired by him. There can be no question of making good the contract when contract no longer subsists. I am, therefore, of opinion that the period of the contract relied upon by the plaintiffs having expired they cannot succeed in the present suit. The result is that the appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

(1) A. I. R. 1914 P. C. 140=42 Cal. 116=41 I. A. 197 (P.C.).

A. I. R. 1929 Oudh 287

PULLAN, J.

Ramji Lal—Appellant.

v.

Subhadra Kuar—Respondent.

Appeal No. 1 of 1929, Decided on 28th February 1929. against order of Sub-Judge, Malihabad, Lucknow, D/- 22nd September 1928.

(a) Civil P. C., Sch. 2, para. 1—Judgment-debtor causing removal of his property from the decree-holder's land through a bailiff—Baliff putting in a bill found excessive—Munsif asked to decide the matter on personal spot-visit—Munsif not to be deemed an arbitrator—Civil P. C., Sch. 2, para. 16.

Where a judgment-debtor caused removal of his property from the decree-holder's land through a bailiff, and where the bill submitted by the bailiff being deemed excessive, the Munsiff before whom the case was, was asked to decide the matter personally by a visit to the spot, and where it was contended that the Munsiff's decision on the matter could not be challenged in appeal he having been appointed an arbitrator:

Held, that the Munsif, was not and could not be so appointed and as such his decision could be challenged in appeal, and that he was merely asked to inspect the locality, the parties agreeing to accept his decision.

[P 288 C 2]

(b) Practice—Appeal—Same Register for appeals under S. 47, Civil P. C. does not change their nature for calculating fees.

That appeals from orders under S. 47 appear in the same register as appeals in regular suits is no reason for regarding them as such for the purposes of calculating pleader's fees.

[P 288 C 2]

Brij Nath Shargha—for Appellant.

Gaya Prasad—for Respondent.

Judgment.—This second appeal arises out of an execution matter the facts of which have been detailed at length by the Courts below All that I have to consider is whether the sum which has been decreed against the appellant in the matter of costs has been rightly awarded and whether there has been some illegality in the procedure which vitiates the decision. It appears that when the case was before the Munsif the judgment-debtor realized that he had to remove a large quantity of materials from a plot of land belonging to the decree-holder. He found it difficult and expensive to do so and finally allowed the materials to be removed by the bailiff. The bailiff put in a bill and the judgment-debtor thought it an excessive bill. Instead of producing evidence he asked the Munsif to go to the spot and decide the matter for himself. The Munsif agreed and came to the conclusion that the bailiff's account was right and passed a decree accordingly. An appeal was filed against this decision and the learned Subordinate Judge declined to interfere, one of his grounds being that the Munsif had been made an arbitrator and that his decision could not be challenged in appeal. This therefore has been made a ground of appeal before me. I do not consider that the Munsif was appointed an arbitrator, and I doubt very much whether he could have been so appointed. He was merely asked to inspect the localities and the parties both agreed that they would accept his decision as to the cost of removing the materials. This being so, as pointed out to me in appeal, the Munsif should have written a note of inspection. Probably because the parties had agreed to accept his decision, whatever it was he failed to comply with this rule. But he stated the grounds on which he came to the decision with great clearness in his judgment and in the appeal preferred before the Subordinate Judge not a word has been said as to his failure to write a separate note. I am not prepared to reverse the decision of the Courts below on this technical plea The parties got the decision they asked for, and there is nothing to show that the decision was an improper one or passed without full and careful consideration. I have now been asked to consider that the Munsif failed to consider an objection raised by the judgment debtor that constructions not standing on the land decreed were wantonly demolished. It is true that some such application was made, but it is manifest that it was not pressed before the Munsif and it does not appear in an intelligible form in the grounds of appeal preferred to the Subordinate Judge, and it is evident from the judgment of the Court that no such point was argued.

There remains only one question, namely, as to whether the pleader's fee has been correctly calculated in the Court below It was calculated at 5 per cent as though this were an appeal in a regular suit. The reason given for taking this view is the curious one that appeals from orders under S. 47 appear in the same register as appeals in regular suits. This does not affect the pleader's fee chargeable on them which must be calculated in accordance with para. 272 (Cl. 9), Ch. 7 of the Oudh Civil Digest. The fee should be calculated at 1¼ per cent and not at 5 per cent.

I therefore allow the appeal to this extent, modify tha decree of the Court below and allow proportionate costs in this appeal.

P.R /R.K. *Appeal partly allowed.*

A. I. R. 1929 Oudh 289

STUART, C. J. AND NANAVUTTY J.

Nanak Prasad Singh and *others*—Defendants—Appellants.

v.

Gaya Prashad Singh and *others*—Plaintiff—Respondents.

First Appeal No. 127 of 1927, Decided on 3rd May 1928, against decree of Sub-Judge, Fyzabad, D/- 16th July 1927.

Hindu Law—Joint family—Migration of a branch of family does not imply separation.

The migration of a branch of the family in itself establishes nothing regarding the question of jointness or separation. Members of a joint Hindu family migrating to another district might or might not separate from their family. [P 289 C 2]

Bisheshwar Nath and *Naimullah* — for Appellants.

M. Wasim—for Respondents

Judgment.—This is a defendants' appeal. The suit out of which this appeal arises was a suit by a certain Gaya Prasad Singh for the partition of his share in certain property in the Fyzabad and Basti Districts. His case was that there was formerly a family of Gaur Thakurs resident in the Fyzabad District. The head of this family was Buland Singh. Buland Singh has seven sons Masanand Singh, Zinda Ranjit Singh and Gajraj Singh and three others with whom we are not concerned. At some period, more than eighty years ago some members of this family migrated to the Basti District. At the present moment there are residing in the Fyzabad District Masanand Singh's branch and there are residing in the Basti District Gajraj Singh's branch. The branches of Zinda Singh and Ranjit Singh, which are also said to have settled in basti, have died out and the branches of the other three sons have also died out. This suit was in effect an assertion by Gaya Prasad Singh and other members of the Masanand Singh's branch that their branch and the branch of Gajraj Singh formed a joint family and an assertion by the members of the Gajraj Singh branch that this was not the case and that Masanand Singh's branch had separated from Gajraj Singh's branch many years before. The contest was acute. The dispute was of distinct importance for the basti property in which the members of the Masanand Singh branch claimed their share is very much more valuable than the Fyzabad property, which is possessed by the members of the Masanand Singh branch The learned trial Judge has decided in favour of the plaintiffs' view and has found that the two branches formed one joint Hindu family and that the property in dispute is all joint family property. It is against this decision that the present appeal is preferred

The suit from its nature was not an easy suit to decide We note that the learned trial Judge has decided it very carefully and has discussed the evidence with great intelligence. The first proposition to the effect that the sons of Buland Singh were originally joint is established clearly upon the general presumptions of Hindu law and the finding to that effect is not challenged by the learned and experienced counsel, who has appeared for the appellants. Nor is it challenged on the other side that Zinda Singh, Ranjit Singh and Gajraj Singh migrated to the Basti District more than eighty years ago. The migration in itself establishes nothing ; and at the period when they are said to have migrated the incident was of little or no significance. The Fyzabad District adjoins the Basti District from which it is separated by the Gogra river. At that period the Fyzabad District was in the kingdom of Oudh and subject to the rule of the king of Oudh and the Basti District was administered by the East India Company. Changes of residence were not unusual Members of a joint Hindu family migrating to another district might or might not separate from their family. They might or might not make acquisitions of land with the nucleus of family funds They might or might not, even if they made acquisition of land with their own funds, incorporate those acquisitions with the joint family property. The learned trial Judge is inclined to think that the family had ancestral property in Basti District. This may be so, but it would seem unlikely that they should have. This much we know that at an early period a portion of the landed property held in the Basti District is described as maurusi or ancestral, but there is some reason to suppose that that very property had been purchased about the year 1844 by Zinda Singh for 662 Farrukhabadi rupees The learned trial Judge has found that there could not

have been a great nucleus of ancestral funds in the hands of those members who migrated to the Basti District but he has found affirmatively that there was some nucleus and it is for the appellants to disturb the finding that such a nucleus existed and that the Basti property was bought therefrom. It is a matter of insuperable difficulty to arrive at a close conclusion as to what the exact nucleus of family funds could be with Gaur Thakurs, who resided in the Fyzabad District in the years preceding the annexation of Oudh There were as many methods by which money could be obtained in those days as they are now, and it cannot be said how far the family funds could be supplemented by the diligence of the members. A Court has to fill up many gaps in evidence by reasoning in such matters ; and granting the fact that Zinda Singh had obtained 662 Farrukhabadi rupees in the year 1844, it is equally difficult to see how he would have obtained the amount from his separate funds.

But the question of acquisition is not the only question here. There is considerable evidence of the treatment of the Basti property as showing that it was treated as joint property belonging both to the family members who had migrated to the Basti District and the members who had remained behind in the Fyzabad District. This evidence of treatment of the property has been considered very carefully by the learned trial Judge. He has considered all the evidence very carefully. There are undoubtedly many difficulties in the case. There are instances of previous partial partition in the family without including the members of the family generally or even the members of the branch generally. There have been certain splittings off and certain separations of the property but the learned trial Judge, has, in our opinion, considered the effect of these partitions and considered the effect correctly. The case as we have said was a difficult case. The decision of the learned trial Judge was a decision which was naturally open to criticizm as all decisions in difficult cases are It has received considerable criticizm from the learned senior counsel who represented the appellants. This criticizm has been eminently fair and intelligent and good criticizm but in the end it has not been able to satisfy us that the decision of the learned trial Judge upon the facts is incorrect. We can now take the grounds of appeal seriatim. We find that the learned trial Judge has arrived at a correct conclusion in holding that the plaintiff and the defendants 1 to 27 were members of a joint Hindu family at the time of the institution of the suit and has arrived at a correct conclusion in holding that the property in question was their joint property. We find that he has rightly repelled the suggestion of separation. We find that he has correctly held that the Basti property was not the self-acquired property of Bali Singh and his descendants. We do not consider that the question as to whether the plaintiff-respondent was to be considered a tenant-in-common arises or has any effect in the matter. We agree that Ex. 13 is admissible in evidence For the above reasons we dismiss this appeal with costs

M.N./R K. *Appeal dismissed.*

A. I. R. 1929 Oudh 290

MISRA, J.

Nakkoo Das—Defendant—Appellant.

v.

Rab Saran Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 353 of 1928, Decided on 25th February 1929, against decree of Addl. Sub-Judge, Sultanpur, D/- 5th July 1928.

(a) Limitation Act, Art. 132—Co-mortgagor redeeming entire property — Suit to redeem property from his hands is governed by 12 years' limitation to be reckoned since when redeeming mortgagor sets up adverse possession.

The limitation, which governs a suit brought by a co-mortgagor to redeem the property from the hands of the other co-mortgagor, who had redeemed the entire property mortgaged, is 12 years, and this period is to be reckoned from the date, when the redeeming co-mortgagor sets up his adverse possession : 9 *O. C.* 91 ; *A. I. R.* 1927 *Oudh* 347 and *A. I. R.* 1927 *Oudh* 552, *Foll.* [P 291 C 2]

(b) Transfer of Property Act, S. 95 — Co-mortgagor redeeming entire property cannot claim interest on excess money he had to pay unless he gave notice that he would charge interest.

Where a co-mortgagor redeeming entire property has to pay excess money he cannot claim interest on such excess money from the other mortgagor when the latter brings a suit

to redeem his share, unless he gives notice of his intention to claim interest on the excess money paid : *A. I. R.* 1925 *Bom.* 484, *Rel. on.*
[P 292 C 1]

Hyder Husein and *A. C. Mukerji*—for Appellant.

Ghulam Hasan—for Respondents.

Judgment.—This is an appeal arising out of a suit for redemption. The facts of the case are that one Ram Harakh and his brother Nanku Singh were the owners of 11 bighas 9 biswas land situate in village Gopalpur, District Sultanpur The plaintiffs-respondents in this case are the sons of Nanku Singh. Nanku Singh mortgaged those lands for Rs. 300 with one Kanhaiya Pandey under a usufructuary mortgage dated 18th December 1893 under the terms of which the mortgagee was to remain in possession and to appropriate the profits thereof in lieu of his interest. He was to pay to the mortgagor a sum of Rs. 29 yearly as paramsana On 29th December 1896, Ram Harakh and Nanku Singh sold one of these plots to one Sanmukh Das and some of the plots together with others were sold by them on 6th January 1921, to the same person. The mortgagee Kanhaiya Pande did not get possession under the terms of his mortgage and sued his mortgagors as well as Sanmukh Das, the purchaser, for recovery of the lands mortgaged and obtained a decree on 7th March 1925 Sanmukh Das subsequently sued Kanhaiya Pande for redemption of the property purchased by him. The case was compromised on 18th December 1893, and by virtue of the compromise redemption was allowed to Sanmukh Das on payment of Rs 300 the sum due under the original mortgage and an additional sum of Rs 325 which the mortgagee claimed on account of the profits of which they were deprived during the time that the mortgagors had remained in possession. Sanmukh Das got into possession of the entire mortgaged property by virtue of this decree on 14th July 1915. Sanmukh Das is dead and the defendant appellant Mahant Nanku Das is his successor-in-interest. Ram Harakh, and Nanku, the original mortgagors, are also dead and the plaintiffs are their successors-in-title. The plaintiffs have now brought the present suit for recovery of the mortgaged property with the exception of those plots of land which were sold by them to Sanmukh Das.

The suit was contested on various grounds but for the purposes of this appeal it is only necessary to consider two defences, namely one in regard to limitation and the other in regard to interest The plea of limitation is based on the ground that the present suit for redemption has been brought after 12 years from the date of the decree passed in favour of Sanmukh Das. The payment made by Sanmukh Das was on 11th February 1915, though possession was obtained by him on 14th July 1915. The present suit has been brought on 11th October 1927. The plea as to interest is based on the ground that the predecessor-in-title of the defendant-appellant had to pay a sum of Rs. 325 in addition to the sum of Rs. 300, which was the principal money entered in the mortgage deed. He was, therefore, it was contended, entitled to claim interest on this amount Both the Courts below have thrown out these two contentions of the defendant-appellant and they have again been urged before me in second appeal.

After hearing the arguments of the learned counsel for the appellant I am of opinion that the decision arrived at in this case by the Courts below is correct, and should not be disturbed. As to the point of limitation I may state that so far as the province of Oudh is concerned the law relating to the position of a co-mortgagor redeeming the entire property was laid down in *Makhdum Khan* v. *Mt. Jadi* (1) In that case it was held by a Bench of the late Court of the Judicial Commissioner of Oudh that the limitation which should govern a suit brought by a co-mortgagor to redeem the property from the hands of the other co-mortgagor, who had redeemed the entire property mortgaged, was 12 years, but this period was to be reckoned from the date, when the redeeming co-mortgagor sets up his adverse possession. The point of view taken in that case was that a redeeming co-mortgagor could not be supposed to be in the position of a mortgagee, but the other co-mortgagors, who wish to seek redemption must bring their suit for possession within 12 years from the date when the redeeming co-mortgagor sets up his adverse possession. In the present

(1) [1906] 9 O. C. 91.

case there is no proof that the defendant-appellant or his predecessor-in-title ever set up his adverse title in regard to the land in suit. I am in entire agreement with the view of law laid down in the above case and so far as I am aware the case has been consistently followed in Oudh : vide *Wajihuddin Asharf* v *Ahmad Ashraf* (2) and *Rameshwar* v. *Sheo Rani* (3). I, therefore, overrule the plea of limitation urged in this case.

As to the plea relating to interest I may refer to a recent decision of the Bombay High Court reported in *Gafur Imam* v *Amir Isab* (4) In that case it was held that in a case like the present the claim for interest could not be maintained unless the redeeming co-mortgagor had given notice that he would claim interest on the excess amount of money paid by him. In the present case it is clear that the defendant-appellant and his predecessor-in title have remained in possession of the property mortgaged after redeeming it from the mortgagee and have enjoyed the profits thereof. It is argued on behalf of the defendant-appellant that the profits were enjoyed by the appellant and his predecessor-in-title in lieu of the sum of Rs. 300 only. I am unable to accept this argument. I think the conduct of the defendant-appellant and of his predecessor-in-title shows explicitly that they have impliedly agreed to take profits of the property in lieu of the interest of the entire sum paid by them. If they desired to charge any interest they could have given notice of their intention to do so to their co-mortgagors, and if the latter had delayed redemption, they might have been heard to say that they were entitled in equity to claim interest In the absence of such an intention I do not think that the defendant-appellant can claim interest when he is in possession of the property and has been in enjoyment of the profits thereof presumably in lieu of the interest of the entire amount paid by him for redemption.

The plaintiffs also filed cross-objections but they were not pressed at the time of the argument. They are, therefore, dismissed with costs. This appeal, therefore, fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1927 Oudh 347=2 Luck. 618.
(3) A. I. R. 1927 Oudh 552.
(4) A. I. R. 1925 Bom. 484=49 Bom. 591.

A. I. R. 1929 Oudh 292

SRIVASTAVA, J.

Imami—Plaintiff—Appellant.

v.

Ibrahim and *others*—Defendants—Respondents.*

Second Appeal No 137 of 1928, Decided on 13th August 1928, against decree of Sub-Judge, Sultanpur, D/- 18th January 1928.

(a) Acquiescence—Plaintiff's connivence at defendant's building in plaintiff's land—Defendants having bona fide belief that they possess good title to the property—Plaintiff's bringing a declaratory suit—Plaintiff's claim cannot be decreed, on ground of acquiescence—Evidence Act, S. 115.

Where the defendants built on the plaintiff's land on the bona fide belief that they had a good title to the property, the large investment they made being evidence of their bona fide belief, and where the plaintiffs never objected to the infringement upon his right though they knew of the mistaken belief of the defendants and thus encouraged the defendants in their building.

Held, that when the plaintiff brought a declaratory suit, it could not be decreed, the plaintiffs being estopped by the doctrine of acquiescence. *Willmott* v. *Barber*, (1880) 15 *Ch. D.* 96 and *A. I. R.* 1927 *Oudh* 66, *Rel. on.* [P 293 C 2]

(b) Specific Relief Act, S. 42—Discretion of Court.

Grant or refusal of declaration is discretionary with the Court. [P 294 C 1]

Mohammad Ayub for *Naimullah*—for Appellant.

H Husain—for Respondent 3.

Judgment.—This is a second appeal by the plaintiff arising out of a suit for a declaration in respect of a 1/9th share in a house and ahata standing on plots 167 and 263 and in the alternative for possession of the same. The suit was based on the allegation that the house and ahata in question belonged to one Shubrati, who died about 50 years ago. On his death the property remained in the possession of his son, Pir Bakhsh, who died about 4 years ago. The plaintiff claimed as heir of Pir Bakhsh.

It may be stated at the outset that the plaintiff did dot pay any Court-fee as regards the alternative relief for possession So the suit has been treated by the Courts below and must be considered to be one merely for a declaration in respect of the plaintiff's title. The defendants 2 and 3 resisted the suit on the ground that the property really belonged to one Ali

Bakhsh and that it devolved on defendant 1 as the sole heir to the property and that defendant 1 executed a sale-deed in repect of it in March 1925 in favour of defendants 2 and 3 for a sum of Rs. 200. The property at that time consisted of a plot of land with a small kachcha thatched house standing on part of it. Defendants 2 and 3 have subsequently put up a substantial building on the plot. They pleaded that these constructions were made in the knowledge of the plaintiff, who stood by allowing the defendants to proceed with the construction without any objection. So it was pleaded that the plaintiffs having acquiesced in the construction were estopped from maintaining the suit.

This plea of acquiescence has been accepted by both the Courts below.

So far as title to the property is concerned the finding of the lower appellate Court is to the effect that the plaintiffs were entitled to a share in the property as heirs of Pir Bakhsh. It has also been found that defendant 1 has a share equal to that of each of the two plaintiffs. The contention which has been pressed by the learned counsel for the plaintiffs in support of the appeal is that the defendants have failed to prove the necessary elements justifying a finding of acquiescence in their favour and reliance has been placed upon the observations of Fry, J. in *Willmott* v. *Barbar* (1) as quoted in *Mustafa Husain* v. *Saidul Nisan* (2).

No doubt the learned Subordinate Judge has not categorically dealt with each one of the elements laid down in the case of *Willmott* v. *Barbar* (1) but I am satisfied that the circumstances in the present case are sufficient to establish all the necessary ingredients for a case of acquiescence I also take it that when the learned Subordinate Judge finds that the defendants' case as regards acquiescence has been made out his finding implies that in his opinion the necessary elements have been established.

The circumstances, on which reliance has been placed by the learned counsel for the defendants are that the plaintiffs are close relations being the first cousin of defendant 1. They are all residents of the same village. When the sale-deed was executed by defendent 1 in March 1925 plaintiff 2 was present at the execution of the deed and signed it as an attesting witness. In this sale-deed defendant 1 described himself as the sole owner of the property. It has been found by the lower appellate Court and the finding is supported by evidence that shortly after the sale-deed defendants 2 and 3 started with the construction of a substantial building on the plot and that plaintiffs 1 and 2 were both present in the village while the constructions were going on The plaintiffs had no doubt pleaded that they had protested against the construction but the evidence regarding it has been disbelieved by both the Courts below. Under the circumstances there can be no doubt that the defendants 2 and 3 were acting under a bona fide belief that they possessed good title to the property under the sale-deed which they had obtained from the defendant 1. It must also be presumed that the plaintiffs knew of their title. It is not denied that the defendants have expended money on the faith of their mistaken belief regarding their own title under the sale-deed. The defendants' case was that they had spent not less than Rs. 4,000 in the construction A Commissioner was appointed who inspected the place and reported that the value of the constructions amounts to about Rs. 3,000. It is impossible to think that the defendants could have invested so much money in the building without a bona fide belief in the soundness of their title Lastly I can safely presume that the plaintiffs knew that the defendants were acting under the mistaken belief of their rights because plaintiff 2, as I have stated before was an attesting witness to the sale-deed and therefore knew very well of the transaction.

The fact that plaintiff 2 was present at the time of the execution of the sale-deed and attested it and the fact that plaintiffs did not raise any protest against the constructions show that they by their silence and conduct encouraged the defendants in expending money over the constructions. I am therefore satisfied that all the necessary elements have been fully made out in the present case.

(1) [1880] 15 Ch. D. 96=43 L. T. 95=28 W. R. 911.
(2) A. I. R. 1927 Oudh 66.

The lower appellate Court has also held that in view of the conduct of the plaintiffs in the present case the Court was justified in refusing to grant the declaration sought by them. Grant of a relief for declaration being in the discretion of the Court I am not prepared to hold that the Court exercised an improper discretion in refusing the declaration in the circumstances of this case

The appeal therefore fails and is dismissed with costs

P.R./R.K. *Appeal dismissed.*

A I R 1929 Oudh 294

MISRA AND RAZA, JJ.

Bajrangi Lal—Decree-holder—Appellant

v.

Ram Harak—Judgment-debtor—Respondent.

Execution Decree Appeal No. 75 of 1928, Decided on 19th February 1929, against order of Sub-Judge, Partabgarh, D/- 9th August 1928

Civil P. C., O 21, R. 71—Misdescription of property in sale proclamation by knowing decree-holder—Defaulting purchaser misled constitutes fraud — Defaulting purchaser cannot be made answerable for deficiency—O. 21, R. 66.

Where the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by giving a misdescription, or by withholding information as to encumbrances which it was his duty to notify, his acts constitute fraud and as fraud vitiates and corrupts everything and no person can be allowed to derive an advantage by his fraud, the defaulting purchaser cannot be made answerable for the deficiency : 16 *Cal.* 535 , 25 *Cal.* 99 *Foll.* , 41 *Mad.* 474, *Dist.* [P 295 C 2]

Radha Krishna—for Appellant.

Hardhian Chandra—for Respondent.

Judgment —This is a second appeal from an order of the Subordinate Judge, Partabgarh, dated 9th August 1928 affirming an order of Munsif, Partabgarh, dated 3rd May 1928 in execution proceedings.

The facts relevant to the appeal are as follows :

Bajrangi Lal, appellant, held a decree against one Ramdin. The decree was passed on the basis of a mortgage. Some plots in village Paniari and some other plots in village Sahjanpur were to be sold in execution of the decree. Bajrangi Lal applied for the sale of the property in execution of the decree. The sale was fixed, the first time, for 20th Jaunary 1926. No encumbrance was shown in the sale proclamation The Paniari property was valued at Rs. 342-12-0 and the Sahjanpur property at Rs. 169-12-0. There were no bids on 20th January 1926 and the sale was, therefore, postponed The next date fixed for sale was 20th March 1926 A fresh sale proclamation was issued and no encumbrance was shown in that proclamation also. It contained the same particulars as were given in the first sale proclamation The property was sold on 20th March 1926 in two lots. The first lot was of Paniari property and the second lot of Sahjanpur property. There is no dispute in this case about Sahjanpur property which was sold to Ram Harakh (respondent) for Rs 405 The dispute in this case relates to the Paniari property only. There was competition between the decree-holder (appellant) and Ram Harakh (respondent) in respect of the first lot (i. e. Paniari property) The bids made by the decree-holder were pre-empted by Ram Harakh who was a cosharer in the village Paniari. The last bid was of Rs 1,000 Ram Harakh deposited twenty five per cent. of the purchase money under O 21, R. 84, Civil P C However, he failed to deposit the full amount of the purchase money within fifteen pays from the date of sale under O. 21, R. 85 The result was that the property was ordered to be resold and Ram Harakh, the defaulting purchaser, forfeited the amount deposited by him under O 21, R. 84. A fresh proclamation for sale was issued under O 21, R 87 and it contained the same description of the Paniari property as noted in the previous proclamations. No encumbrance was shown in this sale proclamation also The sale was fixed for 20th October 1927. The judgment-debtor however, applied for postponement of sale on that date His application was granted and the sale was fixed for 3rd November 1927 On that date the property was sold for Rs. 500 only and was purchased by the decree-holder himself at the auction sale

The decree-holder having thus purchased the property applied on 20th January 1928 for recovery of the deficiency of the price (Rs 500), from the default-

ing purchaser Ram Harakh, under O. 21, R. 71, Civil P. C.

This application was resisted by Ram Harakh on various grounds. He pleaded inter alia that the decree-holder was guilty of fraud in not having shown the prior encumbrance of 1909 in the sale proclamation. He contended that the decree-holder being guilty of fraud could not take advantage of his own fraud.

We should like to note that the prior encumbrance of 1909 was a mortgage in favour of one Sita Ram for Rs. 50 in respect of certain property including the property in dispute. A suit was brought by Sita Ram on the basis of that mortgage on 15th December 1921 The present decree-holder, Bajrangi Lal, was also a party to that suit The claim was decreed for Rs. 600 odd in that suit on 30th March 1922 Though Bajrangi Lal had full knowledge of this encumbrance, he failed to show it in the sale proclamation which was issued in execution of his decree. His own agent filed an affidavit stating that the property in dispute was not subject to any encumbrance. This affidavit was of course a false affidavit.

The lower Courts rejected the decree-holder's claim for deficiency of price on the ground that he was guilty of fraud and could not be allowed to take advantage of his own fraud

Bajrangi Lal decree-holder has now come to this Court in second appeal.

We think there is no substance in this appeal.

The finding of the lower Courts that the decree-holder is guilty of fraud in this matter is based upon admissible evidence and cannot be impugned in second appeal There is no doubt that he is guilty of fraud and that his conduct is very objectionable. He got the sale proclamation issued without showing the encumbrance to which the property was subject. His own agent filed a false affidavit stating that the property was not subject to any encumbrance He then competed with Ram Harak (respondent) in bidding for the property at the auction sale and when the bids went up to Rs. 1,000 he cleverly withdrew and Ram Harakh became the auction purchaser. Ram Harakh became the purchaser believing that the property was not subject to any encumbrance. It was the decree-holder (appellant) who caused Ram Harakh to believe that the property was not subject to any encumbrance. Ram Harakh deposited twenty-five per cent. of the purchase-money, but when he came to know that the property was really subject to an encumbrance he did not deposit the balance. The amount deposited by him was forfeited to Government under O. 21, R. 86, Civil P. C. He thus suffered loss of Rs. 250 but avoided greater loss. The property was ordered to be resold and then the decree-holder himself purchased it for Rs. 500 only. After purchasing the property in this way, the decree-holder filed the present application on 20th January 1928 for recovery of the deficiency of price under O 21, R. 71, Civil P. C. We agree with the following observations made by the Hon'ble Judges of the Calcutta High Court in the case of *Baijnath Sahay* v *Moheep Narain Singh* (1)

> " After the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the legislature could have ever intended such a result."

This case was followed in the case of *Kali Kishore Deb* v. *Guru Prosad* (2). The following observations were made in the judgment in that case :

> " If there was a misdescription on the first occasion, the decree-holder was aware of it, and he ought not to have had the property again proclaimed for sale under a description which he knew to be wrong. Having done that he cannot make the defaulting purchaser answerable for the deficiency."

The appellant's learned counsel has referred to the case of *Venkatchellamayya* v. *Rama Girjee Nilakanta Girjee* (3). We think this case does not help the appellent in the case before us The question of fraud was not considered in that case It should be borne in mind that fraud vitiates and corrupts every thing and no person ought to have advantage of his own wrong or gain an advantage by his own fraud.

We are satisfied that the decree-holder (appellant) was guilty of fraud as held by the lower Courts. In our opinion no

(1) [1889] 16 Cal. 535.
(2) [1898] 25 Cal. 99=2 C. W. N. 408.
(3) [1918] 41 Mad. 474=34 M. L. J. 156 = 7 M. L. W. 159 = 43 I. C. 685 = (1918) M. W. N. 121.

case has been made out to disturb the judgments of the lower Courts. We dismiss the appeal with costs.

P.R./R.K. *Appeal dismissed.*

A. I R. 1929 Oudh 296

WAZIR HASAN, AG. C. J. AND RAZA, J.

Raj Bachan Singh—Plaintiff—Appellant.

v

Bhanwar Lalji—Defendant—Respondent.

First Appeal No 91 of 1928, Decided on 21st February 1929, against decree of Sub-Judge, Kheri, D/- 24th July 1928.

(a) Hindu Law — Custom — Succession—Jangra Sangra Chauhan Thakur—Daughters are excluded from inheriting father's property moveable and immovable—But no inference from this of exclusion from mother's or grand-mother's stridhan can be drawn.

Daughters are excluded from inheriting their father's property whether moveable or immovable in the family of Jangra Sangra Chauhan Thakur; and as daughter has no right to inherit her issue also cannot inherit. But it cannot be inferred from such custom that the custom of exclusion of the same heir from mother or maternal grandmother's property is also in existence. The latter custom has strictly to be proved 5 *I A.* 1 and *A. I. R.* 1922 *Oudh* 278, *Rel. on.*

[P 299 C 2, P 300 C 2]

(b) Hindu Law—Stridhan—In absence of special custom, Hindu Law rules should be applied—In absence of issue, husband or his heirs succeed—But husband is not to be considered propositus.

In the absence of special custom the stridhan must pass according to the special rules of devolution applicable to such property under the Hindu law and the rule of succession to stridhan according to the Mitakshara is that where the marriage is in an approved form (and the presumption is that it was in an approved form unless the contrary is proved) the stridhan goes in default of issue to the husband and his heirs, that is to say, it descends in the same way as if it had belonged to the husband himself. But this does not mean that in such a case the husband is to be considered the propositus. [P 300 C 1, 2]

L. S Misra and *Kashi Prasad Shrivastava*—for Appellant.

G. Jackson, *Ali Zaheer* and *Sita Ram*—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a declaratory suit.

The relative position of the parties will appear from the following pedigree;

(For pedigree see p. 297.)

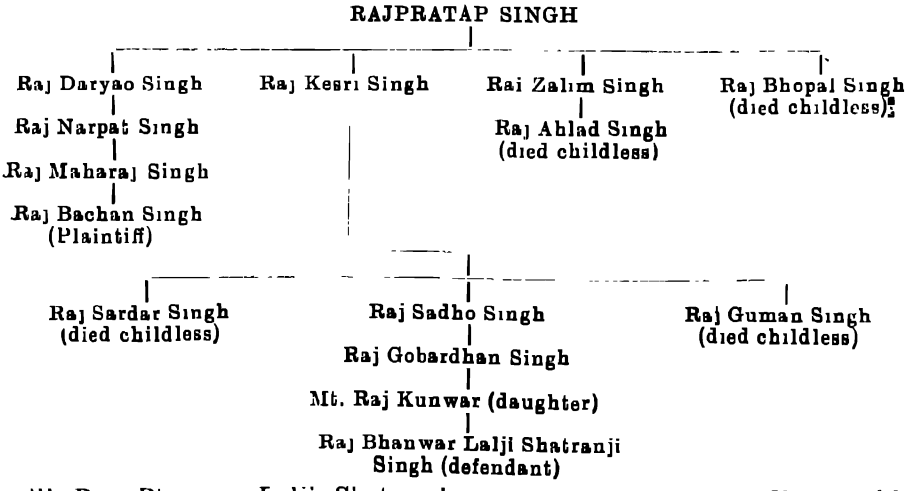
The facts relevant to the appeal are as follows:

Raj Gobardhan Singh was a taluqdar. A reference to list No 1 prepared under S. 8, Oudh Estates Act (Act 1 of 1869), shows that the Bhira estate in the Kheri District was conferred upon four persons one of whom was Raj Sadho Singh, father of Raj Gobardhan Singh. It appears that subsequent to the grant estate was divided into several portions. Raj Gobardhan Singh at the time of his death was in possession of four portions of the Bhira estate. The names of these ilaqas are set out as being Bijwa, Ramnagar, Daulatpur and Nighasan. The estate as originally granted was an estate of list No. 4, the rule of succession being that when the owner dies intestate the property descends according to the ordinary law to which the members of the intestate's tribe and religion are subject.

Raj Gobardhan Singh had no male issue. He had only one daughter, Mt. Raj Kunwar, who was married to Kunwar Sardar Singhji, the second son of the Chief of Shahpura in Rajputana, in 1903. She gave birth to a son (Raj Bhanwar Lalji Shatranji Singh defendant in the present suit) in 1904 and died the same year sometime after the birth of the child. Raj Gobardhan Singh had five Ranis. Mt. Raj Kunwar was his daughter by his second Rani called Rani Sesapaniwali. Rani Seesapaniwali and one other Rani died in the lifetime of Raj Gobardhan Singh. He died in March 1905 leaving three Ranis, namely: (1) Rani Suraj Kunwar called Bari Rani (2) Rani Devi Kunwar called Manjli Rani (3) Rani Dammar Kunwar called Choti Rani The Manjhli Rani died in 1915, the Chhoti Rani in November 1924 and the Bari Rani in May 1925.

Raj Gobardhan Singh had executed a registered will on 13th November 1903. By that will he created life-estates in favour of the Bari Rani and the Chhoti Rani in portions of his taluqa and granted a maintenance at the rate of Rs. 250 a month to the Manjhli Rani. The will created a vested remainder in favour of his daughter's son (and in default of daughter's son, in favour of the daughter herself) which was to take effect in possession immediately on the termination of the life-estates created in favour of the widows. That daughter's son is now the defendant in the present suit. The will contained also a bequest in favour of Raj Bachan Singh (plaintiff in the present

suit) in respect of the villages out of the taluqa to take effect on the determination of the life-estates created in favour of the widows. These ten villages were to go to Raj Bachan Singh for life after the death of the widows. It was further provided that if Bachan Singh should have a son, the ten villages were to descend to him in full ownership after the termination of Bachan Singh's life-estate. It appears that the will of Raj Gobardhan Singh has been duly given effect to. We should like to note that there was a litigation between the parties about the will in question some years ago. The case was finally decided by the late Court of the Judicial Commissioner of Oudh in 1918. It is reported in *Raj Bachan Singh* v *Shatranji*.(1). The will was held to be genuine and valid. It was also held that under the terms of



the will Raj Bhanwar Lalji Shatranji Singh had a vested interest in the estate left by Raj Gobardhan Singh.

The circumstances out of which the present suit has arisen so far as they are material to the judgment may be very shortly stated The Bari Rani of Raj Gobardhan Singh remained in possession of the whole of the taluqa after the death of the Chhoti Rani She died on 15th May 1925. She devoted a considerable portion of her savings to religious purposes and executed several deeds of trust. At her death disputes arose as to succession and as there was apprehension of forcible possession being taken over the moveable property in the possession of the lady at the time of her death, the District Magistrate of Kheri took over charge of the property and kept it in his custody and refused to part with the possession to any person who could not show a title through the civil Court. B. Bankey Behari Lal who was appointed trustee for the deity Sri Thakurji Maharaj to whom property was dedicated under the deed of trust dated 3rd May 1925 filed a suit on behalf of the deity on 1st June 1925 for a declaration that the moveable property left by the lady was dedicated to the deity under the terms of the deed. He impleaded both the parties to the present suit as defendants in that suit. The claim was contested by both the defendants in that suit and each defendant claimed the property as against the other defendant The trial Judge refused to decide in that suit which defendant would succeed to the property which Rani Suraj Kunwar (Bari Rani) was not competent to dispose of in her lifetime. He found that something less than two-thirds of the property which was in possession of the Rani was her self-acquired property which she could dispose of in her lifetime. He found that the Rani had executed the deed of trust intelligently. He decreed the suit accordingly on 24th September 1926. Raj Bachan Singh, who was defendant 1 in that suit and who is the plaintiff in the present suit appealed to this Court asking that the suit should be dismissed in entirety and in the alternative that the relief should be reduced The decree of the first Court was affirmed by this Court with slight modification in September 1927. No determination was made by this Court of the rights of the defendants inter se in that suit. The case is report-

(1) [1918] 5 O. L. J. 519=49 I. C. 963.

ed in *Raj Bachan Singh* v. *Shri Thakurji Maharaj* (2).

Raj Bachan Singh brought the present suit against Raj Bhanwar Lalji Shatranji Singh in January 1928 claiming the rest of the moveable property in respect of which the suit of Sri Thakurji Maharaj was dismissed by the Subordinate Judge, Kheri on 24th September 1926 He claims the property in suit as the heir of Raj Gobardhan Singh, Manjhli Rani and Chhoti Rani. It is also stated in the plaint that should any article out of the property in suit be held to be the property of the Bari Rani, the plaintiff is entitled to the assets of the Bari Rani also by right of inheritance. It is alleged that the defendant has no right to the property in suit as daughters and daughters' sons are excluded from inheritance by the custom prevailing in the clan of Chauhan Thakurs and in the family of Raj Gobardhan Singh who belonged to that clan

The claim was resisted by the defendant He set up the will of 13th November 1903 and denied the alleged custom alleging that it was inapplicable to the present suit He alleged that the plaintiff had no right to the property in suit as against him and that he was entitled to the entire property. The learned Subordinate Judge framed six issues and found as follows :

(1) The plaintiff is not entitled to the property in suit as the heir of Raj Gobardhan Singh or his Ranis.

(2) A custom prevailed among the Sangra Chauhan Thakurs in general and the family of Raj Gobardan Singh in particular by which daughter and daughters' sons are excluded from inheritance so far as the estate or zamindari property is concerned. The property in suit is the moveable property of Raj Gobardhan Singh, the Manjhli Rani and the Chhoti Rani No custom of exclusion of daughters or daughters' sons is proved as regards the moveable property or as regards the separate or absolute property of mothers and maternal grandmothers The alleged custom does not apply to the moveable property left by Raj Gobardhan Singh and also to the moveable property left by the Manjhli Rani and the Chhoti Rani

(3) and (4) The moveable property in suit is not covered by the will of Raj Gobardhan Singh. The defendant is not the residuary legatee under the will of all the properties of Raj Gobardhan Singh.

(5) The property detailed in list, Ex. 26, belonged to Raj Gobardhan Singh and that detailed in list, Ex. 27, to the Manjhli Rani. The rest of the property in suit belonged to the Chhoti Rani. The property which belonged to the Ranis was their stridhan to which the defendant is entitled under the Hindu law The cash which was left by the Bari Rani should be taken to be the income or the saving of the estate. The defendant has taken possession of the taluqa under the terms of the will of Raj Gobardhan Singh and the cash must go along with the estate

(6) The plaintiff is not entitled to any relief.

The plaintiff's claim was therefore rejected. He has appealed challenging the findings on the points decided against him

The learned Subordinate Judge need not and should not have introduced the question of accretion (as regards cash) in the present suit That question, admittedly, does not arise on the pleadings. The plaintiff has filed the lists of the properties of Raj Gobardhan Singh and the Manjhli Rani, separately. These are Exs 26 and 27 Ex 26 is the list of the property of Raj Gobardhan Singh and Ex 27 is the list of the property of Manjhli Rani as stated by the plaintiff in his application dated 16th April 1928 see printed book p 30 It is now agreed that the lists Exs 26 and 27 should be taken to be correct and the rest of the property should be held to be the property of the Chhoti Rani There is no dispute now so far as the specification of property or properties is concerned. The only point for determination is the question of title to the property in suit We now proceed to decide that question

The learned Subordinate Judge, has found that the moveable property in suit is not covered by the will of Raj Gobardhan Singh This finding has not been seriously disputed before us. We have examined the will in question (Ex. A 1). It relates to the taluqa and not to the moveable property. The will in question should therefore be left out of consideration in deciding the question of title. We hold, agreeing with the learned

(2) A. I. R. 1927 Oudh 618.

trial Judge, that the defendant can have no right to the property in suit under the will.

We have to decide the question of title with regard to (1) the property of Raj Gobardhan Singh specified in Ex. 26 and (2) the properties of Manjhli Rani and Chhoti Rani.

As regards the property of Raj Gobardhan Singh, specified in Ex. 26, the title of the defendant under the Hindu law is not disputed. It is, however, contended that the defendant is excluded from inheriting that property by custom. Raj Gobardhan Singh was a Jangra Sangra Chauhan Thakur. The evidence of custom on which the plaintiff relies consists of (1) the wajib-ul-araez of villages Lalpur, Lakhsar, Naurangabad and Teekar, (2) the deposition of Bachchu Lal, P W 2 and (3) the pleadings and judgment in *Mt Parbati Kuar's* case (3). This is the only evidence to which the plaintiff-appellant's learned counsel has referred in the course of arguments before us We find that the wajib-ul-araez of Naurangabad and Teekar (Exs. 4 and 5) are not in point, as they deal with customs prevailing among the Janwar Thakurs of those villages. The wajib-ul-araez of Lalpur and Lakhsar (Exs. 2 and 3), help the plaintiff to some extent. Bachchu Lal, P W. 2, also gives evidence in favour of the plaintiff. The plaintiff relies principally on the pleadings and judgment in *Mt Parbati Kuar's* case (3). Mt Parbati Kuar was the daughter of Raj Milap Singh who belonged to the family of Raj Gobardhan Singh. She brought a suit for possession of the property of her father Raj Milap Singh against Raj Gobardhan Singh and others in 1900 The main defence which was set up to her claim was that under a family custom, daughters were excluded from inheritance and her suit was dismissed on the finding that the custom was proved to exist. It appears that Raj Gobardhan Singh did not actually file any written statement of defence in that suit, but his agent intimated to the Court that he (Raj Gobardhan Singh) took the same line of defence as the other defendants in that suit. The suit was dismissed by the trial Court on 31st March 1904. Mt. Parbati Kuar's appeal was dismissed by the late Court of the Judicial Commissioner of Oudh on 2nd March 1905. It was held that among Jangra Sangra Chauhans, daughters were excluded by brothers and male collaterals, however remote. The case is reported in *Mt. Parbati Kuar* v. *Rani Chandrapal Kuar* (3). Mt. Parbati Kuar's appeal was also dismissed by their Lordships of the Privy Council on 13th May 1909: see *Parbati Kunwar* v. *Chandrapal Kunwar* (4). There is no doubt that the case of Mt. Parbati Kuar helps the plaintiff's case, as regards Raj Gobardhan Singh's property, mentioned above to the full extent This evidence is surely a strong evidence in plaintiff's favour. We think the learned Subordinate Judge was perfectly right in holding on this evidence that daughters are excluded from inheriting their father's property in the family of Raj Gobardhan Singh. If a daughter had no right to inherit her issue also could not inherit: see *Balgobind* v *Badri Prasad* (5). We should like to note that the respondent's learned counsel has not questioned the finding of the learned Subordinate Judge on the point under consideration in the course of arguments.

We accept the finding, but we are not prepared to agree with the learned trial Judge that the custom applies to estate or zamindari property only and not to moveable property. We see no reason why any distinction should be made between moveable and immovable property in this respect. If a daughter is excluded from inheriting her father's property, she is excluded from inheriting his property, whether it is moveable or immovable. It was not necessary for the plaintiff to prove specifically that daughters were excluded from inheriting their father's moveable property also. Surely the defendant would not have got the taluqa of Raj Gobardhan Singh, if the latter had not made the will mentioned above in his favour. It appears that Raj Gobardhan Singh, who had defended the suit of Mt. Parbati Kuar on the ground of custom, was conscious of the force of custom and had therefore executed the will mentioned above. The property in suit is not covered by the will and the defendant can claim no right to the property as he is excluded from inheriting the property of his maternal

(3) [1905] 8 O. C. 94.

(4) [1909] 31 All. 457=12 O. C. 304=4 I. C. 25=36 I. A. 125 (P. C.).

(5) A. I. R. 1923 P. C. 70=45 All. 413=26 O. C. 217=50 I. A. 196 (P. C.).

grandfather by custom. The plaintiff Raj Bachan Singh is the nearest male collateral relative of Raj Gobardhan Singh. He is entitled to the moveable property in dispute (i. e., the property specified in Ex. 26) as the heir of Raj Gobardhan Singh.

As regards the rest of the property (i. e., the property of Manjhli Rani and Chhoti Rani), it is not disputed that the said property is the stridhan of the widows. The rule of succession to stridhan according to the Mitakshara is that where the marriage is in an approved from (and the presumption is that it was in an approved from unless the contrary is proved) the stridhan goes in default of issue to the husband and his heirs, that is to say, it descends in the same way as if it had belonged to the husband himself. The appellant's learned counsel concedes that the successive heirs to a woman's stridhan after the husband would be:

(1) his (husband's) son by another wife, that is, the deceased woman's step-son; (2) his grandson by another wife; (3) his great-grandson by another wife, (4) his other wives; (5) his daughter by another wife, that is, the deceased woman's step-daughter, (6) the son of his daughter by another wife, that is, step-daughter's son; (7) his mother; (8) his father; (9) his brother: (10) his brother's son; then his other sapindas, then his samanodakas, and then his bandhus : see Principles of Hindu Law, 5th edn , by D. F Mulla, pp. 147-48.

He concedes that the defendant being the son of the step-daughter of the Manjhli Rani and the Chhoti Rani, is entitled to the stridhan of the Ranis under the Hindu Law and has preference as against the plaintiff. He contends, however, that the property in dispute should be held to be the property of Raj Gobardhan Singh after the death of the Ranis and should go to the plaintiff, as the defendant is excluded from inheriting the property of Raj Gobardhan Singh by custom. We think this contention is not well founded The plaintiff himself has not treated the property in dispute as the property of Raj Gobardhan Singh after the death of the Ranis. He has filed lists showing properties of Raj Gobordhan Singh and his Ranis separately. The property of the Ranis cannot be held to be the property of Raj Gobardhan Singh simply because it is to descend in the same way as if the property had belonged to Raj Gobardhan Singh himself. That property did not and could not vest in Raj Gobardhan Singh who died long ago. We are not prepared to accept the contention that the husband in such cases is the propositus, whether dead or alive. The stridhan must pass according to the special rules of devolution applicable to such property under the Hindu law. It is true that the defendant is excluded from inheriting the property of his maternal grandfather Raj Gobardhan Singh by custom, but we are not prepared to hold that for that reason, he is also excluded from inheriting the stridhan of the stepmothers of his mother, when he is heir to such property under the Hindu law. No such custom has been set up or proved in this case. In the case of *Hurpurshad* v. *Sheo Dyal* (6) their Lordships of the Privy Council have said that :

" A custom is a rule which in a particular family or a particular district has from long usage obtained the force of law. It must be ancient, certain and reasonable and being in derogation of the general rules of Law, must be construed strictly."

Where a custom has been proved to exist, it supersedes the general law which, however, regulates all beyond the custom : see *Neelkisto Deb* v. *Beer Chunder* (7), *Ram Nundun Singh* v *Janki Koer* (8), *Mata Din* v. *Ahmad Ali* (9). The plaintiff has succeeded in establishing that daughters are excluded from inheriting the property of their fathers and daughters' sons, from inheriting the property of their maternal grandfathers, but he has wholly failed to show that this custom extends to property inherited from females which is " stridhan " in the special sense. We do not find and have not been referred to any clear instance of exclusion from succession to stridhan. As pointed out in the case of *Bijai Bahadur Singh* v *Mathura Singh* (10) the fact that the custom of exclusion of daughters and their issue from inheriting their father or maternal grandfather's property, as the case may

(6) [1875] 3 I. A. 259=26 W. R. 55=3 Suther. 304=3 Sar. 611 (P.C.).
(7) [1868] 12 M. I. A. 523=12 W. R. 21=3 B. L. R. 13.
(8) [1902] 29 Cal. 828=29 I. A. 178=7 C. W. N. 57=8 Sar. 351 (P.C.).
(9) [1905] 11 O. C. 1.
(10) A. I. R. 1922 Oudh 278=25 O. C. 345.

be, has been established, does not lead to a necessary inference that the custom of exclusion of the same from their mother or maternal grandmother's property is also in existence The latter custom has strictly to be proved. This view is supported by the observation of Sir Barnes Peacock in the judgment of their Lordships of the Privy Council in the case of *Brij Indar Bahadur Singh* v. *Janki Koer* (11). His Lordship observed as follows :

" The Judicial Commissioner, however, was of opinion that the plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession. Their Lordships concur in that view and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman."

In that case the property in dispute was held to have belonged to the mother of the defendant-respondent as her absolute property and the remark quoted above was made with reference to the evidence led by the plaintiffs to prove the custom of exclusion of daughters from inheriting father's property. The same view was taken in a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Basant Singh* v *Rampal Singh* (12). The rule that custom being in derogation of the general rules of law must be construed and proved strictly was followed also in the case of *Brijraj Bux Singh* v. *B. Raghuraj Bahadur* (13). It was held in that case that although the custom of division of istribant had been established yet no custom was established to the effect that the descendants of one wife, however, remote in degree had preference over the descendants of the other wife though nearer in degree. No such custom having been established the ordinary rule of Mitakshara law prevailed, viz , those who were nearer in degree excluded those who were more remote. We are of opinion, therefore, that the learned trial Judge was perfectly right in rejecting the plaintiff's claim in respect of the property of the Manjhli Rani and the Chhoti Rani. It is the defendant who is entitled to that property under the Hindu law. He has preference over the plaintiff as stated above.

The result is that the appeal is partly allowed. It is declared that the plaintiff is entitled to the property of Raj Gobardhan Singh detailed in the list Ex 26 The rest of the claim is dismissed. The parties will receive and pay costs in both the Courts in proportion to their success and failure.

R.K. *Appeal partly allowed.*

(11) [1877] 5 I. A. 1=1 C. L. R. 918=3 Suther. 474=3 Sar. 763 (P.C.).
(12) [1919] 6 O. L. J. 248=51 I. C. 985.
(13) A. I. R. 1925 Oudh 178.

A. I. R. 1929 Oudh 301

RAZA AND PULLAN, JJ.

Fasahat Husain and *another*—Plaintiffs—Appellants.

v.

Mohammad Zamin and *others*—Defendants—Respondents

Second Appeal No. 12 of 1928, Decided on 15th January 1929, against decree of Sub- Judge, Sultanpur, D/- 2nd Novem ber 1927.

Landlord and Tenant—Abadi —Mere inclusion in municipality is no test of area being 'town'.

Mere inclusion in a municipality is no test as to whether an area is or is not a town. Where in a mouza the dominating population was agricultural.

Held : that though the houses of the neighbouring town adjoined the area the area could not be, on that account, altered from its old condition as a village site into a town land though some of the old outlying fields of the mouza might have been included in the town. [P 302 C 2, P 303 C 1]

(b) Oudh Laws Act, S. 8—Pre-emption allowed in a city.

Section 8 clearly allows the right of pre-emption to exist in a town and even in a city. It only lays down that such a right must not be presumed to exist. [P 303 C 1]

Radha Krishna for *Hyder Husein*—for Appellants.

M. Wasim and *Khaliq-uz-zaman*—for Respondent 1.

Judgment.—This second appeal arises from a suit for pre-emption of a house and land covering four plots in an area described in the sale-deed as mouza Khairabad. The property in suit is specified at the foot of the plaint. The rights of plaintiffs to pre-empt are conceded if it be admitted that any custom of pre-emption exists in respect of this area, and it is not now disputed that the sale price is Rs. 1,500 We have only to

consider whether this mouza Khairabad is still a village and controlled by Chap. 2, Oudh Laws Act (Act 18 of 1876) or whether, as found by the two Courts below, it is now a portion of the town of Sultanpur, and as such no right of pre-emption exists in it. The learned Munsif who tried this suit was influenced to some extent by his personal observation and it appears that to his mind the property in question is in appearance a part of the town of Sultanpur. If so, it must be the last four plots in the south of the town, as it appears that there is no other building beyond it But the learned Munsif shows in his judgment that he was mistaken as to certain facts. He was under the impression that the town of Sultanpur is gradually growing and is absorbing this area on the south. We find that this is not the case. The town of Sultanpur ceased to exist after the Mutiny and a new town gradually grew up on the site of the old cantonment. The village of Khairabad if shown in the map of the first settlement in the year 1869 as a fairly compact area bearing the number 113 surrounded by fields. The new town of Sultanpur gradually extended its boundaries towards the south and part of it is undoubtedly built on the northern area of Khairabad. The main road from Allahabad to Fyzabad runs along the old abadi of Khairabad in the east and on into the town of Sultanpur, and another road known as the thandhi sarak crosses it at some little distance, north of the old abadi of Khairabad but inside the limits of the village area. The town of Sultanpur has clearly extended itself to this thandhi sarak, but it is another matter to hold that it has absorbed the abadi of Khairabad in which the plot in suit is situated.

We have looked at the maps of the first Settlement and of the later Settlement of 1895 and we find that plot No. 113 in the first Settlement almost exactly corresponds with plot No. 223 of the latest Settlement and the only difference that we can see is that some of the fields adjoining the main were covered by houses at the time of the second Settlement In the year 1882 a portion of the Khairabad village area including the old abadi was brought within the municipal limits of Sultanpur town and it appears that from that the persons residing in this area have the advantages of being members of the municipality. Since then the town of Sultanpur has ceased to grow as is shown by successive census returns.

It is settled law that mere inclusion in a municipality does not change a village into a town. This was the finding of the Judicial Commissioners of Oudh in a ruling in *Janki Prasad* v *Sahib-un-nissa* (1). As the Judges observed :

"if the framers of the Oudh Laws Act had intended that any land within the limits of a municipality should be treated as being situated within a 'town' within the meaning of S. 8, they would have expressed that intention in the Act itself."

We agree with this observation and we consider that mere inclusion in a municipality is no test as to whether an area is or is not a town. It is difficult to find a definition of the word "town" which is of universal use, because all those definitions that we have seen depend on the opinion of some person who has to decide whether the area is or is not a town, for instance the definition in Stroud's Judicial Dictionary, after saying that it is a space covered by houses collected in a mass, goes on to say that the houses must be in sufficient number to be "ordinarily designated a town." It is impossible to say how many houses are required to make a town.

In the present case we find that there is no great difficulty in deciding that this particular area is not included in the town of Sultanpur for the purposes of this case This abadi No. 223 is in every essential the same village site that it was at the time of the first Settlement. The cosharers and lambardars still live in this abadi and they are zamindars of the agricultural lands appertaining to it. Of the 99 houses in this plot 7 8are occupied, 42 by persons whose occupation is agriculture and 18 by persons whose occupation may be considered to be appertenant to agriculture. Thus the bulk of the population of this area is agricultural and not essentially different from the population of any ordinary agricultural village of the same size. The town has not surrounded this area. That is not suggested. All that is said is that it comes up to it along the road. The mere fact that the last house in the town, as the learned Munsif calls it, adjoins this area does not bring the area inside the town, and we fail to see how the area has been altered

(1) [1904] 7 O. C. 74.

from its old condition as a village site into anything which could be described as a town, if a town is to be held to be a mass of houses close together.

Moreover the municipal authorities themselves have differentiated the portion of the municipal area which lies south of the thandhi sarak from that which lies to the north, and they have allowed the construction of kachcha buildings and buildings with thatched roofs in the southern area which includes the old abadi of Khairabad, whereas they have forbidden the construction of such buildings north of the thandhi sarak. We have considered the nature of the buildings as well as the occupation of their inhabitants and we find that only a very few can be described as entirely pucca, and there are no public buildings except such as may be found in any good sized village

There remains the further question whether S. 8, Oudh Laws Act, would forbid us to hold that a custom of pre-emption exists in this abadi even if it were included in the town of Sultanpur. That section clearly allows the right of pre-emption to exist in a town and even a city. It only lays down that such a right must not be presumed to exist. Here there is no case of presumption. The right undoubtedly existed before the approach of the town of Sultanpur. It was exercised in the year 1882, the very year when municipal boundary was extended, and a notice was given to pre-emptors in a sale as late as the year 1905. We may ask, if the right of pre-emption existed in this area in 1882, what has happened in the interval to destroy that right? The only answer which we have heard is virtually the answer that it has been included in the municipal area of Sultanpur and that, as we have shown, is no answer at all. In our opinion this abadi No. 223 has not changed its nature and is still in its essence a village inhabited by a village community. The mere fact, that a portion of the outlying fields in the old mouza of Khairabad may have been included on the town of Sultanpur does not affect our opinion as to the particular area in suit, but we do not wish to extend our judgment beyond the actual facts which we have to decide.

We find, therefore, that the plaintiffs have a right to enforce their right of pre-emption in respect of the property in suit. We set aside the decisions of the lower Courts and decree the plaintiffs' claim in respect of the property in suit on payment of Rs. 1,500 within three months from this date If they fail to do so, their suit will be dismissed with costs in all the Courts If they comply, they will obtain their costs in all the Courts from the contesting defendant, Syed Mohammad Zamin

P.R./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 303

STUART, C. J. AND RAZA, J.

Rawat Shiva Bahadur Singh—Plaintiff—Appellant

v.

Gur Prasad and *others*—Defendants—Respondents.

First Appeal No. 148 of 1927, Decided on 13th August 1928, from order of Sub-Judge, Rae Bareli, D/- 29th August 1927.

Practice—Pleadings—Suit on mortgage—Subsequent agreement to pay enhanced interest by some of the holders of equity of redemption—Enhanced rate not claimed in plaint but in oral pleadings when time barred—Relief being personal against some of the holders of properties cannot be claimed.

After mortgaging certain properties the mortgagors transferred part of them to others. The transferees agreed by a letter to pay an enhanced rate than that fixed in the mortgage but the period within which it was to be paid was not fixed. In a suit by the mortgagees enhanced rate was not claimed in the plaint but was claimed in the oral pleadings when it was time barred.

Held : that this latter relief which was a personal one against the transferees on the basis of subsequent agreement and not against all the holders of the property together cannot be be claimed in the suit though in this suit it was bound to fail being time barred: 26 *Cal.* 707 (*P. C.*), *Rel. on.* [P 304 C 1]

Naimullah—for Appellant.

C. S. Zaman—for Respondents.

Judgment —This is a plaintiff's appeal. On 26th February 1913, Ganesh Singh and Chandi Singh executed a deed of simple mortgage for a consideration of Rs 40,000 in favour of the plaintiff by which they mortgaged half a share which they had purchased under the exercise of a right of pre-emption and one-third of thier ancestral share. On 5th September 1921, Chandi Singh died. On that date Ganesh Singh on behalf of himself and Chandi Singh's descendants sold the whole of the share which had been acqui-

red under exercise of the right of pre-emption but did not sell any portion of the ancestral property. The vendees were Gur Prasad and Parmeshar Dat. Gur Prasad is respondent 3, Parmeshar Dat is deceased and represented by respondents 4 and 5. The suit out of which this appeal arises was instituted by the plaintiff on the basis of the deed of mortgage of 26th February 1913, He claimed Rs. 40,000 principal. He claimed interest at a rate higher than the rate stated in the deed of mortgage. He claimed this enhanced interest on the basis of two letters Ex. 2 and Ex 3 dated 8th December and 11th December 1922. In both these letters Gur Prasad and Parmeshur Dat had stated after their purchase that they would pay an enhanced rate of interest and in the second letter they stated they would pay this enhanced rate of interest if they were given three months time within which to pay up the whole amount due on the mortgage. The letters are, however, not clear as to the period within which they would be ready to pay the enhanced interest. They nowhere stated that they would pay the enhanced interest up to the last date when the principal and interest could be recovered under the deed of 26th February 1913.

The trial Judge has decreed the plaintiff-appellant's suit for the relief which he has claimed with the exception of the claim for enhanced interest. He has refused to award him interest at a higher rate than the rate stated in the deed It is against this portion of his judgment that the present appeal is preferred, We consider that the learned trial Judge has arrived at a right view. We note that the suit was a suit on the mortgage and that the only relief sought was as against the mortgaged property. No personal relief is sought in the plaint against any of the respondents. It is true that in the oral pleadings a personal relief was claimed and the learned trial Judge has rejected this claim on the ground that it was time barred. We consider that the claim was time barred, but we further consider that such a relief could not have been given on the pleadings themselves. The facts in this case are very similar to the facts in *Tika Ram* v. *Deputy Commissioner of Bara Banki* (1). There the facts were as follows: A certain taluqdar had executed three registered mortgages. At the same time he executed three written promises to pay a higher rate of interest. The mortgagees subsequently sued to recover out of the estate not only the interest stated in the deed but this higher interest. The Judicial Commissioner's Court on appeal refused to grant him this higher interest. He appealed to their Lordships of the Judicial Committee. Their Lordships stated at p. 100:

> " Their Lordships were asked to give the appellant a decree against the estate of the deceased Raja based on his personal liability under the rukkas The learned Commissioners expressed their opinion on the matter as if it were properly before them. But the truth is that this question was not raised in the plaint or referred to in the pleadings or issues. In their Lordships' opinion it was not competent for the Court in this suit to deal with it."

Here this relief was not raised in the plaint. It was raised in the oral pleadings and issues. But the fact that it was raised in the oral pleadings and issues does not in our opinion differentiate the case in such a manner as to justify us in considering such a relief. It is to be observed that the plaint merely asked for a relief against the property. In the oral pleadings there was a personal relief asked, not against the holders of the property together, but against certain of the holders in respect of a certain act. We wish to point out for the benefit of the Courts concerned that in our opinion they must look very closely as to the form that these plaints take Parties are too fond in Oudh of leaving these matters vague and then endeavouring to take advantage of their own carelessness by raising points subsequently which should have been cleared up when the pleadings were originally drafted. But in this case we are not determining the question against the appellant only upon the ground that such a relief could not be claimed in the suit but we are determining it also upon the merits. We dismiss this appeal with costs.

M.N./R K. *Appeal dismissed.*

(1) [1899] 26 Cal. 707=26 I. A. 97=3 C.W.N. 573=7 Sar. 520 (P.C.).

A. I. R. 1929 Oudh 305

WAZIR HASAN, AG.C.J., AND PULLAN, J.

Balbhaddar Singh—Plaintiff—Appellant.

v.

Shamsher Singh and *others* — Defendants—Respondents.

First Appeal No. 1 of 1928, Decided on 5th December 1928, from decree of Sub-Judge, Unao, D/- 28th November 1927.

(a) Hindu Law—Succession—Exclusion—Failure to conduct family business is not sign of insanity—*S*, when under observation, leaving hospital of his own will and taking part in funeral and marriage ceremonies—*S* is not lunatic although he may be eccentric and of weak intelligence.

The mere failure to conduct the family business is not a sign of insanity, and a man, who was never placed under restraint, who left the hospital, when under observation, of his own will and who took part in the funeral ceremonies of his brother and the marriage ceremonies of his daughter, is not a lunatic although he may be eccentric and of weak intelligence. [P 307 C 1]

(b) Family settlement—Family settlement need not be embodied in formal registered document—Registration Act S. 17.

It is not necessary that a family settlement should be embodied in a formal registered document. It is sufficient that members of the family should agree among themselves to make a settlement and give effect to such agreement: *A. I. R.* 1927 *Oudh* 97, *Rel. on.*; 35 *All.* 502 and 22 *O. C.* 300, *Ref.* [P 308 C 1]

(c) Family settlement — Parties agreeing not to dispute each other's claims—Active contest is not necessary.

Although at the time when a family settlement is made there was no active contest, still the mere fact that at that time the parties agreed among themselves that they would not dispute each other's claims in respect of certain property is sufficient to establish the fact that a valid and binding family settlement took place between them. *A. I. R.* 1927 *Oudh* 572, *Expl.* [P 308 C 1, 2]

Hyder Husein, *K. P. Misra* and *Ali Zaheer*—for Appellant.

M. Wasim, *Khaliq-uz-zaman*, *Bisheshar Nath*, *Bishambhar Nath*, *Ali Mohammad*, *Syed Mohammad*, *S. M. Ahmad* and *H. N. Das*—for Respondents.

Judgment—This is an appeal by the plaintiff Thakur Balbhaddar Singh whose suit for possession of certain zamindari property has been dismissed by the Subordinate Judge of Unao. The plaintiff claims that he obtained his title to the property by means of a sale-deed executed in his favour on 28th September 1926, by Chandrika Singh and Raja Singh, the sons of one Gokul Singh deceased, and Mt. Ram Dei, the widow of Jagannath Singh who was the brother of Gokul Singh. The property which these persons are said to have transferred in favour of the plaintiff was, first of all, half of the zamindari share formerly belonging to one Narpat Singh, who died in the year 1896 and whose widow Basant Kuar held the estate as a Hindu widow until her death on 16th December 1920, and, secondly a similar half-share which belonged formerly to Jaswant Singh, nephew of the said Narpat Singh, who died in 1911 and was succeeded by his widow Mt. Pohkar Kuar, who died on 7th December 1924. The plaintiff's claim to these two properties has been contested on different grounds, and for the sake of convenience we shall deal first of all with the case of Narpat Singh's property.

When Basant Kuar died on 16th December 1920 there were three reversioners in equal degree, namely, Sitla Bakhsh Singh, Gokul Singh and Jagannath Singh. Mt. Basant Kuar appears to have intended to make some disposition in favour of Mt. Pohkar Kuar and the latter claimed mutation in the revenue Courts. Her application was contested by Gokul Singh, Jagannath Singh and Sahmsher Singh, who was the son of Sitla Bakhsh Singh, all of whom claimed that the property on Mt. Basant Kuar's death was divided half and half between Sitla Bakhsh Singh on the one side and Gokul Singh and Jagannath Singh on the other. On the same day that these applications were made, namely, 20th January 1921, Mt. Pohkar Kuar made a further application stating that she had now learnt that she was not a legal heir to the property and prayed that her application for mutation of names might be dismissed and mutation made in favour of Gokul Singh, Jagannath Singh and Sitla Bakhsh Singh, whom she described as *nasamajh* under the guardianship of his own son Shamsher Singh. Then on 4th February, Mt. Menda Kuar, the widow of Raghuraj Singh, brother of Sitla Bakhsh Singh, also made an application to the effect that she had no objection to the entry being made in favour of Sitla Bakhsh Singh in respect of the property left by the deceased Mt. Basant Kuar. There was thus no one left who could have any claim to this property except those who had expressed their agreement

in mutation being made in favour of Sitla Bakhsh Singh, Gokul Singh and Jagannath Singh. On 19th February the Tahsildar passed orders dividing the property in two halves, one-half going to Sitla Bakhsh Singh, lunatic, under the guardianship of his son Shamsher Singh, and the other half going to Gokul Singh and Jagannath Singh in equal shares This order was confirmed by the Assistant Collector on 27th April 1921, and entries were made in the revenue papers accordingly.

The plaintiff sets up his claim to the property, which was assigned in the mutation proceedings to Sitla Bakhsh Singh, on the ground that Sitla Bakhsh Singh was a lunatic and, therefore, debarred by Hindu law from inheritance and that the property left on the death of Basant Kuar devolved solely on the two nearer reversioners Gokul Singh and Jagannath Singh, and the heirs of Gokul Singh and Jagannath Singh were, therefore, entitled to sell to the plaintiff the half-share of the property which had been wrongly mutated in the name of Sitla Bakhsh Singh He also claimed that even if Sitla Bakhsh Singh was not held to be disqualified from inheritance on the ground of insanity he was under the Hindu law entitled only to one-third of the estate and not one-half, inheritance being per capita and not per stirpes

The plaintiff had at the outset to establish, first, that Sitla Bakhsh Singh was insane, and secondly that his insanity was such as to preclude him from inheritance under the Hindu law: and even if he were able to make good these two points he had to meet the defence that there had been a valid family settlement of the estate at the time of mutation.

The main proof that Sitla Bakhsh Singh was insane, is to be found in numerous documents in which he is described either as *nasamajh*, which means wanting in intelligence, or *falir-ul-aql*, which is an Arabic word having a similar meaning, but which is used as a technical expression for insane There is no evidence that Sitla Bakhsh Singh was ever treated as insane until the year 1909 On 9th July 1909, Shamsher Singh made an application to the District Judge of Hardoi (Ex. 38, p. 72) in which he asked that he should be made guardian of the property of his father Sitla Bakhsh Singh on the ground that he had been a lunatic for seven or eight years and was incompetent to do the zamindari affairs. This application was unsuccessful because the attempt to have Sitla Bakhsh Singh declared insane by the Civil Surgeon failed. There is on the record a document (Ex 43, p. 75) which shows that he was under observation in the District Hospital for 14 days He arrived on 3rd August and went away again on the 5th and he was brought back on the 8th and left on the 19th: apparently the Doctor was unable to give an opinion as to his insanity at the end of that time Despite the failure of the application Shamsher Singh from that time onward constituted himself the guardian of his father and signed documents on his behalf as guardian On one occasion his second son Raushan Singh acted in a similar capacity. There is also the evidence that Sitla Bakhsh Singh was described in the same manner by Pohkar Kuar and Menda Kuar as well as by Gokul Singh and Jagannath Singh and it does not appear that from 1909 until his death he acted for himself in any matter of business.

There is also oral evidence intended to show that Sitla Bakhsh Singh was a lunatic. The plaintiff Balbhaddar Singh is the only person who says that Sitla Bakhsh Singh had to be kept under restraint, and as his statement is entirely unsupported by other evidence it has been properly disregarded by his own counsel The evidence which appears to be more or less reliable is that he was in the habit of using as many as twenty or twenty-five gharas of water for his bath, that he was careless in his dress allowing one-half of his dhoti to trail on the ground, and that he was surly and refused to speak to people. It is also alleged, and it may be true, that he used to abuse and beat his wife, but unfortunately this cannot be regarded as any proof of insanity We have considered carefully all the evidence produced by the plaintiff and we are not satisfied that the peculiarities of this man amount to proofs of madness. He was certainly eccentric and we have statement of Gokul Singh, the father of the plaintiff's vendors, made on oath on 18th September 1924 in which he stated that he had always seen Sitla Bakhsh Singh not to be in his proper senses and this condition had lasted for the last 30 years, which would take us

back to the year 1894. At the same time he admitted that Sitla Bakhsh Singh performed the funeral ceremonies of his brother Raghuraj Singh and also performed the marriages of his own daughters. Later in cross-examination he toned down the statement : but even so he admitted that Sitla Bakhsh Singh arranged for the seating of the guests at the marriage of his daughter Secondly, we have before us the explanation of Shamsher Singh as to why Sitla Bakhsh Singh should have been treated as a lunatic after the year 1909 whereas his condition then was no different from what it had been according to Gokul Singh, in the year 1894, and according to Shamsher Singh in the year 1901. The reason was that on the death of Raguraj Singh, brother of Sitla Bakhsh Singh, the present plaintiff approached Mt. Menda Kuar, widow of Raghuraj Singh, and attempted to make her regard him as taluqdar of her property. Sitla Bakhsh Singh refused to interfere and as he would not go into Court his son determined to act for him and with this end in view sought for appointment as his guardian. This statement of Shamsher Singh is borne out by the documentary evidence. He made his application on 9th July 1909, and on 26th July 1909 Mt. Menda Kuar executed an agreement in favour of Balbhaddar Singh admitting his taluqdari right. This document is Ex. A-10 p. 76, Part 3 and there is the statement of Balbhaddar Singh himself (Ex. A-9 p. 79, Part 3) dated 8th September 1909, in which he deposes that such an agreement had been executed giving him 10 per cent taluqdari dues.

In our view this was a sufficient reason for the sons of Sitla Bakhsh Singh to exaggerate their father's mental condition in order to obtain a right to manage the affairs of the family. We are unable to hold that mere failure to conduct the family business is a sign of insanity and we do not consider that a man, who was never placed under restraint, who left the hospital, when under observation, of his own will, and who took part in those ceremonies which are of vital importance among Hindus, namely, the funeral ceremonies of a brother and the marriage ceremonies of a daughter, was a lunatic He may have been a man of weak intellect and he was certainly eccentric, but we doubt that the evidence justifies us in concluding that he was more than this.

We need not consider how far the Hindu law excludes from inheritance a person, who has not been born insane but who is insane at the time when inheritance opens. Admittedly the insanity, if any, of Sitla Bakhsh Singh was not congenital, but we are not prepared to find that he was insane at all, and we prefer therefore not to enter into the discussion of the meaning of the texts on which this theory of the exclusion of lunatics from inheritance under Hindu law is based.

We now turn to the question of the extent to which Sitla Bakhsh Singh inherited. According to the plaintiff he could only inherit under the Hindu law one-third of the property. No attempt has been made before us to establish a family custom which in this family prescribes that inheritance shall be per stripes and not per capita The defence set up is that the matter was decided by a valid family settlement. We have already stated the main elements of the settlement. They are to be seen in the vairous applications made at the time of mutation after the death of Basant Kuar On that occasion there can be no doubt that the parties, who were concerned in the inheritance, all acted in combination The applications made by Jagannath Singh, Gokul Singh and Shamsher Singh are practically identical and must have been drafted together. Moreover they were all filed on the same date, namely, 20th January 1921, as was the application of Pohkar Kuar admitting their claim and withdrawing her own All these documents are on the record beginning with the application of Mt. Pohkar Kuar on p. 109 and ending with the Assistant Collector's orders on pp. 132-133. It is also a matter worthy of notice that Mt Menda Kuar also was induced to agree to this mutation Thus all the members of the family, who had any interest in the property, agreed not only that mutation should be made in favour of the reversioners Sitla Bakhsh Singh, Gokul Singh and Jagannath Singh, but that the property should be divided into equal halves between Sitla Bakhsh Singh on the one side and Gokul Singh and Jagannath Singh on the other It is true that we have no record of a written agreement, no panchayet appears to have been called and there were no outside witnesses. But Shamsher Singh himself states that on the death of Basant Kuar

mutation was effected with respect to the property of Narpat Singh under a compromise between the parties, and although his statement was challenged at length in cross-examination we do not find that he was shaken in any way and in our opinion his statement may be taken in corroboration of the documentary evidence to which we have already referred. It is also not without significance that when the property of Jaswant Singh came to be settled after the death of Pohkar Kuar, when Sitla Bakhsh Singh was already dead, the sons of Sitla Bakhsh Singh were given by compromise one-half just as their father had received one-half after the death of Basant Kuar.

It is not necessary that a family settlement should be embodied in a formal registered document. It is sufficient that members of the family should agree among themselves to make a settlement and give effect to such agreement A Single Judge of this Court in *Tej Bahadur Khan* v. *Nakho Khan* (1) went so far as to find that it was not even necessary for all members of the family to be parties to a family arrangement in order to make it valid and binding, and in his judgment he quoted *Kokla* v *Piari Lal* (2) and *Gandharp Singh* v. *Nirmal Singh* (3), in his support. Again in a very recent case decided by a Bench, of which one of us was a member—*Mahabir* v *Dwarka* (4)—it was held that the essence of a family arrangement lies in an adjustment of conflicting claims bona fide made and recognized on both sides with the object of putting an end to a controversy It is argued on behalf of the plaintiff-appellant that there was no controversy here as between Sitla Bakhsh Singh on the one side and Gokul Singh and Jagannath Singh on the other, but a controversy may be something less than an active contest. It is enough if a settlement seeks to lay down once for all a position which will avoid possible litigation in the future. There was here a possible ground of litigation. Indeed the question then settled between the parties is in litigation now, and the mere fact that at that time the parties agreed among themselves that they would not dispute each other's claims in respect to this property is sufficient in our opinion to establish the fact that a valid and binding family settlement took place among them.

We find therefore in the first place that Sitla Bakhsh Singh was not insane in the sense that he was a mad man debarred by Hindu law from inheritance, and in the second place we find that all members of the family on the death of Basant Kuar entered into a family arrangement of a binding character by which the property of Narpat Singh was divided among the reversioners in two portions, one portion going to Sitla Bakhsh Singh and other to Gokul Singh and Jagannath Singh. This being so, the share of Sitla Bakhsh Singh devolved upon his sons and the sale-deed executed by the heirs of Gokul Singh and Jagannath Singh in favour of the plaintiff in respect of the share of Sitla Bakhsh Singh is of no effect, and the plaintiff's suit in regard to this portion of the property has been rightly dismissed.

As to the property which formerly belonged to Jaswant Singh we need say very little. The learned counsel for the plaintiff-appellant after briefly stating the facts admitted that in his opinion he had no sufficient ground for challenging the finding of the lower Court with respect to this property. We find that in that case there was a definite and formal family settlement and furthermore the plaintiff's claim was vitiated by the doctrine of lis pendens. We find therefore that the plaintiff's claim as to this portion of the property also has been rightly dismissed.

A cross-objection has been filed by the defendant-respondent 9 on question of costs. He points out that pleader's fee has been taxed in the lower Court on a valuation of Rs 6,600 whereas the lower Court held definitely that the value of the property for purposes of taxation was Rs. 29,000. This objection has not been contested before us and we accept it. The fees in this Court and in the Court below will be calculated on the valuation of Rs. 29,000 instead of the valuation of Rs 6,600

A second cross-objection has been filed on behalf of respondents 1 to 3 but this has not been pressed. As to the third cross-objection, which has been filed on behalf of respondent 11, we have only to say that there is now no contest between

(1) A. I. R. 1927 Oudh 97.
(2) [1913] 35 All. 502=21 I. C. 29=11 A.L J. 765.
(3) [1919] 22 O.C. 300=54 I. C. 325=6 O.L.J. 529.
(4) A. I. R. 1927 Oudh 572=2 Luck. 662.

this respondent and the appellant. He won his suit in the lower Court and he has no status here to obtain a decision by this Court on a side issue which is not before us in appeal. We therefore dismiss this appeal with costs and allow the cross-objection made by defendant-respondent 9 as to the calculation of costs and dismiss the other two cross-objections. There is no order as to costs on the cross-objections.

S.N./R K *Appeal dismissed.*

A. I. R. 1929 Oudh 309

NANAVUTTY AND MISRA, JJ.

Hasan Bibi and *another*—Appellants.

v

Chitto and *others*—Respondents.

Execution of Decree Appeal No 15 of 1928, Decided on 24th August 1928, against the order of Sub-Judge, Gonda, D/- 18th February 1928

Civil P. C., S. 47 — Application by decree-holder sub-mortgagee to execution Court for withdrawal of mortgage money in redemption suit is an application for execution and order passed thereon is appealable.

A mortgaged with possession land in favour of *B & C*. *B* subsequently sub-mortgaged his half share in the mortgagee rights to *X*. *X* obtained a decree for sale of the half share in the mortgagee rights of *B* and the decree was made absolute. Prior to this decree being made absolute *M*, successor-in-title to *A*, obtained a decree for redemption against the heirs of the original mortgagees *B & C*. *X* was not impleaded in the suit for redemption. After *M* deposited the decretal amount in Court for redemption of the mortgaged property, *X* applied for withdrawal of half share of the same but the application was rejected with direction that *X* should bring a declaratory suit, which he eventually brought but which failed on the ground that it was not maintainable in law. *X* again applied to the execution Court praying that his name be substituted in the redemption suit as defendant and that the amount due to *B* on his half share in the mortgage money be paid to him. The Sub-Judge allowed the application holding that though it could not be maintained under O. 22, R. 10, Civil P. C., the sub-mortgagee was entitled to receive the money under S. 134, T. P. Act. On an appeal against this order:

Held. that the application by the sub-mortgagee to the execution Court, praying for withdrawal of money deposited by the mortgagor in the redemption suit against the mortgagee, could be treated as an application for execution of his original decree and that the order passed thereon was appealable. [P 310 C 1]

K. N. Tendon—for Appellants.

Ali Jawad—for Respondents.

Judgment.—This is an appeal arising out of execution proceedings. The facts of the case are complicated and we should like to state them in detail.

On 31st October 1901 one Autar Gir mortgaged with possession 94 bighas 12 biswas of land situate in village Gaurgumari, district Gonda in favour of Abdul Jabbar and Yar Ali Khan. On 4th July 1908 Abdul Jabbar sub-mortgaged his half share in the mortgagee rights under the aforesaid mortgage to Gaya and Bandhu, the ancestors of the respondents, for Rs. 1,000 On 6th May 1920 Gaya and Sindhu, the brother and legal representative of Bandhu the original mortgagee, obtained a decree for sale of the half share in the mortgagee rights possessed by Abdul Jabbar. On 25th February 1921 the decree was made absolute Prior to the decree being made absolute one Sheo Saran Gir, successor-in-title to Autar Gir, obtained a decree for redemption of the mortgage of 1901, against the heirs of the original mortgagees. The sub-mortgagees were not, however, impleaded as defendants in that suit A final decree for sale was passed in the redemption suit on 28th April 1925. It appears that on 6th May 1925 a sum of Rs. 13,840-9 0 was deposited by the decree-holder Sheo Saran Gir for redemption of the mortgaged property. On 9th May 1925 the present respondents applied that the half share in the mortgage money belonging to Abdul Jabbar be paid to them as they were his representatives having obtained a decree on the basis of a mortgage executed by him. On 12th December 1925 the application was dismissed by the execution Court with a direction that the respondents should bring a declaratory suit in order to establish their title. The respondents instituted a declaratory suit but it was dismissed on 27th May 1927 on the ground that no such declaratory suit was maintainable in law. On 30th August 1927 the respondents again applied to the execution Court praying that their names may be substitued in the redemption suit as defendants under O. 22, R. 10, Civil P. C. and that the amount of money due to Abdul Jabbar on account of his half share in the mortgage money should be paid to them since they were entitled lo the extent of Rs. 5,163-12-7.

The Subordinate Judge has allowed this application. He has held that

though the application made by the respondents could not be maintained under O. 22, R 10, Civil P C yet they were entitled to receive the money under S. 134, T. P. Act, (Act IV of 1882) This order was passed by the Subordinate Judge on 18th February 1928. It is against this order that this appeal has been lodged.

A preliminary objection was taken on behalf of the respondents that no appeal lies. We are not, however, inclined to entertain this objection on the ground which will appear from our judgment which will follow later, and from which it will appear that we are going to treat the present application filed by the respondents on the 30th August 1927 as an application for execution and in that view of the case the order in question would be one passed between a decree-holder and judgment-debtor on the excution side We now proceed to give our reasons why we consider that the application for withdrawal of the money presented by the respondents to the Court of the Subordinate Judge of Gonda on the 30th August 1927, can well be treated as an application for execution.

We have examined the execution record and it appears to us that after the respondents obtained their decree absolute on 25th February 1921 they applied for execution on 15th February 1922. The application, it appears from the file, was for bringing on the record the heirs of Abdul Jabbar who had died in the meanwhile The second application for execution was filed on 19th January 1925, amply well within limitation. It appears that that application was, on grounds which it is not necessary to state here, dismissed on 12th December 1925 The right of the respondents to execute their decree as will appear from the dates given above will be available to them till the expiry of three years reckoned from 19th January 1925. Their present application for withdrawal of the money is dated 30th August 1927 In order to do justice to the parties in this case we are inclined to treat this application as an application for execution of their original decree dated 25th February 1921 We will state the reasons which have induced us to take this view. It would be clear from the facts given by us above that the mortgaged property which consisted of mortgagee rights has now taken the shape of actual cash deposited in the Court of the Subordinate Judge on 6th May 1925 The decree-holders respondents cannot now sell those mortgagee rights because they have now been substituted by the cash money. Instead of selling these rights they can now sell the money which was deposited by the successor of the original mortgagor in order to redeem the mortgaged property. It is evident that the money in deposit in the Court cannot be sold and an application for withdrawal of that money can be treated virtually as an application for sale of that very money. We take this view in order that the decree-holders respondents may be in a position to treat this application dated 30th August 1927 which is an application for withdrawal of the money as virtually an application for execution of the decree

It was urged on behalf of the appellants that this was not the view taken by the decree-holders themselves of the application filed by them in the Court below. We are fully aware of the fact that this is so We have only allowed the decree-holdere to take this position here in order that we may be able to do justice in the case and that the appellants may not be able to deprive the decree-holders of their just rights

The dates given above will show that the application dated 30th August 1927 is amply well within limitation. It was urged that there was no proof on the record that the decree-holders respondents filed an application for execution on 15th February 1922. We are not, however, willing to entertain this objection. We have looked into the record ourselves and it appears to us to be clear from the report of the ahlmad that there was a previous execution case and it was on the report of the ahlmad that there was a previous execution case and it was on the report of the ahlmad that this date was substitued by the decree-holder in his application for execution of the decree presented on 19th January 1925, the date previously entered in that application having been found to be a wrong one. We have therefore fully satisfied ourselves that there is no question of present application dated 30th August 1927 being considered in any way time barred.

We might state here that in the view which we have taken of the application dated 30th August 1927 it is not neces-

sary for us that we should decide the question as to whether the application filed by the decree-holders respondents can be treated or not as a good application under S 134, T. P. Act (Act IV of 1882). It is unnecessary for us to do so and we therefore leave the point undecided.

We therefore confirm the order passed by the learned Subordinate Judge but in view of the fact that the decree-holders did not present this view of the case before the learned Subordinate Judge, we direct that the parties shall bear their own costs regarding this application both here and in the Court below

K.N./R.K. *Appeal dismissed.*

A. I R 1929 Oudh 311

WAZIR HASAN, AG. C. J., AND RAZA, J

Narsingh Partab Bahadur Singh—Plaintiff—Appellant

v.

Mamman Jan—Defendant — Respondent.

Second Appeal No. 364 of 1928, Decided on 5th April 1929, against decree of Dist Judge, Rae Bareli, D/- 23rd August 1928.

Limitation Act, Art. 116—Land transferred by registered deed in lieu of maintenance—Transferee required to make certain payments—Acceptance implied in deed of transfer though in unilateral document—Such deed is complete contract within Art. 116.

Certain lands were transferred, by a registered deed in writing in favour of a person for life in lieu of maintenance and he was made to bear the liability of certain payments.

Held that the deed of transfer contained an implied acceptance of the transferee to make the payment though it was in a unilateral document and such deed was a complete contract in writing between the transferrer and the transferee within the meaning of Art. 116 : 19 *Mad* 52; 25 *Mad.* 50, 35 *Cal.* 683, 20 *C. W. N.* 408; *A I. R* 1925 *Bom* 440, *Rel on.*: 26 *All.* 138, 34 *All.* 464 ; *A I R.* 1916 *P. C.* 182 , 9 *Bom. L. R* 667, *Ref. In re New Eberhardt Co.*; 43 *Ch. D.* 118 *Cons.*

[P 313 C 1]

M. Wasim—for Appellant.

Ali Zaheer and *P N. Chaudhary*—for Respondent.

Judgment. — This is the plaintiff's appeal from the decree of the District Judge of Rae Bareli, dated 23rd August 1928, modifying the decree of the Additional Subordinate Judge of the same place, dated 8th May 1928.

The facts of the case are as follows: Under a deed of 23rd December 1920, the plaintiff's predecessor-in-interest transferred certain lands, proprietary and under-proprietary, in favour of the defendant. Having regard to the events which have happened, the defendant was to hold the transferred property for her life in lieu of maintenance The transferee, that is the defendant, was to bear the liability of payment of a sum of Rs 164-15-6 and a further sum of Rs 10 annually to the transferrer or his successor-in-interest, that is the plaintiff. The deed of transfer describes the former amount as "malguzari sarkari" (Government revenue) and the latter as "lagan matahti" (under-proprietary rent) The claim out of which this appeal arises, was laid for the recovery of the sums of money just now mentioned for the years 1328 to 1334 fasli. The claim was resisted on various grounds but we are concerned with only one of such grounds and that is as to whether any portion of the claim in suit is barred by time. The Court of first instance answered the question in the negative but on appeal by the defendant the learned District Judge of Rae Bareli has held that three years' rule of limitation applied to the case and that consequently the claim for the years 1328, 1329 and 1330 fasli was barred by limitation.

Another question, which seems to have been discussed in the Courts below, was as to whether the plaintiff's claim was cognizible by the civil Court or by the Court of revenue. The Court of first instance expressed the opinion that it was cognizable by the former Court The view of the learned District Judge on this question does not appear to us to be quite clear. Be that as it may, it was not argued before us that the suit was not cognizable by the civil Court. The abstract question of the conflict of jurisdiction is of no consequence because in either case the appeal from the judgment of the Court of first instance would lie to the District Judge but it may be of importance as affecting the decision on the point of limitation According to S. 129, Oudh Rent Act 1886, all suits under that Act, except as otherwise provided therein, shall be instituted within one year from the date of the accrual of the cause of action. It was, however, not disputed before us that the limitation for the suit

out of which this appeal arises, is to be found in the provisions of the Limitation Act, 1908. The argument on behalf of the plaintiff is that Art. 116 and not exclusively Art. 110, Lim. Act, which presumably is the article under which the lower appellate Court has held the present suit to fall, is applicable, and in support of the argument reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Tricomdas Coverji* v *Gopinath Jiu* (1). If this argument is accepted the decree of the Court of first instance must be restored.

Article 116 is as follows:

"For compensation for the breach of a contract in writing registered : six years, when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases."

The deed of transfer, to which reference has already been made and on the terms of which the title to the claim in question rests, is a "writing registered." The argument advanced by Mr. Ali Zaheer on behalf of the respondent is that there is no "contract" in this case and in support of the argument the learned counsel relies on a decision of Sir Lawrence Jenkins, Chief Justice of the Bombay High Court, in the case of *Apaji Bapuji* v. *Nilkantha Annaji* (2), and upon a decision of the Court of appeal in England *In re New Eberhardt Co.* (3), referred to by Sir Lawrence Jenkins in the above mentioned case.

As to the Privy Council case cited by Mr. Wasim, counsel for the plaintiff-appellant, Mr. Ali Zaheer distinguishes it on the ground that in that case the lease on which the suit was founded was effected by two registered documents: (1) a mokurari kabuliyat executed by the lessee and (2) a patta executed by the lessor and thus there was a complete contract in writing between the parties of that case while in the present case there is only a unilateral document evidencing a grant by the donor in favour of the donee and the acceptance of the grant by the latter is not shown by any writing but merely by conduct. We think that on the bare question as to whether the decision of their Lordships of the Judicial Committee covers the case before us or not the argument of Mr Ali Zaheer is weighty but it appears to us that the interpretation placed on the language of Art. 116 by several High Courts in India turns the balance in favour of Mr. Wasim's argument and in the absence of a decision of their Lordships of the Judicial Committee directly bearing on the arguments advanced by Mr. Ali Zaheer we think we should adopt the same interpretation. In the English case of *New Eberhardt Co.* (3), mentioned above the question decided by the Court of appeal was the interpretation of the words "contract duly made in writing" occurring in S 25, Company's Act of 1867 (30 and 31 Victoria, Chap. 131), which is as follows:

"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

To bring into relief the view taken by the Court of appeal we propose to quote some portions from the judgments of Bowen, L J , and Fry, L. J. Bowen, L J., said:

"It is an offer duly made in writing,and only an offer, till it is accepted, and it was filed while it was an offer only. The offer being something short of the contract, it was not a complete contract when it was filed. It is true that it did turn afterwards into a contract when it was accepted, but it did not turn into a contract, I think, which was duly made in writing, because the offer only was made in writing, and it certainly did not turn into a contract which had been made in writing at the date when the document was filed, and it only became a contract long after the document was filed. It is obvious, therefore, that, unless we are to fritter away the section by putting a forced construction upon it, the section has not been complied with."

Fry, L. J., said:

". . . . the contract must be made in writing, by which I understand that both parties to the contract must signify their assent to the terms of it in writing, and that without going beyond the writing you can see the existence of the contract between the contracting parties. That is the ground on which it appears to me that we cannot convert this into a contract satisfying the language used by reason of the subsequent acceptance of its terms by some of the persons making the contract."

We now come to the cases decided in

(1) A. I. R. 1916 P. C. 182=44 Cal. 759=44 I. A. 65 (P.C.).
(2) [1901] 3 Bom. L. R. 667.
(3) [1890] 43 Ch. D. 118=59 L. J. Ch. 73=1 Meg. 441=38 W. R. 97=62 L. T. 801.

India. In *Ambalavana Pandaram* v. *Vaguran* (4), the claim was for the recovery of arrears of rent on a document which was signed by the tenant only. The Court held:

"In our opinion a contract which has in fact been registered is no less a contract in writing registered within the meaning of Art. 116 because it bears the signature of only one of the parties in the absence of any statutory provision requiring the signature of "both parties."

To the same effect is the decision in the cases of *Kotappa* v. *Vellur Zamindar* (5). These cases were accepted as laying down good law in *Girish Chandra Das* v *Kunja Behari Malo* (6), which was followed in *Chaliphoo* v. *Banga Behari Sen* (7). In the Bombay High Court the same view seems to have been taken by implication in the case of *Ganapa Putta* v. *Hammad Saiba* (8). As against the above cases the learned counsel for the respondent has placed before us the cases of *Ram Narain* v *Kamta Singh* (9) and *Jaggi Lal* v *Sri Ram* (10). Both these cases unquestionably support the argument of the learned counsel.

Having regard to the system of conveyancing prevailing in this country and particularly in the province of Oudh we are of opinion that the deed of transfer in question must be treated as evidencing a complete contract in writing between the transferrer and the transferee. It not only purports to make a transfer of immovable property mentioned therein on the part of the transferrer but it also contains the implied acceptance of the liability of the transferee to pay the annual rent to the transferrer. The acceptance though contained in a unilateral document is really and in essence the acceptance made by the transferee. We, therefore, allow this appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with costs in all Courts.

P.N./R.K. *Appeal allowed.*

(4) [1896] 19 Mad. 52=5 M.L.J. 228.
(5) [1902] 25 Mad. 50.
(6) [1908] 35 Cal. 683=12 C.W.N. 628=9 C. L. J. 1.
(7) [1916] 20 C. W. N. 408=41 I. C. 394=22 C.L.J. 311.
(8) A. I. R. 1925 Bom. 440=49 Bom. 596.
(9) [1904] 26 All. 138.
(10) [1912] 34 All. 464=16 I. C. 146=10 A. L. J. 1.

A. I. R. 1929 Oudh 313

RAZA, J.

Muhammad Sher Khan—Defendant—Appellant.

v.

Lal Bahadur Khan and *another*—Plaintiffs—Respondents.

Second Appeal No. 433 of 1928, Decided on 23rd March 1929, against order of 1st Sub-Judge, Kheri, D/- 31st October 1928

(a) Pre-emption—Title acquired by purchaser after cause of action for pre-emption arose may be urged in defence in such suit.

A purchaser may use a title acquired by him subsequently to the origin of the cause of action for a pre emption suit as a defence against such a suit instituted after acquisition of the said title. 11 *O. C.* 290; 12 *O. C.* 229, 14 *O. C.* 156, 3 *O. L. J.* 309; 20 *O. C.* 160, 17 *O.* C. 242 and 26 *All.* 389, *Rel. on.* [P 314 C 1]

(b) Oudh Laws Act (18 of 1876), S. 9—S. 9 is applicable even where two or more persons are equally entitled to buy property and one or more of them has or have acquired it.

Section 9 is applicable not only where there are persons equally entitled to buy a property and the property has been sold to a stranger, or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt. but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it: 13 *O. C.* 260, *Ref.* [P 314 C 2]

Ghulam Hasan—for Appellant.

Daya Kishen Seth—for Respondents.

Judgment—This is a defendant's appeal arising out of a pre emption suit. Munne Khan (defendant 2) sold plot 384 ('63 in area) in patti Gobere Khan in Thok Hasan Khan in village Raipur in the District Kheri, to Muhammad Sher Khan (defendant 1) for Rs. 200 on 7th December 1926. There is an under-proprietary chak of mahal called chak Airi in village Raipur The said chak has a "thok" called "thok Hasan Khan" which is sub-divided into three pattis, namely (1) patti Amir Khan; (2) patti Gobere Khan and (3) patti Newaz Khan. Lal Bahadur Khan pre-emptor (plaintiff) is a cosharer of patti Newaz Khan. Munne Khan vendor (defendant 2) is a cosharer of patti Gobere Khan. Thus the pre-emptor and the vendor are cosharers of "thok Hasan Khan," in Chak Airi, in village Raipur. Muhammad Sher Khan vendee (defendant 1) is the superior proprietor of village Raipur. On 1st De-

cember 1927, Muhammad Sher Khan (defendant 1) purchased 1·35 acres of under-proprietary area in patti Amir Khan from one Mt Zad Bibi: see Ex. A-1. Thus he also became a cosharer of thok Hasan Khan in chak Airi in village Raipur. Lal Bahadur Khan brought the present suit to enforce his right of pre-emption on 7th December 1927. Thus the suit was brought six days after Muhammad Sher Khan had purchased the under-proprietary area mentioned above from Zad Bibi.

The claim was resisted by the defendants on various grounds. Defendant 1 Muhammad Sher Khan, who is the principal defendant in this case, set up under-preprietary rights on the strength of the sale-deed dated 1st December 1927 (Ex A-1). This is the plea with which we are concerned in this appeal This plea was rejected by the lower Courts and the result was that the plaintiff's claim was decreed with costs. Muhammad Sher Khan (defendant 1) has now come to this Court in second appeal The appellant's learned counsel has confined his arguments to one point only He contends that defendant 1 may use as a defence the title which he (defendant 1) acquired after his purchase but before the suit for pre-emption was brought against him I think this contention is well founded and must prevail. It is well settled that a purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a pre-emption suit instituted after acquisition of the said title: see *Tahawar Khan* v. *Madho Ram* (1) referred to in *Amir Hasan* v *Mt. Sardar Begam* (2); *Sheo Charan Singh* v *Bhikai* (3), *Durga Singh* v *Gayga Singh* (4) and *Lalta Prasad* v *Raghubar Singh* (5); see also *Onkar Singh* v *Bhagwan Das* (6) and *Ram Hit Singh* v. *Narain Rai* (7) I should like to note that defendant 1's rights under Ex A-1 have become perfect and are now unassailable. Thus the vendor and the pre-emptor have become persons equally entitled to purchase the property in dispute before the case is finally disposed of.

The last clause of S. 9, Oudh Laws Act (Act 18 of 1876) is applicable not only where there are persons equally entitled to buy a property and the property has been sold to a stranger or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt, but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it: see *Mahabir Prasad* v. *Ram Jivan Lal* (8). Now lots must be cast under S. 9, Oudh Laws Act, in order to determine which of them (vendor and pre-emptor) shall exercise the right to buy the property in dispute Hence I allow the appeal and setting aside the decree of the lower appellate Court remand the case to that Court with directions to re-admit the appeal under its original number in the register and to dispose of it according to law. The question as to who is entitled to the property should be decided by drawing lots. Costs will abide the result.

P. N./R K. *Appeal allowed.*

(1) [1908] 11 O. C. 290.
(2) [1909] 12 O. C. 223=3 I. C. 516.
(3) [1911] 14 O. C. 156=11 I. C. 532.
(4) [1916] 3 O. L. J. 307=36 I. C. 55.
(5) [1917] 20 O. C. 16=41 I. C. 9=4 O.L.J. 459.
(6) [1914] 17 O. C. 242=25 I. C. 694.
(7) [1904] 26 All. 339=1 A. L. J. 20)=(1904) A W. N. 68.
(8) [1910] 13 O. C. 260=8 I. C. 272.

A. I R. 1929 Oudh 314

RAZA, J.

Mahomed Sher Khan—Plaintiff — Appellant.

v.

Kunwar and *another* — Defendants—Respondents.

Second Appeal No. 226 of 1928, Decided on 18th October 1928, against decree of First Sub Judge, Kheri, D/- 14th May 1928.

(a) Landlord and Tenant — Abadi — Non-tenant residents do not make village a non-agricultural village.

A village in which such persons as silversmiths, Jogis, Julahas and Telis reside besides the tenants does not cease to be an agricultural village for that reason. [P 315 C 1]

(b) Landlord and Tenant— Tenant ceasing to be tenant but allowed to remain in house—Tenant gifting the house—Transfer by tenant is not permitted—Transferee acquires no right and can be ejected as trespasser by landlord.

According to the general custom prevalent in the United Provinces of Agra and Oudh a person, agriculturist or agricultural tenant, who is allowed by a zemindar to build a house for his occupation in the abadi, obtains, if there

is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the abadi occupying under the zemindari he has, unless he has obtained by special grant from the zemindar, no interest which he can sell by a private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood work of the house. [P 315 C 2]

Where a tenant who had ceased to be one but was allowed to continue in the occupation of a house in the village makes a gift of the house with the site, the zemindar owner is entitled to recover possession of the site, the right of ownership embracing within it the right of possession. The transfer is illegal and invalid as against the landlord as it is tantamount to a complete abandonment on the part of the donor of whatever interest he had either in the house or in the occupation of it, in favour of the donee. 20 *All.* 248; *A. I. R.* 1915 *Oudh* 262; *A. I. R.* 1927 *Oudh* 482, *Ref.* [P 315 C 2]

Ghulam Hasan—for Appellant.

Bhagwati Nath—for Respondents

Judgment.—This is an appeal from a decree of the First Subordinate Judge, Kheri, dated 14th May 1928, affirming a decree of the Munsif, Kheri, dated 22nd November 1927. The dispute in this case relates to a house in the abadi of village Raipur in the District of Kheri. The plaintiff is the taluqdar of Raipur. The defendants are his ryots. Defendant 1 Kunwar, who is potter by caste, has transferred the house in suit to defendant 2 Gokaran Prasad, by a shankalapnama (deed of gift) dated 4th February 1926. The present suit was brought by the plaintiff for possession of the house. The claim was resisted by the defendants on various grounds. The defence was accepted by the lower Courts and the result was that the plaintiff's suit was dismissed with costs The plaintiff, Muhammad Sher Khan has come to this Court in second appeal.

I think this appeal should be allowed. I am not prepared to agree with the learned Subordinate Judge that Raipur is not an agricultural village though silversmiths, Jogis, Julahas and Telis also reside in the village. It cannot be said that a village in which such persons reside beside the tenants is not an agricultural village. It is admitted in this case that Kunwar was formerly a tenant. Though he ceased to be a tenant some years ago the taluqdar allowed him to occupy the house However, the taluqdar brought the present suit when Kunwar transferred the house to defendant 2 by the shankalapnama in question. It was for the defendants to show that the transfer in question was valid as against the taluqdar, but they have failed to do so. The transfer in question amounts to abandonment and I see no reason why the landlord should not be held entitled to possession of the house in suit.

According to the general custom prevalent in the United Provinces of Agra and Oudh a person, agriculturist or agricultural tenant, who is allowed by a zemindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the abadi occupying under the zemindari he has, unless he has obtained by special grant from the zemindar, no interest which he can sell by a private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. A tenant in the occupation of a house in the village has no right to sell the house with the site and the zemindar owner is entitled to recover possession of the site, the right of ownership embracing within it the right of possession. Such transfer is forbidden by the village custom and the transferee acquires no right under that transfer. His possession is that of a trespasser and the owner of the land is entitled to eject him: see *Sri Girdhariji Maharaj* v. *Chote Lal* (1); *Azmat-un-nissa* v. *Ganesh Parshad* (2). and *Mathura* v. *Udey Bhan Singh* (3). In my opinion the transfer in question is illegal and invalid as against the taluqdar and it is tantamount to a complete abandonment on the part of Kunwar defendant 1 of whatever interest he had either in the house or in the occupation of it, in favour of the donee, defendant 2 The transfer being illegal, the taluqdar is entitled to recover possession of the house. Hence I allow the appeal and setting aside the decree of the lower Courts give the plaintiff a decree for possession of the house in suit against the defendants. The plain-

(1) [1898] 20 All. 248=(1898) A. W. N. 27.
(2) A. I. R. 1925 Oudh 262=28 O. C. 119.
(3) A. I. R. 1927 Oudh 482=3 Luck. 107.

tiff will get his costs from the defendants in all the three Courts.

M.N./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 316

WAZIR HASAN AND MISRA, JJ.

Razia Begam and *another*—Plaintiffs—Appellants.

v.

Ishrat Ali and *another*—Defendants—Respondents.

Second Appeal No 413 of 1928, Decided on 23rd April 1929, against decree of Second Addl Dist. Judge, Lucknow.

(a) Civil P C., S. 100—Question of fact.

Question whether purchaser had notice of a charge on the property purchased is one of fact and binding on High Court in second appeal. [P 317 C 1]

(b) Transfer of Property Act, Ss. 39 and 40—Decree-holder-purchaser at Court sale, cannot avoid specific charge created by judgment-debtor on property purchased, on the ground of his being bona fide purchaser without notice.

Sections 39 and 40 deal with personal rights in cases where such rights do not arise out of a specific charge on immovable property. But where such a charge is created either by decree or by contract it follows by implication that it would bind the immovable property on which it rests even in the hands of a transferee for consideration and without notice. [P 318 C 1]

Hence a decree-holder purchasing property of his judgment debtor at an auction sale cannot avoid a specific charge created by the debtor on the property purchased on the ground of his being a bona fide purchaser without notice : *Cases discussed.* [P 319 C 2]

Ghulam Hasan—for Appellant.

Bisheshar Nath—for Respondent 2.

Judgment.—These two appeals arise respectively out of two suits disposed of by one judgment of the Subordinate Judge of Unao, dated 30th July 1927, confirmed by one judgment of the Second Additional District Judge of Lucknow at Unao, dated 18th August 1928. One suit (No. 6 of 1927) was brought by the plaintiffs-appellants Chaudhri Fateh Ali, Chaudhri Sitwat Ali and Chaudhri Muhammad Sultan and by the Deputy Commissioner of Hardoi as Manager of the Court of Wards, Kakrali estate, who is now respondent 4, against one Gobardhan Prasad and two other persons. The relief prayed for was a declaration to the effect that the two annas' zamindari share situate in village Adaura, District Unao, which had been purchased by the defendant-respondent, Gobardhan Prasad, in execution of his money decree against one Chaudhri Ishrat Ali was subject to a charge of Rs. 250 per annum on account of certain religious expenses laid by the award of the Deputy Commissioner of Hardoi, dated 30th June 1918. This award was made a rule of the Court and a decree was passed thereon on 22nd October 1918 A claim for Rs 730 for the said expenses which were due and had not been paid was also made in the suit.

The other suit (No. 109 of 1926) was brought by two ladies, Mt. Razia Begam and Mt. Shafiqunnisa, both daughters of one Chaudhri Nasrat Ali of Sandila, for a declaration that the said two annas share of the village Adaura, which had been purchased by Gobardhan Prasad, as already stated, was liable to a charge of Rs 360 annually in favour of the plaintiffs on account of their maintenance under the award dated 17th June 1921 delivered by one Khan Bahadur Amjad Ali of Hardoi since deceased. This award was also made a rule of Court and a decree passed on the basis thereof on 23rd June 1921 The plaintiffs also claimed a sum of Rs 692-11 ; Rs. 540 on account of arrears of maintenance and Rs 102-2 as interest on the said amount The case of the plaintiffs of both the suits, therefore, is that the liability for these sums of money is a charge upon the 2 annas share of village Adaura and that they were entitled to recover them by sale of the said share.

The main defence of Gobardhan Prasad is that these items were not charged upon the property and even if they were, the plaintiffs could not claim any relief against him because he had no notice of these charges and was a bona fide transferee for value The main questions for trial in the suits were whether the items in respect of which the plaintiffs claimed relief in the two suits were charged upon the two annas share of village Adaura purchased by the defendant, Gobardhan Prasad, and whether he had actual or constructive notice of those charges prior to his purchase ; and further if the former question is answered in the affirmative and the latter in the negative is the share released of the charge in the hands of the defendant ?

The learned Subordinate Judge of Unao held that the two items in respect of which the plaintiffs claimed relief were no doubt charged upon the aforesaid 2 annas share but the defendant had no notice of these charges at the time of his purchase and consequently the share in his hands was not liable to satisfy the charge. In this view of the case he dismissed both the suits. On appeal the learned Additional District Judge of Lucknow at Unao has upheld the findings of the learned Subordinate Judge and has, therefore, dismissed both the appeals. We have two second appeals before us. Appeal No. 411 of 1928 is in suit No. 6 of 1927 and Appeal No. 413 of 1928 is in suit No 109 of 1926 The questions which arise for decision before us are the same as arose in the Courts below.

Both the Courts below have found that the defendant is not proved to have had actual notice of these charges prior to the date of his purchase. We have been led through the evidence on the record in proof of the said notice and after going through it we have come to the conclusion that the finding arrived at by the lower appellate Court on this point cannot be disturbed. It is a finding of fact binding on this Court in second appeal and it has not been shown to be in any way vitiated by any error of law or procedure. We, therefore, confirm the finding and hold that the defendant had no actual notice of these charges at the time of his auction purchase. The concurrent finding of the Courts below that the liability in question amounted to a charge was not seriously disputed by the defendant before us and indeed on the construction of the two awards the finding is undoubtedly correct.

The last point, namely, whether the said share in the hands of the defendant is liable to satisfy the charges in respect of which relief is claimed by the plaintiffs in the two suits, is a difficult point We took time to consider our judgment and we now proceed to give it. The question of rights of transferees for valuable consideration will be found to be discussed in books of English Law under the subject of " Equity." Ashburner in Principles of Equity, Chap. 4 (edition 1902) says :

" Where relief in equity is sought in respect of a proprietary right, ... the right follows the property into whatever hands it passes, and is only lost where the person in possession of the property can shelter himself as a purchaser for valuable consideration without notice ..... It has long been settled that a judgment-creditor ..... is to be treated as a volunteer under the judgment-debtor."

The same question is dealt with in Halsbury's Laws of England (Vol. 13), S. 8, para. 87, p. 78. Para. 87 runs as follows :

" But the plea of purchase for value without notice still avails against a plaintiff who is not seeking to establish a claim to an equitable estate or interest but merely to enforce an equity, such as an equity to set aside a conveyance. Ordinarily an assignee takes subject to all equities to which the assignor was subject , and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity. But if he is a purchaser for value without notice, the equity cannot be asserted against him.....judgment or execution creditors take only what was vested in the debtor, hence they do not rank as purchasers, but take subject to prior equities. A vendor's lien appears to be not a mere equity, but an equitable estate, and it avails against the purchaser and persons claiming under him, whether as volunteers or for value, other than a subsequent purchaser who takes the legal estate without notice ; but the vendor may be postponed by his conduct."

In *Madell* v. *Thomas & Co.* (1) Key, L. J., observed as follows .

" Nothing is clearer than that on general principles.....an execution creditor would be bound by it just as much as the.....execution debtor himself.....An execution creditor is in privity with the execution debtor. He takes under the execution debtor not like a purchaser for valuable consideration, and it has been decided over and over again that he only takes what was vested in the execution debtor. Where property is subject to any rights by which it would be bound in the hands of the ....execution debtor nothing can be more clear as a general proposition than that it would be subject to such rights as against the execution creditor."

Under the English law, therefore, the execution creditor buys subject to the liabilities created by the judgment-debtor prior to the sale. This being so the question of notice is wholly immaterial. The principle of English law stated above does not appear to us to be founded on any technical rule or any peculiarity of that law. To us it appears that it rests on grounds of public convenience which are of universal application and should be followed by us as a rule of equity, justice and good conscience, unless we

(1) [1831] 1 Q. B. 230=60 L. J. Q. B. 227= 39 W. R. 280=64 L. T. 9.

find that its application is excluded by any rule of law of this country. So far as the statutory law is concerned we find no provision by the force of which a decree-holder purchasing property of his judgment-debtor at an auction sale can avoid a specific charge created by the debtor on the property purchased on the ground of his being a bona fide purchaser without notice.

In the course of the arguments Ss. 39 and 40, T. P. Act, 1882, were referred to. Textually those sections have no application to the present case. They both deal with personal rights in cases where such rights do not arise out of a specific charge on immovable property. But where such a charge is created it would seem to follow by implication that it would bind the immovable property on which it rests even in the hands of a transferee for consideration and without notice. In a case decided by Richards, J., and reported in *Maina* v. *Bachchi* (2), it was held that S. 39, T. P Act, had no application to a case where a suit had been previously brought for recovery of maintenance out of certain property and a decree had been passed incorporating therein a charge upon a particular property.

In a case decided by their Lordships of the Calcutta High Court (Ghosh and Rampini, JJ.) and reported in *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (3), the same view was taken. It was held that S. 39, T. P. Act, did not protect a transferee for consideration when the immovable property transferred had already been declared by a decree of Court subject to a charge of maintenance. In *Bhoje Mahadev Parab* v. *Ganga Bai* (4), the learned Judges of the Bombay High Court (Bachelor and Shah, JJ.) endorsed this proposition as will appear from the judgment of Bachelor, J. on p. 628, where the learned Judge remarked as follows :

"I am also of opinion under the authority of *Kuloda Prasad Chatterjee* v. *Jageshar Koer* (3), that the plaintiff's purchase was subject to the charge in favour of defendant 1 irrespective of the question whether the plaintiff had or had not notice of that charge."

In *Krishna Pattar* v. *Ramasami Pattar* (5), the learned Judges of the Madras High Court (Tyabji and Spencer, JJ) took the same opinion as will appear from the following passage, which is to be found on p. 56 :

"Had the decree been passed, and had the claim of the transferee arisen after the decree, it is clear that the transferee would have taken subject to the charge."

The case reported in *Kuloda Prosad Chatterjee* v *Jageshar Koer* (3), was quoted with approval.

In *Kallapa Ramappa* v. *Balwant Daso* (6), the learned Judges of the Bombay High Court (Sir Norman Macleod, Kt. C. J., and Mr. Justice Crump) took the view that in a case where the charge was created by a decree, the full proprietary rights in regard to the property transferred, which was ordinarily in the possession of the judgment-debtor, were reduced from full ownership to a limited ownership, and that if the ownership of the judgment-debtor was thus reduced the execution creditor could not acquire more than what was possessed by the judgment-debtor himself.

In *Srinivasa Raghava Aiyangar* v. *K R. Raganatha Aiyangar* (7), the learned Judges of the Madras High Court (Sadasiva Aiyar and Spencer, JJ) held that where there was a charge on immovable property to secure payment of a sum of money a purchaser of the immovable property although without notice of the charge, took it only subject to the charge. Mr. Justice Sadasiva Aiyar observed as follows :

"As regards S. 40 Act 4 of 1882, an obligor who executes a bond creating a charge on specific immovable property does, in my opinion, transfer an interest herein and the obligee is entitled to an interest in the property and not merely to the benefit of an obligation annexed to the obligor's ownership of immovable property within the meaning of S. 40, Act 4 of 1882. The obligation, contemplated in that section is a personal obligation correlative to a personal right in the obligee such as a right to obtain a mortgage-deed or a sale-deed (which deed it is that transfers the interest contracted to be transferred). The subsequent purchaser from a man who has already created a valid charge is as much bound by it as the creator himself on the same principle that the subsequent purchaser for valuable consideration from a simple mortgagor is bound by the mortgage, the question of actual notice to him being immaterial."

In *Mahadeo Prasad* v. *Anandi Lal* (8),

(2) [1906] 28 All. 655=3 A. L. J. 551=(1906) A. W. N. 165.
(3) [1900] 27 Cal. 194.
(4) [1913] 37 Bom. 621=21 I. C. 54=15 Bom. L. R. 809.
(5) [1914] 16 M. L. T. 551=25 I. C. 759.
(6) A. I. R. 1925 Bom. 343.
(7) [1919] 36 M. L. J. 618=51 I. C. 989=25 M. L. T. 347.
(8) A. I. R. 1925 All. 60=47 All. 90.

the learned Judges of the Allahabad High Court (Daniels and Neave, JJ.) held that the position of a charge-holder under the Transfer of Property Act is stronger than that of a person holding a merely equitable charge under English law, and though there might be cases in which a mere equitable claim would not be enforced against bona fide transferees for value without notice, yet it was much too broad a proposition to state that in all cases where by act of parties or by operation of law immovable property of one person was made security for payment of money to another and the transaction did not amount to a mortgage, the security would not be enforced against such transferee.

On behalf of the respondents reliance was placed upon a decision of ours in *Hasan Baqar* v. *Sheo Narain Singh* (9). The question for decision in that case was whether the lien which the vendor had under S. 55 (4) (b), T. P. Act, as against the property sold for the whole or any portion of the purchase money could be enforced against a subsequent transferee for value and without notice of the said lien. It was held by us that this lien was only an equitable lien and could not therefore be enforced against a subsequent transferee for value and without notice.

Reliance was also placed on behalf of the respondents on two cases of the Calcutta High Court, *Royzuddi Sheik* v. *Kali Nath Mookerjee* (10) and *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (11); one case of the Allahabad High Court, *Gur Dayal Singh* v. *Karam Singh* (12) and one case of the late Court of the Judicial Commissioner of Oudh, *Lala Parbhu Dayal* v *Babban Lal* (13). In *Royzuddi Sheik* v. *Kali Nath Mookerjee* (10) the question for decision was whether an instrument, by which the payment of money is secured on land must be taken to create an interest in specific immovable property. Their Lordships on the interpretation of that document held that an instrument by which payment of money was secured on land, might be treated to create a charge but in order to create an interest in specific immovable property there must be a clear indication to that effect in the deed.

In *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (11) the question was whether a purchaser of a certain property at an auction sale could escape the liability of certain dues payable to the Municipal Board and it was held that the purchaser could not be considered to be a bona fide transferee for value since if he had made inquiries he would have ascertained that the municipal rates had not been paid and were in arrears. In *Gur Dayal Singh* v. *Karam Singh* (12) the question for decision was one of vendor's lien for unpaid purchase money. In *Lala Parbhu Dayal* v. *Babban Lal* (13) Mr. Lindsay, J. C. held on the interpretation of a particular will that although a charge had been created upon the property in respect of a certain maintenance, yet it did not amount to an interest in specific immovable property.

It will thus appear that there is a consensus of opinion in all the High Courts in this country that where the right is charged on a specific immovable property either by decree or by contract, the subsequent transferee though for valuable consideration and without notic takes it subject to that charge. We are therefore of opinion that the decree of the Court dated 23rd June 1921 passed on the award of 7th June 1921 in the one suit and the decree of the Court dated 22nd October 1918 passed on the award of 30th June 1918 in the other suit entitle the plaintiffs of the two suits to enforce their claims against the two annas share of the village of Adaura in the district of Unao now held by the defendant, Gobardhan Prasad The result is that we allow both these appeals, set aside the decrees of the Courts below and decree the reliefs prayed for in the two suits with a direction that the amount of the two decrees shall be paid by the defendant, Gobardhan Prasad, to the plaintiffs of the two suits respectively within three months of today. In the event of default the two annas' share of the village of Adaura shall be sold and the proceeds of the sale shall be utilized for the purpose of satisfying the two decrees. The defendant, Gobardhan Prasad, shall also pay

(9) A. I. R. 1926 Oudh. 81=1 Luck. 7.
(10) [1906] 33 Cal. 985=4 C. L. J. 219.
(11) [1915] 42 Cal. 625=21 C. L. J. 177=27 I.C. 261=19 C. W. N. 37.
(12) [1916] 38 All. 254=35 I.C. 289=14 A.L.J. 304.
(13) [1914] 1 O. L. J. 43=23 I. C. 867.

the costs of the plaintiffs in the two suits and shall bear his own costs in all the Courts.

S.N./R.K. *Decrees set aside.*

A. I. R. 1929 Oudh 320

PULLAN, J.

Rampal Singh—Plaintiff—Appellant.

v.

Ram Tawakkul and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No 302 of 1923, Decided on 8th November 1928, against decree of Sub-Judge, Partabgarh, D/- 17th May 1928.

Specific Relief Act, S. 41—Mortgage void ab initio—Heirs of mortgagor must return benefit obtained.

The heirs of a mortgagor cannot recover property mortgaged by a deed which is void ab initio without restoring to the mortgagee the benefit received : 11 *O. C.* 1, *Ref.* ; *A. I. R.* 1926 *Oudh.* 270, *Dist.* ; 33 *All.* 779, *Rel. on.* [P 320 C 2]

H D Chandra—for Appellant.

Ali Zaheer and *S. N. Srivastava*—for Respondents.

Judgment.—This appeal raises a single question of law, namely, whether the heirs of a mortgagor can recover property mortgaged by a deed which is void ab initio without restoring to the mortgagee the benefit received. The Court of first instance decided in favour of the plaintiffs and the lower appellate Court has found that they must pay the amount of the original mortgage before they can obtain possession. There is no authority of this Court or of the Court of the Judicial Commissioner of Oudh bearing directly upon this case though there are certain observations in the case of *Mata Din* v. *Ahmad Ali* (1) which support the view taken by the lower appellate Court. The case of *Dasrath* v. *Sandala* (2) is of a different nature. It is a case in which the mortgagee finding that his mortgage was void sued in a Court of Small Causes for a return of the consideration. In that case it was held that he was not entitled to recover the amount advanced on the void mortgage but only such sum as was due to him by separate transaction prior to the mortgage. The Allahabad High Court has laid down that a case of this kind is governed by the ordinary rule of equity, that he who seeks equity, must do equity, and that the mortgagor cannot come into Court and take back the property while he still retains the mortgage money in his own hands : see *Bahoran Upadhya* v. *Uttamgir* (3). This judgment followed several previous decisions of the same Court which were to the same effect and their Lordships particularly stated that the case of a mortgagee in similar circumstances seeking to recover possession from the mortgagor is different. The lower appellate Court considered that S. 65 of the Contract Act, applied to this case but this decision is not one which is free from controversy, as there is a conflict of authority as to whether S 65 refers to an agreement which is void ab initio in view of the fact that the words used are "when an agreement is discovered to be void or when a contract becomes void" In my opinion it is not necessary to apply the principles of the Contract Act, as the case is sufficiently governed by the rule of equity to which I have referred I cannot differentiate between the case when the mortgagor himself seeks to recover the property mortgaged from that in which the sons of the mortgagor after his death come forward with a similar plea. In a case of this kind the sons who are the heirs of their father are in the same position as their father They have received the benefit from the mortgage through him and they cannot recover possession of the property without returning that benefit to the mortgagee. I accept the view taken by the lower appellate Court and dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

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(1) [1908] 11 O. C. 1.
(2) A. I. R. 1926 Oudh. 270.
(3) [1911] 33 All. 779=12 I. C. 112=8 A.L.J. 991.

A. I. R. 1929 Oudh 321 (1)

STUART, C. J., AND NANAVUTTY, J.

Hemnath and *others*—Plaintiff—Appellants.

v.

Wilayat Ahmad and *others*—Defendents—Respondents.

First Appeal No. 59 of 1928, Decided on 24th-April 1928, against the decree of the Sub-Judge, Sitapur, D/- 6th January 1928.

Court-fees Act, S. 7 (v)—Suit by mortgagee for possession of mortgage property is not governed by S. 7 (v) but fee ought to be calculated on principal money secured by mortgage according to principles of Court-Fees Act, S. 7 (ix).

A suit by a mortgagee to recover possession of the mortgaged property under the terms of the deed, cannot be governed by S. 7 (v) for it is not a suit for possession of land within the meaning of that section. But in such a suit Court-fee ought to be calculated according to the provisions of S. 7 (ix) i. e. on the principal money expressed to be secured according to the mortgage-deed. [P 321 C 1]

H D. Chandra—for Appellant.

Judgment.—The question that we have to decide is whether a plaintiff suing as a mortgagee for possession of mortgaged property should pay a Court-fee according to the money alleged to be due on the mortgage deed or according to five times the land revenue assessed on the mortgaged property. The Stamp Officer is of opinion that they should pay upon a valuation of the amount of money alleged to be due on the deed of mortgage. The Court-fees Act, 7 of 1870, does not expressly cover the case. The case does not fall in our opinion under the provisions of S. 7 Cl. (v), for it is not a suit for possession of land within the meaning of that section. That section is a section which covers suits for the proprietary possession of land Here the possession sought is not proprietary possession but possession as mortgagee in accordance with the alleged terms of a deed of mortgage and it will be open to the mortgagor to recover possession upon redemption of the mortgage. The case ought to be provided for under the provisions of S. 7 Cl. (ix)., but it is not explicitly provided for there. However the principles in that subsection are sufficient to indicate the rule to be applied. We find there that when a mortgagee brings a suit to foreclose a mortgage or where a person holding a mortgage by conditional sale applies to have the sale declared absolute the fee is to be calculated according to the principal money expressed to be secured by the instrument of mortgage. This is a suit by a mortgagee to recover possession under the terms of the deed of mortgage and in our opinion the Court-fee ought to be according to the principal of mortgage. That valuation is not as great as the valuation stated by the office. It is nine thousand rupees. We direct that the amount of Court-fee be calculated on that valuation in both Courts. After the office has prepared a statement of the amount now due the appellants will be allowed till 16th July 1928 to make up the deficit. No further extension will be granted in any circumstances.

S.N./R.K. *Ordered accordingly.*

* A I. R 1929 Oudh 321 (2)

RAZA, J.

Lale and *another*—Appellants.

v.

Emperor—Opposite Party

Criminal Appeals Nos. 49, 51, 52 and 53 of 1929, Decided on 18th March 1929, against order of Additional Sess. Judge, Gonda, D/- 20th November 1928.

*** (a) Evidence Act, S. 133—Evidence in corroboration of approver's evidence need not be direct.**

The evidence in corroboration of the approver's evidence need not be direct evidence showing that the accused have committed the crime It is sufficient if it is merely circumstantial evidence of their connexion with the crime : 1 *L. C.* 999, *Cons.* [P 326 C 1]

(b) Evidence Act, Ss. 114, Ill. (b) and 133—Rule of criminal law that accomplice is unworthy of credit unless corroborated in material particulars is not absolute.

The well-known rule of criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars, which is formulated in S. 114, Ill. (b), is not absolute as will be evident from S. 114 [as to Ill. (b)] and S. 133, but it is only in exceptional cases that the corroboration can be dispensed with: *A. I. R.* 1928 *Oudh* 430, *Cons.* [P 326 C 1]

(c) Penal Code, S. 401—For conviction under S. 401, it is not necessary that person convicted must have taken part in any particular theft or robbery.

It is not necessary for a conviction under S. 401 that the person convicted must have taken part in any one theft or robbery. Evidence showing the actual participation by an

accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 379 or S. 392 may yet be relied upon for the purpose of conviction under S. 401 : *A. I. R.* 1928 *Oudh* 430, *Rel. on.* [P 327 C 1]

(d) **Penal Code, S. 401—Scope—Penal Code, Ss. 379 and 392.**

A conviction under S. 401 cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 379 or 392. [P 327 C 1]

H. G. Walford—for Appellant.

G. H. Thomas—for the Crown.

Raza, J.—These four appeals arise out of a case under S. 401, I. P. C. Eight persons, namely, (1) Lale, (2) Sattar, (3) Surajdat Singh, (4) Sadho Saran, (5) Peru, (6) Bansraj Singh, (7) Ram Dat alias Khuddur and (8) Taluq Lal were sent up for trial. It was alleged that these eight men and Badal Chaubey (an absconder) and Badri Narain had formed a gang for committing thefts in the Balrampur town Badri Narain was made an approver. He is the uncle of Sadho Saran accused. Lale, Sattar, Surajdat Singh, Sadho Saran and Peru were convicted by the learned Additional Sessions Judge of Gonda on 20th November 1928. Lale, Sattar, Surajdat Singh and Sadho Saran were sentenced to four years rigorous imprisonment each. Peru, who is an ex-convict, was sentenced to five years rigorous imprisonment. The remaining three persons, namely, Bansraj Singh, Ramdat alias Khuddur and Taluq Lal were acquitted. Lale and Sattar have appealed through their counsel. Surajdat Singh, Sadho Saran and Peru have submitted their appeal from jail.

Surajdat Singh is related to Bansraj Singh accused. Both of them were employed as sepoys in the Estate Army and had their quarters in the Estate Army Lines. Sadho Saran is the son of a notorious thief, named Kanhai who is said to have left this province for Nepal. Peru is a resident of a village adjoining Balrampur. He was in the service of a prostitute who was a resident of Balrampur. Lale and Sattar are brothers. They are Faqirs by caste and both of them reside in Balrampur. They were known as petty general dealers. Balrampur is an important town in the Gonda District. It is a municipal town some 28 miles away from Gonda. It has a police station with two outposts. There are some important buildings in the town including the palaces of the Maharaja of Balrampur, the premier taluqdar of Oudh.

The case for the prosecution was that the ten persons named above had formed a gang for committing thefts in the Balrampur town, by the end of February 1927 and committed thefts there for about a year up to the middle of January 1928. The evidence on the record shows that 28 thefts were committed during the period mentioned above and there were also 11 attempts to commit thefts and three conspiracies The learned trial Judge found that 28 thefts were committed by this gang and the gang was also responsible for 11 attempts to commit thefts. The alleged conspiracies were not proved. The approver had joined 10 thefts and six attempts to commit thefts. Thus he took part in 16 occurrences out of the occurrences for which the gang was responsible.

This case originated under the following circumstances :

Mt. Budhni alias Gurhan was the mistress of Lale accused. She was living in a house in Mohulla Baluha in Balrampur Lale had rented the house for her and so she was living there. The Balrampur police had information about some of the accused persons assembling at the houses of Mt. Budhni and Badri Narain approver, but was not aware of the existence of any gang of thieves. The police came to know of the existence of an organized gang for committing thefts, when Badri Narain approver was arrested on 21st January 1923. A burglary was committed in the shop of Sita Ram's brother Lachhman Prasad, cloth seller in the Balrampur bazar on the night of 13-14th January 1928 at about 2 a. m. A large quantity of cloth worth about Rs. 800 was stolen away. Surajdat Singh and Sadho Saran were caught red-handed by the bazar people. They were found running away with a bundle of stolen cloth at a short distance from Lachhman Prasad's shop. They were brought to the shop and were then taken to the police station. The bundle of cloth which was recovered from them was found wrapped up in a jazim. It was also taken to the thana. Surajdat Singh and Sadho Saran were put in the thana lock up. The station officer, Musahib

Ali Khan then proceeded to search Sadho Saran's house and directed his second officer to search the house of Surajdat Singh. A military blanket and two iron mpilements which might be used as implements of house-breaking, were recovered from Sadho Saran's house. It was found that Surajdat Singh had left the blanket there on the previous night. The house of Sadho Saran's uncle, Badri Narain, was also searched, but no suspicious property relating to the theft under investigation was found there. One Ali Jan (an accused of the Utraula gang case and subsequently made an approver in that case) happened to be in the thana lock-up that day. Surajdat Singh and Sadho Saran and Ali Jan were kept in the same room of the lock-up and they passed the night there. This was skilfully arranged by the station officer Musahib Ali Khan. Next morning Ali Jan informed the station officer of the conversation which he had with Surajdat Singh and Sadho Saran in the lock-up at night. The station officer then questioned Surajdat Singh and Sadho Saran also about the talk which they had with Ali Jan. Thus he came to know that Badri Narain, Lale and Sattar also had taken part in the burglary which was committed in the shop of Lachhman Prasad. He found also a clue to the thefts committed at the shops of Lal Muhammad and Ram Bharosey. He came to know also that the bulk of the property which was stolen away from Lachhman Prasad's shop was taken to the house of Mt. Budhni alias Gurhan, the mistress of Lale accused.

The station officer then proceeded to search Mt Gurhan's house Her house was searched, but no suspicious articles were found there. The station officer made enquiries from her about the stolen property and thus came to know that she, Lale and Sattar had removed the property from her house to the house of her friend Mt. Najiban, wife of Munawwar Shah, brother of Gauhar Shah. Mt. Najiban's house was then searched and almost all the cloth stolen from Lachhman Prasad's shop was recovered from that house. Mt. Najiban and Mt. Gurhan both were arrested. Mt. Gurhan then unlocked her house and brought out some utensils which were also said to be stolen property. Surajdat Singh and Sadho Saran were then sent to Gonda and their confessional statements were recorded by Mr. Jilani, Magistrate, Gonda. Lale and Sattar were arrested on 16th January 1928 in the evening. The station officer Musahib Ali Khan went to Gonda on 21st January 1928 and met Badri Narain (approver) near the Sabzimandi and arrested him, as he was wanted in connexion with the cases of Lachhman Prasad, Lal Muhammad and Ram Bharosey. Badri Narain admitted that he had taken part in the thefts in question and offered to give information about other cases of theft committed by him and his associates. He named Surajdat Singh, Sadho Saran, Lale, Sattar, Peru, Taluq Lal, Khuddur and Badal as his associates and offered to verify, on the spot, his statement about the places where he and his associates had committed thefts. He offered also to deliver some stolen property kept by him, to help in the arrest of his associates and to point out the places where thefts were attempted to be committed. The Sub-Divisional Magistrate, after questioning Badri Narain about the facts mentioned in the reports submitted by the police, directed that he (Badri Narain) should go back into the police custody and appointed Dr. Tajammul Husain, an Honorary Magistrate of Balrampur, to go with Badri Narain to the places which were to be pointed out by him so that his statement might be verified. The places were pointed out by Badri Narain. Badri Narain's statement was recorded by the police. In this statement Badri Narain gave the details of the thefts which he had joined with the members of the gang. He also gave the names of the members of the gang joining each of the thefts. He gave some stolen articles to the police on 23rd January 1928. Peru, Taluq Lal and Khuddur were arrested on that date. Badri Narain gave some stolen property of different thefts on 25th January also. He informed the police on 26th January of some more thefts committed by his gang.

The station officer recorded further statement of Badri Narain on 29th January 1928 in the presence of the Circle Inspector, who was in charge of the investigation of this case. The date of the remand period expired on 30th January 1928. Badri Narain was sent to Gonda on that date. The Sub-Divisional Magistrate, Mr. Jilani, recorded the state-

ment of Badri Narain in the District Jail, Gonda, on 1st February 1928 after keeping him in the jail for two days. Bansraj Singh was then arrested on the information given by Badri Narain. This case was then registered at the thana on the report of the Circle Inspector, on 22nd February 1928. The accused was then sent up for trial. Thus this case came into existence.

Badri Narain, approver, is a Thather by caste. His elder brother was the notorious thief, Kanhai. His statement shows that thieves and men of bad character, including all the accused persons, except Bansraj, Sadho Saran and Badal, used to visit his brother Kanhai at their ancestral house in 1926. Badri Narain took another house on rent behind his ancestral house. When Kanhai was sent to jail in 1926, the accused persons named above did not come to the approver's house for about six months. Then they began to visit him just as they used to visit his brother Kanhai and asked him re join them in committing thefts in place of Kanhai. The approver agreed and eight men, namely, Lale, Sattar, Taluq Lal, Khuddur, Peru, Surajdat Singh, Badal and the approver himself formed a gang to commit thefts in Balrampur. Surajdat Singh and Lale were to find out places where thefts were to be committed. This gang committed the first theft ot the shop of Mathura, son of Domai, on 23rd March 1927. Bansraj and Sadho Saran also joined the gang four or five days after that theft. The approver gives a detailed account of all the thefts which were committed by him and the members of his gang. His evidence shows that the members of the gang had confidence in Lale and that generally the latter used to keep the stolen property in the house in which he was living with his mistress Mt. Gurhan. The stolen property was generally disposed of there. His evidence shows also that the members of the gang used to meet in batches mostly at the house of Mt. Gurhan for the purpose of consultation and planning out thefts. Sometimes they used to assemble for that purpose at the house or shop of Sadho Saran and also at the house occupied by the approver.

There is sufficient evidence on the record to show that the approver participated in the commission of the following thefts:

1. Thefts of the silver Chhattar at the Statue Hall.
2. Theft at the shop of Bachchu son of Nirhu Teli.
3. Theft at the house of Bachchu Halwai.
4. Theft at the shop of Bachcha Ram Teli.
5. Theft at the shop of Ram Bharosey Thather.
6. Theft at the shop of Lal Muhammad.
7. Theft at the shop of Lachhman Prasad.
8. Theft at the shop of Bhagwan Das Barai.

9 & 10. Thefts at Madhuri Saran's shop.

The approver participated also in the attempt to commit the following thefts:

1. Attempt to commit theft at the shop of Baijnath.
2. Attempt to commit theft at the shop of Chunni Lal.
3. Attempt to commit theft at the shop of Nikkamal Gaya Prasad.
4. Attempt to commit burglary at the shop of Hanuman Dass.
5. Attempt to commit theft at the shop of Hasan Ahmad
6. Attempt to commit theft at the private treasury of the Maharani Sahiba in Raj Mahal.

The statement of the approver about his joining these thefts and attempts to commit thefts is sufficiently corroborated by other evidence on the record. Ali Jan, P. W. 88, gives evidence about the conversation which Surajdat Singh and Sadho Saran had with him in the lock up at Balrampur police station on the date of their arrest in the case of the theft at the shop of Lachhman Prasad. The confessions made by Surajdat Singh and Sadho Saran before the Magistrate on 16th January 1928 (Exs. 101 and 102) are also on the record. They had named several members of the gang in their confessions. This evidence also corroborates the approver's statement about the gang to a certain extent.

The police had made searches and arrests in consequence of the confessions made by Surajdat Singh and Sadho Saran. The station officer searched the house of Mt. Gurhan, the mistress of Lale accused, but found no suspicious

articles there. In consequence of the information received from her he went to the house of Mt. Najiban, the friend of Mt. Gurhan. Mt. Gurhan herself took the station officer to the house of Mt. Najiban. Mt. Najiban's house was searched and almost all the stolen property of Lachhman Prasad's shop and also some articles relating to the theft committed at Lal Muhammad's shop, were recovered from her house. Mt. Gurhan then herself handed over some utensils including a gagra to the station officer. The gagra was subsequently identified as one of the utensils stolen away from the shop of Ram Bharosey Thather. Lale, Sattar, Surajdat Singh, Sadho Saran and Mt. Gurhan were sent up for trial in Lachhman Prasad's case. Lale, Sattar, Surajdat Singh and Sadho Saran were charged with and convicted of an offence under S. 457, I. P. C. Mt. Gurhan was charged with and convicted of an offence under S. 414, I. P. C. These persons appealed and the result was that the appellate Court upheld the convictions of Surajdat Singh, Lale, Sadho Saran and Mt. Gurhan, but acquitted Sattar. Badri Narain was examined as an approver in that case also. Mt. Najiban was not eventually prosecuted in that case but was examined as a witness for the prosecution. She has been examined as a witness in this case also. Her evidence shows that the cloth stolen from Lachhman Prasad's shop was brought to her house by Mt. Gurhan, Lale and Sattar. Mt. Gurhan had asked her to keep the bundles of cloth in her house as she (Mt. Gurhan) had to go to Gonda with a relation on that occasion.

Mt. Gurhan's evidence shows that Mt. Gurhan, Lale and Sattar had brought a number of bundles of cotton yarn also to her house on another occasion. Mt. Gurhan had asked Mt. Najiban to keep them saying that her own house was not safe. Those bundles were removed from Najiban's house after one or two days. She had brought certain other articles to Najiban's house on certain other occasions also. It appears that Mt. Najiban and Mt. Gurhan were friends and the latter had confidence in the former. Mt. Najiban's evidence shows that she did not know that the articles which were brought to her house from Mt. Gurhan's house were stolen property. The bundles of cloth which related to the theft committed at the shop of Lachhman Prasad were brought to her house by Mt. Gurhan, Lale and Sattar the next day after the theft early in the morning. Mt. Najiban's evidence on this point is fully corroborated by the evidence of Gauhar Shah (P. W. 97).

A silver chhattar was stolen away from the Statue Hall at Balrampur on 17th May 1927. The approver's evidence shows that this theft was also committed by his gang. He and some members of the gang melted the silver of the chhattar and took it for sale to Jasgar, P. W. 15 Idu, at first, expressed his willingness to purchase the silver, but ultimately refused to purchase it Idu's evidence shows that Surajdat Singh, Lale, Badri Narain, Peru, Sattar, Sadho Saran and others had gone to his house to sell the silver on that occasion. His evidence on this point is corroborated by the evidence of Bakridi, P. W. 26. Having regard to the nature and the bulk of the property which was stolen away from the shops of Mathura, son of Domai, Maduri Saran, Ram Bharosey Thather, Lal Muhammad and Lachhman Prasad and from the Statue Hall of the Balrampur estate, I think the learned trial Judge was perfectly right in coming to the conclusion that four or five men, at least, must have joined in committing these thefts.

It is also in evidence that since the arrest of the accused in this case there have been practically no thefts in the town

We have also sufficient evidence of association in this case. Specific association of various accused is satisfactorily proved regarding six thefts at least, namely, at Bachchu Teli's shop, at the shop of Hanuman Dass Marwari, at the house of Bachchu Halwai and at the shops of Ram Bharosey, Lal Muhammad and Lachhman Prasad. Some 52 witnesses give evidence about general association also and the learned trial Judge has relied on the evidence of some 27 witnesses. He did not think it safe to rely on the evidence of the remaining 25 witnesses.

After examining the evidence produced in this case, I am not prepared to disagree with the finding of the learned trial Judge that there was really a gang

of persons associated for the purpose of habitually committing thefts and that the evidence given by the approver is sufficiently corroborated by other evidence on record. The learned Judge has tried the case with great care and intelligence. He has gone into the evidence pains-takingly and intelligently. He has tested the witnesses strictly (in some instances, too strictly). He has applied his mind carefully to the principles of law also in trying this case. I should like to note that the evidence in corroboration of the approver's evidence need not be direct evidence showing that the accused have committed the crime. It is sufficient if it is merely circumstantial evidence of their connexion with the crime. As pointed out in the case of *Ram Prasad* v. *Emperor* (1) the evidence of accomplices is always admissible and is always relevant, but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connexion with the crime.

The well-known rule criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars, which is formulated in S. 114. Ill. (b), Evidence Act, is not absolute as will be evident from S. 114 (" as to Ill. (b) ") and S. 133, Evidence Act, but it is only in exceptional cases that the corroboration can be dispensed with. It was held in the case of *Khilawan* v. *Emperor* (2) that in a case where a man is tried on a charge of belonging to a gang of dacoits under S. 400 I. P. C., the evidence against a particular accused to prove that he took part in a certain dacoity when it is shown that he has already been tried on the charge of having committed that particular dacoity and has been acquitted, cannot be admitted, it being not a question of habit or association. Once a man has been acquitted on a charge of that nature, it is not open in a subsequent criminal prosecution to prove that he actually committed that offence. The case is of course different where the prosecution is endeavouring to establish an offence with which he was not charged in that case. For example, where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity known or having reason to believe that that property was stolen in a dacoity, it is open to the Crown to prove that he actually took part in the dacoity for the latter was not an offence of which he was acquitted. Even if he has been acquitted on a charge of dacoity it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of the dacoity. In criminal proceedings evidence that an accused person has a bad character is inadmissible unless evidence has been given that he has a good character, in which case it becomes admissible. But S. 54, Evidence Act, does not apply to cases in which the bad character of any person is itself a fact in issue If the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved aliunde the evidence of bad character is admissible. Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible aliunde, it should not be excluded. Here the provisions of S 14, Act 1 of 1872, have application. Such evidence is admissible, not as evidence of character but as evidence to prove habit and association.

The case before me is a case under S 401, I. P. C , but the principle of deci-

(1) A. I. R. 1927 Oudh 869=2 Luck. 631.

(2) A. I. R. 1928 Oudh 490.

sion must be the same as in a case under S 400, I. P. C. In my opinion it is not necessary for a conviction under S 401, I. P. C, that the person convicted must have taken part in any one theft or robbery. Evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association Evidence which though not believed for the purpose of a conviction under S. 379 or S 392, I P. C., may yet be relied upon for the purpose of conviction under S. 401, I P. C. A conviction under S. 401, I. P. C., cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 379 or 392, I. P C., I think the learned trial Judge has not ignored these principles of law in trying this case.

The learned counsel who has appeared for Lale and Sattar has contended that the approver's evidence is not reliable at all, as his confession was not recorded on the day on which he was arrested It is true that the confession was recorded several days after the approver's arrest but there are sufficient reasons for this delay. In the first place the Sub-Divisional Magistrate had directed in the remand order dated 21st January 1928 that the approver should be produced before him along with other accused on 30th January 1928. In the second place it was thought proper and safe that the statement should be verified by inspecting the places where thefts had been committed or attempted to be committed in Balrampur and the police also expected to receive some further information from him about the various thefts for which the gang was responsible. The learned counsel has contended also that it is strange that the police came to know of the gang only when the approver was arrested on 21st January 1928. I am not prepared to accept this contention also. The evidence on record shows that the thefts which were committed by the members of this gang were generally petty thefts The police of course did not know before the arrest of the approver that there was an organized gang for committing thefts. The mere fact that the police did not care to know before the arrest of the approver that there was an organized gang for committing thefts does not establish that there was never a gang as contended by the appellants' learned counsel. (Judgment then considered the evidence in the case of each appellant separately and concluded in each case that the appellant was rightly convicted and punished and that his appeal should be dismissed.)

S.N./R.K *Appeals dismissed.*

A. I. R. 1929 Oudh 327

STUART, C. J., AND MISRA, J.

Fateh Bahadur Singh—Plaintiff—Appellant.

v.

Nagendra Bahadur Singh—Defendant—Respondent.

First Appeal No 153 of 1927, Decided on 23rd August 1928, against decree of Sub-Judge, Partabgarh, D/- 21st September 1927.

Lease—Construction—Superior proprietor letting village from year to year and generation after generation—Lessees applying for decree for under-proprietary rights—Settlement Officer ordering that "their claim was dismissed but that they had secured their end"—Lessees not recorded as under-proprietors and not exercising such rights—Lessees had obtained no transferable right under the lease.

The taluqdar, having the superior proprietary rights, executed in favour of *K* and *D* a lease of a village which granted them the whole village from year to year and generation after generation (*naslan bad naslan*). *K* and *D* applied to the settlement Court for a decree that they were entitled to under proprietary rights and produced the lease before the Settlement Officer who ordered that "their claim was dismissed but that they had secured their end". They were never recorded as under-proprietors nor did they exercise their rights as such until the transfer in dispute was made.

Held: that no under-proprietary rights i. e. to say hereditary and transferable rights in the village were granted to *K* and *D*. The order of the Settlement Officer could only mean that such rights were refused to them. They had therefore no rights of transfer in the village: 14 *I. A.* 7 and *A. I. R* 1927 *Oudh* 74, *Dist.* [P 328 C 2]

H. Husain—for Appellant

Ganpat Sahai—for respondent

Judgment.—This is a plaintiff's appeal. The decision in the appeal will be solely on the question as to whether under-proprietary rights were conferred on Khanjan Singh and Dhaunkal Singh

in the years 1863-1864. It is established beyond doubt and it is admitted on both sides, that Mata Badal Singh and Dhunkal Singh applied in the year 1863 for under-proprietary rights in the Settlement Court in the Partabgarh District. On 15th December 1863 the taluqdar who had the superior proprietary rights executed in their favour a lease Ex 3 It would appear from the subsequent evidence that before he executed this lease he had executed a previous lease for which Ex 3 was substituted. Ex 3 is called a perpetual lease. It grants the whole of the village of Bhagesara from year to year and naslan bad naslan (generation after generation). The lessees agreed to pay a fixed rent to the taluqdar. This lease was produced before Mr. King, Settlement Officer, and he then passed an order on 15th January 1864 (Ex. A-3) as follows :

"To-day the plaintiffs produced the lease from which it appears that they have been granted a perpetual lease by the taluqdar generation after generation of the village on an annual jama of Rs. 401 with the exception of fifteen bighas jagir land, etc, Hanwant Lal, general agent of the taluqdar, has made an admission to the same effect. It is, therefore, ordered that in view of the application filed by the plaintiffs the case having been dismissed be consigned to the records. The Sadar Munsarim is to be directed to make entries in the survey papers accordingly."

On the same date Mr. King, Settlement Officer wrote Ex. A-5 .

"Parties present. The deed is reproduced with additions which are intended to secure the benefit of the lease to the plaintiffs' heirs and ancestors" (presumably means successors) for ever. The plaintiffs have thus secured their end and I dismiss their claim to an under-proprietorship by a decree that the plaintiffs' claim is rejected."

This is really all the evidence which we have in the matter. Khanjan Singh and Dhaunkal Singh were never at any time recorded as under-proprietors and there is no evidence to show that at any time did they or their successors attempt to exercise any rights as under-proprietors until their successors made the transfers which are challenged now. The learned trial Judge has found that there are no under-proprietary rights. The learned counsel for the appellant, who contests this finding, lays stress upon a decision of their Lordships of the Judicial Committee in *Thakur Harihar Bakhsh* v. *Thakur Uman Parshad* (1), where their Lordships at p. 16 (*of* 14 *I. A.*) have stated that they are unable to find any instance in which a gift with the words naslan bad naslan attached has been held to confer anything less than the absolute ownership. But the transaction here is not a gift, but a perpetual lease. Perpetual leases in no case confer proprietary title, and in many instances they have been found not to confer under-proprietary title. Reliance has also been placed on a decision of a Bench of this Court in *Sheo Bahadur Singh* v. *Bishunath Saran Singh* (2), where the Chief Judge, who was one of the Judges composing of the Bench, said that he accepted the view that where a man is proved to have hereditary rights and there is nothing to show that they are non-transferable they must be presumed to be transferable This, however, is not a case in which there is nothing to show that the rights were not transferable for the judgment of the Settlement Court itself shows that the rights were non-transferable. The case is clear. Khanjan Singh and Dhaunkal Singh had applied at the settlement Court for a decree that they were entitled to under-proprietary rights that is to say to hereditary and transferable rights in the village of Bhagesara The taluqdar, the owner of the village, granted them a perpetual lease which gave them hereditary rights. The settlement Court then declared that their suit was dismissed but that they had secured their end This can only mean, in our opinion that their claim for transferable rights was refused. There is no question of presumption remaining as the presumption has been effectively rebutted We accordingly dismiss this appeal with costs

S N./R.K. *Appeal dismissed.*

(1) (1887) 14 Cal. 296=14 I. A. 7=4 Sar. 766 (P.C.).

(2) A. I. R. 1927 Oudh 74=2 Luck. 4.

A. I. R. 1929 Oudh 328

RAZA AND PULLAN, JJ.

Jagatjit Singh—Plaintiff—Appellant.

v.

Mohammad Asghar Ali—Defendant—Respondent.

Second Appeal No. 242 of 1928, Decided on 1st February 1929, from decree of Addl. Dist. Judge. Gonda, D/- 2nd April 1928.

(a) Adverse possession — Talukdar is not required to prove actual user of jungle and waste land.

A taluqdar cannot be required to prove actual user of jungle and waste land and his possession is assumed until there is definite proof of ouster . 8 *O. C.* 177, *Foll.* [P 329 C 1, 2]

(b) Adverse possession—Every owner must be presumed to know boundary of his own land.

"Every owner must be presumed to know the boundary of his own land, and if he allows another person to cross that boundary and occupy an area of 25 acres, and plant thereon a number of trees, and forbid the owner's men to enter the land, and his possession extends for a period of over 12 years, a title will be obtained by adverse possession . 8 *O. C.* 177, *Dist.* [P 330 C 1]

Radha Krishna and *Ali Zahcer*—for Appellant.

Ghulam Hasan and *Muhammad Ayub* —for Respondent.

Judgment.—This second appeal arises from a dispute between the owners of the two adjoining villages in the District of Bahraich. The plaintiff is the owner of the village Shamshatarhar and the defendant is the owner of the village Gondni Bisahi. It is now found that the land in suit forms a portion of the village of Shamshatarhar, but that it has been in the possession of the defendant, for a long period of years The question which we have to decide is whether the defendant has obtained a title by adverse possession or not. The lower appellate Court decided in favour of the defendant and the plaintiff has appealed.

In appeal he is prepared to concede that the defendant is entitled to the trees which he has planted in this land, but he bases his appeal on the decision of the Judicial Commissioners of Oudh reported as *Thakur Sheo Narain Singh* v. *Bodal Singh* (1) where it was held that the mere planting of trees does not necessarily dispossess the owner of the land. That ruling however, is not altogether in favour of the present appellant. It goes on to say that "to dispossess the owner" the other party

"must assert clearly that he claims the right to hold possession as owner or his conduct must be such as to amount to an assertion of an intention to exclude the actual owner."

It is true that both in the ruling which we have cited and in many subsequent rulings of the Oudh Courts it has been held that a taluqdar cannot be required to prove actual user of jungle and waste land and his possession is assumed until there is definite proof of ouster. In this case the lower appellate Court has considered the ruling to which we have referred in *Thakur Sheo Narain Singh* v. *Bodal Singh* (1). He has clearly held that in the present case there is further proof of adverse possession over and above the plantings of trees. As it was not clear from the judgment what this further proof was, we have read the evidence of the witnesses to whom the learned Judge has referred as supporting the defendant's case. The facts that we find to have been proved are as follows:

Years ago the boundary between these two villages was lost. For at least 26 years the defendant has used the land on the west side of the pathway which runs between the two villages During this period he has planted some four hundred shisam trees and five hundred clumps of bamboos. In fact he has created what is virtually a small forest. Thus it is not a case where a man has planted a few isolated trees. He has made regular systematical plantation. In addition to this there is the oral evidence of three persons who were at one time in the service of the plaintiff and whose evidence has not been discredited by any questions put to them in cross-examination. The first of these is witness 14 Zamirul Hasan, who was a munsarim of the plaintiff's estate in the years 1913-1914. He found at that time not only that the defendant was in possession of the land lying to the west of the path, but that he employed two persons as rakhwalas who forbade access to the land to the servant of the plaintiff. He even went so far as to forbid the witness himself from cutting some bamboo shoots in order to determine the boundary. The two other witnesses were a ziladar's moharrir and a sipahi who deposes to the preceding year when a dispute arose because the defendant had impounded the cattle of the plaintiff's tenants for grazing in this area. On that occasion the matter was referred to the Tahsildar who found that the area on the west of the path actually belonged to the defendant and refused to take any action against him These assertions of the defendant's title were made more than 12 years before the suit was brought in

(1) [1905] 8 O. C. 177.

April 1926 In our opinion such action on the part of the defendant's conduct amounts to "an assertion of an intention to exclude the actual owner" It is not open to the plaintiff to say that he did not know where his own boundary was and so to maintain that the possession of the defendant could not be adverse Every owner must be presumed to know the boundary of his own land, and if he allows another person to cross that boundary and occupy an area of at least 25 acres, possibly more, and plant thereon a number of trees, and forbid the owner's men to enter the land, and this possession extends for a period of over 12 years, we must hold that a title has been obtained by adverse possession. Thus in the present case we find that the lower appellate Court came to a correct decision and we dismiss this appeal with costs.

S.N /R K. *Appeal dismissed.*

A. I. R. 1929 Oudh 330

STUART, C. J. AND RAZA, J.

Bhagwati Pershad—Appellant.

v.

Nandu Lal and *others* — Respondents.

First Appeal No 8 of 1928, Decided on 25th September 1928, against order of Assistant Collector, First Class, Kheri, D/- 17th October 1927

U. P. Land Revenue Act (3 of 1901), S. 111 —Objector's title admitted— Plea of previous partition does not raise question of proprietary title.

An assertion in an objection that there had been a previous private partition does not make the objection an objection involving a question of proprietary title where the title to the share of the objector is admitted 10 O. C. 204, *Ref.* [P 332 C 2]

Ram Bharose Lal and *Ram Das*—for Appellant.

J K. Tandon—for Respondents

Judgment —This is a defendant's appeal. The facts are as follows : Three members of the same family owned between them the whole of the village of Dilawalpur in the Kheri District and fourteen annas of the village of Saraiyan In the Kheri District. The remaining two annas in the Saraiyan village belonged to a distant relation called Gauri Shankar. In Dilawalpur Madho Ram had a share of eight annas which had been partitioned by a regular revenue partition and was designated as mahal Madho Ram The remainder of the village had been partitioned in the same manner and was designated as mahal Matapur. Mata Prasad held four annas in mahal Matapur and Durga Prasad held the remaining four annas. In Saraiyan, Madho Ram held ten annas, Mata Prasad held two annas, Durga Prasad held two annas and Gauri Shankar held two annas. Madho Ram had originally only eight annas and Mata Prasad and Durga Prasad had three annas each, but before 1898 Mata Prasad and Durga Prasad had each transferred one anna to Guman Singh. Guman Singh had transferred these shares to Madho Ram. Thus we have it that in 1898 Madho Ram had eight annas in Dilawalpur and ten annas in Saraiyan. On 8th April 1898, Mata Prasad and Durga Prasad transferred their shares in Saraiyan to Madho Ram Madho Ram in exchange transferred to them four annas and six pies in mahal Madho Ram in Dilawalpur. Subsequently Madho Ram acquired Gauri Shankar's two annas and became the owner of the whole of Saraiyan Mata Prasad and Durga Prasad subsequently transferred their shares of two annas and three pies each in mahal Madho Ram in Dilawalpur to certain persons who are parties to the suit. Madho Ram died and was succeeded by his son Bhagwati Prasad Nandu Lal, one of the transferees already mentioned, applied on 13th May 1927, to the revenue Court under the provisions of S. 107, Local Act 3 of 1901, for a partition of his share in accordance with the provisions of Chap. 7 of the Act. Other transferees subsequently claimed partition of their shares.

The proclamation required by S. 110 called on the other parties (including Bhagwati Prasad) to appear and state their objections on or before the 24th June 1927. Bhagwati Prasad appeared on that day and made an objection which he was permitted to formulate on 2nd July 1927. He formulated his objection on that date. This objection was in the main that no interference should be made with the arrangement arrived at in 1898 when his father had transferred four annas and six pies of his share in mahal Madho Ram, village Dilawalpur, to Mata Prasad and Durga Prasad.

The partition continued as provided by the provisions of the Chapter, the objection of Bhagwati Prasad being retained for decision by the Assistant Collector making the partition. On 17th October 1927, the Assistant Collector found that Bhagwati Prasad was the owner of a three annas six pies share in the mahal in question, but he found that he was not entitled to enforce any arrangement which had been made in 1898. The learned Assistant Collector, however, stated that Bhagwati Prasad should be first allotted the specific plots mentioned in the fard Ex. 7. Fard Ex. 7, contains the arrangements which were stated to have been made in 1898. At first sight it would appear that in these circumstances Bhagwati Prasad, who is the appellant before us, has no grievance and nothing to appeal against as the order could almost be read as complying exactly with his request. But his learned counsel has pointed out that it is possible that if the provisions of S. 117 be complied with exactly, deductions may be made from the lands held by tenants whose rents he is at present collecting alone.

This appeal has been filed to the Chief Court on the allegations the Bhagwati Prasad made an objection raising a question of proprietary title which had not already been determined by a Court of competent jurisdiction, that the learned Assistant Collector himself inquired into the merits of the objection and decided it, and that therefore, an appeal lies direct to the Chief Court under the provisions of S. 112 of the Act.

The learned counsel on the other side has argued that no appeal lies to the Chief Court as the objection of Bhagwati Prasad did not raise a question of proprietary title. In order to consider the force of this argument of the learned counsel for the respondent we have to look closely at the words of the objection of Bhagwati Prasad. Bhagwati Prasad stated in this objection that he was a cosharer to the extent of three annas and six pies in the village. No one has denied that fact. He is a cosharer to the extent of three annas and six pies, and he has been recorded as a sharer of three annas and six pies He continued that a partition had already been made of that share, and that the partition stood entered in the Government papers and then added the plea that a partition could not be made a second time. His main plea was, therefore, that the share of which he was admittedly the proprietor had already been partitioned in such a manner as precluded its subsequent partition. He added at the end of the application that Nandu Lal could not be entitled to a partition of the plots held by him as he had been for more than twelve years in sole possession and occupation of that share separately in the capacity of absolute proprietor. It is somewhat difficult to understand what exactly he meant by the last portion of this objection. He can hardly be held to set up that his title to the three annas six pies share was based upon adverse possession, for his title to the three annas and six pies was based on something much better than adverse possession, and was not questioned. The effect of the objection, as we understand it, was that as the property had already been partitioned once it could not be partitioned again. Is this an objection involving a question of proprietary title? We should have had no difficulty in deciding this matter, had it not been that the question has become to a certain extent complicated by certain decisions of their Lordships of the Allahabad High Court In the first of these decisions *Muhammad Jan* v. *Sadanand Pande* (1) in an application for partition before an Assistant Collector certain parties raised an objection that they were exclusively entitled to a portion of the land sought to be partitioned.

The Assistant Collector tried the question of title so raised under S. 113, Land Revenue Act—that section has not been materially altered now—and decided it in favour of the objectors. The applicants appealed to the Collector, who entertained the appeal. A subsequent appeal was taken both to the Commissioner and the Board of Revenue Before the partition proceedings were completed the unsuccessful objectors filed a suit in the civil Court praying for a declaration for a decree that the lands in question were their exclusive property. It was held that that suit was maintainable because it had been instituted before the comple-

(1) [1906] 28 All. 394=3 A. L. J. 43=(1906) A. W. N. 30.

tion of the partition proceedings. It may well be said that the decision in that case does not at first sight appear very material to the point before us, but we quote it as it was referred to in a subsequent decision of the Allahabad High Court In *Muhammad Nasar Ullah Khan* v. *Muhammad Ishaq Khan* (2) a Bench of the Allahabad High Court held that, when in a suit for partition of a revenue paying land one of the non-applicants alleged that under a private partition he was in possession of certain lands and claimed those lands for himself, and the Collector in appeal ordered those lands to be given to him, no question of proprietary title was thereby raised, and that no appeal lay to the District Judge against the order of the Collector The District Judge having considered that the decision in *Muhammad Jan* v. *Sadanand Pande* (1) afforded authority for the view that an appeal did lie to him, the Bench quoted that case as distinguishable. They quoted in support of their finding a decision in *Tulshi Rai* v. *Gate Ram Rai* (3). There it had been held that, where certain persons intervened in proceedings before a Court of Revenue for the imperfect partition of certain zamindari lands alleging an existing partition and taking exception to the method proposed for the division of the common lands, there was no question of proprietary title raised This decision was thus authority for the proposition that an assertion in an objection that there had been a previous private partition, did not make the objection an objection involving a question of proprietary title But we find that in a subsequent decision in *Ram Narain* v. *Jagannath Prasad* (4) a Bench arrived at a decision which appears to us inconsistent with the previous decision. No reference was made to the previous decision. At p 116 it is noted :

"Upon notice being issued to the recorded cosharers, the plaintiff Jagannath raised an objection to the effect that the village had already been privately partitioned, that a definite portion of it had been allotted to his share and that that portion could not be partitioned again. He thus raised a question of proprietary title."

Thus there is no clear authority in the Allahabad High Court upon the point. The opinions appear to be divided. We are not aware that this point has ever been directly raised before the Chief Court We find in the Judicial Commissioner's Court in *Ram Autar* v. *Thakur Jagannath Baksh Singh* (5) that the question was considered though not directly. Mr. Chamier at p 207 said :

"According to the finding of the lower appellate Court the parties agreed to recognize each other as the separate owners of the land allotted to them. It is clear enough that Government is not bound to take any notice of such a partition. But are the parties themselves bound by it in case one of them subsequently applied to the revenue Courts for a partition of the estate? I think not. The Land Revenue Act shows that a joint property must on partition be divided up according to the shares of the parties therein. In the present case I do not understand that the private partition was intended to alter the shares of the parties, it was merely an arrangement to prevent constant disputes about the profits. Such a partition holds good till a regular partition is effected but no longer."

This decision does not exactly touch the point before us. We have to consider without assistance from previous decisions what is the meaning of words "involving a question of proprietary title," in S. 111. We are quite clear as to Bhagwati Prasad's position. He owned a share of three annas and six pies. Nobody says he owned less He did not say he owned more. Nobody questions his title to that share. But his case was that the partition officer should not interfere with the allocation of land made between his father Mata Prasad and Durga Prasad in 1898. Does such an objection involve any question of proprietary title? We think not He went on to say, that the partition effected in 1898 was a final partition and good in law. It can be argued that it was not a final partition and good in law as it was not a partition under Chap. 7 which had become complete by confirmation of the Collector under the provisions of S. 131, Local Act 3 of 1901. In any circumstances this suggestion that this partition was good in law did not involve any question of proprietary title His plea that he should be permitted to retain certain land in his separate enjoyment also did not involve any question of proprietary title. In these circumstances we consider that the preliminary objec-

(2) [1910] 32 All. 523=6 I. C. 833=7 A. L. J. 558.
(3) [1904] A. W. N. 225.
(4) [1916] 38 All. 115=32 I. C. 184=14 A. L. J. 28.
(5) [1907] 10 O. C. 204.

tion prevails and that no appeal lies to this Court. We, therefore, dismiss this appeal with costs.

M.N /R K. *Appeal dismissed.*

A. I R. 1929 Oudh 333

SRIVASTAVA, J.

Sadhnoo—Appellant.

v.

Baiju and *another*—Respondents.

Second Rent Appeal No. 46 of 1928, Decided on 14th September 1928, against decree of Second Addl. Dist. Judge, Lucknow, D/- 20th April 1928.

(a) Oudh Rent Act, S. 127 — Landlord knowing tenant to be dead giving receipts in deceased tenant's name and entering defendant's name only as person making actual payment—Landlord did not wish to treat defendant as tenant — Landlord and Tenant.

The fact, that the landlord after knowing that the original tenant was dead, passes receipts only in the deceased tenant's name, and enters the name of the defendant only in the column headed "name of person actually making payment," strongly shows that the landlord did not intend to treat the defendant as tenant and so landlord's suit to eject defendant is not barred on account of such receipts 7 *C. W. N.* 132, *Rel. on* . 1 *Cal.* 391 (*P. C.*), *Dist.* [P 333C 2]

(b) Oudh Rent Act, S. 127—Scope.

Where a landlord, erroneously believing defendant to be deceased tenant's heir sues him for ejectment under S. 62, and issues notice to him of ejectment, no weight can be attached to his erroneous admission that defendant was deceased tenant's heir in a suit for ejectment under S. 127. [P 334 C 1]

R. B. Lal—for Appellant.

Radha Krishna—for Respondents.

Judgment.— This is a second rent appeal by the defendant who has been unsuccessful in both the Courts below. The appeal arises out of a suit for arrears of rent and ejectment under S. 127, Oudh Rent Act. The facts are that one Sukhnandan was a tenant of certain lands belonging to the plaintiffs. He died a few years ago and was succeeded by his widow, Mt. Jasoda. Mt. Jasoda also died about two years before the institution of the present suit.

It appears that on Mt Jasoda's death the defendant entered into the possession of the holding The defence raised to the plaintiff's claim for arrears of rent and ejectment under S 127, Oudh Rent Act, was that the defendant-appellant had been recognized as a tenant by the landlord and the suit under S 127, was, therefore, not maintainable, Both the lower Courts have rejected this plea of the defendant.

The learned counsel for the defendant-appellant has relied before me in support of the alleged recognition of the defendant as a tenant by the plaintiff landlord, firstly, upon their receipts for rent paid by the defendant; secondly, upon the plaint dated 30th March 1926, in a suit brought under S. 62, Oudh Rent Act, and, thirdly, on a notice of ejectment issued in 1926. The argument is that the facts of the landlord having accepted rent from the defendant, of his having instituted a suit for ejectment against him under S 62, on the ground of his having sublet the holding and of his issuing a notice of ejectment against the defendant show thet he recognized the defendant as a tenant. As regards the payment of rent, it is admitted that two of the receipts relate to payment of rent for years preceding the death of Mt. Jasoda. As regards the third receipt it relates to rent for the year in which Mt Jasoda died. It is important to note that in all these receipts the name of Sukhnandan is entered in the column headed "Name of tenant" and the name of the defendant appears only in the column headed "Name of person actually making payment" It is not denied that the landlord knew of the fact of Sukhnandan being dead when these receipts were issued by him. In my opinion, the fact that the receipts were given in the name of Sukhhandan, the deceased tenant, strongly shows that the landlord did not intend to treat the defendant as a tenant. The case is parallel to the case of *Rasamoy Purkait* v. *Srinath Moyra* (1) in which it was held that where the old tenant's name occurred in rent receipts under the heading "tenant's name" and the name of the purchaser from the tenant occurred under a different heading as sarbrakar, the landlord by those receips did not mean to recognize the purchaser as a tenant. The learned counsel for the defendant-appellant relied upon the decision of their Lordships of the Privy Council in *Ranee Sonet Koer* v. *Mirza Himmut*

(1) [1903] 7 C. W. N. 132.

Bahadoor (2). The facts of that case are quite distinguishable from the present case. It must depend upon the circumstances under which the rent was accepted whether the acceptance should be construed as an admission of tenancy or not.

Next as regards the suit under S 62, Oudh Rent Act, and the notice of ejectment in 1926. The plaint in the suit for ejectment leaves no room for doubt that it was brought against the defendant under the impression that he was the heir of Sukhnandan. Evidently the notice of ejectment was also issued on the same basis. The suit and the notice both were subsequently withdrawn. No value can, therefore, be attached to any inference which might have been possible to draw from these proceedings if they had not been withdrawn. In any case the only inference which could possibly be drawn from these proceedings was an inference about the defendant being the heir of Sukhnandan. It has been found by both the Courts below and is not denied by the defendant that he is not the legal heir of Sukhnandan in respect of the tenancy in question. The admission, therefore, was clearly an erroneous one and under the circumstances no weight can be attached to it.

For the above reasons, I agree with the lower appellate Court that the defendant-appellant cannot be considered to have been admitted to the tenancy by the landlord and the suit against him under S. 127, Oudh Rent Act, was properly maintainable. The appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(2) [1875] 1 Cal. 391=3 I. A. 92=25 W. R. 299=3 Sar. 608 (P. C.).

A. I. R. 1929 Oudh 334

MISRA, J.

Ramman Singh and *another*—Defendants—Appellants.

Dilla Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 108 of 1928, Decided on 8th November 1928, against decree of Sub-Judge, Hardoi, D/- 22nd December 1927.

(a) Arbitration—Parties cannot be allowed to show that arbitrator's award was wrong on merits.

The arbitrators are judges of both the questions of fact and of law and the parties cannot be allowed to show subsequently that their decision was wrong on the merits. [P 335 C 2]

(b) Oudh Rent Act (1886), S. 5—Division of occupancy holding among different persons claiming as heirs of deceased tenant cannot amount to transfer.

A 'transfer' in law must be deemed to imply a transfer by a person entitled to that property in favour of a person having no title otherwise. [P 336 C 1]

Where a holding is claimed by different heirs of a deceased occupancy tenant or where the occupancy tenure forms part of the property of a joint family or of co-tenants and a division takes place among such persons, it cannot be held that the transaction amounts to a transfer from one having a right in favour of one having no right at all: 33 *All.* 143, *Foll.*; 23 *All.* 383 (*P.C.*), *Dist.* [P 336 C 1]

A. P. Sen and *Naimullah*—for Appellants.

Ghulam Husain—for Respondents.

Judgment—This is an appeal in a declaratory suit, which was dismissed by the Munsif of Bilgram, but has been decreed in appeal by the Subordinate Judge, Hardoi The facts of the case are that one Chhutta Singh, resident of village Dabha, District Hardoi, was an occupancy tenant holding land measuring 8 bighas 5 biswas in occupancy tenure and a house and certain moveable property situate in that very village He died on 17th September 1925 After his death a dispute arose in respect of his property between the plaintiff-respondents, who alleged that they were his sons and the defendants-appellants, who alleged themselves to be his next heirs being his cousins. The appellants deny the legitimacy of the respondents. An application was made for mutation of names by both the parties in the revenue Court, which ordered mutation in favour of the appellants on 15th March 1926. Before the respondents could file an appeal the parties agreed to refer their whole dispute to the arbitration of two persons named Gulab Singh and Bakhtawar Singh both of Dabha. The agreement to refer their dispute to arbitration was executed on 22nd March 1926, (Ex. 2) and the arbitrators delivered their award (Ex. 3) on 24th March 1926. After the award both the parties applied to the revenue Court to the effect that their disputes had been set-

tled by the said arbitrators and they accepted the award and prayed for mutation of names to be effected in accordance with the award. This application was filed on 7th April 1926 (Ex. 1). On 2nd May 1926, the revenue Court rejected the application on the ground that the award of the arbitrators amounted to a transfer of an occupancy tenure and was, therefore, invalid and could not be given effect to. The plaintiffs-respondents thereupon instituted the present suit in which the present appeal has arisen on 1st March 1926, asking the Court to declare their title in respect of the property given to them by the arbitrators under their award dated 24th March 1926.

The suit was contested by the defendants-appellants on the ground that the plaintiffs were not legitimate sons of Chhutta Singh and the award of the arbitrators was invalid on the ground that it operated as transfer of an occupancy tenure which was invalid in law. The learned Munsif of Bilgram who tried the suit accepted the defence and held that the plaintiffs were not legitimate sons of Chhutta Singh and the award was invalid since it operated as a transfer of an occupancy tenure. He, however, was of opinion that the award was valid in other respects. In result he dismissed the plaintiffs' suit by his decree dated 6th August 1927. The plaintiffs took the matter further in appeal to the Subordinate Judge of Hardoi, who took a different view of the case. He has held that the award is good and operative and is binding upon the parties. In this view he allowed the appeal and decreed the plaintiffs-respondents' suit by his decree dated 22nd December 1927. The defendants-appellants have now appealed to this Court and the main point which has been argued in second appeal before me is that the award of the arbitrators should be deemed as invalid and inoperative on the ground that it can only be treated as a transfer of an occupancy tenure in favour of the plaintiffs-respondents who have been held to be illegitimates sons of Chhutta Singh. The case has been argued at great length before me and I have come to the conclusion that the judgment of the learned Subordinate Judge is correct and must be affirmed.

I now proceed to give my reasons for the same. It is clear from the facts stated above that the plaintiffs-respondents' claim to be the legitimate sons of Chhutta Singh and in that capacity put forward their claim to his occupancy holding in the revenue Court. The defendants-appellants denied their legitimacy and advanced their claim to the said holding on the ground that they were the next heirs of the deceased. The revenue Court accepted the objections filed by the defendants-appellants and allowed mutation in their favour. It is obvious that the finding of the revenue Court that the plaintiffs-respondents were not the legitimate sons of Chhutta Singh was not finding of a competent Court and could not be considered to be binding on the parties till the matter had been decided by civil Court. It is also clear that the plaintiffs-respondents wanted to appeal from that decision as would appear from the recitals of the agreement to refer the matter to arbitration.

It was in this stage that the matter had been referred to arbitration. The arbitrators decided to allot a major portion of the holding of Chhutta Singh to the plaintiffs-respondents and the remaining portion to the defendants-appellants who were his cousins. Although they did not state in their award that the plaintiffs-respondents are the legitimate sons of Chhutta Singh, yet it must be held that this was their implied finding otherwise they should not have allowed any portion of the land to the plaintiffs-respondents. The arbitrators were judges of both the questions of fact and of law and the parties cannot be allowed to show subsequently that their decision was wrong on the merits It is also clear from the facts that the award of the arbitrators was accepted by the parties as will appear from the application filed by both of them in the revenue Court on 7th April 1926 : vide Ex 1.

It, therefore, appears to me that the said award is binding upon the parties and in the face of it the defendants-appellants cannot be allowed to prove that the plaintiffs-respondents are not the legitimate sons of Chhutta Singh, and, therefore, not entitled to any portion of his property. The learned Munsif was, therefore, entirely wrong in taking up that question and in giving a finding thereon, contrary to one which was

to be implied from the award of the arbitrators. For the purpose of this case the plaintiffs-respondents must, therefore, be held to be the legitimate sons of Chhutta Singh and as such entitled to the portion of the occupancy tenure allotted to them by the arbitrators under their award dated 24th March 1926, (Ex. 3).

As to the next point, namely, that the award is bad in law on the ground that it must be deemed to be a transfer of an occupancy tenure I have come to the conclusion that this contention is not sound. My finding on point 1 which relates to the legitimacy of the plaintiffs-respondents takes away entirely the force of the contention now urged on behalf of the defendants-appellants. Even if it were not so I am not prepared to hold that an occupancy tenure in Oudh, which is non-transferable under S. 5, Oudh Rent Act 22 of 1886, cannot be divided or partitioned amongst the members of the family of a deceased occupancy tenant or amongst several persons who may claim to be the heirs of such a tenant. A division of such a tenure cannot be treated as a transfer. A 'transfer' in law must be deemed to imply a transfer by a person entitled to that property in favour of a person having no title otherwise. Such a transaction relating to an occupancy tenure must, therefore, be deemed to be inoperative. Where, however, the holding is claimed by different heirs of a deceased occupancy tenant or where the occupancy tenure forms part of the property of a joint family or of co-tenants and a division takes place among such persons, it cannot be held that the transaction amounts to a transfer from one having a right in favour of one having no right at all. In such a case all the persons must be deemed to have a right in the holding and when the parties divide it among themselves their action must be considered to refer to the right possessed by each party to whom the land has been allotted on division or partition

I am supported in this view by a decision of the Allahabad High Court reported as *Raghunath Kalwar* v. *Baladeen Kalwar* (1). It was held in that case that where the parties were joint tenants of a certain occupancy holding and disputes arose between them which were referred to an arbitration and the arbitrators partitioned the tenure, it could not be said that the agreement and the partition effected by the arbitrators were invalid in law. It may be as pointed out in that case, that such a partition or division may not be binding upon the landlord unless made with his consent, but it cannot be said that it is not binding among the joint tenants themselves.

On behalf of the appellants reliance was placed upon a ruling of their Lordships of the Privy Council reported as *Jafri Begam* v *Ali Raza* (2) It was pointed out that their Lordships of the Privy Council held in that case on p 392 that if the arbitrator in his award laid down a course of devolution in respect of the property which was the subject-matter in dispute different from the ordinary principles of Mahomedan Law such a course must be held to be invalid My attention was drawn to the remark of their Lordships that the property which was divisible in law could not be made by an arbitrator indivisible for ever. I am fully bound by this decision of their Lordships of the Privy Council, but I am of opinion that this case does not help the defendants-appellants. The award nowhere lays down anything which is contrary to law The division of an occupancy tenure between the two parties, both of whom claim it as heirs of the deceased, cannot be considered as shown by me above to be contrary to any principle of law. An occupancy tenure is certainly heritable though not transferable. I am, therefore, of opinion that this case can be no authority for holding that the award is invalid or inoperative. The appeal, therefore, fails and is dismissed with costs.

S.N /R K. *Appeal dismissed.*

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(1) [1911] 33 All. 143 = 7 I. C. 393 = 7 A. L. J 918.

(2) [1901] 23 All. 383 = 28 I. A. 111 = 8 Sar. 27 (P.C.).

A. I .R. 1929 Oudh 337

MISRA, J.

Bashir Ahmad and *others*—Plaintiffs—Appellants.

v.

Parshotam and *others*—Defendants—Respondents.

Second Appeal No. 410 of 1928, Decided on 4th February 1929, from decree of Sub-Judge, Barabanki, D/- 28th August 1928.

(a) Civil P. C., S. 100—Adverse possession is mixed question of law and fact.

The question of adverse possession is a mixed question of law and fact and it is always open to the Court of second appeal to examine the facts established in the case and to determine for itself whether they are sufficient to establish in law the adverse possession which is claimed on the basis of those facts : *A. I. R.* 1917 *P.C.* 33, *Rel. on.* [P 338 C 2 P 339 C 1]

(b) Adverse possession—Cosharers—Possession of one is not adverse unless there is ouster—Denial of title is ouster.

If a property belongs to several cosharers and one cosharer is in possession of the entire property, his possession cannot be deemed to be adverse to other cosharers. He must be deemed to be in possession on behalf of the other cosharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other cosharers. The ouster takes place when the title of the other cosharers is denied : *Cases referred.* [P 339 C 2]

(c) Adverse possession — Cosharers— One cosharer mortgaging joint property exempting some plots—Exemption does not prove his exclusive title to them or ouster of other cosharers.

Where a cosharer while mortgaging joint property exempted certain plots therein, the fact of mere exemption of these plots would not indicate that he was in exclusive possession of these plots and therefore, had become exclusively entitled to them, and had power to mortgage them in entirety thus constituting an ouster of the other cosharers with respect to these plots. [P 339 C 2]

(d) Adverse possession—Cosharers—Mutation in the name of one without denial of title of others does not establish.

Mutation in the name of one cosharer cannot be any indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of other cosharers was denied. [P 340 C 1]

(e) Cosharer—Right against trespasser—One cosharer can sue to eject trespasser from entire property—Suit does not establish ouster or denial of other cosharer's title.

One cosharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere fact that a cosharer brings such a suit can therefore be no evidence that he denied the title of the other cosharers. It is a question arising out of his exclusive possession, but can be no evidence of a denial of the title of the other cosharers. The suit brought by one cosharer would in the eyes of law be considered for the benefit of the other cosharers and the latter would be entitled to take advantage of such proceedings. [P 340 C 1]

M. Wasim and *Khaliq-uz-zaman*—for Appellants.

Ghulam Hasan—for Respondents.

Judgment.—The question involved in this appeal is one relating to adverse possession. The facts of the case are rather complicated and will be found in detail in the judgment of the learned Subordinate Judge of Barabanki. Shortly stated they are as follows :

There is a village named Mamreznagar in the District of Barabanki which was at the time of the Regular Settlement divided principally into two pattis, one patti Afzal Khan consisting of 9 annas and 4 pies share and the other patti Mansab Khan consisting of 6 annas 8 pies share. We are only concerned in this case with patti Mansab Khan. The cosharers of patti Mansab Khan were :

	A.	P.
1. Mansab Khan himself ...	4	11
2. Muhammad Ali and his two brothers ...	1	5
3. Azima Bibi ...	0	4
	6	8

On the 1st June Mansab Khan mortgaged his whole share consisting of 4 annas and 11 pies to one Muhammad Kasim, by a deed of conditional sale. He, however, exempted from the said mortgage certain plots of land, which were entered in the village papers at the time of the Regular Settlement as *sir* and khudkasht of the cosharers owing patti Mansab Khan. The numbers of the plots reserved were 332, 334, 344, 350 and 382. It appears that after this mortgage Mt. Azima Bibi died and her four pies share was inherited by Mansab Khan and he, therefore, became the owner of five annas three pies share.

On 17th July 1889, Mansab Khan mortgaged the whole of his share five annas three pies to one Fida Husain including the plots which had been exempted by him from the mortgage-deed in favour of Muhammad Kazim By a series of transactions the mortgagee rights of Fida Husain passed to Lala Purshottam Dass and Ram Prakash who constituted at the time of the assignment members of a joint family. The assignment in

their favour is dated 26th May 1892. Muhammad Kazim brought the suit for foreclosure in respect of four annas eleven pies share on the basis of his mortgage-deed dated 1st June 1886. He impleaded Purshotam Das and Ram Prakash in his suit as puisne mortgagees. He obtained a preliminary decree on 26th December 1894, which was made absolute on 16th July 1895.

One Abdul Hafees, father of plaintiffs 1, 2 and 3 brought a suit for pre-emption in respect of four annas eleven pies share which had been foreclosed in favour of Muhammad Kazim. His suit was decreed on 29th August 1898. After the death of Abdul Hafees the aforesaid plaintiffs succeeded to the said share of four annas eleven pies which he had acquired by pre-emption. It may be stated that this foreclosure decree had no concern with the five plots of land mentioned above which had been exempted from the mortgage of 1896.

Parshotam Das and Ram Prakash then put the mortgage of the 17th July in suit and obtained a preliminary decree for foreclosure in respect of the entire share of five annas and three pies including the plots in dispute on 10th March 1893. This decree was made absolute on 21st December 1897.

It may be stated that Parshotam Dass and Ram Prakash who had been impleaded as defendants to the suit brought by Muhammad Kazim did not pay the money due under the decree as directed by it, and the property covered by the foreclosure decree became the absolute property of Muhammad Kazim, which is now, as stated above, the property of plaintiffs 1, 2 and 3. The result of the transaction was that the foreclosure decree obtained by Purshotam Dass and Ram Prakash in respect of the mortgage of 1889 remained operative only in respect of four pies share and the plots exempted under the mortgage of 1886.

The plaintiffs 1, 2 and 3 have now by a series of transactions acquired the proprietary interest in respect of two-thirds share out of the patti Muhammad Ali which consisted of one anna five pies share. Plaintiff 4 has acquired the remaining one third. Thus the plaintiffs are now the owners of patti Muhammad Ali.

The present suit has been brought by the plaintiffs for a declaration to the effect that the plots 332, 334, 344, 350 and 382 are not the exclusive property of Purshotam Das, but the plaintiffs have also a share them proportionate to their share of one anna five pies out of the entire share of six annas eight pies which was the original extent of patti Mansab Khan. Besides these plots the plaintiffs also claimed a declaration that they were entitled to a six annas four pies share in plot 380.

We might also state that there was a partition effected between the members of the joint family to which Purshotam Das and Ram Prakash belonged. As a result of that partition the property obtained by 17th July 1889, was allotted in equal shares to one Ram Behari who was a member of the family, and to Ram Prakash. Subsequently, by a deed dated 27th March 1905, Ram Behari transferred his half share to Ram Prakash. By deeds dated 13th April 1915 and 19th April 1915 Ram Prakash has sold the entire plots in dispute to defendants 3 to 7. Parshotam Das and Ram Prakash are defendants 1 and 2 in the case.

The suit was mainly contested by defendants 3 to 7, who now claim to be the owners of the entire plots Purshotam Das and Ram Prakash did not put in any defence. They contented themselves by saying that they had no claim now left in respect of these plots and had been wrongly impleaded.

The question, therefore, involved in this case is whether Purshotam Das and his cosharers and their transferees defendants 3 to 7 had perfected their title by adverse possession in respect of the plots in suit. Both the Courts below have decided the case against the plaintiffs on the ground that the title of the defendants in respect of these plots has become perfected by adverse possession

In appeal it is contended before me that the finding of the Courts below regarding adverse possession should not be accepted. On behalf of the respondents it was contended that the finding was one of fact and should not be allowed to be challenged in second appeal.

I am unable to accept that contention. I am of opinion that the question of adverse possession is a mixed question of law and fact and it is always open to the Court of second appeal to examine the facts established in the case and to determine for itself whether they are sufficient to

establish in law the adverse possession which is claimed on the basis of those facts. I am supported in this view by a decision of their Lordships of the Privy Council reported as *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (1). In that case the question involved was one of custom on which both the Courts in India had given a concurrent finding and it was urged before their Lordships that the point being one of fact it was not open for the appellant to raise it again before their Lordships. They, however, rejected this contention and held that the question of custom being one mixed of law and fact it was open to their Lordships to see whether the conclusion arrived at by the Courts in India could be legally sustained. I may state that there is no dispute regarding the facts in the present case. The only question is what is the conclusion to be derived from those facts.

The following facts have been relied upon by the Courts below to prove the adverse possession of the defendants-respondents.

1. Mortgage-deed of 1st June 1886, executed by Mansab Khan, in favour of Muhammad Kazim in which he exempted plots 332, 334, 344, 350 and 382

2. Foreclosure decree passed in favour of Muhammad Kazim on the basis of the said mortgage in 1894 and 1895.

3. Mutation in respect of the plots on the basis of civil Court decree obtained in 1901.

4. Suit brought in civil Court by Purshotam Das and his cosharers for possession of two out of the plots in dispute, namely, Nos. 344 and 388 against one Sahib Din.

5. Sale-deed dated 27th March 1905, executed by Ram Behari in favour of Ram Prakash.

6. Sale-deeds executed by Ram Prakash in favour of defendants 3 to 7 dated 13th April 1915 and 19th April 1915.

I will now examine each of these points in order to find out whether adverse possession can be considered to have been established in favour of the defendants-respondents. Before doing so, however, I must again point out a well-settled rule of law, which has been laid down in numerous cases both by their Lordships of the Privy Council as well as by this Court and the other High Court in India. The rule is that if a property belongs to several cosharers and one cosharer is in possession of the entire property, his possession cannot be deemed to be adverse to other cosharers. He must be deemed to be in possession on behalf of the other cosharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other cosharers The ouster takes place when the title of the other cosharers is denied. I may refer on this point to the following cases:

Corea v. *Appuhamy* (2); *Hardit Singh* v. *Gurmukh Singh* (3), *Jogendra Nath Rai* v. *Baldeo Das* (4); *Ahmad Raza Khan* v. *Ram Lal* (5); *Inderpal Singh* v. *Thakur Din Singh* (6); *Mahipal Singh* v. *Sarjoo Prasad* (7); *Mahadeo Prasad* v. *Ramphal* (8) and *Sheo Raj* v. *Ajudhia* (9)

Taking points 1 and 2 together I must state that they do not amount to an ouster of the plaintiffs or their predecessors from the plots in suit. In the mortgage-deed dated 1st June 1886, Mansab Khan only mentioned the fact that he was exempting the plots mentioned above from the mortgage-deed. It is argued on behalf of the respondents that this exemption showed clearly that he was in exclusive possession of these plots and had denied the title of the other cosharers, in respect thereof. I am not inclined to accept this contention for the reason that the fact of mere exemption of these plots would not indicate that he was in exclusive possession of these plots and that, therefore, had become exclusively entitled to them, and had power to mortgage them in entirety. Even if he was in exclusive possession that fact would not make his possession adverse. It was admitted by the learned advocate for the respondents that no higher value can be attached to the foreclosure decree than the mortgage on which it was based. It was also admitted by him that if the mortgage did not show adverse possession,

(1) A. I. R. 1917 P. C. 38=40 Mad. 709=44 I. A. 147 (P.C.).

(2) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.

(3) A. I. R. 1918 P. C. 1=64 P.R. 1918 (P.C.).

(4) [1908] 35 Cal. 961=6 C. L. J. 735=12 C. W. N. 127.

(5) [1917] 37 All. 203=26 I. C. 922=13 A. L. J. 204.

(6) A. I. R. 1924 Oudh 255=27 O. C. 77.

(7) A. I. R. 1926 Oudh 141.

(8) A. I. R. 1926 Oudh 358=1 Luck. 62.

(9) A. I. R. 1929 Oudh. 284.

the foreclosure based thereon could show neither. I may further point out that the foreclosure decree did not cover these plots, nor was any mention made of them therein. I, therefore, come to the conclusion that the respondents cannot be allowed to base their adverse possession on the basis of these two facts.

As to the fact of mutation in respect of these plots standing in favour of Purshotam Dass and his cosharers I fail to understand that such mutation can be any indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of other cosharers was denied. No proof of such a declaration has been given by the respondents, and in the absence of such a proof the mere fact that these plots were entered in the name of one of the cosharers would not entitle him to contend that his possession was adverse. It has been held in *Bharat Prasad* v. *Ganga Bakhsh* (10) that mere entry of the name of one cosharer would not be proof of adverse possession.

As to the civil suit brought by Purshotam Das and his cosharer against Sahebdin I may observe that that fact also would not amount to an ouster of the other cosharers. It is a settled rule of law that one cosharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere fact that a cosharer brings such a suit can, therefore, be no evidence that he denied the title of the other cosharers. It is a qustion arising out of his exclusive possession, but cannot be no evidence of a denial of the title of the other cosharers. The suit brought by one cosharer would in the eyes of law be considerod for the benefit of the other cosharers and the latter would be entitled to take advantage of such proceedings. I, therefore, fail to understand how the suit brought in the civil Court by Purshotam Das and his cosharers in respect of a portion of the property in suit can be considered to be evidence of adverse possession.

As to the sale-deed dated 27th March 1905, executed by Ram Behari in favour of Ram Prakash it is enough to state that the deed recited that the share together with all the rights appurtenant thereto was being transferred thereby. There is not the least indication in that deed that the title of other cosharers in respect of these plots was denied. As to the sale deed executed by Ram Prakash in favour of defendants 3 to 7 it is admitted by the learned counsel for the plaintiffs-appellants that they undoubtedly amount to an ouster of the plaintiffs. The argument advanced was, however, to the effect that the present suit had been brought on 23rd September 1926, which was within 12 years from the date when those sale-deeds were executed. Under these circumstatces the defendants-respondants cannot claim that title had been acquired by them in respect of the plots in suit, since their adverse possession for 12 years before the date of the suit had not been established.

My conclusion, therefore, is that none of the facts stated above, on which reliance was placed on behalf of the defendants-respondents can be considered to have established their adverse possession in regard to the plots in suit

Before finishing this judgment, I may point that it was urged on behalf of the defendants-respondents that the plot actually exempted was 380 and not 382, which is actually entered in the mortgage-deed of 1st June 1886. I think this contention is well-founded In the deed the area shown opposite No. 382 is 3 bighas 12 biswas. Turning to the khasra I find that the area indicated above is the area of plot 380 and not of plot 382. The khasra further shows that the area of plot 380 was actually exempted from the mortgage of 1886 and not the plot 382.

Since the result of my finding is that the plot 380 was actually exempted from the mortgage of the year 1886, it follows that the plaintiff's claim to this plot should be decreed to the extent of one anna five pies share therein as in the case of the plots 332, 334, 344 and 350. The plot 382 should be considered to have been covered by the mortgage of 1886 and the plaintiffs are, therefore, entitled to claim a share to the extent of six annas four pies in it.

The result is that this appeal is accepted and the decrees of the Courts below set aside and the plaintiffs' suit is decreed with costs in all the three Courts with this modification that they will be given a decree in plots 332, 334, 344, 350 and 380 to the extent of one anna five pies share and in plot 382 to the extent of six annas four pies share.

M.N./R.K. *Appeal accepted.*

(10) [1911] 9 I. C. 425.

A. I. R. 1929 Oudh 341

WAZIR HASAN, Ag C. J. AND MISRA, J.

Channan Kuer and *others*—Plaintiffs—Applicants.

v.

Sahdeo Singh—Defendant—Opposite Party.

Civil Revn. Appln. No. 39 of 1928, Decided on 17th January 1929, against order of Assistant Collector, First Class, Kheri, D/- 12th September 1928.

(a) Civil P. C., Ss. 10 and 11—Applicability.

Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. 11 *All.* 148, *Rel. on.* [P 345 C 1,2]

(b) Civil P. C., S. 10—For S. 10 to be applicable, entire subject-matter of two suits must be same—Where former suit relates to declaration of title with regard to certain properties and latter suit is for profits in regard to one of those properties S. 10 will not apply.

In order to attract the provisions of S. 10 it is not enough that the same issue should be involved in the two suits but it is also necessary that the entire subject-matter of the two suits should be the same. So where the former suit is a suit relating to the declaration of title in regard to certain properties and the latter is a suit for profits in regard to a portion of these properties S. 10 will have no application 24 *C. L. J.* 514; *A. I. R.* 1923 *Cal.* 716, 4 *P. L. J.* 557; *A. I. R* 1925 *Mad.* 574, 6 *O. L. J.* 96 and 82 *I.C.* 530, *Foll.* [P 345 C 1,2]

(c) Civil P. C., S. 10—Suit for profits which is solely cognizable by a revenue Court cannot be stayed by prior suit for declaration of title pending in civil Court.

In order to hold that S. 10 is applicable the two Courts must be Courts of concurrent jurisdiction, that is to say, each of those Courts must be in a position to try any one of the two suits and to grant the relief claimed in either of them. So a suit for profits which is solely cognizable by revenue Courts cannot be stayed on account of a prior suit for declaration of title which is pending in a civil Court: 114 *P.R.* 1919 and 12 *N.L.R.* 174, *Foll.* [P 346 C 1]

(d) Civil P. C., S. 151—Court can stay suit under its inherent powers even where it does not come within the provision of Civil P. C., S. 10.

The inherent powers of the Court are not to be deemed to be limited or otherwise affected by the express provisions of the Code and so even where a suit cannot be stayed under the terms of S. 10, it can be so stayed by the Court if it is necessary to do so to do justice between the parties: 33 *Cal.* 927 and *In S.* 115 *Application No.* 44 *of* 1927, *Foll.* [P 346 C 2]

(e) Oudh Rent Act (1886), S. 135—Rent suit in Oudh relating to properties which are situate within jurisdiction of different Courts can be instituted in any of such Courts.

In all rent suits in Oudh the provisions of the Code of Civil Procedure have been made applicable provided they are not inconsistent with the provisions of the Oudh Rent Act itself. And as there is nothing in Oudh Rent Act inconsistent with S. 17, Civil P. C., a rent suit which relates to different properties which are situate within the jurisdiction of different Courts can be instituted in any of such Courts. [P 347 C 1, 2]

Sarju Singh, *M. Wasim*, *Radha Krishna* and *S. C. Das*—for Applicants.

H. Husain and *Bisheshar Nath*—for Opposite Party.

Judgment.—This is a revision against an order of the Assistant Collector, First Class, Lakhimpur, District Kheri, dated 12th September 1928. This order was one directing that Suit No. 1 of 1928 instituted in his Court by the plaintiffs applicants against the defendant-opposite party should be stayed till the decision of an appeal pending in the High Court at Lahore arising out of a suit brought by the defendant against the same plaintiffs in the Court of the Senior Subordinate Judge of Jullundur, Punjab.

The facts of the case are rather complicated and will have to be mentioned in detail. The relationship of the parties will appear from the following pedigree:

SARDAR GULAB SINGH

Sardar Angad Singh, (dead).	Sardar Arjun Singh, (alive).	Sardar Rajeshwar Singh, (dead)	Sardar Dwarka Nath Singh, (dead)	Sardar Tirloki Nath Singh, (dead).
		Sardar Sahdeo Singh, defendant.	Widow, Sardarni Vidyawati Kuar, plaintiff.	1. Widow, Sardarni Channan Kuar, plaintiff, and 2. Widow, Sardarni Lajwanti Kuar.

It would appear from the above pedigree that the father of the defendant, Sahdeo Singh, and the husbands of the plaintiffs-applicants, Sardarni Channan Kuer and Sardarni Vidyawati Kuar were all brothers, the sons of one Sardar Gulab Singh. Sardar Gulab Singh had two other sons, namely, Sardar Angad Singh and Sardar Arjun Singh. The former is dead in the influenza epidemic: Sardar Rajeshwar Singh, father of the defendant-opposite party, Sardar Tirloki Nath Singh, husband of Sardarni Channan Kuar plaintiff-applicant 1, and Sardar Dwarka

Nath Singh, husband of Sardarni Vidyawati Kuar plaintiff-applicant 2 died one after the other within a period of about a month. At this time Arjun Singh was admittedly living separately from his three deceased brothers and the remaining members of the family consisted of the defendant Sahdeo Singh, his father Sardar Rajeshwar Singh and his two uncles, the husbands of the plaintiffs. Though he was a minor yet trouble seems to have arisen between the parties as to the shares left by his uncles Tirloki Nath Singh and Dwarka Nath Singh. He claimed the shares of his two uncles on the ground that they constituted a joint family with him at the time of their death. The plaintiffs-applicants, on the other hand, claimed that their husbands were separate from Sardar Rajeshwar Singh, the father of the defendants, and thus they were entitled to the shares of their husbands. We might also mention that Sardar Tirloki Nath Singh had left two widows One of them was Sardarni Channan Kuar, plaintiff in the present suit, and the other was Sardarni Lajwanti Kuar.

The widows and the defendant applied to the revenue Court for mutation in respect of the shares of Sardar Tirloki Nath Singh and Sardar Dwarka Nath Singh. The revenue Court by its order dated 15th December 1920, directed that mutation of names in respect of the 4 annas share of Sardar Tirloki Nath Singh should be effected in favour of his two widows Sardarni Channan Kuar and Sardarni Lajwanti Kuar in equal shares of two-annas each, and in respect of the four annas share of Sardar Dwarka Nath Singh mutation should be effected in favour of his widow Sardarni Vidyawati Kuar. Being dissatisfied with the order passed by the revenue Court, the defendant Sardar Sahdeo Singh instituted a suit in the Court of the Senior Subordinate Judge of Jullundur on 29th August 1921 The suit was brought in the Punjab Court because a portion of the property belonging to the family was situated in that Province. The suit related to the entire property belonging to the family and was one for declaration that the family, consisting of Sardar Rajeshwar Singh the father of Sahdeo Singh the defendant in the present case, and Sardar Tirloki Nath Singh and Sardar Dwarka Nath Singh the husbands of the plaintiffs-applicants, respectively, was a joint Hindu family and that the widows were not entitled to any share in the family property. It was also alleged in that suit by the defendant that there prevailed a custom in his family by virtue of which widows were excluded from inheritance. It may be mentioned here that the properties in respect of which the profits are claimed by the plaintiffs-applicants in the present suit were admittedly included in the suit brought by the defendant in the Court in the Punjab. After a protracted trial the suit was dismissed by the Senior Subordinate Judge of Jullundur by his decree dated 23rd June 1927 The defendant has appealed from the said decree to the High Court at Lahore and the appeal is still pending.

We may mention certain other facts which will be relevant for the purpose of understanding the various contentions raised on behalf of the parties in the present application. After the institution of the suit by the present defendant in the year 1921, he applied to the Court of the Senior Subordinate Judge of Jullundur for issue of an injunction against the present plaintiffs restraining them from realizing any rent of the share in respect of which mutation had been effected in their favour by the revenue Court. This application was filed on 20th November 1922. The application was granted by the Subordinate Judge on 6th January 1923, and he ordered that the injunction prayed for be issued.

The present plaintiffs appealed against this order to the High Court at Lahore and on 17th May 1923, the High Court set aside that order and remanded the case to the Court of Subordinate Judge for a fresh decision. On 8th November 1924, the Subordinate Judge passed a fresh order by which he revoked the previous order relating to the issue of an injunction and directed that a receiver of the property in the possession of the widows be appointed. The matter was again carried in appeal to the High Court at Lahore and on 27th March 1925, Jai Lal, J., passed a final order the effect of which was that the widows who were defendants in the Punjab Court and are the plaintiffs in the present suit were restrained from making collections and Sardar Sahdeo Singh, the plaintiff in the previous suit and the defendant in the

present suit, was directed to deposit the entire income of the property in dispute situate in District Kheri in the Court of the Subordinate Judge, Jullundur, Punjab, and out of the amount so deposited each of the widows was to receive a maintenance allowance of Rs. 300 per mensem. The possession of the widows was, however, maintained in respect of the properties situate in the Districts of Lahore and Jullunder in the Punjab.

In pursuance of the said order of the High Court, Sardar Sahdeo Singh deposited his realizations in the Court, out of which Rs. 43,000 has admittedly been paid to the plaintiffs-applicants. It is argued that a large sum of money is still held in deposit in the Court of the Subordinate Judge of Jullundur, Punjab. We might also mention here that one of the widows of Sardar Tirloki Nath Singh, namely, Sardarni Lajwanti Kuar, entered into a compromise with Sardar Sahdeo Singh in respect of her 2-annas share out of the share left by her husband. The result of this compromise was that, a decree only in respect of the two-annas of the property forming the subject-matter of the suit brought in the Punjab Court was passed in favour of Sardar Sahdeo Singh but that his suit was dismissed in respect of 6-annas share of that property It may also be mentioned that after the suit brought by Sardar Sahdeo Singh had been decided by the Subordinate Judge of Jullundur, the Judge directed that the balance of the money deposited in his Court might be paid to Sardar Sahdeo Singh. An objection to this was raised but was disallowed by the Subordinate Judge.

The matter was then taken to the High Court at Lahore by the applicants by filing a revision against the said order and on 6th December 1927, the High Court at Lahore passed an order to the effect that the balance of the money held in deposit by the Court of the Subordinate Judge of Jullundur, should not be paid to Sardar Sahdeo Singh but should be allowed to remain in deposit as it was on the date of the disposal of the suit till the title to the said money had been adjudicated upon by a competent Court. That money, we may mention, is still in deposit in the Court of the Subordinate Judge of Jullundur. The present suit which is a suit for profits under S. 108, Cl. 15, Oudh Rent Act 22 of 1886, was instituted in the Court of the Sub-Divisional Officer of Tahsil Lakhimpur, District Kheri. The profits are claimed in respect of certain villages situate in Tahsil Lakhimpur and certain others situate in Tahsil Mohamdi, both Tahsils being in District Kheri. Plaintiff 1, Sardarni Channan Kuar, claims profits in respect of 2-annas share and Sardarni Vidyawati Kuar in respect of 4-annas share in those villages, the total amount claimed being Rs 1,70,000.

The defendant-opposite party has raised a number of contentions as to the maintainability of the present suit but for the purposes of the decision of the application for revision before us it would be necessary to mention only two of them. They are firstly, that the present suit for profits should not be tried till the appeal lodged by the defendant Sardar Sahdeo Singh against the plaintiffs-applicants in the High Court at Lahore had been decided, and secondly, that the Sub-Divisional Officer of Tahsil Lakhimpur, had no jurisdiction to take cognizance of the portion of the claim which related to the profits of the villages situate in Tahsil Mohamdi. The learned Assistant Collector in charge of Tahsil Lakhimpur in whose Court the suit was instituted had decided both the points against the plaintiffs. He has held that the suit brought in his Court can be maintained only in respect of the villages situate in Tahsil Lakhimpur and that the plaintiff should institute a separate suit for profits in respect of villages situate in Tahsil Mohamdi in the Court of the Sub-Divisional Officer of that Tahsil. He has further held that in view of the provisions of S. 10, Civil P. C, and also of S. 151 of the same Code it would be neither proper nor just to try the present suit for profits until the decision of the appeal pending in the High Court at Lahore. His order is therefore, to the effect that the present suit brought by the plaintiffs-applicants be consigned to the records till the decision of the appeal before the Lahore High Court and shall be taken up on file after the said decision, on application by either party, if and when necessary. The plaintiffs, Sardarni Channan Kuar and Sardarni Vidyawati Kuar, have now filed an application for revision of the said order in this Court challenging the validity of the order passed by the learned

Assistant Collector on both the points. The two contentions urged on their behalf before us are the same as were urged by them in the Court below. The case was argued at great length on both sides and we have taken time to consider our judgment. We now proceed to give our decision in regard to both the aforesaid points.

Regarding the contention that the order passed by the learned Assistant Collector under S 10, Civil P. C. directing the suit of the applicants to be stayed is illegal and incorrect, we are of opinion that the contention is sound and must be upheld. We proceed to give our reasons for the said view.

Section 10, Civil P. C of 1908 runs as follows.

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or in any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction, or before His Majesty in Council."

On an analysis of the section quoted above it would appear that a Court shall not proceed with the trial of the suit, if first, the matter in issue in the suit is also directly and substantially in issue between the same parties; Secondly, the previously instituted suit is pending; (a) in the same Court in which the subsequent suit is brought, or (b) in any other Court in British India (whether superior, inferior or co-ordinate) or (c) in any Court beyond the limits of British India established or continued by the Governor-General in Council, or (d) before His Majesty in Council; and, thirdly, where the previously instituted suit is pending in any of the Courts mentioned in Cl (b) or Cl. (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit. We have, therefore, to see whether the matter in issue in the present suit was directly and substantially in issue in the Court of the Subordinate Judge of Jullundur and whether the Court would be competent to grant the plaintiffs-applicants the relief which has now been claimed by them in the present suit.

A large number of authorities were quoted before us during the course of arguments, but we would refer principally to those which have been passed under the present Code of 1908. One of the main differences between the wordings of S. 10 of the present Code and S. 12 of the Code of 1882 is to be found in the omission in the new Code of the words " for the same relief " which occurred after the words " previously instituted suit " of the corresponding section of the previous Code. It would thus appear that according to the present Code the fact whether the relief claimed in the suit subsequently instituted is different from that claimed in the previously instituted suit or whether it is the same, would not make any difference in the applicability of the present section. The only elements which have to be seen are firstly, whether the matter in issue in the subsequent suit is also directly and substantially in issue in the previously instituted suit; secondly, whether the previous suit and subsequent suit are between the same parties or between those who are litigating under the same title and, thirdly, whether the relief claimed in the subsequent suit could be granted by the Court in which the previous suit had been instituted It is evident that the parties in the present suit and in the previous suit are the same and so far as that element is concerned it does exist. It is also admitted on both sides that the property in respect of which profits have been claimed in the present suit formed the subject-matter of the previous suit.

The contention, however, raised on behalf of the plaintiffs-applicants is that though the property is the same yet the subject-matter of the present suit is not the subject-matter involved in the previous suit. The argument is that the words " matter in issue " must be read with reference to the entire subject of controversy between the parties and not merely to one of the matters in issue. It was said that although the present suit related to the profits of the property which formed the subject-matter of the previous suit yet the subject-matter in issue in the present suit was a claim for profits which was not the subject matter in issue in the previous suit. On behalf of the defendant it was contended that

though the subject-matter was different yet the real issue involved in the two cases was the same, it being whether the applicants were entitled to the property in respect of which they now claimed profits or whether the defendant-opposite-party was entitled to that property. It was further urged on behalf of the defendant that the words " matter in issue " which were to be found both in S. 10 and S. 11 of the Code should be read in the same sense. Although there is some force in the contention raised on behalf of the defendant yet we feel that the weight of authority is against him, and that it has been consistently held by the different High Courts in India that the words " matter in issue " in S. 10 should not be read as implying any particular issue, but must be read as referring to the entire subject-matter of the subsequent suit

The question now before us came up before the Allahabad High Court in the year 1888 and the Full Bench of that Court, in a case reported as *Balkishan* v. *Kishan Lal* (1) took the view that the pendency of a litigation regarding rent, malikana or other demand for one year did not under the provisions of the Code of Civil Procedure bar a suit between the same parties in which the same demand was made for a subsequent year. The difference between old S. 12 (now S. 10) and old S. 13 (now S. 11) was pointed out in that case. It was observed by Mahmood, J, at p. 154 that the rule in S. 12 related to matters sub judice whilst the rule in S. 13 related to matters which had passed into res judicatam : that whilst S. 12 barred only a suit, S. 13 barred the trial of both the suit and of an issue involved in that suit It is unnecessary to point out that the same distinction still exists in the present Code of 1908.

The Calcutta High Court has adopted the same view and in a case reported as *Bepin Behary Mazumdar* v. *Jogendra Chandra Ghosh* (2) Mukerjee, J., observed that the expression " matter in issue " had reference to the entire subject of controversy between the parties and that the object was to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter This case was followed by the same Court in *Jamini Nath Mullick* v. *Midnapur Zamindary Co.* (3). In the Patna High Court the same has been held in *Kesho Prasad Singh* v *Shiva Saran Lal* (4). It was said that in order to attract the application of S. 10, Civil P. C, the matters in dispute in the previously instituted suit and the subsequently instituted suit must be substantially the same though the reliefs claimed may be different. In the Madras High Court the same view has been taken as will appear from a case reported as *Kuberan Nambudri* v. *Koman Nair* (5).

In the late Court of the Judicial Commissioner of Oudh the same interpretation was accepted in a decision reported as *Sital Singh* v. *Sital Bakhsh Singh* (6). The Bench of that Court consisting of Mr Stuart, J C, (now Sir Louis Stuart, C. J .) and Mr. Daniels, A. J. C., observed that the object of the rule contained in S. 10, Civil P C., was to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two or more parallel litigations in respect of the same cause of action and the same subject-matter, that is litigations in which the matters in controversy are the same, and that the mere fact that the decision of subsequent suit will largly be affected by the decision of the previous suit still pending was not sufficient for the application of S. 10, Civil P. C. The view held in *Balkishan* v. *Kishan Lal* (1) and *Bepin Behary Mozumdar* v. *Jogendra Chandra Ghosh* (2) was followed in this case. In Sind the same opinion has been taken by the Court of the Judicial Commissioner of that Province as would appear from a case reported as *Jainarain Babulal* v. *Nathoomal Manoharlal* (7).

It would, therefore, appear that there is almost concensus of authority that in order to attract the provisions of S. 10, Civil P. C., it is not enough that the same issue should be involved in the two suits, but it is also necessary that the entire subject-matter of the two suits should be the same. It is clear that the subject-matter of the present suits is not the same, the former being a suit

(1) [1889] 11 All. 148=(1889) A. W. N. 42.
(2) [1916] 24 C. L. J. 514=36 I. C. 641.
(3) A. I. R. 1923 Cal. 716.
(4) [1919] 4 P. L. J. 557=51 I. C. 362=(1919) P. H. C. C. 284.
(5) A. I. R. 1925 Mad. 574.
(6) [1919] 6 O. L. J. 96=50 I. C. 212.
(7) [1921] 82 I. C. 539.

relating to the declaration of title in regard to certain properties and the latter being a suit for profits in regard to a portion of those properties The second reason why we think S. 10 is not applicable to the facts of the present case is that the Court of the Subordinate Judge of Jullundur, which tried the previously instituted suit is not competent to try the present suit and to grant the relief claimed in this suit In order to hold that S. 10 is applicable the two Courts must be Courts of concurrent jurisdiction, that is to say, each of those Courts must be in a position to try any one of the two suits and to grant the relief claimed in either of them If this condition is not present, the section is not to be applicable. This is apparent from the language of the section itself. If any authority were needed we would refer to a case decided by the Punjab Chief Court and reported as *Paira Mal & Sons* v. *Raj Narain & Co.* (8) and to another case decided by the Court of the Judicial Commissioner, Nagpur reported as *Gopikisan* v. *Padamraj* (9). It is clear from the facts given above that the present suit is one for profits and is solely cognizable by a revenue Court both under the provisions of S 108, Cl. 15, Oudh Rent Act, 22 of 1886, and S. 77, Cl. (k), Punjab Tenancy Act, 16 of 1887. A civil Court either in the Punjab or in Oudh is not competent to take cognizance of a suit for profits. Under those circumstances the trial of the present suit cannot in our opinion, be stayed under the provisions of S 10, Civil P. C., of 1908.

We feel, however, that looking to all the circumstances of the case it would not be just and proper to allow the present suit to be tried on the merits at present As would appear from the defence urged by the defendant in the present case the main contention raised by him is that the plaintiffs-applicants are not entitled to claim any profits since they have no title to the property in respect of which profits are claimed. It is manifest that it is open to a person against whom profits are claimed to contest such a suit by urging that the plaintiff is not entitled to profits on the ground that he does not possess any title to the property in respect of which profits have been claimed In this case the question as to whether the plaintiffs-applicants are possessed of title in the property in respect of which they claim profits is a question which must necessarily be tried. We are also aware that if such a question is again tried in a revenue Court it would entail a large amount of expenditure, and much of the time of the Court would be wasted in trying it It is also evident that the decision of the High Court at Lahore as to the title of the parties in respect of the villages situate in the district of Kheri will operate as res judicata. There can, therefore, be no doubt that it would be in consonance with the ends of equity and justice if the trial of the present suit should be stayed till the decision of the appeal by the High Court at Lahore. We are clearly of opinion that we are possessed of inherent jurisdiction to pass such an order.

In S. 151, Civil P. C. it is clearly laid down that nothing provided in that Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such order as may be necessary for the ends of justice or preventing abuse of the process of the Court. It was argued on behalf of the applicants that it would not be proper for us to apply the provisions of S. 151, Civil P. C. when the case clearly does not come within the provisions of S. 10 of the same Code. We regret we are unable to take that view. The very language of S. 151 shows that the inherent powers of the Court are not to be deemed to be limited or otherwise affected by the express provisions of the Code. If the contention of the learned counsel for the applicants were to be accepted as correct, there would be no necessity at all for enacting S. 151 of the Code It is only to meet cases like the present which are not provided for in the Code or to which the provisions of the Code do not apply that the legislature has enacted S. 151. We are supported in this view of ours by two decisions of the Calcutta High Court reported as *Hukum Chand* v. *Kamalanand Singh* (10) and *Nand Kishore Singh* v *Ram Golam Sahu* (11). The former was a case before the passing of the Code of 1908. It was

(8) [1919] 114 P. R. 1919=53 I. C. 467=47 P. L. R. 1920.

(9) [1917] 12 N. L. R. 174=37 I. C. 510.

(10) [1906] 33 Cal. 927=3 C. L J. 67.

(11) [1913] 40 Cal. 955=18 I. C. 207=16 C. L. J. 508.

held in that case that the provisions of Civil Procedure Code, as it then existed, were not exhaustive and that a Court was in a position, in cases to which the provisions of that Code were not applicable to exercise its inherent jurisdiction to do justice between the parties such as may be warranted under the circumstances of that case. The same principle was affirmed in the latter case also.

We may, however, refer to a decision of a Bench of our own Court which was given in a case between the same parties. *In S.* 115, *Application* 44 *of* 1927 decided by Raza and Nanavutty, JJ., on 3rd August 1928, the learned Judges of this Court held that although the provisions of S. 10 could not be applied to the facts of that case yet it would be very inconvenient and undesirable if the suit in which the order of stay was passed were tried on its merits and in the circumstances of that case the Court exercised its inherent powers under S. 151, Civil P. C. and stayed proceedings till the decision of the appeal by the High Court at Lahore. We intend to adopt the same course here. We now proceed to deal with the other point involved in the case, namely, whether the Sub-Divisional Officer of Tahsil Lakhimpur, in whose Court the present suit was filed, was competent to try it in face of the fact that the profits claimed therein related to a portion of the property which was situate in Tahsil Mohamdi.

To us it appears to be clear that in all rent suits in Oudh the provisions of Civil Procedure Code have been made applicable provided they are not inconsistent with the provisions of the Oudh Rent Act itself. This is clear from S. 135, Oudh Rent Act. The first thing we have, therefore, to do is to see whether under the provisions of Civil Procedure Code it would be permissible for the applicants to institute a suit like the present one in the Court of the Sub-Divisional Officer of Lakhimpur. Section 17, Civil P C, lays down that where a suit is to obtain relief respecting property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate provided that in respect of the subject-matter of the suit the entire claim is cognizable by such Court. Thus under the provisions of S. 17 the suit can be instituted in either of those two Courts The plaintiffs have instituted their suit in the Court of the Sub-Divisional Officer of Lakhimpur, so the suit is clearly maintainable under the provisions of the said section.

We have, however, to see whether there is anything in the provisions of the Oudh Rent Act 22 of 1886, which is inconsistent with the provisions of S 17 of the Code. Our attention was drawn to S. 121, Oudh Rent Act, which provides for the distribution of business in rent Courts. Section 121 of the Act provides that the Deputy Commissioner has power to direct by order in writing that any business cognizable by him and by any Court subordinate to him shall be distributed amongst those Courts in such a manner as he thinks fit provided that a direction given by the Deputy Commissioner did not empower any Court to exercise a power or deal with a business beyond the limits of its proper jurisdiction We do not think that this provision in any way conflicts with the provisions of S. 17, Civil P C Just as in the case of the civil Courts this Court has defined the territorial limits of the different civil Courts in the Province which are subordinate to it, so has the Deputy Commissioner of every district in Oudh been given power to prescribe the territorial limits for each Court subordinate to him and also to distribute various kinds of business amongst the different Courts subordinate to him Just as this Court has no power to direct a subordinate civil Court to try a suit beyond the pecuniary limits of its jurisdiction as prescribed by law, similarly the Deputy Commissioner as is stated in the proviso to S 121, has no power to empower any Court to deal with any case beyond the limits of its pecuniary jurisdiction. It is admitted that the Court of the Assistant Collector, First Class, in accordance with the provisions of S. 114, is now competent to try and determine suits of every description irrespective of their value. The Sub-Divisional Officer of Lakhimpur was, therefore, in our opinion competent to try the present suit and we have not been able to follow the decision of the learned Assistant Collector, when he says that the present suit for profits is not cognizable by him so far as it relates to the villages situate in Tahsil Mohamdi. We, therefore, hold that the suit brought by

the plaintiffs-applicants in the Court of the Sub-Divisional Officer of Lakhimpur was properly brought and is maintainable in that Court.

In conclusion we must point out that while we have decided not to interfere with the order staying the trial of the present suit passed by the learned Assistant Collector, we are equally clear in our mind that before we uphold such an order we must put the parties in this case on terms It is admitted on both sides that in pursuance of the decision of the High Court at Lahore passed on 27th March 1925, both the plaintiffs-applicants were to receive a monthly allowance of Rs 300 each and that the plaintiffs-applicants did actually receive allowance according to the said scale up to 23rd June 1927 It is admitted that they have not received any such allowance since that date. We, therefore, direct the learned Assistant Collector to make an inquiry regarding the point and to order the defendant to deposit the money in his Court within a time to be fixed by him for the purpose, sufficient for payment of the monthly allowance to both the applicants at the rate of Rs. 300 per month, from the date that such payment has been stopped up to the date of the passing of this order. We also direct the defendant that after the passing of this order he will deposit every month in the Court of the Sub-Divisional Officer of Lakhimpur, Kheri, a sum of Rs. 600 for payment to both the applicants at the rate of Rs. 300 each If he fails to deposit the sum found due on account of past arrears within the time fixed by the Assistant Collector or if he fails to deposit the future maintenance for any two months consecutively, the order staying the trial of the case will stand revoked and the learned Assistant Collector will proceed to try the suit on its merits. If, however, the defendant complies with the order passed by us, the suit shall be stayed till the appeal filed by the defendant-opposite party, Sardar Sahdeo Singh, in the High Court at Lahore against the plaintiffs-applicants, has been decided by the said High Court at Lahore. We, therefore, modify the order of stay of proceedings passed by the learned Assistant Collector, dated 12th September 1928, by declaring it subject to the aforesaid conditions. In the circumstances of the case we do not make any order as to costs in either Court.

S.N./R K. *Order modified.*

A. I R. 1929 Oudh 348

MISRA, J

Sheo Mangal and *others*—Defendants—Appellants.

v.

Prag Narain—Plaintiff—Respondent.

Second Appeal No. 271 of 1928, Decided on 1st October 1928, against decree of Sub-Judge, Mohanlalganj, D/- 13th April 1928

Landlord and Tenant — Cess — Nankar—Where mere fact that nankar has been granted to persons who were old proprietors is established, presumption will be, unless shown to the contrary, that the grant was in lieu of old proprietary right of a heritable and transferable character.

A right to nankar is, as a rule, to be considered an under-proprietary right of a heritable and transferable nature though a person in receipt of such allowance cannot necessarily be considered to be the under-proprietor of lands of which he may be in possession. This will depend upon the circumstances of each case. [P 350 C 2]

Where a nankar has not been decreed by a Settlement Court or where a person is not shown to have been in enjoyment thereof since the time when he lost his zemindari right and where it is shown that he has been granted those rights at a subsequent time it should be open to the zemindar to show that at the time when such grant was made it did not carry with it an estate of inheritance or transferability but was merely a grant of a personal character, limited to the life or lives of the person or persons to whom it has been granted. If, however, this is not proved by the landlord and the mere fact that a nankar has been granted to the persons who were old proprietors is established then the presumption would be, unless shown to the contrary, that the grant was in lieu of old proprietary right of a heritable and transferable character. This would especially be the case where the person to whom the grant was made happened to be a former proprietor of the village and where the entry of the rights was to be found in the under-proprietary register 1 *O. C.* 157; 1 *O. C.* 161; 4 *O. & A. L. R.* 446, 1 *O. L. J.* 733, 2 *O. L. J.* 359; 12 *O. C.* 124 and 4 *O. L. J.* 187, *Rel. on.* [P 350 C 2, P 351 C 1]

Hakimuddin—for Appellant.

Sailen Roy—for Respondent.

Judgment.—This is on appeal arising out of a declaratory suit. The plaintiff Lala Prag Narain is the taluqdar and proprietor of village Khajuha, District Unao, and the defendants were admittedly former proprietors of that

village. They lost their proprietary rights when the village was included in the estate of the plaintiff. In lieu of the loss of their proprietary rights they were given certain under-proprietary land and muafi lands in the said village. It appears that after the regular settlement the plaintiff's ancestors granted to the defendants a cash nankar of Rs 25 per mensem presumably in lieu of the same rights. The exact date of the grant is not known but the evidence on the record shows that it was granted prior to 1294 Fasli equal to 1886-87 A D In the under-proprietary khewat prepared in the year 1298 Fasli a mention of the nankar was made It is admitted that for a number of years the defendants continued to receive the nankar. It, however, appears that some time prior to the recent settlement which is now going on in the Unao District, the entry was removed from the village papers. It does not, however, appear as to who was responsible for the said removal and under whose orders it took place. When the recent settlement operations started in the Unao District the defendants applied to the Settlement Authorities for correction of the said record and for an entry of the said nankar in the village papers

The Settlement Officer accepted their request and his order has been maintained by the higher Revenue Authorities in appeal. The order of the Assistant Record Officer was passed on the 26th October 1925, and the final order in appeal was passed on 24th September 1926 This has given rise to the cause of action in favour of the plaintiff taluqdar to bring the present suit.

The main allegations in the plaint are to the effect that the nankar rights were granted to the ancestors of the defendants in 1294 Fasli with a condition attached thereto that its continuance would depend upon the pleasure of the plaintiff. The plaintiff stopped the payment of the said nankar in 1294 Fasli and the defendants have no right to insist on the continuance of the payment of the said nankar. In short the plaintiff's case is that it was a grant of a mere personal right to the defendants and liable to be resumed at the pleasure of the plaintiff.

The defence put forward by the defendants was to the effect that the nankar granted by the plaintiff's ancestors to the ancestors of the defendants was not a grant of merely a personal right but was a grant of a heritable and transferable right in consideration of the loss of their old zemindari rights. They further alleged that the plaintiff never took any proceedings in a Court of law to resume the said grant and they had no knowledge that the entry relating to the nankar had ceased to exist in the village papers. They only came to know of it when the settlement operations commenced in the district and as soon as they came to know of it they applied to the Settlement Authorities for an entry of their rights and their application was granted They denied the plaintiff's right to resume the said grant at his will and urged that the plaintiff was not entitled to the declaration which he had asked for.

The main question for trial in the case, was therefore, whether the nankar allowance in dispute was determinable at the pleasure of the grantor or whether it was a heritable and transferable right of an under-proprietary character. The learned Munsif of Purwa at Unao who tried the case came to the conclusion that the nankar allowance which the defendants and their ancestors used to receive was a heritable and transferable right and not merely a personal right determinable at the pleasure of the plaintiff In this view of the case he dismissed the plaintiff's suit by his decree dated 9th May 1927. In appeal the learned Subordinate Judge of Mohanlalganj at Lucknow who heard the appeal took a different view and held that the nankar allowance was a mere personal allowance and not one which could be deemed to be heritable and transferable. He, therefore, by his decree, dated 13th April 1928, set aside the decree of the trial Court and granted the plaintiff the declaration which he had asked for. The defendants have now appealed to this Court and it is now contended again on their behalf that the nankar which their ancestors were in enjoyment of was not a personal grant but was a grant of a heritable and transferable character. The case has been argued at great length before me and I have also taken time to consider my judgment. The conclusion to which I have arrived is that this appeal must

be allowed and I now proceed to give my reasons for the same.

I may state at the outset that a nankar allowance is usually an allowance which should be considered as implying a right of an under proprietary nature, which means that it is a heritable and transferable right. The history of the matter was discussed by Mr. Blennerhassett, Judicial Commissioner of Oudh, so far back as the year 1898 in *Fateh Bahadur Singh* v. *Sheomber Singh* (1). He traced in that case the history of these nankar rights and referred to Sykes' Compendium, p. 168. He also referred to the Gonda, Bahraich and Rae Bareli Settlement Reports, the Oudh Sub-settlement Act 26 of 1866 and also to the explanation given in Carnegy's Kacheri Technicalities In Sykes' Compendium p. 168 the history of the nankar rights is to be found Mr. Sykes describes this right as a subordinate right in taluqas usually enjoyed by under-proprietors.

In para 32, Bahraich Settlement Report, nankar is explained as a drawback allowed to zemindars by the revenue authorities from the demand made on the estate, and as constituting the main portion of the ostensible profits of the zemindars. In the Rae Bareli Settlement Report the matter is dealt with in para 66 and it is stated that the nankar partakes of the nature of an under-proprietary right. In Rr. 10 and 11, Oudh Settlement Act, *sir* and nankar are treated as rights of an under-proprietary nature In Carnegy's Kacheri Technicalities it is stated that in Oudh the right is recognized as an under-proprietary right. It is on the basis of these authorities that Mr Blennerhassett ruled that nankar was a heritable right and not a personal right which the zemindar could resume at his pleasure In *Raja Rudra Pratab Sahi* v. *Sheo Charan* (2) the same view was upheld by a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Mr Blennerhassett, J C., and Mr. Chamier, A J. C. (now Sir Edward Chamier) They held in that case at p. 165 that they had no doubt that cash nankar granted in lieu of the surrender of zemindari right was an under-proprietary right.

In *Nauab Mirza Mohammad Jafar Ali Khan* v. *Muzaffar Husain* (3), Mr Kendall, A. J. C, (now Kendall, J), followed these cases and held that cash nankar granted in lieu of surrender of zemindari rights was an under-proprietary tenure and the holder of it had a heritable and transferable interest therein In *Lal Muneshar Bakhsh Singh* v. *Shahzade Khan* (4) the Board of Revenue, however, held that a right to receive a cash nankar does not necessarily connote a right to possession of land as an under-proprietor but may when coupled with other facts go to establish a prima facie case of under-proprietary right.

In *Ram Kuar* v. *Hanoman Singh* (5) the Board of Revenue held that the mere fact that certain persons were entitled to cash nankar does not show that they are under-proprietors and the allowance is heritable

In *Deputy Commissioner, Gonda* v. *Bhagwan* (6) it was held by the late Court of the Judicial Commissioner of Oudh that a right to a cash nankar or to dyhak or daswant does not necessarily connote a right to possession of land as an under-proprietor

In *Partab Bali* v. *Bindeshri Prasad Singh* (7) it was decided that a right to cash dasaundh in a village was in the nature of a charge on its rents though it could not connote a right to possession of the village and could not be deemed to be an under-proprietary right in its land.

It would thus appear as a result of the decisions quoted above that a right to nankar is, as a rule, to be considered an under-proprietary right of a heritable and transferable nature though a person in receipt of such allowance cannot necessarily be considered to be the under-proprietor of lands of which he may be in possession. This will depend upon the circumstances of each case I am also prepared to go so far that where a nankar has not been decreed by a Settlement Court or where a person is not shown to have been in enjoyment thereof since the time when he lost his zemindari rights and where it is shown that he has been granted those rights at a subsequent time it should be open to the zemindar

(1) [1898] 1 O.C. 157.
(2) [1898] 1 O.C. 168.
(3) 4 O. & A L.R. 146
(4) [1914] 1 O.L.J. 733=27 I.C. 175.
(5) [1915] 2 O.L.J. 359=30 I.C. 373.
(6) [1909] 12 O C. 124=2 I.C. 297.
(7) [1917] 4 O L.J. 187=40 I.C. 111.

to show that at the time when such grant was made it did not carry with it an estate of inheritance of transferability but was merely a grant of a personal character, limited to the life or lives of the person or persons to whom it has been granted. If, however, this is not proved by the landlord and the mere fact that Mt. Samkar has been granted to persons who were old proprietors is established then the presumption would be, unless shown to the contrary, that the grant was in lieu of old proprietary right of a heritable and transferable character. This would especially be the case where the person to whom the grant was made happened to be a former proprietor of the village and where the entry of the rights was to be found in the under-proprietary register (Here the judgment discussed the evidence and concluded) Upon a consideration of the entire evidence I have come to the conclusion that the finding of the learned Subordinate Judge to the effect that the grant was of a personal character cannot be maintained. It appears to me that the learned Subordinate Judge has looked at the case from an entirely wrong point of view. I am inclined to hold the grant, in view of the circumstances which I have mentioned above to be of an under-proprietary nature unless proved to the contrary I, therefore, accept this appeal, set aside the decree of the lower Court and restore the decree of the learned Munsif The plaintiff's suit will stand dismissed with costs in all the three Courts.

S.N./R.K. *Decree set aside.*

A. I. R. 1929 Oudh 351

SRIVASTAVA, J.

Hirajee and *another* — Defendants—Appellants.

v.

Suraj Bali—Plaintiff—Respondent.

Second Civil Appeal No. 216 of 1928, Decided on 13th September 1928, against judgment and decree of Sub-Judge, Malihabad, D/- 17th March 1928.

Easements Act, S. 41—Grant of easement not stipulating its termination on expiry of necessity—Grant does not terminate on expiry of necessity.

The scope of a grant of easement (right of way) must be determined by the terms of the contract between the parties. Where there is nothing in the terms of the grant that it was to continue only until such time as the necessity was absolute and there was no evidence in support of such agreement it must be held that the grant was not limited till the necessity for it existed. [P 352 C 1]

K. P. Misra and *M. B. Haq*—for Appellants.

Raj Bahadur Srivastava — for Respondent

Judgment —This is a second appeal by the defendants arising out of a suit for demolition of a wall ; for removal of certain spouts for flow of rain water and for an injunction in connexion with the above reliefs. The facts which have given rise to the present suit are that one Mt. Samkora owned a plot of land with a kachcha house standing thereon In 1910 she sold the house together with the portion of the land on which it stood to the plaintiff. In 1925 the heirs of Mt Samkora sold the rest of the land to the defendants. The defendants constructed a house on the land purchased by them. The plaintiff's grievance was that a wall constructed by the defendants blocked his passage through a door which he had opened in the house and that the spouts discharged water inside his house. The defendants denied the plaintiff's right to any of the reliefs claimed Both the Courts below have agreed in dismissing the plaintiff's claim as regards the spouts but have passed a decree for demolition of the wall in favour of the plaintiff.

The first point urged on behalf of the defendants-appellants is that the plaintiff has been wrongly held entitled to a right of way through the door which had been opened by him in his house. The learned Munsif had held that the plaintiff had acquired a right of way through the door in question over the defendant's land by prescription The learned Subordinate Judge on appeal has upheld the right on a different ground. He has held that the plaintiff is entitled to the right of way under a grant from Mt Samkora. The argument urged on behalf of the defendants is that no grant has been made out and that in any case the grant must be deemed to have terminated now

It is quite clear from the terms of the sale-deed executed by Mt. Samkora that the plaintiff was expressly permitted to open the door in question. I agree with the learned Subordinate Judge that there

could be no object in granting permission for the opening of the door unless the door was intended to be used for ingress and egress from the house. This intention is further supported by the fact that at the time when the sale took place there was no convenient access to the house from the public road. I can, therefore, see no reason to disagree with the opinion of the lower appellate Court that the terms of the sale-deed coupled with the oral evidence fully established the alleged grant. The argument about the grant having terminated is based on the ground that though there was necessity for such a grant at the time of the sale-deed yet no such necessity exists now as the plaintiff can have access to the house from the public road otherwise than by the route in respect of which the right of way is claimed in the suit.

It is urged that the grant must be considered to be a grant of easement of necessity and as there is no longer any absolute necessity for the alleged right of way the grant also must be deemed to have come to an end. I cannot accept this contention. The scope of the grant must be determined by the terms of the contract between the parties. There is nothing in the terms of the sale-deed to limit the grant until such time as the necessity is absolute. If it was intended that the grant should be limited in the sense contended for by the defendants one should have expected some express provision in the sale-deed to the effect that the door was to be closed when the necessity was no longer absolute. In the absence of any such provision in the sale-deed and in the absence of any other evidence in support of such agreement I must hold that the grant cannot be limited as the defendants would wish to limit it. I must, therefore, overrule the contention. Next it was contended that the grant is invalid for want of registration. It was held in *Bhagwan Sahai* v. *Narasingh Sahai* (1) that an easement can be imposed without the grant being embodied in a written deed. Assuming that a registeeed deed is necessary, the grant in the present case is contained in the sale-deed which is a registered document. The contention, therefore, has no force.

Lastly reference was made to the case of *Ram Lal* v. *Makhan Lal* (2) and it was contended that this Court should limit the plaintiff's right of way to the passage shown as APOU in the Commissioner's map which was sufficiently convenient for the requirements of the plaintiff and least onerous to the defendants This matter also seems to me to be concluded by the findings of the lower appellate Court. The contest in the Courts below was whether the plaintiff is entitled to a right of way by the route shown as ABCD or by route shown as APOU in the Commissioner's map.

The lower appellate Court after discussing the evidence of the witnesses examined by both parties has found it as a fact that the passage granted by Mt. Samkora at the time of sale in 1910 and which has been used by the plaintiff ever since is represented by ABCD. Under the circumstances the plaintiff is legally entitled to use the passage granted to him at the time of his purchase of the house. The matter is, one of contract between the parties and no question of my exercising any discretion in the case arises. This disposes of all the arguments argued in support of the appeal

The learned Counsel for the plaintiff-respondent has drawn my attention to the fact that the letter T as given in the decree of the Munsif to describe the door is a mistake for the letter L A copy of the Commissioner's map which has been attached to the decree correctly gives the letter L against the door in question. The learned Subordinate Judge has also referred to this mistake in the beginning of his judgment but did not give any directions for necessary correction being made. I direct that the letter T as used in the decree of the first Court should be corrected and letter L substituted in place of it. With the above remarks I dismiss the appeal with costs.

M.N./R.K. *Appeal dismissed.*

(1) [1909] 31 All. 612=3 I.C. 615=6 A.L.J. 871.

(2) [1920] 7 O.L.J. 308=55 I.C. 710.

A. I. R. 1929 Oudh 353

WAZIR HASAN AND RAZA, JJ.

Bisheshar Dayal—Appellant.

v.

Bajrang Bahadur Singh and *others*—Respondents.

Execution Decree No 79 of 1928, Decided on 4th April 1929, against decree of Dist. Judge, Rae Bareli, D/- 19th October 1928.

(a) Civil P. C., S. 2 (ii)—Auction-purchaser in execution of decree for sale on mortgage of under-proprietary tenure is not legal representative of original under-proprietor.

The auction-purchaser in execution of a decree for sale on a mortgage of an under-proprietary tenure cannot be called the legal representative of the original under-proprietor because the term legal representative only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent. Further such an auction-purchaser cannot be called the representative of the original under-proprietor in respect of a liability arising subsequent to the mortgage on which the decree for sale is founded and in execution of which decree he becomes the purchaser, though he is certainly a representative of the under-proprietor qua the rights and liabilities which stood on the date of the mortgage ; 9 *O. C.* 185, *Ref.* ; 12 *O. C.* 45, *Rel. on.* [P 354 C 1]

(b) Oudh Rent Act (1886) S. 154—Combined effect of S. 154, Oudh Rent Act and S. 146, Civil P. C., is to render auction-purchaser of under-proprietary tenure liable to satisfy decree for arrears of rent obtained against original under-proprietor, although such purchaser in not judgment-debtor on record of that decree—Civil P. C., S. 146.

The combined effect of S. 154, Oudh Rent Act and S. 146, Civil P. C. is to render an auction-purchaser of an under-proprietary tenure in execution of a mortgage decree liable to satisfy a decree for arrears of rent obtained against the original under proprietor. Because the provisions of S. 154, Rent Act not only make the transferee-purchaser liable for the rent subsequently accruing but they make him so liable in consequence of the act of omission to pay the rent on the part of the original under-proprietor. That being so he must be held to be a person claiming under his transferrer, and, as such, the decree against the original under-proprietor can be rightly executed against him under S. 146, Civil P. C., although he is not a judgment-debtor on the record of that decree: 9 *O. C.* 185, *not Appr.* [P 354 C 1, 2]

Radha Krishna—for Appellant.

Ghulam Hasan and *Saiduddin Ahmad*—for Respondent 1.

Judgment.—This case has come before us for decision on a reference by our learned brother G. N. Misra, J. The facts are as follows :—

The respondent, Rai Bajrang Bahadur Singh, obtained a decree on the 23rd August 1924 for arrears of rent in respect of an under-proprietary tenure against Muhammad Ishaq and Muhammad Yasin. In the years 1911 to 1914 the appellant, Bisheshar Dayal, had obtained several mortgages in respect of the same tenure from the persons mentioned above or their predecessors-in-interest. These mortgages were put in suit and a decree for sale of the tenure was obtained by Bisheshar Dayal against the under-proprietors. Eventually in execution of that decree the tenure was put up for sale and purchased by Bisheshar Dayal on the 20th December 1926. In the month following the sale was confirmed. The respondent, Rai Bajrang Bahadur Singh, now desires in the proceedings, out of which this appeal has arisen, to execute his decree for rent by sale of the under-preprietary tenure as against Bisheshar Dayal. Bisheshar Dayal objects to this procedure but his objection has been overruled by the Courts below. Hence this second appeal before us.

The argument advanced on behalf of the appellant is that the law as enacted in S 154, Oudh Rent Act, 1886, imposes a liability on the appellant to pay to the respondent the rent which has fallen due in respect of this under-proprietary tenure subsequent to encumbrances or the auction purchase but that the liability stops and there is no justification in law or in the principle to make the appellant liable for the satisfaction of the decree, which the respondent had obtained long before the sale in favour of the appellant, in a process of execution of the said decree. It was suggested rather than argued that having regard to the liability under S. 154 aforementioned the respondent may bring a separate suit for the recovery of the same arrears of rent for which he had obtained a decree in 1924 against the original under-proprietors if the claim happens to fall in time on the date of the second suit.

The argument, which we have just now noticed, derives support from the judgment of Mr. Ross Scott in *Mt. Atam Dei* v. *Bakht Narain* (1), while he was Judicial Commissioner of Oudh. In the same case, however, Mr Wells, Additional Judicial Commissioner, expressed

(1) [1906] 9 O. C 185.

a different opinion. The opinion, which we have formed in this case, after, hearing arguments on both sides at great length, is in accord with the opinion expressed by Mr. Wells, though we do not find ourselves in agreement with him in the reasons for that opinion. Mr. Wells says that the transferee becomes by operation of law representative of the judgment-debtor. If that were so there could be no question of the appellant being brought on the record of the case either in addition to or in substitution of the original judgment-debtors and execution proceedings being taken as against him for the satisfaction of the decree in question. But we are unable to see how in the circumstances in which the appellant is placed he can be treated as the representative of the judgment-debtor by operation of law. The term "legal representative" as defined in the Code of Civil Procedure only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent. The present case is not such a case. Further the appellant cannot be held to be the representative of the original judgment-debtors in respect of a liability which had arisen subsequent to the mortgages on which the decree for sale was founded and in execution of which decree the appellant became the purchaser of the under-proprietary tenure. He is certainly a representative of the judgment-debtor qua the rights and the liabilies which stood on the date of the mortgages We do not think that the last-mentioned proposition requires any authority in support of it. But it may as well be to refer to a decision in the late Court of the Judicial Commissioner of Oudh in *Pratab Bahadur Singh* v. *Maheshwar Bakhsh Singh* (2). Nor was the proposition questioned at the hearing of this appeal by the learned advocates on the side of the appellant and the respondents both

On what grounds the appellant can he held to be liable to satisfy the decree for arrears of rent obtained in the year 1924 in process of execution of the same decree though the appellant is not a judgment-debtor on the record of the decree? It seems to us that the combined effect of the provisions of Ss. 154, Oudh Rent Act, 1886, and 146, Civil P. C., 1908. furnishes such grounds. The liability of the appellant is admitted and this is by reason of S. 154, Oudh Rent Act. It appears to us that the provisions of S. 154 not only make the transferee or the incumbrancer as he is described in that section liable for the rent subsequently accuring but they make him so liable in consequence of the act of omission to pay the rent on the part of the original under-proprietor. If the liability therefore arises by reason of such an omission it must be held, we think, that the transferee is a person claiming under, if such a term can be used in respect of a liability, the transferror. This brings us to S. 146, Civil P. C. It is a new section in the sense that there was no provision similar to it in the old Code of 1882 The section is as follows :

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

It follows as logical corollary, if we may say so, that the proceedings now being taken in execution of the rent decree of 1924 may be and are rightly taken against the appellant. This disposes of the suggestion that a second suit may be open to the respondent against the appellant for the recovery of the same arrears of rent for which the decree had been obtained in the year 1924 against the original under-proprietors. If the appellant is a person, claiming under the original under-proprietors as we think he is, the second suit as against him will obviously be barred by the provisions of S. 11, Civil P. C. The appeal fails and is dismissed with costs.

S N /R.K. *Appeal dismissed.*

(2) [1909] 12 O. C. 45=2 I. C. 57.

A. I R. 1929 Oudh 354

STUART, C. J , AND RAZA, J.

Sajid Husain and *another*—Plaintiff —Appellants.

v.

Abdul Rahim and *another* — Defendants—Respondents.

First Appeal No. 36 of 1928, Decided on 16th October 1928, against the decree of First Addl. Sub-Judge, Malihabad, D/- 6th December 1927.

(a) Guardians and Wards Act, S. 48—Minor declared to have attained majority—Court cannot again interfere to correct age.

After a minor was declared to have attained majority by Court, the Court again entertained an application for correcting the age.

Held: that the Court had no right to interfere in the matter as it was functus. [P 356 C 2]

(b) Guardians and Wards Act, S. 31—Absence of enquiry does not vitiate good bargain.

Where a Judge in a case in which an enquiry is necessary allows through his remissness a transaction to take place to the detriment of the minor the sanction which he has given is not a bar to a re-opening of the transaction. But apart from the fact that the law itself does not order an inquiry, absence of inquiry would not vitiate the transaction if the Judge has been able to conclude a good bargain. [P 357 C 2]

M. Wasim and *Rameshari Dayal*—for Appellants.

Ghulam Hasan, *K P. Misra*, and *Hardayal*—for Respondents.

Judgment.—This is a plaintiff's appeal. The facts are as follows. The plaintiff Chaudhury Sajid Husain is the son of the late Chaudhury Kazim Husain, a Shia gentleman of position, who was the brother of the late wife of the late Raja of Mahmudabad. Chaudhury Kazim Husain died on 30th September 1913. He died possessed of a share in the village Palhri, a share in the village Parathia, the whole of the village Bahadurpur and a house at Muftigunj, Lucknow. It appears that the whole of this property descended to his sons Chaudhury Mustafa Husain and Chaudhury Sajid Husain Shortly after his death Mustafa Husain applied to be made guardian of the person and the property of his younger brother Sajid Husain and on the 16th October 1914, he was appointed (Ex. 8) the guardian of his brother's person and property by the District Judge of Lucknow. When he applied for the guardianship he stated that Sajid Husain had been born on the 25th April 1903, and this statement was accepted by the District Judge. The property of the late Chaudhury Kazim Husain was heavily-encumbered and he had in addition left unsecured debts. It is quite clear on the evidence that the property was practically bankrupt property. All the villages were encumbered, Bahadurpur being mortgaged with possession for Rs. 28,000 The income available for family use consisted only of the profits of Rs 2,060 a year from Palhri and Rs. 782 from Parathia, that is to say, Rs. 2,842, Bahadurpur produced a profit of Rs. 950 a year but that was, of course, enjoyed by the mortgagee in possession and the family could derive no benefit from Bahadurpur until Rs. 28,000 had been paid. We find that on 21st September 1915 (Ex. A-17) Mustafa Husain approached the District Judge with an application in which he stated that the total debts were then Rs 77,466-2-0 out of which Rs. 49,466 were bearing interest. The rate of interest charged was something more than 5 per cent but even at 5 per cent the interest on the Rs. 49,466 would have come approximately to Rs. 2,500 and this would have left Rs. 342 only for the support of the two sons and their family In these circumstances Mustafa Husain submitted a very reasonable proposal that such rights as the family retained in Palhri should be sold. Ex. A shows that the office of the Judge reported favourably on the proposal and in Ex. A-26 the District Judge on 28th September 1915, sanctioned the sale as far as the minor was concerned. However, no one was found who was ready to purchase Palhri and on 24th January 1916, the District Judge then holding the office was approached by Mustafa Husain in an application (Ex. 6) with an alternative suggestion that Bahadurpur should be sold.

In Ex. A-8 the office wrote a report as to this application and (Ex. A-9) Mustafa Husain was examined before the Judge and he stated that he could get Rs. 37,000 for Bahadurpur In Ex. 2 the District Judge sanctioned the sale of Bahadurpur for Rs. 37,000 but Bahadurpur was eventually sold on 21st February 1913 under Ex. A-1 for Rs. 37,200. By this sale the estate satisfied the mortgage on Bahadurpur and obtained for the equity of redemption after paying the costs of the transfer a sum of nearly Rs. 9,000. As we have already stated the income of Bahadurpur was only Rs. 850. Thus the property was sold for cash for nearly 40 years' purchase. Palhri was already mortgaged under a simple mortgage. A suit had been brought on the mortgage and a decree was passed on 15th June 1916, and it was found impossible to redeem. The

share in the village was not actually sold until the 21st May 1919, when (see the sale certificate Ex. A-57) the actual price obtained was Rs. 56,573 which satisfied the decretal amount and left nothing over Palhri thus was sold for about 28 years' purchase. Before that sale, however, a third sale had taken place. Bahadurpur had gone. A decree had been passed against Palhri but there was no means of satisfying it and the share in Parathia, which was also encumbered, alone was left On 8th January 1918, the Maharaja of Mahmudabad who is a relation of these persons, purchased the share in Parathia for Rs. 23,400. At this time as a result of the sale of Parathia the family was left with their house in Muftiganj, their debts paid and a few thousand rupees over. As we have already noted Mustafa Husain had in his application (Ex A-5) stated that Sajid Husain had been born on 25th April 1903. After the debts had been paid and a certain amount of money had accumulated an application was presented to the District Judge on behalf of Badrunnisa, a sister of Sajid Husain, to the effect that Sajid Husain had really been born about 1900 and was over 20 years of age at the time. Sajid Husain countersigned this application It is Ex. A-26 and dated 15th December 1921. In addition Sajid Husain presented another application (Ex. A-14) on 16th December 1921, to the same effect. A medical certificate was produced from a certain Captain E. G. Pandali. This certificate is Ex. A-12. Captain E. G. Pandali was called as a witness (see Ex. A-16). He deposed on 20th December 1921, that he had examined Sajid Husain who was over 20 years of age and as a result the District Judge Mr. Sherring passed the order (Ex. A-15) on 20th December 1921

"Sajid Husain is declared a major. The Bank to be informed that Sajid Husain is now major and can deal with his own property. The guardianship now ceases to exist. File."

Sajid Hussain obtained a substantial amount of money on the finding that his age had been incorrectly recorded. He was then taken to have been born about 1900. Any suit to set aside the sale of Bahadurpur would have had to be filed before the end of 1924. After any such suit had become timebarred on this computation, Saijd Husain executed a sale-deed on 29th May 1925, in favour of Bhola Prasad, a Kurmi who resides in Lucknow District, by which he agreed to transfer to him four annas out of his eight annas in Bahadurpur for a consideration of Rs. 500 upon the understanding that Bhola Prasad would finance all litigation to get the sale of Bahadurpur set aside. The sale-deed in question is Ex 3, After he had executed this sale-deed he apparently changed his mind, for we find that on 22nd May 1926, he brought a suit against Bhola Prasad to have this sale Ex. 3 set aside on the ground that its execution had been obtained from him by duress. Then he changed his mind again and withdrew that suit on 14th July 1926. On 1st September 1921, he applied to the District Judge of Lucknow who was then Mr. Cuming to correct the date of his age We have little difficulty in understanding how Mr. Cuming formed the conclusion that he had any right to interfere in the matter when he was clearly functus but he passed on 28th October 1926, an order Ex 4. This is his order:

"The above statement of ex-guardian is supported by the record. Let the age be corrected accordingly. The age originally stated in the guardianship application of 22nd (sic) September 1914, being restored. The parties having come to terms on the other matters between them the papers can be filed".

Now it is to be noted that in these proceedings Chauduri Mustafa Husain was a party. This is noticeable in view of the fact that Chaudhuri Mustafa Husain although summoned three times to give evidence in the present case refused to appear The next stage in these proceedings was the filing of the suit out of which this appeal has arisen. It was filed on 13th January 1927. The learned trial Judge arrived at the conclusion that the suit should succeed on the merits, but that it had to be dismissed because it had been filed more than three years after Sajid Husain had attained majority. The dismissal would of course, be unavoidable ,however good the case had been in the matter, if it had been filed after limitation. But in such event some sympathy might have been excited. But we are not disposed to extend any sympathy to either of the plaintiffs in the present matter, as we find that the suit should not have succeeded on the merits even had it been filed within limitation. The learned counsel for the respondents have taken in our view a very proper course

in supporting the judgment of dismissal on grounds which were decided against him in the trial Court. The view taken by the learned trial judge upon the merits is as follows. He considers that there were two defects The first defect was that Mr. Sherring had made no inquiry, and this abstention in his opinion vitiated the permission to sell under S. 31 (1), Guardians and Wards Act (8 of 1890). He further went on to find that the order of Mr Sherring was defective in form in certain particulars because it did not recite the advantages to be gained by the minor, and because it did not describe with particularity the property to be sold. He considered the first objection fatal to the validity of the transfer. He considered the second objection immaterial. He added, however, a conclusion that the transaction had not been for the benefit of the minor and that both legally and fairly he ought to be permitted to set aside but as he also arrived at the conclusion that the vendee Abdul Rahim had acted perfectly honestly and had paid up the price in full, his view was that the minor could not set the transaction aside as far as he was concerned without refunding a moiety of what Abdul Rahim had paid. To take the last point first as we consider it the most important, we are unable to follow the learned Judge's reasoning or his view in respect of the transaction To us it appears that Mr. Sherring acted in the best possible interest of the minor and secured an extraordinarily good price for Bahadurpur.

The learned trial Judge has said that as Bahadurpur is near Lucknow and is connected with it by a metalled road the property there is likely to increase in value. There is no doubt force in this remark, but the learned Judge has failed to satisfy us, even if the property was likely to increase in value that a vendor should be dissatisfied with a price equivalent to forty times the annual value of the property, that is, the rate which Sajid Husain received from Abdul Rahim We consider that Mr. Sherring managed this bankrupt estate of Kazim Husain with great intelligence. If matters had been allowed to take their course and no property had been sold, the result would have been that Palhri and Parathia would have passed out of the hands of the family having been sold in execution of civil Court decrees, the house in Muftiganj would have gone also and the family would have been left with nothing except the equity of redemption in Bahadurpur and would have been kept out of possession until they had been able to obtain Rs. 28,000. The equity of redemption in Bahadurpur was no doubt worth something but it is quite possible that if the interest had been allowed to accumulate too long on the other debts the equity of redemption in Bahadurpur would also have been attached and sold. Thus a business management which resulted in the payments of all the debts, the preservation of the house in Muftiganj and an accumulation of a reasonable amount of ready money was a business arrangement to be commended and not to be condemned We look at the transaction of sale of Bahadurpur as eminently in the interests of Sajid Husain.

We now take the next point. The learned trial Judge is of the opinion that the permission given by the District Judge was worthless because he made no proper inquiry. We do not propose to go into the question, as to how far the previous decisions of the Judicial Commissioner's Court have laid down the law correctly as to the necessity of such inquiry or the manner in which it ought to be conducted. It is clear enough on broad principles that where a Judge in a case in which an enquiry is necessary allows through his remissness a transaction to take place to the detriment of the minor the sanction which he has given is not a bar to a re-opening of the transaction. But apart from the fact that the law itself does not order an inquiry, absence of inquiry would not vitiate the transaction, if the Judge has been able to conclude a good bargain. To suggest that such transaction should be set aside when the Judge had obtained for the property having had sufficient intelligence to obtain such a price without making an enquiry, is not in our opinion justified by anything in the Guardians and Wards Act or anywhere else. However, it is not necessary for us to expatiate on this point as we are of opinion that on the facts the Judge made sufficient inquiry. It is only necessary to look at the inquiry that was made before Mr. Hamilton in 1915

to show that at the time that Mr. Sherring passed his order he had on the file materials compiled in a previous inquiry which were sufficient for the purpose of his order. As to the formal defects to which the learned trial Judge adverted but which he did not consider sufficient to invalidate proceedings we have only to say that those defects were formal and that we agreed with the view of the law taken by the learned trial Judge in respect of them. We find that even if the suit had been in time it would have failed not only under the provisions of S 48, Guardians and Wards Act but because on the merits the transaction was eminently for the benefit of the minor and was conducted in a regular and proper manner. Why Sajid Husain and the speculator, who is financing these proceedings should have wished to institute them we are not in a position to say Possibly the learned Judge is correct and the property has risen very much in value since 1916.

We now come to the last point which in view of our previous decision is really unimportant Has the suit been rightly dismissed as time barred? While we consider that there is force in the argument that there was very little reason for Mustafa Husain to mis-state his brother's age in Ex 8 we find that upon the facts it is impossible to arrive at a conclusion different from the conclusion of the learned trial Judge. The evidence in support of the allegation that Sajid Husain was born in 1902 is oral evidence consisting of the evidence of Mumtaz Husain, Akbar Ali, Usman Ali, Sughra Begum mother of Sajid Husain and Sajid Husain himself. The learned trial Judge has disbelieved the evidence of Mumtaz Husain We consider that he has disbelieved him rightly The statement of this witness appears to us to be completely unreliable We have examined the evidence of Akbar Ali and Usman Ali and we find their statements equally unreliable. The lady Sughra Begum was disbelieved by the learned Judge and rightly disbelieved.

It is difficult to describe the evidence of Sajid Husain dispassionately, as upon his own showing he was ready to perjure himself upon any occasion when he thought it suited him. His evidence was of course worthless. There remains nothing except the fact that in the original application and in the original order he was stated to have been born in 1903. The statement was that of Mustafa Husain, who has constantly refused to give evidence in the case. Against this there is the evidence of Dr. Varma D W. 6 to the effect that in his opinion Sajid Husain was at least 29 years old when he examined him in 1927. We see no reason to distrust Dr. Varma's evidence We have considered all the evidence on the question of age and we have no hesitation in agreeing with the view of the learned trial Judge. One point remains There was filed before us to-day an application to file certain documents and to produce witnesses to prove them. This is an application under O. 41, R. 27, Civil P. C to produce additional evidence in the appellate Court. The evidence in question was not put before the trial Court and so there was no question of the trial Court having refused to admit it. We certainly do not require this evidence. Sajid Husain has stated that he was not aware that these documents were in existence at the time that he filed his appeal. We have only his word for it and we have found no reason to trust him upon any subject It is perfectly clear to us that he had every opportunity of knowing of the existence of these documents before the case was decided in the trial Court. We refuse to permit him to produce this additional evidence. As a result the appeal is dismissed with costs.

M.N./R K. *Appeal dismissed.*

A. I. R. 1929 Oudh 358

STUART, C. J. AND RAZA, J.

Deputy Commissioner, Gonda—Defendant—Apppellant.

v.

Karimdad Khan and *others*—Plaintiffs—Respondents.

Second Appeal No 134 of 1928, Decided on 22nd August 1928, against decree of Addl. Dist. Judge, Gonda, D/- 12th January 1928.

(a) U. P. Land Revenue Act, S. 4 (15)—Decree granting birt rights under Circular

2 of 1861 grants under proprietary rights —Land Tenures—Birt.

A decree granting birt rights under the provisions of Circular No. 2 of 1861 is necessarily a grant of under-proprietary rights whether under-proprietary rights are or are not specially mentioned, and if a Settlement Officer forming his own opinion as to what the Circular meant proceeded to give title as birtias to persons under the provisions of that Circular that title can only be held to be title as the under-proprietor. *A. I. R* 1922 *P. C.* 41 *Rel., on.* [P 361 C 2]

(b) Land Tenures—Non-transferable holding—Hereditary right proved—Transferability can be presumed.

Where a man is proved to have heriditary rights and there is nothing to show that they are non-transferable they must be presumed to be transforable. [P 361 C 1]

H. K. Ghose and *M. Wasim*—for Appellant.

Radha Krishna—for Respondents

Judgment.—This is a second appeal by the defendant, the Deputy Commissioner of Gonda, in his capacity as representative of the Court of Wards managing the Ajudhia Estate against the decision of both Courts that the plaintiffs-respondents have under-proprietary rights in Pura Saif Khan hamlet of Umedjot, Gonda District. The title of the plaintiffs-respondents is based solely upon a decree of the Settlement Court of Gonda District, dated 30th September 1871. Under this decree their predecessors-in-interest were given certain rights in that hamlet. The superior proprietor of the hamlet was the Maharaja of Ajudhia. These rights were continually challenged by the Ajudhia Estate. A history of the attacks upon the plaintiffs and thair predecessors-in-interest is given in the decision of Mr. Pim, Junior Member of the Board of Revenue dated 25th August 1925, (Ex. A-4). The decree was passed in 1871. In 1875 the Ajudhia Estate endeavoured to eject the decree-holders. The Estate failed. In 1898 the Ajudhia Estate again endeavoured to eject one of their number. That attempt again failed. In 1903 during the progress of the then settlement the plaintiffs' predecessors who claimed to be under-proprietors in the hamlet and admitted their liability to pay rent to the superior proprietor, applied to the Settlement Officer asking him to fix their rents. The Ajudhia Estate objected. The case for the Ajudhia Estate was that the estate had a right to fix the rents of these persons as it pleased and that no Court should be allowed to interfere with that right. The question was decided against the estate and no appeal was preferred. In 1905 the Estate again endeavoured to challenge the title. It came into Court and asked for a declaration that the plaintiffs' predecessors were ordinary tenants and such birt rights as they might have had lapsed. That suit was dismissed. It, however, happened that at no time had the plaintiff's predecessors been recorded as under-proprietors. They have been recorded as birtdars. In the 1903 Settlement an entry had been made in the khewat which was opposed to the terms of the 1871 decree and the decision of the Settlement Officer. This entry was that they were ordinary tenants. The omission to enter them as under-proprietors affected them in 1914 when they attempted to partition the mahal The Board of Revenue found that they were not under-proprietors. The last attack made by the Ajudhia Estate upon the plaintiffs is thus described by Mr. Pim in his judgment :

"In the present litigation the Estate has tried new tactics. Abandoning the obviously hopeless attempt to eject by notice it served a notice on the appellants to pay an enhanced rent which, however, had been found in the first Court to be reasonable and on their refusal to pay it, have brought a suit under S. 52 on the basis of the conditions of re-entry laid down in the settlement decree of 1871."

This attempt has been successful as far as the revenue Courts are concerned for in spite of the fact that the Settlement Court in 1903 had laid down distinctly that the rents were to be fixed by the revenue Courts and not by the Estate, the refusal of the plaintiffs to pay a rent, which whether reasonable or not, the Estate on the previous decision had no right to fix has resulted in a decree for their ejectment. But they have not been ejected actually and are still in physical possession of the property. They then instituted the present proceedings in the civil Courts for a declaration that they are not tenants but under-proprietors. They have succeeded in obtaining a declaration that they are under-proprietors. If this decree is upheld they cannot be ejected by the revenue Courts and will be permitted to hold the land as they have all along held it. The Courts below have devoted considerable trouble to the decision of

he somewhat complicated facts and have displayed great skill in considering the evidence and applying the law thereto.

The decision of this appeal turns in the main on the construction to be placed upon the decree of 1871 Before we consider its terms it is necessary to note the definition of "under-proprietor" in the Oudh Rent Act. An under-proprietor is a person possessing a heritable and transferable right of property in land for which he is liable or but for a contract or decree would be liable to pay rent. We now come to the litigation of 1871. The judgment on which the decree is founded gives a sufficiently full account as to how that case came into being The plaintiffs in that case who were the predecessors-in-interest of the present plaintiffs came into Court on the assertion that in the year 1203 Fasli (a year which corresponds to 1796 A. D.) a certain Rani Bhagwant Kuar had, in consideration of the payment of Rs. 500, given to their ancestor unnamed a birt right in the hamlet. The right carried with it the privilege to the birtias of deducting by way of dahyak one-tenth of the rent assessed on the hamlet. The plaintiffs in that litigation continued that as the Ajudhia Estate, which had since acquired the village refused to recognize their rights they had come to the Settlement Court to have their rights defined and enforced. The reply of the Estate was a complete denial The judgment continues that the plaintiffs were unable to produce any document granting them such rights such a failure would not be surprising if the rights had been granted in the year 1796, and that as there had been no real proof one way or another, the parties had consented to abide by the statement of the Patwari Shiam Lal and that Shiam Lal had deposed, after examining such papers as he had in his possession, that it was an undoubted fact that the plaintiffs were the birtdars of the village He continued that Saif Khan was the founder of the hamlet Pura Saif Khan that he was the ancestor of the plaintiffs and that he had founded the hamlet some seventy years before, having obtained a birt contingent on his cutting down the jungle and reclaiming the land. The terms of the birt were that the birtdars were to retain possession on payment of the rent fixed by the taluqdar. The rent was to be fixed in the following way. Tue jama was to be at prevailing rates and the birtdars were entitled to deduct from the prevailing rates one-tenth on account of their dahyak right. This was the statement of the patwari and upon this statement the Settlement Officer decreed the case. The words of the effective part of the judgment are these :

"Therefore, the plaintiffs' birt rights and possession within limitation having been established on the evidence in the manner required by Circular No 2 of 1861, it is ordered that a decree may be passed in favour of the plaintiffs Fateh Khan and Amir Khan and their co-sharers for continuance of their possession over Pura Saif Khan included in Umedpot, Pargana Gonda. the dahyak rights to be deducted. The defendant shall have power to assess and alter the jama. The plaintiffs' right of dahyak shall be calculated. If the plaintiffs decline to accept the rate assessed by the taluqdar he will have the power to take the village under his direct management, but in that case the plaintiffs shall be entitled to recover one tenth as dayhak from the jama so collected. The taluqdar will have to pay this "dahyak at the close of the year."

To a certain extent the question as to the nature of the birt rights so conferred has been decided between the parties for in the litigation of 1905 to which we have already referred in an appeal brought by the Ajudhia Estate against the predecessors-in-interest of the present plaintiffs it was decided in the Judicial Commissioner's Court on 3rd September 1907 (*Second Civil Appeal No.* 565 *of* 1906) that the predecessors-in-interest of the plaintiffs had the rights of birtias (or birtdars) under the decree of 1871. The Second Additional Judicial Commissioner, who decided the appeal, said in his judgment :

"It does not appear to me to be open to question that the present defendants have acquired heritable rights under the Settlement decree of 1871. The fact that the defendants were not recorded as birtdars or under proprietors until the year of 1903 is of little importance. The rights conferred by the decree of 1871 cannot be affected by the ommission to have the decree-holders recorded in the village papers as birtdars."

It is true that the Judicial Commissioner's Court did not arrive at any decision as to the exact state of the predecessor-in-interest of the plaintiffs In other words while deciding that they had hereditary rights the Judicial Commissioner's Court expressed no opinion as to whether they had transferable rights.

In determining whether in addition to hereditary rights they had also transferable rights, apart from the argument that where a man is proved to have hereditary rights, and there is nothing to show that they are non-transferable they must be presumed to be transferable, it is necessary to examine the decree of 1871 from another point of view. That decree was passed under the provisions of Circular No. 2 of 1861 which the Settlement Officer has misdescribed as Circular No. 2 of 1862. It is a Circular which was known as the Record-of-Rights Circular and refers in paras. 22 to 25 particularly to birts It is possible to criticise the Chief Commissioner's description and definition of birts which appears to us not to be accurate altogether But we are not concerned whether he, appreciated the nature of birts accurately or not. We are concerned with the effect of the circular in respect of Settlement decrees declaring the existence of birts. The paragraphs having bearing upon the case will be found at p. 174 et seq, of Sykes' well-known Compendium of the Taluqdari Law. It is quite clear from these articles that the Chief Commissioner considered what he called birts to be under proprietary tenures. He said that these tenuree when granted by the taluqdar for money received, will be maintained as representing the proprietary rights of the birtias who by purchase have acquired the position of intermediate holders, and as constituting the portion of the profits left them by the taluqdar. Here he was considering only the case of what are known as bai birts. He proceeded to discuss what he called birts conferred by favour or raiyati birts and says these birts conferred by favour or raiyati birts, as they are styled in contradistinction to the former or bai birts are not birts in their essential characteristics, but are identical with the rent fee grants made by the taluqdars and are, therefore, liable to resumption by them at the Regular Settlement when the Government will take its full share of the rental. He continued in para. 24

"Where the birtia has lost possession there is no more to be said. We are not to restore him. But the Chief Commissioner is clearly of opinion that the birtias who were found in direct engagement with the Estate at annexation or who have uninterruptedly held whole villages on the terms of their pattahs under the taluqdar must be maintained in the full enjoyment of their rights in subordination to the taluqdar."

These extracts are sufficient to justify the conclusion at which we arrive that the Chief Commissioner did not intend recognition of the rights of birtias unless those birtias were under-proprietors as opposed to tenants. Thus the mere fact that the decree of 1871 was in accordance with Circular No 2 of 1861 is sufficient to show that the Settlement Officer intended to declare the existence of under-proprietary rights. It is true that the Patwari knew nothing about the existence of the bai birt which the plaintiffs' predessors had put forward in the proceedings of 1871. All that he knew was that Sail Khan had cut down the jungle A birt obtained from a taluqdar in consideration of cutting down jungle and clearing the soil was known as a ban kati birt or ban tarashi birt The Chief Commissioner in the circular in question had not taken into account specifically the existence of such birts which were clearly not what he called raiyati birts or rent free grants made by the taluqdar But if a Settlement Officer forming his own opinion as to what the Circular meant proceeded to give title as birtias to persons under the provisions of that Circular that title, in our opinion, can only be held to be title as the under-proprietor. The learned counsel for the defendant-appellant has asked us to distinguish this case from the case of *Mohammad Abdul Hasan* v. *Lachmi Narain* (1).

Mr Pim distinguished this case from that case and it was on the distinction that he made that he ordered the ejectment of the plaintiff We are not of opinion that we should distinguish this case from that case (1) and we consider that the decision of their Lordships of the Judicial Committee in that case so far from going against our views support our views That case was a case of a ban kati birt. It was also a *Gonda* case. It was not the same estate. A certain person had claimed rights under a ban kati birt The Settlement Court had decided that he had made out those rights and gave him a decree upholding his possession and occupation under the provisions of Circular No 2 of 1861 subject to the condition that the taluqdar

(1) A. I. R. 1922 P. C. 41=49 All. 355=48 I. A. 267 (P.C.).

should always have the power to renew the patta and to assess the jama according to the practice observed during the Shai times. The Settlement Officer further declared that the jama should be fixed at prevailing rates and that birtdar should be entitled to deduct from it ten per cent. as dahyak dues. Further it was stated that if the birtdar took any objection to the payment of this jama the taluqdar should be allowed a right of reentry, should take the village under direct management and that the birtdar should in these circumstances be only entitled to receive ten per cent. as dahyak on the jama. The similarity up to this point is very marked. But there is one distinction on which the learned counsel for the appellant has laid great stress. In that decree the birtdars were described as under-proprietors and the present decree says nothing on the subject one way or the other. Their Lordships of the Privy Council while holding that the birt holder was an under-proprietor took into consideration the fact that he was described as under proprietor. But at p. 278 of 48 *I. A.* [*Mohammad Abul Hasan Khan* v *Lachmi Narain* (1)] a reference is made to the Circular No 2 of 1861, which supports our view, that a decree granting birt rights under the provisions of that Circular is necessarily a grant of under-proprietary rights whether under proprietary rights are or are not specially mentioned.

We finally revert to the argument that where a man is proved to have hereditary rights and that there is nothing to show that they are non-transferable they must be presumed to be transferable. What are the facts here? It is admitted that Saif Khan at the beginning of the nineteenth century brought the land under cultivation and cleared the forest, that he settled the hamlet and populated it and that for over seventy years he and his descendants held this hamlet on payment of rent at a privileged rate to the superior proprietor This position has continued ever since. The rights enjoyed by Saif Khan have descended as hereditary rights subsequently. In the decree there is not one word said restricting the power of transfer. It is unnecessary to establish a power of transfer by outside evidence. Where a man has rights of a hereditary nature it is a good legal presumption that those rights are transferable. Such a presumption can of course, be rebutted, but there is no rebuttal here.

For the above reasons we find ourselves in agreement with the conclusions of the Court below and we find that upon the evidence the plaintiffs are under-proprietors and entitled to under proprietary rights in Pura Saif Khan. We, therefore, dismiss this appeal with costs.

M.N./R.K. *Appeal dismissed.*

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* A I R. 1929 Oudh 362

STUART, C. J. AND WAZIR HASAN, J.

Mool Chand and *others* — Plaintiffs—Appellants.

v.

Iltifat Husain and *others* — Defendants—Respondents.

Second Appeal No. 200 of 1928, Decided on 5th November 1928, against decree of Addl. Sub-Judge, Sitapur, D/- 21st April 1928.

*** Civil P. C., S. 11—Land Record Officer ordering that mortgagor should be recorded as ex-proprietary tenant of his sir land—His order will operate as res judicata in subsequent civil suit, Land Record Officer having exclusive jurisdiction to pass such order.**

The judgment of a Court of exclusive jurisdiction, directly upon the point is conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Hence the order of the Land Record Officer declaring that a person who had mortgaged his village should be declared as ex-proprietary tenant of his *sir* land will operate as res judicata and the question cannot be opened again in a Civil suit, although provisions of S. 11, Civil P. C., are not applicable to such a case, the Land Record Officer having exclusive jurisdiction to pass such an order : *A. I. R.* 1924 *P. C.* 175, *Dist.* [P 363 C 1, 2]

Bisheshwar Nath and *Ishwari Prasad* —for Appellants.

Wasim and *Akhlaq Husain*—for Respondents.

Judgment —This is the plaintiffs' appeal from the decree of the Additional Subordinate Judge of Sitapur, dated 21st April, 1928, reversing the decree of Munsif of the same place dated 23rd December 1927 The facts necessary for the decision of this appeal are as follows. In virtue of a mortgage of 25th August 1886 executed by the predecessor-in-interest of the defendant-respondents in respect of the village of Harraya in favour of the predecessor-in-interest of the plaintiffs

appellants the mortgagee entered into possession of the mortgaged property on 29th June 1904, under a decree of Court. At the time when the mortgagee entered into possession the mortgagors held 56 bighas 16 biswas *sir* land in the village of Harraya. At the instance of the mortgagors the Court of Revenue on 26th October 1910, fixed rent in respect of 9 bighas 2 biswas of the *sir* land awarding the status of ex-proprietary tenant to the mortgagor's representatives-in-interest. In the course of settlement operation in the year 1924, the defendants claimed that the entire 56 bighas 16 biswas of the *sir* land was their ex-proprietary tenancy land and that the entries in the revenue papers should be so corrected as to cover the entire area of the *sir* land as the ex-proprietary holding of the mortgagees. The Land Record Officer eventually passed an order on 28th September 1924, as between the mortgagors and the mortgagees that the entire 56 bighas 16 biswas should be recorded as an ex-proprietary tenancy of the mortgagors One part of the order just now mentioned is important and may with advantage be reproduced here.

"They (mortgagors) are admittedly in possession of it (the entire area of 56 bighas 16 biswas). Hence it is to be recorded as their ex-proprietary holding."

The plaintiffs made an infructuous attempt to obtain a review of this order and finally instituted the suit out of which this appeal has arisen. The Court of first instance gave a decree to the plaintiffs for possession over the lands in suit which are included within the area of the 56 bighas 16 biswas mentioned above. On appeal by the defendants the lower appellate Court holding that the order of the Court of Revenue dated 28th September 1924, constituted a bar to an adjudication of the plaintiffs' right to the possession of the land in suit allwed the appeal and dismissed the plaintiff' suit.

The quesion in appeal, therefore, is as to the effect of the order of 28th September 1924 on the relief claimed by the plaintiffs. We are of opinion that the said order constitutes res judicata in favour of the defendants-respondents and consequently the decree of the Court below must be maintained. There is no doubt that the Land-Record Officer had jurisdiction to pass the order of 28th September 1924. He was seized of that jurisdiction first under the express provisions of S. 36, Land Revenue Act, (3 of 1901) and secondly under the general provisions of the Oudh Rent Act relating to the determination of ex-proprietary rights under S 7-A, Oudh Rent Act, 1886. Further the Land Record Officer was not only possessed of this jurisdiction but his jurisdiction was exclusive Obviously the provisions of S. 11, Civil P. C, 1908, relating to res judicata are not applicable to this case but the provisions are not exhaustive, and what is applicable to this case is the second rule of the rules stated in *Duchess of Kingston's* case (1) and it is as follows:

"That the judgment of a Court of exclusive jurisdiction, directly upon the point, is···conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose."

The plaintiffs cannot get actual possession of the lands in suit unless they obtain a finding that those lands do not constitute the ex-proprietary tenancy of the defendants. This finding we are precluded from giving in favour of the plaintiffs by virtue of the rule of res judicata just now mentioned

As against this view two points were urged by the learned advocate, who appeared on behalf of the appellants· (1) That the provisions of S 7-A, Oudh Rent Act, 1886, were inapplicable to the present case for the reason that the original mortgage was of 25th August 1886, while the ex-proprietary rights under the provisions of the Oudh Rent Act were given only in case of alienations after the first day of January 1902, and (2) that the claim made for ex proprietary rights in the year 1924 was barred on that day by one year's rule of limitation prescribed by S. 129. In support of the second ground it was pointed out to us that in the present suit the defendants had admitted, "that the plaintiffs were in possession of the property in suit until the order of the revenue Court dated 28th September 1924 was passed."

We are of the opinion that both the grounds are untenable. As to the first ground, it is not necessary to decide, but it may well be argued as it was, before us, that the provisions of S. 7-A, Oudh Rent Act come into operation in this case not on the date of the mortgage but on the date when the mortgagee took possession of the mortgaged property under the decree of Court in the year 1904.

(1) [1776] 2 Sm. L. C. (11th Ed.) p. 791.

The fatal answer to the argument is that the order is conclusive though it might have been wrong. As to the second ground it appears to us that we must accept the statement as to possession made in the order of the Land Record Officer 28th September 1924, that both parties were agreed that the mortgagors were in possession of the entire area of the land now in suit That there might have been change of possession since is immaterial. What is material is that the defendants are to-day in possession. No question of limitation can arise under such circumstances. Here again the order is conclusive, though it may be wrong.

We were asked to go behind the order of 28th September 1924, on the authority the decision of their Lordships of the Judicial Committee in the case of *Secretary of State* v. *Jatindra Nath Chowdhury* (2). That decision was given with reference to the provisions of S 6 of Act 9 of 1847 relating to the boundary disputes in cases of alluvion The section provided for the finality of the orders of the Board of Revenue on those matters.

"Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity."

The finality imposed by the provisions of S. 6 of the said Act upon the orders of the Board of Revenue obviously did not affect and raise the question of jurisdiction, but this is the question which arises in the present case. Further the two mistakes, if they were mistakes, which the Land Record Officer is said to have made and which we have already mentioned, cannot, in our opinion, amount to fundamental irregularity. The decision relied upon is, therefore, inapplicable. Accordingly we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(2) A. I. R. 1924 P. C. 175=51 Cal. 802=51 I. A. 241 (P. C.).

A. I. R. 1929 Oudh 364

MISRA AND NANAVUTTY, JJ.

Jagadat Singh—Plaintiff—Appellant

v.

(*Rawat*) *Kanhaiya Bakhsh* and *another*—Defendants—Respondents.

First Appeal No. 28 of 1928, Decided on 8th August 1928.

Hindu Law—Widow—Costs in litigation incurred by her to protect her title to the estate are binding on reversioners but not those undertaken with any other object.

The law applicable in cases where a reversioner is sought to be bound with costs of litigation incurred by a Hindu widow is that if she has incurred debts to meet the costs of litigation brought against her, in order to protect her title to the estate, the debts so incurred would be binding on the reversioner. If, however, she has incurred debts in litigation undertaken by herself not with the object indicated above, those debts will not be binding on the reversioner 4 *All.* 532 ; 12 *Cal.* 52 , *A. I. R.* 1917 *P C.* 33 ; *A. I. R.* 1923 *All.* 298 ; *A. I. R.* 1926 *All.* 511 ; *A I. R.* 1926 *Cal.* 1046 and 22 *P. R.* 1890, *Cons.* and *Rel. on.*

[P 367 C 1]

Radha Krishna—for Appellant.

Pirthvi Nath—for Respondent 1.

Judgment.—This appeal arises out of a declaratory suit. The plaintiff-appellant brought a suit to the effect that the mortgage-deed, dated 24th July 1926, executed by one Mt. Rachhpal Kuar, widow of Darshan Singh, respondent 2 in the appeal before us, in favour of Rawat Kanhaiya Bakhsh Singh, respondent 1 for Rs 6,000 be declared as inoperative and not binding on him as having been executed without any legal necessity The plaintiff alleged himself to be the next reversioner of the husband of the said lady It was alleged that two prior mortgages had been executed by Darshan Singh, in favour of respondent 1, one on 2nd June 1908, and the other on 11th June 1909, which the plaintiff-appellant was entitled to redeem, but in order to deprive him of that right a fresh deed of mortgage had been executed by the lady in favour of respondent 1, fixing a long period of redemption, namely 50 years before which the property could not be redeemed. The plaintiff also sought for a declaration to the effect that this condition be declared not to be binding on him

The widow did not put in any appearance in the suit, which was mainly contested by defendant-respondent 1. He denied the plaintiff's reversionary title, his right to redeem the two prior mortgages and pleaded that the deed was binding upon the plaintiff since it had been executed for legal necessity The Subordinate Judge of Rae Bareli, who tried the suit, held that the plaintiff's reversionary right was fully established and that the mortgage-deed was only binding upon the plaintiff so far as its

consideration went to pay off the two previous mortgages executed by her husband and which have been stated above, and further to the extent of a sum of Rs. 1,200 which had been according to his opinion spent by the lady on account of legal necessity. He also held that the term of fifty years provided in the mortgage-deed in suit was an unreasonable term and would not be binding upon the plaintiff-appellant, and that he would be entitled to redeem the two mortgages executed by Darshan Singh ignoring the term fixed in the mortgage-deed in suit.

The plaintiff has come to this Court in appeal against the decision of the learned Subordinate Judge and the point raised by him in appeal before us is that the amount declared by the learned Judge to have been borrowed by defendant 2 for legal necessity is not proved by the evidence on the record to have been so justified. We now proceed to determine how far the contention raised by the plaintiff-appellant can be maintained.

Turning to the mortgage-deed in suit we find that its consideration consists of the following items :

	Rs.
(a) On account of pro-note dated 28th May 1925, executed by defendant 2 in favour of one Maharaj Bukhsh	1,960
(b) On account of the prior mortgage-deed dated 11th June 1903, executed by Darshan Singh (Ex. 5) ...	200
(c) On account of the prior mortgage deed dated 2nd June 1908, executed by Darshan Singh (Ex. 4) ..	175
(d) On account of the pleader's fee due to one Pandit Satyanarain Shukla pleader, Rae-Bareli	2,200
(e) On account of the pro-note dated 11th June 1925, executed by defendant 2 in favour of one Chandra Pal Singh	1,165
(f) For purchase of stamp and registration expenses	200
(g) For another mortgage-deed dated 10th November 1903, executed by Darshan Singh in favour of Maharaj Bukhsh	100
Total ...	6,000

The Subordinate Judge disallowed items (a), (e), and (g) altogether, allowed (b) and (c) in full and allowed item (d) to the extent of Rs. 1,100 and item (f) to the extent of Rs. 100. In result he declared that the deed was binding to the extent of Rs. 1,575. The plaintiff-appellant admitted the two mortgage-deeds executed by Darshan Singh constituting the items (b) and (c) and there is no dispute regarding them here.

The main dispute centres round items (d) and (f) under which the learned Subordinate Judge allowed Rs. 1,100 and 100.

We proceed to deal with each of these two items separately. Regarding the item (d) we may point out that it is an item relating to the fee due to a pleader named Pandit Satyanarain Shukla of Rae Bareli on account of the various suits conducted by him on behalf of Mt. Rachpal Kuar The learned Subordinate Judge found that out of this a sum of Rs. 400 had already been paid to the said pleader and the rest was still due out of the total amount which under the mortgage-deed in suit she had asked defendant 1 to pay to the said pleader. The learned Subordinate Judge held that a sum of Rs. 1,100 out of this entire amount should be considered as binding upon the plaintiff. We regret to observe that the learned Subordinate Judge has not approached this question from a proper point of view. What the learned Subordinate Judge should have in our opinion done is to consider the nature of each litigation separately by itself and to determine whether the expenses incurred by defendant 1 in connexion with that litigation could be considered as being justified by legal necessity. We, however, now proceed to do so ourselves.

The evidence regarding these litigations is to be found in the deposition of Pandit Satya Narain Shukla, who was examined in the Court below as D. W. 1. According to his evidence we find that the fee due to him was in connexion with seven pieces of litigations, the details of which we give below :

(1) 2 Suits of profits brought in the revenue Court by Mt Rachhpal Kuar against Jagdutt Singh plaintiff-appellant in respect of which a fee of Rs. 475 was settled ; (2) A declaratory suit brought by the plaintiff-appellant, Jagdutt Singh, in the Court of the Subordinate Judge, Rae Bareli, against Mt. Rachhpal Kuar, on the ground that the lady was not entitled to possession of the property left by her husband. The fee settled in this case was Rs. 250, which is the legal fee

in the case and which comes to the same figure if allowed for ten hearings which the pleader did at the rate of Rs. 25 per hearing; (3) Appeal in the above declaratory suit brought by the plaintiff-appellant, Jagdutt Singh, in the Court of the District Judge, Rae Bareli, against the said Mt. Rachhpal Kuar The fee settled in this case was Rs. 250 but Rs 100 only was paid by the lady; (4) *Mahadeo Singh* v *Jagdutt Singh* and *Mt Rachhpal Kuar* in the Court of the Additional Subordinate Judge, Rae Bareli. What the nature of the litigation was does not appear to have been stated by Pundit Satya Narain Shukla, nor is there any evidence on the record to prove it The fee of Rs 850 is alleged to have been settled in this case; (5) Execution proceedings taken by Mt. Rachhpal Kuar for recovery of costs of the declaratory suit brought by the plaintiff-appellant against her in the Subordinate Judge's Court, Rae Bareli. Rs 25 are claimed as fee due to the pleader in these proceedings; (6) *Mt. Rachhpal Kuar* v. *Jagdutt*, a suit instituted by the lady in the revenue Court for removing the plaintiff-appellant from the post of the lambardar. A sum of Rs. 125 is alleged to have been settled to have been payable to the pleader; (7) Execution proceedings in *Mt. Rachhpal Kuar* v. *Jagdutt*, the two suits brought by her for profits in the revenue Court, in which a fee of Rs. 475 is alleged to have been settled.

The total amount of the fees settled according to the statement of Pandit Satya Narain Shukla comes to Rs. 2,450 out of which he admitted a receipt of Rs. 200. The balance left due to him was Rs. 2,250. He stated that he had relinquished a sum of Rs. 75, which would reduce his dues to Rs. 2,175 We do not understand how in the mortgage-deed a sum of Rs. 2,200 was stated as payable to him. However, that is a small matter, which cannot affect the decision of our case.

Before taking each of these items it is necessary that we should consider the law applicable in cases where a reversioner is sought to be bound with costs of litigation incurred by a Hindu widow.

The first case on the subject, which has always been followed, is a case decided by Brodhurst and Mahmood, JJ. of the Allahabad High Court, reported in *Indar Kuar* v. *Lalta Prasad Singh* (1). Mahmood, J in delivering the judgment observed on p 543 that in his opinion a distinction should be drawn between litigation undertaken to protect the property and litigation the object of which was to obtain a possible benefit for the estate, the former relating to the security of that which has already been acquired and in actual possession, and the latter relating to that which may possibly be acquired.

According to his decision the former class of litigation would no doubt amount to legal necessity but in regard to the latter class of litigation the costs of such litigation would only be binding, if it has ended in bringing an actual benefit to the estate. In the latter case, according to the opinion of the learned Judge, any alienation to meet the costs would be binding on the reversioner on the analogy of the maxim—he who enjoys the benefit ought to bear the burden also

In *Amjad Ali* v. *Moniram Kalita* (2) it was held that the legal expenses incurred by a Hindu widow in defending her life estate in her husband's property constitute such a charge on the property as to make a sale therefor by her binding as against the reversioner.

The question of what constitutes "benefit to the estate" was discussed by their Lordships of the Privy Council in *Palaniappa Chetty* v. *Deivasikamony Pandara* (3). Lord Atkinson in delivering the judgment of their Lordships observed on p. 155 that it was impossible for their Lordships to give a precise definition of "benefit to the estate" applicable to all cases and that they would not attempt to do so. It was, however, observed that the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of its portions from injury, or deterioration by inundation, these and such like things would obviously be benefits. It would, therefore, be clear from this decision that it would constitute legal necessity for a Hindu widow to incur debts in order to meet the costs of the litigation for the purpose of defending herself against the hostile litigation.

(1) [1882] 4 All. 532=(1882) A. W. N. 133.
(2) [1885] 12 Cal. 52.
(3) A. I. R. 1917 P. C. 33=40 Mad. 703=44 I. A. 147 (P. C.).

The matter was considered again in the Allahabad High Court by Rafiq and Lindsay, JJ. in a subsequent case reported in *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (4), in which it was held after a discussion of those different cases that the effect of the decisions was that an act for which the character of "legal necessity" or "benefit to the estate" could be claimed must necessarily be a defensive act—something undertaken for the protection of the estate already in possession and not an act done with the purpose of bringing a fresh property into possession and which may or may not be successful under the chances happening upon litigation—vide p. 394.

This principle seems to have been followed in the same Court in a subsequent case reported in *Jado Singh* v. *Nathu Singh* (5)

The Calcutta High Court has recently held that costs of litigation are not always a legal necessity, if the costs have been incurred for the purpose of protection of the estate and the limited owner has incurred debts for the purpose of meeting these costs, then only the costs of litigation could be considered as legal necessity—vide *Upendra Nath* v. *Kiram Chandra*, *A. I. R.* 1926 *Cal.* 1046.

The same view appears to have been followed by the Punjab Chief Court in a case reported in *Abdul Ghaffur Shah* v. *Pir Muhammad Khan* (6).

The rule of law deducible from the above cases, in our opinion, appears to be that if a Hindu widow has incurred debts to meet the costs of litigation brought against her, in order to protect her title to the estate, the debts so incurred would be binding on the reversioner. If, however, she has incurred debts in litigation undertaken by herself not with the object indicated above, those debts will not be binding on the reversioner. It is this test that we are bound to apply in this case in order to determine how far the plaintiff-appellant can be considered to be bound by the debts borrowed by defendant 2 under the mortgage-deed in suit.

As to the two profits cases it appears to us from the evidence that they were suits in no way connected with the protection of her estate. The property which Mt. Rachhpal Kuar had inherited from her husband seems to have been a joint property, and the only way how her husband or she could recover the profits thereof was by instituting suits for the purpose in the revenue Court. We do not see how such suits can be considered to be litigation for the purpose of protecting the estate, which was in her possession These suits were suits for recovering only the profits to which she was entitled We are, therefore, of opinion that the costs incurred by her in this litigation cannot be allowed.

As to the costs incurred by her in the declaratory suit and in the appeal relating to that suit, we are of opinion that the said litigation comes within the rule of law laid down by us as deducible from the reported cases. The suit was obviously brought by the plaintiff-appellant himself against the lady for declaration that she had no title to the property in suit and it was her clear duty to protect her estate, and if she incurred debts to meet costs of that litigation, the plaintiff-appellant must be bound by the said debt We, therefore, hold that the sum of Rs. 400 which remained to be paid on account of the fee due to Pandit Satya Narain Shukla in this case is a valid charge on the estate and the plaintiff is bound by it.

We may mention here that it was argued on behalf of the plaintiff-appellant that there was no proof on the record showing that the costs awarded to her in that suit had not been realized by her from the plaintiff-appellant and consequently the said amount should not be declared as a charge. We regret we are unable to accept this contention. It was for the plaintiff-appellant himself to prove whether the debts incurred by the lady had been paid off by the amount of costs realized by her in execution proceeding, if any. The appellant has given no evidence to that effect. He was the best person to give such evidence, because he himself was the person, from whom such costs must have been realized if at all.

As to the case of *Mahadeo Singh* v. *Jagdutt* we are unable to declare that any debt incurred by the lady on account of the costs of litigation in this case can be held as binding on the estate, since no evidence has been given in the

(4) A. I. R. 1923 All, 298=45 All. 990.
(5) A. I. R. 1926 All. 511=48 All. 592.
(6) [1890] 22 P. R. 1890.

course of the trial proving the nature of the said litigation. In the absence of such proof we regret we cannot hold any debt incurred in respect of the costs of that litigation to be binding on the reversioner

As to the execution proceedings taken in the Court of the Subordinate Judge, Rae Bareli, for recovering the costs of the declaratory suit, we are of opinion that any such costs would not be costs incurred for the benefit of the estate. but incurred by the lady only for the purpose of recovering costs for her own benefit

As to the lambardari case filed by Mt. Rachhpal Kuar against Jagdutt we are clearly of opinion that the said litigation cannot in any way be considered to have been undertaken for the purpose of protecting her estate. The object of that litigation was obviously to get the plaintiff-appellant removed from the post of the lambardar. This cannot, therefore, be considered a litigation coming within the definition of the words "for the benefit of the estate."

As to the execution proceedings taken in the two profits cases we must point out that when we have held that the suits for profits themselves could not be considered as litigations, the costs of which would be a charge on the estate, the execution proceedings in those very cases cannot be considered to be of a character, the costs of which should be declared to be justified by legal necessity.

The result of these findings is that out of the sum of Rs. 500 which was incurred by the lady as costs of the litigation in the declaratory suit and the appeal in connexion therewith should be considered to be those justified by legal necessity. The evidence, however, shows that Rs. 100 out of the said costs have already been paid by Mt Rachhpal Kuer out of her own pocket and the only sum which defendant 1 has been asked to pay to Pandit Satya Narain Shukla on that account is a sum of Rs 400. We, therefore, declare, that item to be binding on the plaintiff-appellant as a reversioner of the husband of Mt. Rachhpal Kuar.

We now proceed to discuss the other item (f) which has been partially awarded by the learned Subordinate Judge, that being on account of the costs and expenses incurred in the execution and registration of the deed. The learned Subordinate Judge has allowed a sum of Rs. 100 on that account. This sum he has allowed on the basis that the deed which had been executed by the lady was for a sum of Rs 6,000 According to our finding the sum which is justified for legal necessity consists of the sum due under the two previous mortgage-deeds which amounts to Rs 375 and the sum of Rs. 400 on account of the costs due for the litigation in respect of the declaratory suit The total amount for which the widow was justified to execute the mortgage-deed in suit comes therefore only to Rs 775. In our opinion Rs. 25 would be quite ample to meet the costs of the stamp and registration of the deed executed for that sum.

We, therefore, hold that the mortgage-deed in suit is only operative to the extent of Rs. 375 due under the two mortgages executed by Darshan Singh, one dated the 2nd June 1908, and the other dated the 11th June, 1909 and to the extent of Rs 400 on account of the costs of the declaratory suit and Rs 25 on account of the costs incurred in executing the deed in suit. The total of this sum, therefore, comes to Rs. 800.

The plaintiff-appellant has in his grounds of appeal to this Court admitted his liability to that extent.

We, therefore, allow this appeal and modify the decree passed by the learned Subordinate Judge to this extent that the deed in suit dated 24th July 1926, executed by Mt Rachhpal Kuar, defendant 2 in favour of Rawat Kanhaiya Bakhsh, defendant 1, shall be declared as binding and operative against the plaintiff-appellant only to the extent indicated above.

The defendant-respondent Rawat Kanhaiya Bakhsh Singh will bear his own costs in this Court as well as in the Court below but will pay $\frac{3}{4}$th of the costs of the plaintiffs in the Court below and the plaintiff's entire costs of appeal in this Court.

N.K./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 369

NANAVUTTY, J.

Bismillah and *another*—Accused—Applicants.

v.

Emperor—Complainant — Opposite Party.

Criminal Revn No 42 of 1928, Decided on 10th July 1928, from order of Sess. Judge, Rae Bareli, D/- 23rd May 1928.

Penal Code, S. 447—Complainant must be in actual physical possession.

The offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question 33 *All.* 773, 17 *O. C.* 21 and 43 *I. C.* 405, *Dist.* [P 369 C 2]

Akhlak Husain—for Applicants.

H. K. Ghosh—for the Crown.

Judgment.—This is an application for revision of an order of the learned Sessions Judge of Rai Bareli, upholding the order of Munshi Ali Husain, Honorary Magistrate of Rae Bareli, dated 10th April 1928, sentencing the applicants Bismillah and Faujdar under S. 447 I. P. C. to undergo one month's rigorous imprisonment. I have heard the learned counsel for the applicants, as also the learned Government Pleader at considerable length and perused the evidence on the record. The facts out of which the present application arises are briefly as follows: On 2nd September 1924 Abdul Wahab mortgaged plot 872 and others to Shamsher, brother of the applicants. On 23rd December 1926 Abdul Wahab's cosharers sued for cancellation of the mortgage. On 20th July 1927 their suit was decreed and on 4th October 1927, joint possession of plot 872 and of other plots was given to the complainant, who is the agent of the cosharers of Abdul Wahab. A fortnight later on 18th October 1927 the complainant Mashadi Husain brought the present complaint under S. 447 against Shamsher, Bismillah, Faujdar and others.

The first point for determination is whether the complainant has proved that he was in actual physical possession of plot 872 in respect of which the applicants are alleged to have committed criminal trespass. There is no evidence on the record to prove that the complainant was in actual physical possession of plot 872. All that has been proved is that the complainant was given joint possession over this plot along with Shamsher the brother of the applicants. The civil suit for damages, to which reference has been made in the judgment of the learned Sessions Judge, is in respect of plot 746 and it is not shown that this plot 746 is the same as plot 872 in the present case

No useful purpose, therefore, can be served by referring to the pleadings and the judgment in that suit for damages The learned Honorary Magistrate discharged Shamsher of the offence under S. 447. On the same ground that Shamsher was discharged the applicants were also entitled to a discharge or acquittal. Shamsher was in actual possession of plot 872 and through him the applicants were also in possession. The offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question In the present case the complainant was not in actual physical possession of the land in suit and, therefore, no offence of criminal trespass could possibly be committed against him by the applicants. The learned Government Pleader invited my attention to a ruling of the Allahabad High Court. *Ram Prasad* v. *Emperor* (1) That ruling has no applicability to the facts of the present case. In that ruling it was laid down that a joint owner of land who entered upon the land with the intention or knowledge that he was about to do an act which was wrongful to his fellow-owners had committed trespass. Here obviously the intention of the applicants was not to do any wrongful act injurious to their fellow-owners, but was merely to maintain their possession undisturbed. A person who is in joint possession, if he wishes to have actual possession, has got his remedy by bringing a suit for actual partition The complainant instead of suing for partition and actual possession decided to to take forcible possession of the plot in suit No. 872 by arbitrarily dispossessing the applicants. It is not the applicants who are at fault but the complainant in the present case The ruling reported in *Sarbadan Singh* v. *Emperor* (2) has also no applicability to the facts of the present case. The complainant not being in

(1) [1911] 33 All. 773=12 I. C. 300=8 A. L. J. 927.

(2) [1914] 17 O. C. 21=23 I. C. 184=1 O. L. J. 527.

actual possession of the plot has no right to assert actual possession by show of force. Shamsher's mortgage had only been cancelled to this extent that the complainant was given a decree for joint possession along with Shamsher. The ruling in *Somadurai Mudaliar, In re* (3) has also got no applicability to the facts of the present case.

For the reasons given above I allow this application for revision, set aside the judgments of the lower Court and acquit the applicants of the offence charged. The applicants are on bail. Their bail bonds are cancelled

R.K. *Revision allowed.*

(3) [1918] 19 Cr. L. J. 117=43 I. C. 405.

A. I R. 1929 Oudh 370

SRIVASTAVA, J.

Lalta Pershad—Defendant — Appellant.

v.

Harnam Singh—Plaintiff — Respondent.

Second Rent Appeal No. 39 of 1928, Decided on 11th September 1928, against decree of Addl. Dist. Judge, Gonda, D/- 19th March 1928.

Landlord and Tenant—Adverse possession —Entry as tenants bila faisla is inconsistent with adverse possession—Mere possession for long time or non-payment of rent cannot establish adverse possession.

The entry in village papers of the defendants as tenants bila faisla is inconsistent with their possession being adverse. These entries must be presumed to be correct unless they are rebutted. The mere fact that the defendants have been in possession for a long time or that they had not paid any rent for the land cannot establish title by adverse possession: *A. I. R.* 1925 *Oudh* 442; 8 *O. L. J.* 495, *Ref.* [P 371 C 2]

H. N. Misra—for Appellant.

H. Husain—for Respondent.

Judgment.—These are three appeals arising out of suits for arrears of rent and ejectment under S. 127, Oudh Rent Act. The defence raised in all the suits was that the defendants had acquired proprietary title by adverse possession extending to a period of over 12 years. The trial Court held that as the case involved a bona fide dispute regarding a question of title the revenue Courts have no jurisdiction to entertain the suit under S 127 and on this preliminary ground dismissed the suit. On appeal, the learned Additional District Judge of Gonda has disagreed with the opinion of the trial Court. He has, therefore, set aside the order of the first Court and remanded the case to the Court for trial according to law.

Two contentions have been urged before me in support of the appeal The first is that the revenue Courts have no jurisdiction under S. 127, Oudh Rent Act, to determine questions of disputed title between persons who are bona fide claimants to the same land It is urged that if a defendant in a suit under S 127 sets up a proprietary title to the land and if the Court is satisfied that such claim is made bona fide, it will at once oust the jurisdiction of the revenue Courts to proceed with the suit and reliance has been placed on two decisions of the Board of Revenue, namely, *Nisar Ali* v. *Megh* (1) and *Bhagwan Bakhsh Singh* v. *Shafiq-uz-zaman* (2), in support of this contention If the Board of Revenue mean to lay down that the mere fact of a question of title being raised in defence in such suits is sufficient to exclude the jurisdiction of the revenue Courts if the claim is a bona fide one, I feel very doubtful of the soundness of this view In my opinion it is the duty of revenue Courts to decide every question raised before them, an adjudication of which is necessary for the complete decision of the suit even though the decision of the revenue Courts may not be final or binding upon the parties in the civil Court. I am supported in this view by the decision of Mr. (Now Sir Edward) Chamier in *Sheikh Talib Ali* v. *Basant Rai* (3). However, if it were necessary for me to arrive at a definite decision on this question in the present case I should have preferred to refer this matter to a Bench of two Judges but I consider it unnecessary to do so in view of the provisions of S 124-C, Oudh Rent Act This section provides that in a case like the present if the appellate Court has before it all materials necessary for the determination of the suit it shall dispose of the appeal as if the suit had been instituted in the right Court. There was a distinct issue framed in the case regarding the defendants having acquired ownership by adverse proprietary possession for over 12 years. The parties had full

(1) Sel. Dec. No. 4 of 1913.
(2) [1914] 1 O. L. J. 707=26 I. C. 709.
(3) [1904] 7 O. C. 340.

opportunity to adduce all the evidence which they wished to produce on this issue. The lower appellate Court had referred to the evidence bearing on this question. I am not prepared to say that the evidence referred to by the lower appellate Court does not afford sufficient material for the determination of the suit on the merits. For these reasons I think that the question of jurisdiction raised by the learned counsel for the defendants-appellants cannot help him in view of the provisions of S. 124-C, Oudh Rent Act.

The next contention is regarding the finding of the lower appellate Court about the defendant being

"a person taking or retaining possession of the land without being entitled to such possession"

within the meaning of S. 127, Oudh Rent Act. The lower appellate Court has relied on the evidence of the patwari, the statement of Sheo Narain (D. W. 5) and the entries in the village papers in support of its finding. I am not prepared to attach much importance to the statement of Sheo Narain (D. W. 5). It can be explained as meaning that he had been in possession of the land in suit as a proprietor believing it to be included in his thok. But apart from his statement I think the statement of the patwari and the entries in the village papers are quite sufficient to justify the finding arrived at by the learned Additional District Judge. The patwari deposed that in this village there are thoks and pattis of which the land and revenue are quite separate. The village khasras support the statement of the patwari. Thus the finding of the lower appellate Court, being supported by legal evidence, cannot be questioned in second appeal There is ample authority for the view taken by the learned Additional District Judge that the entry of the defendants as tenants bila faisla is inconsistent with their possession being adverse: see *Nageshar Singh* v. *Baldeo Singh* (4) and *Durga* v *Rampadarath* (5) These entries must be presumed to be correct unless they are rebutted. Nothing has been shown to me in rebuttal of these entries The mere fact that they have been in possession for a long time or that they had not paid any rent for the land cannot establish title by adverse possession.

For the above reasons I uphold the finding of the lower appellate Court and dismiss the appeals with costs

S.N./R.K. *Appeals dismissed.*

(4) A. I. R. 1925 Oudh 442=28 O. C. 325.
(5) [1921] 8 O. L. J. 495.

A. I. R 1929 Oudh 371

MISRA AND NANAVUTTY, JJ.

Rasul Baksh—Applicant—Appellant

v.

Gulab Rai and *others*—Opposite Party—Respondents.

Misc Appeal No 31 of 1928, Decided on 24th August 1928, from order of 1st Addl. Dist Judge, Lucknow, D/- 13th April 1928.

Provincial Insolvency Act (5 of 1920), Ss. 42 and 25—Fraudulent acts of insolvent and mala fide transfers made by him are to be enquired into by Court after adjudication and not at initial stage.

If the debts entered in the list attached to the application are not bogus debts and if it is found that the property which the insolvent is now possessed of is not enough to pay his debts, he would clearly be entitled to present the application for insolvency under S. 10 and the Court will be bound to adjudicate him insolvent under S. 25. The fraudulent acts of the insolvent and the mala fide transfers made by him are to be enquired into by the Court, after the insolvent has been adjudged as such and not at the initial stage. *A. I. R.* 1922 *Bom* 80 and *A. I. R.* 1916 *P.C.* 64, *Foll.* [P 372 C 1, 2]

M. Wasim for *Khaliquzzaman* — for Appellant

Radha Krishna—for Respondents

Judgment—This suit arises out of insolvency proceedings. One Chaudhri Rasul Bakhsh presented his application to the Court of the Additional District Judge of Lucknow at Bara Banki for being declared an insolvent. The application was presented on 3rd March 1928. Along with the application the insolvent gave a list containing his debts, which according to that list amount to Rs 9,679. He has also attached along with his application another list containing moveable and immovable property of which he alleged that he was possessed. The value of the said property as given in the list amounts to Rs 271-8.

There are three creditors whom he made parties to this application, namely, Gulab Rai, Balgovind and Guley Ram.

The debts entered in the list attached to the petition are alleged to be in favour of these creditors. A notice of application was issued to all the creditors who were present in his Court on 13th April 1928. On that date the applicant entered into the witness-box and deposed on oath that he was indebted to the extent of about Rs 10,000 and was unable to pay his debts as his assets were not worth more than Rs 250. He also stated that the list of the debts and of the assets filed by him was a correct one and that he had not concealed any property. The petitioner was cross-examined on behalf of the creditors and certain facts were elicited from the statement of the insolvent. The learned Additional District Judge on the strength of those statements has held that the application presented by the applicant was not a bona fide one nor was he satisfied that the applicant was unable to pay his debts.

Against that order the insolvent has lodged the present appeal. On behalf of the insolvent it is contended that the finding of the learned Additional District Judge that he (the insolvent) was not unable to pay his debts was not justified on the evidence on the record. It was further urged on his behalf that if the applicant had concealed any property it was open to the Court to consider this matter at a later stage when the insolvent applied for a discharge under S 42, Prov Ins. Act (Act 5 of 1920)

After hearing the parties in this case we are of opinion that the materials placed before the learned Additional District Judge were not enough to let him come to the conclusion that it was established that applicant was unable to pay his debts At this stage the enquiry should be confined in our opinion, merely to the question whether the insolvent was unable to pay his debts. This could very well be ascertained by finding out what the assets of the insolvent are and what are his debts. If the debts entered in the list attached to the application are not bogus debts and if it is found that the property which the insolvent is now possessed of is not enough to pay his debts he would clearly be entitled to present the application for insolvency under S. 10 and the Court will be bound to adjudicate him as insolvent under S. 25, Prov. Ins. Act. If it is brought to the notice of the Court that the insolvent has transferred some property with the intention of defeating the creditors the Court can direct the receiver to take possession of such property and declare the transfer to be bad and not binding on the creditors under S 53 of the said Act. What we mean to suggest is that this would be a matter relevant to the proceedings taken after the insolvent has been adjudged as such and not at the initial stage at which the proceedings were in the present case before the learned Additional District Judge

We are fortified in this view of law by the decision of their Lordships of the Bombay High Court reported in the case of the *Laxmi Bank, Ltd Poona* v. *Ram Chandra* (1) and by a decision of their Lordships of the Privy Council in *Chhatrapat Singh* v. *Kharag Singh* (2)

We are fully aware that these cases were decided under the old Act but they are a useful guide in determining the question as to what would be the proper stage at which the fraudulent acts of insolvent and the mala fide transfers made by him are to be enquired into by the Court It appears to us that the intention of the legislature in adding the words "unless he is unable to pay his debts" in S 10, Prov. Ins. Act (Act 5 of 1920) was that if a Court found that a debtor had failed to establish this preliminary intention he could not be held to be insolvent and, therefore, was not entitled to be adjudged as such. It must, however, be borne in mind that in arriving at a conclusion regarding this matter it would not be relevant to consider whether a particular transfer made by the insolvent was bona fide or otherwise. This, as we have remarked above, must be reserved for a subsequent stage. We have examined the record in this case and find that apart from the examination of the insolvent no particular opportunity was given to any of the creditors to prove that the insolvent was really in a position to pay his debts. Nor was one given to the insolvent to show what the real nature of his position in regard to the alleged brick kiln in respect of which he was alleged to have received some money actually was. In the ends of justice we, therefore, think

(1) A. I. R. 1922 Bom. 80=46 Bom. 757.
(2) A. I. R. 1916 P. C. 64 = 44 Cal. 535 = 44 I. A. 11 (P.C.).

it necessary that in order to arrive at a correct conclusion regarding this matter of the inability of the insolvent to pay his debts, the learned Additional District Judge must give a full opportunity to the insolvent and to the creditors named in the application to prove their respective cases. If on an enquiry the learned Additional District Judge arrives at the conclusion that the insolvent is unable to pay his debts he should adjudicate him as such, otherwise he would be justified in dismissing his application on the ground that he had failed to establish the preliminary condition We, therefore, set aside the order of the learned Additional District Judge dated 13th April 1928 by which he dismissed the applicant's application for insolvency and direct that the said application be again restored to its original number and decide in accordance with law as indicated above. The costs of these proceedings will be the costs in the case.

N K /R.K. *Order set aside*

A. I. R. 1929 Oudh 373

MISRA AND NANAVUTTY, JJ.

Sital Singh and *others*—Defendants—Appellants.

v.

Gijindra Bahadur Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 89 of 1926, Decided on 23rd August 1928, from decree of Addl Sub-Judge, Gonda, D/- 10th December 1927.

(a) Family arrangement—True test regarding validity—Claims adjudged and disputes settled is sufficient consideration for upholding the family settlement.

It is a wrong principle of law to test the validity of the agreement by having recourse to the expedient of finding out whether the claims of the parties to the agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement." If a settlement was arrived at, the strength or validity of the claims of the parties has nothing to do with the validity of the family settlement. The fact that the claims of the parties had been adjudged and that the disputes between them had been settled would amount to a sufficient consideration for the upholding of the family settlement *A. I. R.* 1927 *Oudh* 572, *Appr.* and *Foll.* [P 374 C 2]

(b) Registration Act, S. 17—Family settlement needs no registration.

Agreement of the nature of a family settlement does not require either writing or registration . *A. I. R.* 1927 *Oudh* 97, *Foll.* [P 375 C 1]

(c) Family arrangement — Terms — Terms recorded in wajib-ul-arz and acted upon—Validity cannot be questioned.

Where agreement of family arrangement was recorded in the wajib ul-arz prepared at the time of the settlement and its terms were acted upon since then, it is not open to the parties to raise any question regarding the validity of the agreement *A. I. R.* 1924 *P. C.* 27; *A. I. R.* 1916 *P. C.* 9, *A. I. R.* 1927 *Oudh* 162 and *A. I. R.* 1927 *Oudh* 570, *Foll.* [P 376 C 1]

Niamatullah and *Naimullah*—for Appellants.

M. Wasim—for Respondents.

Judgment.—This is an appeal arising out of a suit brought by the plaintiffs-respondents in pursuance of an order of the Court of Revenue in proceedings for partition instituted on an application for partition filed by them. The dispute relates to one hundred bighas kham of land situate in village Ramanpur, District Gonda. In the partition proceedings the plaintiffs claimed this land as their exclusive property and the revenue Court had directed them to bring a suit in the civil Court for a declaration of their exclusive rights in respect of the said land. The plaintiffs have now brought the present suit for the purpose. Their allegation is to the effect that custom of haq jethansi prevails among the Bandhalgoti Thakurs and that at the time of the preparation and verification of the wajib-ul-arz by the Regular Settlement Court, Hardat Singh, father of defendant-appellant Sital Singh had agreed to give to their great-grandfather Drigbijai Singh the said one hundred bighas kham as his haq jethansi. They alleged that the agreement arrived at before the Settlement Court was of the nature of a family settlement and had been subsequently given effect to by the ancestors of the defendants and that the said land had been in their possession continuously since that time. They further alleged that their right to this haq jethansi in respect of the one hundred bighas land had been recognized in a will executed by Jagat Singh, their grandfather, by means of which he had given the said land exclusively to the plaintiffs and apportioned the rest of the land among them and the defendants. The defendants contested the suit and contended in defence that no such custom prevailed in

the family and that the agreement arrived at between the parties at the time of the regular settlement was inoperative since it was without any consideration and no suit could now lie for enforcing the said agreement. They also contended that the agreement being unregistered was inadmissible in evidence and could not be the basis of the suit.

We might mention here that the plea of custom was given up by the plaintiffs during the trial of the case and no issue was, therefore, framed in respect thereof. The learned Additional Subordinate Judge of Gonda by his decree dated 4th March 1926 held that the agreement was invalid and inoperative in law and therefore dismissed the suit The learned Additional District Judge of Gonda by his decree dated 10th December 1927 has reversed the finding of the learned Additional Subordinate Judge and has held that the agreement arrived at between the parties at the time of the settlement was of the nature of a family settlement and did not therefore require any registration He also held that the agreement had been acted upon by the parties and it was now too late for the defendants to challenge its validity On this view of the case he decreed the plaintiffs' suit and granted them the declaration asked for. The defendants have now appealed to this Court and it is now again argued on their behalf that the agreement is invalid and inoperative in law and the plaintiffs' case, having been exclusively based on it, should be dismissed

We now proceed to consider how far this contention raised on behalf of the defendants-appellants can be upheld.

The agreement is embodied in the wajib-ul-arz of village Ramanpur, which is on the record of the case and which is Ex 11 The wajib-ul-arz mentions it clearly that Amar Singh the eldest son of Pirthipal Singh was to obtain haq jethansi in the village Riwan, and that Jai Narain, son of Baiju Singh was to get a similar haq jethansi against his brother, Sheo Ratan Singh. The document then proceeds to state that Hardat Singh, father of Sital Singh, the defendant-appellant, had willingly agreed to give one hundred bighas kham as haq jethansi to his elder brother, Drigbijai Singh in village Ramanpur. This wajib-ul-arz was verified by the cosharers of the village and purports to bear the signatures of both Hardat Singh and Drigbijai Singh The verification clause has been filed in the case and is Ex 13. This leaves no doubt in our mind that the agreement was complete and fully accepted both by Hardat Singh and Drigbijai Singh. We are further of opinion that it operates as a family settlement. It was argued that there was no consideration for this agreement since the plaintiffs had given up the plea relating to the custom of haq jethansi, the effect of which was that no such custom had ever existed. Whatever may be the effect of the plaintiff's abandonment of the plea relating to haq jethansi during the course of the trial of the present suit, we cannot ignore the fact that several members belonging to the family of the parties had claimed haq jethansi at the time of the settlement and it had been conceded to them This was in the case of Amar Singh and of Jai Narain Singh If the members of the family came to a settlement among themselves by conceding the right of haq jethansi to such of them as were entitled to it, we are not justified in testing the validity of the agreement on the ground that no such custom had existed since the plaintiffs-respondents have given up the plea regarding the said custom in the present case. The plaintiffs might have thought it proper to give up the plea of the said custom thinking that their case, as it rested on the family settlement, was quite a good case and could succeed apart from the question of custom itself.

It has been pointed out in several cases decided by the various High Courts in India that it is a wrong principle of law to test the validity of an agreement by having recourse to the expedient of finding out whether the claims of the parties to that agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement." If a settlement was arrived at, the strength or validity of the claims of the parties had nothing to do with the validity of the family settlement. The fact that the claims of the parties had been adjusted and that the disputes between them had been settled, would amount to a sufficient consideration for the upholding of the family settlement. We may refer in this connexion to a de-

cision of a Bench of this Court decided by Stuart, C J., and Hasan, J., reported in the case of *Mahabir* v *Dwarka* (1). The principle of law laid down in that case is clear and we are in full agreement with the view of law taken in that case. It therefore appears to us that the family settlement was a good agreement binding upon the parties to this case who claim either under Hardat Singh or under Drigbijai Singh both of whom were parties to the original agreement. As to the argument that the agreement is bad on the ground that it was not registered we may point out that an agreement of the nature of a family arrangement does not require either writing or registration. This principle has been followed both by the Allahabad High Court and the late Court of the Judicial Commissioner of Oudh in a series of cases. It would be sufficient for our purposes to refer to a decision by one of us which is reported in the case of *Tej Bahadur Khan* v. *Nakku Khan* (2), where all the cases on the subject have been discussed We are in entire agreement with the view taken in that case, and are therefore of opinion that the family settlement embodied in the wajib-ul-arz prepared at the time of the regular settlement is operative and binding in spite of the fact that it was not registered (The judgment then discussed other transactions and holding that the agreement was given effect to, proceeded.) We would like to point out that the principle enunciated by their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (3) and in *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao* (4) applies fully to the facts of the present case In *Mahomed Musa* v. *Aghore Kumar Ganguli* (3) a compromise was made in a suit in 1873 by virtue of which certain properties had been allotted to a particular party. The agreement, however, was not registered nor had a transfer been executed in his favour as contemplated by the compromise. It was, however, found that the parties had acted upon the terms of the compromise and had in effect arranged their rights in the property in terms of the compromise Lord Shaw delivering the judgment of their Lordships observed as follows .

"Their Lordships, in view of the argument strongly pressed upon them, think it right further to say that even although the razinama and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. * * * * * * * From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 *Ves. Sen.* 441) may be here repeated . "If confessed or in part carried into execution it will be binding on the parties, and carried into further execution as such, in equity." Their Lordships do not think the law in India is inconsistent with these principles. On the contrary it follows them."

In *Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao* (4) the facts were that upon the marriage of the appellant in that case in 1886 her aunt, a wealthy Hindu widow with whom she had resided since childhood had promised that if the appellant and her husband would reside with her she would purchase unspecified immovable property for the appellant. The appellant and her husband accordingly resided with the aunt. In 1893 the aunt purchased a village in her own name, but, as she stated, for the appellant. Dissatisfaction subsequently arose because the village was not transferred to the appellant and the appellant and her husband consequently ceased to reside with the aunt. In October 1893 the aunt again wrote to the appellant stating that the village had been purchased for her and would be transferred to her The appellant and her husband thereafter resided with the aunt until the aunt's death in 1899. It was held by their Lordships of the Privy Council that the letter of October 1893 constituted a binding contract by the aunt and the appellant was entitled to possession of the village. It was observed by their Lordships in this case that after the terms had been acted upon, the parties could not avail themselves of locus penitentiæ or the power of resiling from the agreement Their Lordships followed *Mahomed Musa's* case quoted above The principle laid down by their Lordships in the cases quoted above has been followed in this Court in two cases reported in *Bismilla Begam* v *Mohammad Ali Mohammad Khan* (5) and in *Udairaj Singh* v. *Shankar Singh* (6). We are

(1) A. I. R. 1927 Oudh 572.
(2) A. I. R. 1927 Oudh 97.
(3) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P.C.).
(4) A. I. R. 1926 P. C. 9=39 Mad. 503=43 I. A. 138 (P.C.).
(5) A. I. R. 1927 Oudh 162.
(6) A. I. R. 1927 Oudh 570.

therefore of opinion that in accordance with the principle laid down by their Lordships of the Privy Council in the above cases it is no more open to the appellants to raise any question regarding the validity or otherwise of the agreement recorded in the wajib-ul-arz prepared at the time of the regular settlement, and that the plaintiffs' case as based on that agreement has been rightly decreed by the learned Additional District Judge of Gonda.

We, therefore, dismiss this appeal with costs.

M N /R K *Appeal dismissed.*

A. I R. 1929 Oudh 376

STUART, C. J., AND PULLAN, J.

Matadin—Appellant

v.

Special Manager, Court of Wards, Ajodhya Estate, Gonda—Respondent.

Second Rent Appeal No. 27 of 1928, Decided on 7th November 1928, against decree of Addl. Dist. Judge, Gonda, D/- 2nd February 1929.

(a) Oudh Rent Act (22 of 1866), S. 127—Appeal.

There is no appeal against an order of ejectment under S. 127 following a decree for arrears of rent. [P 377 C 2]

(b) Oudh Rent Act (22 of 1886), S 108 (2)—Person declared tenant by decision of competent Court must be sued for rent as tenant under S. 108 (2) as also in suit under S 127—He cannot be ejected on decree for rent.

Where in the course of a judgment of a competent Court a person is described as a tenant and declared liable to pay certain sums by way of rent, he should be treated as a tenant and not a trespasser. He should be sued for rent as tenant under S. 109 (2) and not trespasser who should be held to have been treated as tenants for the purpose of the suit under S, 127 and no order of ejectment can follow as a consequence of a decree for rent. [P 378 C 1]

K. N. Chak and *H D. Chandra*—for Appellant,

H. K. Ghosh—for Respondent.

The appeal was originally heard by Srivastava, J., who referred it for decision by a Bench of two Judges by his order reproduced below.

Srivastava, J.—All these four appeals arise out of suits for arrears of rent under S. 108, Cl. (2), Oudh Rent Act, brought by the Special Manager of the Court of Wards of the Ajudhia Estate against certain tenants The learned Additional District Judge of Gonda has disposed of the appeals out of which Rent Appeals Nos. 27 to 29 of 1926 arise by one judgment and the appeal out of which Rent Appeal No. 30 of 1928, arises by a separate judgment but the parties before me are agreed that the points involved in all the appeals are common and that they can be disposed of together.

The relevant facts are that notices of ejectment were issued by the Court of Wards against the defendants-appellants in 1915 The tenants sued to contest the notice of ejectment but were unsuccessful and the Court of Wards obtained delivery of possession against them but as a matter of fact the tenants appear to have continued in possession in spite of the formal delivery of possession. In 1917 the Court of Wards instituted suits against them in the civil Court for possession of part of the lands which formed the subject of the notices of ejectment and dakhal dahani of 1915. These suits resulted in a compromise under which the tenants were allowed to retain possession of the lands in dispute together with certain other lands at a rent specified in the compromise. In 1918 the Court of Wards instituted two suits against each of the tenants one for getting them to execute a qabuliat in pursuance of the compromise mentioned above and the other for arrears of rent. The suits for compulsory execution of qabuliats were eventually dismissed by the Commissioner whose order was upheld by the Board of Revenue The suits for arrears of rent were decreed.

In 1926 the present suits were instituted for arrears of rent for the years 1330 to 1333 Fasli under S 108, Cl (2), Oudh Rent Act. These suits were decreed by the Court of the Assistant Collector. A few days later applications were made by the Court of Wards to the Assistant Collector under Cl. 2, S. 127, Oudh Rent Act, praying for a decree for ejectment of the defendants-tenants from the land in their possession. The applications were granted the same day on which they were made Subsequently the defendants appealed against the decrees passed by the Assistant Collector. The main point argued before the lower appellate Court in support of the appeals was that the defendants were holding the land with consent of the Court of Wards and, therefore, they were not liable to ejectment under S. 127. The learned Additional District Judge re-

pelled the contention and dismissed the appeals. The defendants have come to this Court in second appeal.

The initial difficulty in the way of the appellants strikes me to be regarding their right to contest the validity of the order for ejectment in the appeals before the Additional District Judge and this Court. S. 119, Oudh Rent Act, allows appeals from decree passed by an Assistant Collector to the District Judge and to this Court only in suits of the description specified in the section. In the present case appeals were filed in the Court of the District Judge on the ground that the suits were under S. 108, Cl (2). But it is admitted by the appellants that they do not dispute their liability to pay rent nor do they question the amount of rent which has been decreed against them Their whole grievance is against the ejectment. The question whether the order for ejectment passed by the Assistant Collector was appealable to the District Judge or whether an appeal against it should have been made to the Commissioner is one not free from difficulty. The parties are unable to cite any authority on the point. While on the one hand the policy of the Oudh Rent Act seems to be that appeals in matters of ejectment should lie to the Commissioner and the Board of Revenue yet on the other hand the matter deserving of consideration is that the proceedings in ejectment under Cl. (2), S. 127, Oudh Rent Act are only in the nature of a consequential relief following the decree for arrears of rent which forms the real substance of the suit. It would lead to some anomaly and possible confusion for the forum of appeals against one part of the decision relating to arrears of rent being different from the forum regarding appeals against orders relating to ejectment passed in the same suit. As the question is one of considerable importance on which there is no authority one way or the other, I consider it desirable that the appeals should be heard by a Bench of two Judges and I certify accordingly.

Stuart, C. J. and Pullan, J.—These four rent appeals have been referred to a Bench by an order of a single Judge of this Court mainly on the ground that there has been no decision by this Court as to whether an appeal raising the question of ejectment under S. 127, Oudh Rent Act, lies to a revenue or a civil Court. We have already expressed our opinion on this question in *Ram Bahadur Singh* v. *Dharam Raj Singh* (1). Generally speaking, there is no appeal against an order of ejectment under S 127 because this order merely follows upon a decree for arrears of rent in the case of a person who although not a tenant has been treated as a tenant under the first clause of S. 127. In the present case the appellants have been treated by the Courts below as trespassers and the Courts below have, therefore, dealt with them under S 127 and after passing a decree for arrears of rent have ordered that on the application of the plaintiff, the defendants will be ejected from the land This is a case in which the plaintiff is the Court of Wards of this province representing the Ajudhya Estate and we are constrained to remark that the plaints in these suits have not been drawn up in a manner which gives the Court a clear idea of the facts in issue.

It appears that since the years 1915 there has been litigation off and on between the Court of Wards on the one side and the appellants on the other. In that year notice of ejectment was served on these persons namely, Mahabir, Mata Din, Chandrika and Ram Das in respect of 218 plots. Their ejectment was ordered by the Assistant Collector and his order was upheld both by the Commissioner and by the Board of Revenue. But both the higher Courts made observations in their judgments to the effect that the Court of Wards would be better advised to accept these persons as tenants. Probably as the result of these remarks the appellants refused to vacate the land although dakhal dehani wss obtained and in 1917 the Court of Wards sued them in the civil Court for ejectment as trespassers These suits resulted in a compromise according to the terms of which the land in suit, along with other land would be given on lease to the defendants Apparently no leases were executed and there was further litigation both in the revenue and civil Courts. There is a decision of the Court of the Judicial Commissioner dated 20th January 1921 in which it appears that the Court considered the question as to whether the enhancement of rent sanctioned

(1) A. I. R. 1929 Oudh 79.

by the compromises which must be the compromises of 1917 was valid. In the course of the judgment these persons were referred to as tenants in the land which is described as the bila faisla land and it is also stated that they have been reinstated in some other portions of the holding As a result they were declared liable to pay certain sums by way of rent. The net result of this decision seems to be that the present appellants have been treated by the Courts as being tenants and not as trespassers We cannot find a way to differentiate between the numbers which were contained in the compromises and the number which appear in the plaints in the present suit nor can we distinguish either of them from the numbers in regard to which order of ejectment was served in the year 1915. As far as we can see the holdings have been all along substantially the same although there may have been certain differences in detail. In our opinion it was for the plaintiff to have shown us clearly how he maintained that the defendants were trespassers in one part of the holding and tenants in another and this the plaintiff-respondent has failed to do. In our opinion these persons should have been treated as tenants It is not for us to say to what class of tenants they belong but they were tenants who should have been sued for rent under S. 108, Cl. (2) and not trespassers who should be held to have been treated as tenants for the purpose of the suits by the plaintiff under S. 127 This being so no order of ejectment could follow as a consequence of the decree for arrears of rent and the decrees of the Courts below should be held to be decrees for arrears of rent only

The result is that we allow these appeals to the extent prayed for, namely that the decrees of the Courts below shall read as decrees for arrears of rent only and there shall be no order for ejectment. The appellants in each case will get their costs throughout.

R.K. *Appeals allowed.*

A. I. R 1929 Oudh 378

MISRA, J.

Umrai Kuer—Appellant.

v.

Umrao and *another*—Respondents.

Second Rent Appeal No. 58 of 1928, Decided on 5th December 1928, from decree of Dist. Judge, Sitapur, D/- 21st August 1928

(a) Oudh Rent Act (22 of 1866), S. 127—S. 127 applies only when person in possession cannot show himself to be a bona fide tenant — Another person claiming to be owner—Person in possession as tenant — S. 127 does not apply.

Where parties claim to be entitled to a particular land and one of them is in actual possession of the same, the other party cannot be allowed to take possession of that land by bringing a suit for arrears of rent against the tenant in actual occupation of the land under S. 127 The section was never intended by the legislature to cover such a case. That provision of law is only intended to cover a case where the person cannot show himself to be a bona fide claimant of the land in dispute and where his possession must be held to be that of a pure trespasser. In that case it would be upon the landlord to either sue the person in possession for ejectment in the civil Court or to treat him as tenant and sue him for arrears of rent in the revenue Court. Where, however, another person claims to be the owner of the land and has been in possession thereof for a long time and a tenant is in occupation of that land on his behalf, proceedings under S. 127 cannot be availed of in order to obtain possession of the same land . *A. I. R* 1928 *Oudh* 353, *Ref.*

[P 379 C 2, P 380 C 1]

(b) Oudh Rent Act (22 of 1866), S. 138—Suit for arrears of rent—Tenant pleading bona fide payment to third person—Bona fides are established if payment is made to person to whom payments were previously and continuously made.

The test of the bona fides of a tenant when he pays rent to a particular person is whether he has paid rent to him before or not. If he paid rent to a person to whom he has been paying rent hitherto, his good faith will be considered to have been established and he cannot be held to be liable to pay rent again to another person who lays claim to the said land. [P 380 C 1]

Radha Krishna—for Appellant.

Hyder Husain and *B. K Bhargava*—for Respondents.

Judgment.—These four appeals arise out of four suits brought by the plaintiff-appellant Mt. Umrai Kuar for arrears of rent against the defendants-respondents.

The facts of the case are that there are two villages named Dulapur and Khairandeshnagar, situate in district Sitapur, adjacent to each other. Village Dulapur belongs to the plaintiff-appellant

and village Khairandeshnagar belongs to one Babu Krishna Kumar who is also a respondent before me In 1926 the Assistant Record Officer of Sitapur had the demarcation effected and included some small pieces of land, in respect of which rent is claimed in the four suits, within the boundary of village Dulapur It is on the basis of this order of demarcation that the plaintiff-appellant claims these lands as appertaining to her village Dulapur and has in that capacity brought the present suits for arrears of rent under S 127, Oudh Rent Act, against the defendants-respondents in the four appeals These respondents are in actual cultivation of those pieces of land The rent is claimed in respect of the year 1335 Fasli

The defence put forward by the tenants in these cases is the same and it is to the effect that the lands belong to Babu Krishna Kumar who is the zamindar of Khairandeshnagar and they have paid rent to him for the year in dispute They further allege that they have been doing so for a long time past and are not liable to pay the arrears of rent claimed by the plaintiff. Babu Krishna Kumar who is the zamindar of the contiguous village of Khairandeshnagar was made a party to these suits.

The learned Assistant Collector who tried the case held that the demarcation proceedings effected by the Assistant Record Officer were binding on the parties and in view of those proceedings the defendants could not be heard to say that the land appertained to any village other than Dulapur. He also held that in those circumstances the payment of rent to Babu Krishna Kumar by the tenants could not be considered to be bona fide. Consequently the suits brought by the plaintiff were decreed.

On appeal the learned District Judge has taken a different view. He has held that at the time the Assistant Record Officer took the demarcation proceeding and included the land in dispute in the village Dulapur he made it quite clear by his order that he did not in any way purport to interfere with possession. He was also of opinion that S. 127, Oudh Rent Act, was not intended to cover such cases. He therefore allowed the appeals and dismissed the suits brought by the plaintiff, Mt. Umrai.

In second appeal it is contended before me by the plaintiff-appellant that she is entitled to get decrees for arrears of rent inasmuch as the order passed by the Assistant Record Officer in the demarcation proceedings is binding upon the zamindars of the two contiguous villages until it is set aside by the civil Court.

After hearing the arguments in this case I have come to the conclusion that the judgment of the learned District Judge dismissing the four suits must be maintained and that these appeals should be dismissed.

It appears to me after reading the order of the Assistant Record Officer, dated 30th October 1926 that the said Officer did not intend to disturb the possession of either party He expressly stated in his order that regarding the fact of possession he was not going to pass any order nor was he in any way concerned with it Under those circumstances the force of the order is altogether destroyed so far as the question of possession is concerned. The order as to demarcation passed by the Assistant Record Officer must be read subject to this condition and if this is done, the appellant in my opinion has no case. These small pieces of land may have been shown in the map of the village Dulapur but beyond this no other effect can be given to the order of the Assistant Record Officer. The argument, therefore, based on S 44, U. P. Land Revenue Act, 1901, has no force.

I may also point out that I have always been of opinion that in cases like this S. 127, Oudh Rent Act, has no application Where parties claim to be entitled to a particular land and one of them is in actual possession thereof the other party cannot be allowed to take possession of that land by bringing a suit for arrears of rent against the tenant in actual occupation of the land under S. 127, Oudh Rent Act. That section was never intended by the legislature to cover such a case In my opinion that provision of law is only intended to cover a case where the person cannot show himself to be a bona fide claimant of the land in dispute and where his possession must be held to be that of a pure trespasser. In that case it would be open to the landlord to either sue the person in possession for ejectment in the civil Court or to treat him as a tenant and to sue him for arrears of rent in the revenue Court. Where, however, another person

claims to be the owner of the land and has been in possession thereof for a long time and a tenant is in occupation of that land on his behalf proceeding under S. 127 cannot in my opinion be availed of in order to obtain possession of the said land. I am supported in this view by a recent decision of this Court reported in *Ishar Din* v. *Sambhu Dat* (1).

I find from the evidence of the patwari of the village who was examined in this case on behalf of the defendants that the latter have been paying rents of the land in dispute to Babu Krishna Kumar respondent 2 for the last 14 years during the time he has been patwari of the village. There can therefore be no doubt that the defendants as tenants of the land in dispute were justified in making payments to Babu Krishna Kumar The test of the bona fides of a tenant when he pays rent to a particular person is whether he has paid rent to him before or not. If he has paid rent to a person to whom he has been paying rent hitherto, his good faith will in my opinion be considered to have been established and he cannot be held to be liable to pay rent again to another person who lays claim to the said land.

I am of opinion that the plaintiff-appellant must if she wishes to get possession of these lands, establish her claim, if so advised, in the civil Courts. Until, however, that is done she cannot be allowed to secure her object by bringing a suit under S 127, Oudh Rent Act.

All the four appeals, therefore, fail and are dismissed with costs.

V.B /R.K. *Appeal dismissed.*

(1) A. I. R. 1928 Oudh 359.

A. I. R. 1929 Oudh 380

PULLAN, J.

Bisheshar Singh and *others*—Appellants.

v.

Irshad Husain—Respondent.

Second Appeal No. 322 of 1928, Decided on 8th November 1928, against decree of Sub-Judge, Bara Banki, D/- 19th July 1928.

Wajib-ul-arz—Construction.

Where a clause in the wajib-ul-arz provides that 'no tenant grove-holder can plant new trees after the trees in the grove have been cut or fallen down", it means that the tenant cannot in fact plant any new trees at all without the permission of the taluqdar.

[P 380 C 2, P 381 C 1]

K. P. Misra and *B. Singh Paul*—for Appellants.

M. Wasim—for Respondent.

Judgment—This is a second appeal from a decree of the Subordinate Judge of Bara Banki modifying the judgment of the Munsif, in a suit brought by a taluqdar for the removal of certain trees from a grove in the possession of the defendants. As the case stands at present the suit has been decreed in respect of 100 trees on No. 746, one tree on No. 744 and 45 trees on 745/2. The main ground of appeal is that plots 74 and 405, on the first of which fresh trees have been planted, are in the ownership of the defendants as landholders and they are not tenant grove-holders The lower Courts went into this point at great length and discussed certain decisions prior to the year 1868, but there was no need for the lower Courts going beyond the first regular settlement and the subsequent entries in the village records. The defendants have always been recorded as tenant grove-holders and that must be taken to be their position in respect of the land in suit. As tenant grove-holders they were bound by the terms of the wajib-ul-arz which lay down definitely the rights of tenant grove-holders in their grove These rights are merely a right to maintain the trees existing and to take their fruits but they cannot cut or sell the trees without paying malikana and they cannot plant new trees to replace those that have fallen unless they have obtained permission of the taluqdar. The object of these clauses in the wajib-ul-arz is clear. It is to enable the taluqdar to obtain possession ultimately of the groves of those persons who do not obtain his permission for planting fresh trees. I cannot read the second clause which runs:

"No one can plant new trees after the trees in the grove have been cut or fallen down."

As meaning that no new trees can be planted after the whole grove has been cleared. Such a clause would be meaningless or at least otiose in view of the subsequent clauses which give the taluqdar absolute right to resume the whole grove-land when it is cleared of trees. This clause clearly means that the tenant cannot replace fallen trees with new ones and so cannot in fact plant any

new trees at all without the permission of the taluqdar.

The last question raised is one of limitation. The suit is clearly within limitation on the finding of facts of the Courts below that the trees in suit have been planted within two years of the institution of the suit. There is only one point in which the lower appellate Court appears to have gone wrong; that is, in granting a decree for possession of the remaining portion of plot 746 which is not occupied by trees. The mistake appears to have arisen from a misreading of the last clause in the wajib-ul-arz which should run:

"If out of the grove all the trees have been cut or have fallen down and no trees stand, then so much land as becomes vacant can be put under cultivation by the taluqdar or given on rent."

The lower appellate Court appears to have thought that some trees could stand after all the trees had been cut down or had fallen down, but as this is impossible I conclude that the word read as "hon" by the lower appellate Court is "na hen" which appears to be the case from the copy before the Court and I accordingly amend the decree of the lower appellate Court to this extent that possession shall not be given to the taluqdar of any portion of plot 746. No objection is raised to giving of possession of plot 406, and as to the other numbers the only question is whether the trees which have been recently planted should or should not be cut. On this point I uphold the decision of the lower appellate Court and dismiss the appeal with costs.

V B./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 381

STUART C. J. AND RAZA, J.

Nawab—Accused—Appellant.

v.

Emperor — Complainant — Opposite Party.

Criminal Appeal No. 212 of 1929, Decided on 3rd May 1929 against order of Addl. Sess. Judge, Bahraich, D/- 9th April 1929.

(a) Evidence Act, S. 24—Detailed and voluntary confession subsequently retracted though not found to be true in certain parts is sufficient for conviction.

Confession made by an adult man who understood what he was doing, though retracted, is sufficient for the conviction of the person making it, even although certain parts of it are not found to be true, provided that there was a detailed confession and it was made voluntarily and in spite of the fact that he was explained the consequences of making it. [P 382 C 2]

(b) Criminal Trial—Opinions of recording Magistrate, on guilty conscience of accused and demeanour are not admissible in Sessions trial.

In a Sessions trial the opinions of the Magistrate who recorded the confession as to his impressions about the demeanour of the accused, that it showed that he had done something wrong or seen something wrong being done, that he was suffering from guilty conscience are not admissible. [P 382 C 2]

R. F. Bahadurji—for Appellant

G. H. Thomas for *Govt. Advocate*—for the Crown.

Judgment.—Nawab Khan has been convicted by the learned Additional Sessions Judge of Bahraich of an offence of murder under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. He appeals. The reference in confirmation is also before us The offence of which he was convicted, mas the murder of a Bania called Lachman. Lachman's dead body was discovered on 5th December 1928, lying in an arhar crop some distance from the house in which he resided in the Fakhrpur village. He had disappeared from his home some days before. The medical evidence was unable to discover the cause of his death as the corpse was greatly decomposed before it was seen by the medical officer. Suspicion fell on the appellant. He was arrested on 8th December 1928, and two days afterwards on 10th December 1928, he made a confession before Mr. Bhagwati Prasad, a Magistrate of the First Class of Bahraich. As a result four persons were put on their trial for committing murder and a woman called Haliman was put on her trial under Ss. 201 and 202, I. P. C. Three men and the woman were acquitted The appellant alone was convicted According to his confession he and other persons combined in murdering the deceased man on account of an intrigue which he was carrying on with the woman who has been acquitted. The appellant was clear and distinct in his confession as to what had happened. He gave full details. He stated that the deceased man had been murdered by throttling in the house of the woman and that the dead body had then been

placed in a corn bin. After a few days the stench of the corpse was so intense that it had to be removed. He stated that he then with other men had taken away the corpse and thrown it into the place where it was subsequently discovered. The Magistrate who recorded this confession took great care to see that Nawab Khan should not be prejudiced. He kept him in his Court room for an hour after his arrival in the charge of two orderlies. He allowed no police officers to come near. The Magistrate then explained to him clearly that he was not bound to make any confession and that any statement which he would make would be used against him The appellant then made this full and detailed confession. In addition he took the police officer to the house in which the woman Halıman lived and searched in a bin where there was fodder. He produced from the fodder a rag of cloth. The Imperial Serologist found traces of human blood upon this rag. According to the confession this rag was used to gag the deceased at the time of the murder.

The learned counsel for the appellant has pointed out to us that there is nothing in throttling which would ordinarily cause blood to be shed. That is so; but there is nothing incompatible in throttling with blood being shed. The deceased might have bitten his tongue and that could have caused blood to come on the rag. It is impossible to say what happened owing to the decomposition of the corpse but the fact remains that the rag was found and the appellant has to answer the question how did he know that there was a blood stained piece of rag in the fodder in the bin in the woman's house? The confession has been retracted but the appellant has not been able to give any satisfactory reasons as to how he came to make it He stated that the investigating officer kept him seated for four days and beat him. Now it is clear that he was only arrested two days before he made the confession and that he remained in police custody for a very short time being handed over speedily to the jail authorities. When asked to explain how he knew anything about the rag he said that he knew nothing about it and that he had never given it to the Sub-Inspector. Balmakund (P. W. 7) deposed that he was present at the time of the search and that Nawab Khan brought out the rag from the fodder. The investigating officer gave evidence. The appellant did not ask him in cross-examination whether he had or had not beaten him. The appellant produced no witnesses in his defence. There are a few details in the confession which are not shown to be correct. But there is nothing in the evidence to detract from the main details which are to the effect that certain people conspired deliberately to murder the deceased, that they enticed him into a certain place and that there they throttled him, that the corpse was kept for some time in a corn-bin but that when it became very offensive it was taken away and thrown into the place where it was subsequently found.

There are several decisions of this Court which are to the effect that a retracted confession is sufficient for the conviction of person making the confession even although certain parts of the confession are not found to be true. Here we have a clear detailed confession made by a man of 30 years of age. He was warned to be careful. It was explained to him what would be the result Nevertheless he made the confession. We consider that the learned Sessions Judge should not have questioned the Magistrate who wrote the confession as to his impressions. The Magistrate's opinion that the appellant's demeanour showed that he had done something wrong or seen something wrong being done was not admissible and so was the Magistrate's opinion that the appellant was suffering from a guilty conscience. Further the learned Judge should not have stated that in his opinion the appellant looked like a murderer. We have attached no value of any kind to these impressions of the Judge or the Magistrate but on the confession, as it stands, made as it was by an adult man who understood what he was doing, we consider the conviction amply justified. He has been unable to explain this confession away. The discovery of the rag undoubtedly corroborates the confession The murder was on the appellant's own admission a cold-blooded and cowardly one It was premeditated. We accordingly are unable to mitigate the sentence. We dismiss the appeal, uphold the conviction, con-

firm the sentence and direct that Nawab Khan be hanged by the neck till he be dead.

V.B /R.K. *Appeal dismissed.*

A I. R. 1929 Oudh 383

MISRA, J.

Jagannath—Applicant

v.

Bikarmajit Singh—Opposite Party.

Revn. Appln. No. 33 of 1928, Decided on 21st November 1928, from order of Sm. Cause Court Judge, Sultanpur, D/- 7th May 1927.

(a) Oudh Rent Act (22 of 1886), S. 108 (a) —Suit against lambardar for illegal realization of rent lies exclusively in revenue Court.

Suit by a tenant against lambarder for the recovery of money illegally and wrongfully realized by him from the tenant on account of land revenue is exclusively cognizable by a revenue Court. [P 383 C 2]

(b) Civil P. C., S. 115—Laches in revision application not permissible unless good cause is shown.

An application for revision should not be entertained when filed after considerable delay unless good cause is shown for delay in filing it. [P 383 C 2]

(c) Jurisdiction — Consent cannot confer, nor can waiver make for defect or lack of jurisdiction—Party to proceeding can challenge it subsequently.

If a decree is passed ex parte by a Court which had no jurisdiction to try it, the defendant, judgment-debtor, can challenge it on the ground that it was passed by a Court which had no jurisdiction. The general principle is that jurisdiction cannot be conferred by consent of the parties and any waiver on their part cannot make for the lack or defect of the jurisdiction: 38 *Cal.* 639, *Rel. on.* [P 384 C 1]

Radha Krishna—for Applicant.

Moti Lal Saksena — for Opposite Party.

Judgment.—This is an application for revision in a suit brought by the plaintiff-respondent in the Court of the Subordinate Judge of Sultanpur for recovery of a sum of Rs. 764 on account of money illegally and wrongfully realized by the defendant for him. The suit was decreed ex parte on 7th May 1927. The defendant failed in getting the decree ex parte set aside and also failed in a declaratory suit brought by him for the purpose of getting a declaration to the effect that the decree passed in this case was without jurisdiction.

It is admitted by the parties in this case that the suit relates to the money illegally and wrongfully realized by the defendant as lambardar from the plaintiff on account of the land revenue and that it is exclusively cognizable by a revenue Court. It is, therefore, clear that the civil Court in this case had no jurisdiction to try the case or to pass a decree for the amount claimed.

It is, however, contended on the other side that the application for revision should not be entertained because it has been filed after the expiration of a year and five months from the date of the decree. Several rulings were quoted before me by the learned advocate for the respondent which go to show that the High Court should not ordinarily interfere in revision when the application is filed after a great delay I am fully alive of this principle and would not have interfered were it not that good cause has been shown for the delay in filing the present application. The cause shown in the case is that soon after the ex parte decree was passed, the defendant tried to get that decree set aside He failed in his attempt. Thereupon he filed a regular suit for a declaration to the effect that the decree was passed without jurisdiction and therefore inoperative and should be set aside. The Courts which tried that case held that although the suit had been filed in a Court without jurisdiction yet because the defendant had absented himself and the decree had been passed ex parte, there was no sufficient ground for the grant of a declaratory relief. After the plaintiff failed in that attempt he has filed the present application for revision. The circumstances are in my opinion sufficient to explain the delay which has occurred in filing the application for revision.

It was also contended on behalf of the respondent that this Court should not interfere in revision unless it was satisfied that injustice had been done in the case. The suit has not been tried out on the merits and there are no materials before me which would satisfy me that the claim of the plaintiff was a good one. Under these circumstances the only remedy left to the applicant is to get a trial of the claim brought against him in the proper Court.

It was further contended on behalf of the respondent that if the defendant-applicant did not appear and the decree passed against him was ex parte he should not now be allowed to challenge the decree on the ground that it was passed by a Court which had no jurisdiction I do not think that this contention has any force It has been often held by their Lordships of the Privy Council that consent of a particular party to a litigation cannot confer jurisdiction upon the Court. In *Rajlakshmi Dasee* v. *Katyayani Dasee* (1) it was held that jurisdiction cannot be conferred upon a Court by consent of parties and any waiver on their part cannot make up for the lack or the defect of the jurisdiction.

I am therefore, of opinion that this application for revision must be allowed and the plaint should be directed to be returned to the plaintiff for presentation to the proper Court. I would not, under the circumstances, make any order as to costs in this case

V.B./R.K *Revision allowed.*

(1) [1911] 38 Cal. 630=12 I. C. 464.

A. I. R. 1929 Oudh 384

WAZIR HASAN, AG C.J. AND PULLAN, J.

Chandrika Singh — Appellant.

v.

Inder Kunwar Rani—Respondent.

Second Rent Appeal No. 19 of 1927, Decided on 19th November 1928, against the decree of the 3rd Addl. Dist. Judge, Lucknow, D/- 11th April 1927.

Oudh Rent Act (22 of 1866), S. 7-A—Tenant holding sir land as exproprietary tenant has to pay rent fixed by law.

A person holding *sir* land of which he is an exproprietary tenant within the meaning of S. 7-A is liable to account for the rent of the same only at the rent fixed by law and that is "four annas in the rupee less than the fair and equitable rate payable by statutory tenants for land of the same class or classes of soil."

[P 384 C 2]

S. N. Roy—for Appellant.

Rajeshwari Prasad—for Respondent.

Judgment.—This is the defendant's appeal in a suit by the respondent for his share of profits under Cl. 15, S. 108, Oudh Rent Act, 1886. The defendant is also the lambardar of the village. One of the questions in the case is as to the rate of rent at which the defendant is liable to account in respect of his *sir* lands which he holds in the character of an exproprietary tenant

The Courts below have assumed that the defendant holds land of that nature and are of opinion that until determination of rent in respect of such lands has taken place in favour of the defendant as an exproprietary tenant of the same he is liable to account for rent at the chauhaddi rate This opinion is clearly erroneous If the defendant holds *sir* lands of which he is an exproprietary tenant within the meaning of S. 7-A, Oudh Rent Act, he is liable to account for the rent of the same only at the rate fixed by law and that is:

"four annas in the rupee less than the fair and equitable rate payable by statutory tenants for land of the same class or classes of soil."

At the hearing of the appeal a question has arisen as to what land (and the area thereof) is *sir* land within the meaning of the section just now mentioned. Before us the parties are in controversy on this matter and in the Courts below no finding was recorded. We are, therefore, unable to decide this appeal to-day We accordingly direct the Court of first instance, through the lower appellate Court, to try the issue stated below after admitting relevant evidence

How much land the defendant holds as *sir* land within the definition of the word '*sir*' in any of the paragraph of Cl 17, S. 3, of para. 3, of S 7-A of the same Act ?

The finding arrived at by the Court of first instance will at first be submitted to the lower appellate Court. The lower appellate Court will then after consideration of the merits give its own finding. Ten days after the finding recorded by the lower appellate Court will be allowed to the parties for filing objections. The finding together with the evidence will be returned to this Court on or before 15th April 1923 (Their Lordships then considered the finding and evidence thereon and reduced the decree by Rs. 117).

V.B./R.K. *Order accordingly.*

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* * A. I. R. 1929 Oudh 385
Full Bench

STUART C. J., AND WAZIR HASAN AND RAZA, JJ.

Mohammad Raza—Defendant—Applicant.

v.

Ram Saroop and *others*—Opposite Party.

Application No. 61 of 1928, Decided on 19th July 1929, from order of Sub-Judge, Bahraich, D/- 10th November 1928.

*** * (a) Civil P. C., S. 96 (3)—Decree on compromise—Party verifying or admitting compromise on behalf of other without authority—Other party can appeal against decree.**

It is open to a party to a suit to appeal from the decree passed in the suit on the basis of a compromise purporting to be on his behalf when the person verifying or admitting the said compromise had no authority to enter into it on his behalf. [P 387 C 2]

*** * (b) Civil P. C., Ss. 151, 152 and 153—Decree on basis of compromise—Party verifying or admitting on behalf of other without authority—Other party can invoke inherent powers under Ss. 151, 152 and 153 to remove name from decree—No question of limitation arises.**

Where a decree is passed on the basis of a compromise verified and admitted by one party on behalf of another when that party had no authority to enter into the compromise on the other party's behalf, it is open to such a party to invoke the inherent power of the Court to get the judgment and the decree amended under Ss. 151, 152 and 153 so that his name might be removed from the decree after the period of limitation prescribed for appeal or review has expired and the judgment and the decree have become final. 32 *Cal.* 206 (*P.C.*), and *A. I. R.* 1924 *Oudh* 408, *Rel. on.* [P 387 C 2]

Ali Zaheer, *Ali Muhammad* and *Yusuf Ali*—for Applicant

R B Lal and *R. N. Shukla*—for Opposite Party.

Order of Reference.

Misra and **Srivastava, JJ**—This is an application in revision under S. 115, Civil P. C, against an order of the Subordinate Judge, Bahraich, dated 10th November 1928 dismissing an application made by the applicant (Mohammad Raza) under Ss 151 and 152, Civil P. C. One Debi (Badri?), Prasad father of Ram Sarup and others (opposite party) brought a suit against Saiyid Ali Haider, Mohammad Raza and others on the basis of a mortgage-deed dated 23rd October 1918, Mohammad Raza was defendant 4 in that suit. The claim was resisted by the defendants including defendant 4 (Mohammed Raza) Defendant 2 was discharged and his name was struck off the plaint

The Court recorded some proceedings on different dates and then two compromises were filed on 28th January 1927. One compromise was filed by the plaintiff and defendant 5. The other compromise purports to be a compromise between the plaintiff and defendants 3 and 4. This is the compromise which we have to consider in this case A decree for sale of the mortgaged property was eventually passed in terms of the compromise against defendants 3 to 5 and ex parte against defendant 6 and against defendant 1 on his admission on 31st January 1927. Though the compromises were filed on 28th January 1927, the decree was passed on 31st January 1927. There is nothing on the record to show why the suit was not disposed of on 28th January 1927, the date on which the compromises were filed. The decree which was passed on 31st January 1927 was a preliminary decree

Ram Sarup and others (sons of Badri Prasad since deceased) applied for a final decree under O. 34, R 5, Sch. 1, Civil P. C., on 17th March 1928 This application was opposed by Mohammad Raza (defendant 4) on the ground that he was no party to the compromise dated 28th January 1927 and that his name had been wrongly entered in the preliminary decree and should not be entered in the final decree. He contended that the decree dated 31st January 1927 was not anyhow binding on him and asked the Court to take action under Ss 151 and 152, Civil P. C The learned Subordinate Judge dismissed defendant 4's application on the ground that it was not maintainable under Ss. 151 and 152, Civil P. C He did not dispose of the application on the merits. The result was that the final decree was passed on 10th November 1928 Mohammad Raza has now applied for revision challenging the order of the learned Subordinate Judge dated 10th November 1928.

We have examined the record and find that Mohammad Raza defendant 4 was not really a party to the compromise in question. His name was of course noted in the petition of compromise, but the

fact is that the compromise was not signed either by him or his pleader or agent on his behalf. Saiyid Zaigham Ali had appeared as pleader for defendants 3 and 4 in that suit, but it is noticeable that he did not sign the compromise in question on behalf of defendant 4. We should like to note also that he had no authority to compromise the suit on behalf of defendant 4 as his vakalatnama did not authorize him to compromise the suit on behalf of defendant 4 and he did not actually compromise the suit on behalf of the said defendant Defendant 4 was not personally present on the date on which the compromise was filed. We regret that the learned Subordinate Judge did not take the trouble of seeing whether the compromise was duly signed by defendant 4 or his duly authorized agent or pleader. He ought to have seen that the compromise was duly signed by or on behalf of defendant 4. The endorsement on the compromise shows that Mr. Zaigham Ali, who had appeared as pleader for defendants 3 and 4 had admitted simply the contents of the compromise, but the admission does not and cannot make the compromise binding on defendant 4 Defendant 4 never authorized Mr. Zaigham Ali to enter into the compromise in question on his behalf. It is quite clear that the compromise is not binding on defendant 4 and the decree which was passed on the compromise is void as to him. Defendant 4 never gave his consent to the compromise in question The question is:

Can defendant 4 now ask the Court to remove his name from the decree or reopen the case so far as he is concerned by making the application under consideration?

There is no doubt that the Court has an inherent power to correct its own proceedings. As pointed out in the case of *Devendra Nath* v. *Ram Rachpal* (1), every Court has an inherent power to correct its own proceedings. It can set aside its own decree based on a compromise found to have been filed by a person having no authority to make or present the compromise. It is immaterial whether this power is to be found in S. 151 or S. 153, Civil P. C., or whether it is a power in review. The decision of the Bombay High Court in the case of *Basangowda Hanmantgowda* v. *Churchigirigowda Yogandowda* (2), was followed in that case. We should like to note that the question of limitation was not considered in those cases. We have sent for the record of the case reported in *Devendra Nath* v. *Ram Rachpal* (1). The record shows that the decree in respect of which the application was made under S. 151, Civil P. C. was passed by the District Judge on appeal on 21st January 1925 The application under S 151, Civil P. C, was made on 20th March 1925. The application was thus made in that case within the period of limitation provided for appeal (or review) from the decree passed in that case and the decree had not become final till then.

The respondents' learned counsel contends that the present application for revision is not maintainable as an appeal lies to this Court from the final decree passed by the lower Court in this case. We are not prepared to accept this contention. The learned counsel has referred to S 96, Civil P. C., but the applicant having preferred no appeal from the preliminary decree was precluded under S 97, Civil P C, from disputing its correctness in any appeal which could be preferred from the final decree It appears of course that the applicant could appeal from the preliminary decree as that decree was not passed with his consent, but he failed to do so. The preliminary decree was passed in this case more than two years ago and no appeal was preferred from that decree within the period provided by law. Though the decree in question is void as to the applicant as stated above, but the fact remains that no steps were taken for setting aside that decree before August 1928. Mohammad Raza made his first application under Ss 151, 152, Civil P. C., on 4th August 1928. He thus made his application under Ss. 151 and 152, Civil P. C., long after the period of limitation provided for appealling from the preliminary decree had expired The Court has of course an inherent power to correct its own proceedings, but the question is:

"Has the Court such power to correct its decree which is in conformity with the judgment simply on the application of a party though the decree was appealable but no

(1) A. I. R. 1926 Oudh 315.

(2) [1910] 34 Bom. 408=5 I. C. 968=12 Bom. L. R. 223.

appeal was preferred from the decree within the period of limitation?"

It was held in the case of *Tota Ram* v. *Panna Lal* (3), that the Court cannot ignore the provisions of the law of limitation by appealing to S. 151, Civil P. C

The questions involved in this case are questions of some difficulty and also of importance. We have therefore thought it proper to refer the following questions to a Full Bench of this Court under S. 14 (1), Oudh Courts Act (Act 4 of 1925):

(1) Is it open to a party to a suit to appeal from the decree passed in the suit on the basis of a compromise purporting to be on his behalf when the person verifying or admitting the said compromise had no authority to enter into it on his behalf?

(2) Is it open to such a party in the suit to invoke the inherent power of the Court to get the judgment and the decree amended under Ss. 151, 152 and 153, Civil P. C., so that his name might be removed from the decree after the period of limitation prescribed for appeal or review has expired and the judgment and the decree have thus become final?

Opinion

Stuart, C. J.—The two questions which have been referred to the Full Bench under the provisions of S. 14 of Local Act 4 of 1925 are these:

"(1) Is it open to a party to a suit to appeal from the decree passed in the suit on the basis of a compromise purporting to be on his behalf when the person verifying or admitting the said compromise had no authority to enter into it on his behalf?

(2) Is it open to such a party in the suit to invoke the inherent power of the Court to get the judgment and the decree amended under Ss. 151, 152 and 153, Civil P. C. so that his name might be removed from the decree, after the period of limitation prescribed for appeal or review has expired and the judgment and the decree have thus become final?"

The application under S 151 covers much ground. Before it can be decided it would appear that information should be given to the Bench which at present is not before it. The applicant has not so far filed an affidavit stating when he received information that the preliminary decree had been passed against him and there is need for explanation as to why his counsel agreed to an adjournment for a fortnight in order to discuss an amicable settlement, why he put before the Court the terms of the amicable settlement at which he said both the parties had arrived, why he committed those terms in writing and why he agreed to them on behalf of his client when according to the applicant his counsel never informed him of any of these facts. But I have no difficulty in answering the two questions propounded without going into these matters It is not for this Full Bench to decide on the merits. The merits will be discussed before the Bench which has made the reference My opinion on the points before us is as follows. It is open to a party to a suit to appeal from a decree passed in the suit on the basis of the compromise purporting to be on his behalf on the ground that the person verifying or admitting the compromise had no authority to enter into it on his behalf. In regard to the second question I consider that it is open to a party in a suit to invoke the inherent power of the Court to get the judgment and the decree amended under the provisions of Ss. 151, 152 and 153 of the Code quite apart from the limitation, applicable to the institution of an appeal or a review. He has a right to make the application but it is for the Court to decide whether he has made out a case justifying interference. An unjustified abstention may well be held on the merits to afford sufficient ground for refusing relief. This, however, is a question of merit. He has a right to apply, but it is for the Court to see whether his application deserves consideration

Wazir Hasan, J.—The two questions referred for decision to the Full Bench are as follows:

"(1) Is it open to a party to a suit to appeal from the decree passed in the suit on the basis of a compromise purporting to be on his behalf when the person verifying or admitting the said compromise had no authority to enter into it on his behalf?

(2) Is it open to such a party in the suit to invoke the inherent power of the Court to get the judgment and the decree amended under Ss. 151, 152 and 153, Civil P. C. so that his name might be removed from the decree, after the period of limitation prescribed for appeal or review has expired and the judgment and the decree have thus become final?"

On the first of these questions the argument of the learned counsel for the applicant is that having regard to the provisions of sub-S. 3, S. 96, Civil P. C an appeal from the decree passed in this case being a decree with the consent of the parties was excluded by those provisions The argument in answer is that having regard to the facts which exist behind the decree and the circumstances in which it came to be passed the decree

(3) A. I. R. 1924 All. 668=46 All. 631.

in question in this case must be treated as a decree not passed with the consent of the parties. Speaking for myself I am inclined to accept the argument advanced on behalf of the applicant It is admitted that the decree on the face of it is a decree passed with the consent of the parties. It is true that if we are to enter into the merits of the circumstances in which the decree in question came to be passed it might be found that the decree is a nullity ; but I should think that the proper procedure for discovering the nullity or otherwise will be to initiate proceedings under S 151 or by way of review of judgment But if the decree exfacie is a consent decree it seems to me that an appeal is barred. It appears to me to be wholly immaterial as to whether the decree can be shown by proof of circumstances aliunde to be not a consent decree. But when it is shown, it is only then that it would cease to be a decree without consent. The present proceedings are clearly intended to bring about the last mentioned result. The proceedings may fail or may succeed If they succeed the decree will only then cease to be a consent decree.

In the present case, however, it is not necessary for me to commit myself definitely to the view stated above. I will assume in answering the first question that an appeal could be preferred and would therefore answer that question in the affirmative This answer, however, does not lead me to the conclusion that because a party can get an error in a decree rectified by appealing therefrom and if he does not appeal, his other remedy, if it is open to him under the provisions of the Civil Procedure Code, must also be shut against him This brings me to answering the second question which again I would answer in the affirmative. The fact that no appeal has been preferred while it could be preferred and the further fact that an appeal, if now preferred, would be barred by limitation are wholly immaterial. Considerations such as these may or may not weigh with the Court when deciding the application on merits. I can well conceive of cases where a Court would be amply justified in correcting its errors in spite of the fact that the same error could have been corrected by the Court of appeal if an appeal had been preferred In this connexion a case where a decree passed by a Court turns out to be a nullity may well be stated as an example. Where a decree is a nullity no proceedings are required to set it aside either by way of an appeal or otherwise : see *Khairajmal* v *Daim* (4). Any person may draw the attention of the Court to the error which has resulted in making a decree a nullity and the Court would be well advised in correcting that error even after a lapse of 100 years I am not at all fantastic when I say hundred years I very deliberately use that expression. Time is of no consequence in matters like these I had occasion to decide a similar point in the case of *Sheodarshan Singh* v. *Matadin Singh* (5). The question of limitation can only arise in this way. Will an order passed under S. 151, Civil P C. rectifying an error injuriously affect the other party where he has obtained an advantage in his favour by lapse of time If this question is answered in the affirmative that may be a reasonable ground on merits to refuse relief under that section In the present case though the applicant does not state specifically in his application to the Court below the ultimate relief which he claims but obviously he cannot get more than an order setting aside the so-called compromise decree in so far as he is concerned and restoring the suit in which that decree came to be passed for trial de novo on merits as against him. If he were asking for the dismissal of that suit altogether and thus compelling the plaintiff to institute a fresh suit for obtaining the same relief and if the Court were of opinion that a fresh suit would be barred by time or otherwise I am quite clear in my mind that such a prayer would be refused. But none of these considerations arise at the present stage of the case As observed by the Hon'ble Chief Judge these matters and matters similar to them are the grounds on which the Court would be justified in basing its opinion when it comes to form it on the merits of the application.

Raza, J —I accept and adopt the judgment of the Hon'ble the Chief Judge and therefore answer both the questions in the affirmative.

V.B./R.K *Reference answered.*

(4) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P.C.).

(5) A. I. R. 1924 Oudh 408.

* A. I. R. 1929 Oudh 389
Full Bench

STUART, C. J., WAZIR HASAN, MISRA, RAZA AND NANAVUTTY, JJ.

Gaya Prasad—Plaintiff—Applicant.

v.

Kalap Nath— Defendant — Opposite-Party.

Revn. Appln. No. 49 of 1928, Decided on 19th July 1929, against order of Dist. Judge, Fyzabad, D/- 18th August 1928.

*** (a) Oudh Rent Act (22 of 1886), Ss. 108, 119, 119-B and C and 135** (*Per Full Bench*)— **Suit for arrears of rent—Second appeal decided by District Judge—District Judge is not subordinate to Chief Court and no revision lies from his order** (*Wazir Hasan, J.* Contra).

Where a suit for arrears of rent is filed under S. 108 (2) before an Assistant Collector and a second appeal from such suit is filed before the District Judge, the District Judge in such case is not subordinate to the Chief Court and the order of the District Judge in such second appeal is not subject to revision by the Chief Court under S. 115, Civil P. C.: *A. I. R.* 1928 *Oudh* 214, *Affirmed.* [P 390 C 1]

Per Wazir Hasan, J.—The District Judge in the exercise of his jurisdiction over appeals under S. 119, Oudh Rent Act is not a Court of Revenue. The District Judge in such cases being Civil Court, his order passed in such appeals is subject to revision by the Chief Court under S. 115, of Civil P. C., [P 391 C 1]

(b) Interpretation of statutes—Exception.

Per Wazir Hasan, J.—It is a well recognized principle of interpretation that an exception does not affect the general rule and it must be confined within its own limits and strictly to the subject matter entrusted within it. [P 392 C 1]

(c) Civil P. C., S. 115—Power of revision explained.

Per Wazir Hasan J. — Where there is no right of appeal the High Court's power of interposition is provided by the creation of its revisional jurisdiction and that jurisdiction is extremely narrow and limited. It only arises in cases of an error of a Court below when such error affects its jurisdiction. Such revisional jurisdiction can be destroyed only by an express legislative enactment. [P 393 C 2]

Ishri Prasad—for Applicant.

R. D. Sinha—for Opposite Party.

Order of Reference

Wazir Hasan, Ag C. J — This is an application in revision under S. 115, Civil P. C., from an order of the District Judge of Fyzabad in the following circumstances.

A suit for recovery of rent under the provisions of S 108, Cl. 2 Oudh Rent Act, 1886, was instituted by the Applicant in the Court of an Assistant Collector of Second Class. The suit was dismissed. On an appeal by the plaintiff the Deputy Commissioner of Fyzabad reversed the decree of the Court of first instance and made a decree in favour of the plaintiff. From the decree of the Deputy Commissioner the defendant, opposite party, preferred an appeal to the District Judge of the same place. The learned District Judge accepted the appeal, set aside the decree of the Deputy Commissioner and restored the decree of the Court of first instance. As against this decision of the District Judge the present application is preferred.

On behalf of the defendant, opposite party, a preliminary objection has been taken by his learned advocate to the effect that no application for revision under S. 115, Civil P. C. is maintainable for the reason that the Court of the District Judge of Fyzabad is not a Court subordinate to the Chief Court in the circumstances of this case. In support of this objection the learned advocate has referred to the decision of a Bench of two learned Judges of this Court in the case of *Narayan* v. *Baldeo Singh* (1). This decision was followed by a learned Single Judge in the case of *Fateh Bahadur Khan* v. *Chhotey Khan* (2). In the ordinary circumstances I should have followed the decision of the Bench in *Narayan* v. *Baldeo Singh* (1) and upheld the objection but I am of opinion that the matter should further be considered by a Full Bench of this Court. Accordingly under S. 14, sub-S (1) Oudh Courts Act, 1925, I refer the following question of law for decision to a Full Bench.

Is the Court of the District Judge in the circumstances of this case subordinate to the Chief Court?

Opinion

Stuart, C. J — The following question has been referred to a Full Bench of this Court for decision :

"Is the Court of the District Judge in the circumstances of this case subordinate to the Chief Court ?"

The circumstances have been set out sufficiently in the referring order. The decision in question is a decision of a District Judge passed in second appeal under the provisions of S. 119, Oudh Rent Act. The Court of the District Judge is under the provisions of this sec-

(1) A. I. R. 1928 Oudh 214=3 Luck. 150.
(2) [1928] 5 O. W. N. 457.

tion the final Court of appeal. Under the provisions of S. 3 (1) "Court" means any judicial officer presiding in a Court of revenue for the disposal of matters under this Act. Thus it appears to me that the Court of the District Judge must be considered in this connexion to be a Court of revenue and not a civil Court. This view is strengthened by the fact that in S. 119-C of the same Act it is stated that for the purpose of deciding appeals under this Act a District Judge shall have the powers conferred on a Court by this Act In these circumstances I do not consider that the Court of the District Judge sitting as such Court of appeal is a Court subordinate to the Chief Court within the meaning of S 115, Civil P C It is to be noted that the Chief Court is not here sitting as a Court of revenue It has powers as a Court of revenue under S. 119-C but only for the purpose of deciding appeals. Thus in so far as the Court of the District Judge is concerned in this connexion, it is a revenue Court over which the Chief Court sitting in any capacity has no authority. So the Court is not subordinate to us. These are the views which I have already taken in *Narayan* v. *Baldeo Singh* (1) I would answer this reference accordingly.

Wazir Hasan, J —The circumstances case are as follows :

A suit for arrears of rent was laid by a landlord against his tenant in the Court of an Assistant Collector of Second Class under S. 113, and Cl. (2) S. 108, Oudh Rent Act, 1886 The suit was dismissed. The plaintiff preferred an appeal to the Court of the Deputy Commissioner of Fyzabad. The appeal was allowed and a decree for the recovery of the arrears was passed in favour of the plaintiff Thereupon the defendant preferred a second appeal to the Court of the District Judge of Fyzabad. The learned District Judge allowed the appeal, set aside the decree of the Deputy Commissioner and restored the decree of the Assistant Collector. The present application for revision challenges the correctness of the decision of the learned Judge on the grounds stated in S 115, Civil P. C. Against this application the argument is that the District Judge in the exercise of his appellate jurisdiction in the present case is not a "Court subordinate to ' this Court. The question, therefore, which has been raised for decision in this reference is :

" Is the Court of the District Judge in the circumstances of this case subordinate to the chief Court ?"

My answer is in the affirmative and my reasons are as follows :

1. Section 115, is a rule of adjective law and is incorporated in the Civil Procedure Code, 1908. For the purpose of determining the question of subordination of Courts in relation to one another recourse must primarily be had to the provisions of the code itself. S 3 of the Code is as follows :

" For the purpose of this code, the District Court is subordinate to the High Court, and every civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

I am unable to conceive the possibility of an argument that 'District Judge' used in Cl. (a), S 119 Oudh Rent Act, 1886 is not the same tribunal as " District Court" mentioned in S. 3 Civil P C. This being so, it follows that the Court of District Judge is subordinate to the High Court.

2 "Court" is defined in S. 3, sub-S. (1), Oudh Rent Act, 1886, as follows :

" Court means any judicial officer presiding in a Court of revenue for the disposal of matters under this Act."

This definition is obviously not sufficient in itself and clearly prescribes the necessity for settling the meaning of "a Court of revenue." S. 109 of the same Act is as follows .

" For the purposes of this Act, there shall be five grades of Courts of revenue, namely .

(1) the Assistant Collector of the second class :

(2) The Assistant Collector of the first class.

(3) The Collector ;

(4) The Commissioner ,

(5) The Board."

It would seem to follow, according to my opinion, inevitably from the above enumeration and classification of Courts of revenue that the Court of the District Judge in entertaining an appeal under the provisions of Cl. (a) S. 119 is not a Court of revenue nor is the Chief Court a Court of of revenue when it entertains an appeal from a decree of an Assistant Collector of first class in a suit for arrears of rent under Cl. (b), S. 119 I hold therefore that the District Judge' in entertaining and deciding an appeal under Cl. (a) and the Chief Court under Cl. (b), S. 119, Oudh Rent Act, 1886, are civil Courts

and not Courts of revenue. This conclusion is also borne out by the provisions of S 119-A of the same Act. That section is as follows :

"The rules for the time being in force in regard to the time within which appeals from the decrees and orders of civil Courts may be received, and to the manner in which such appeals are heard and determined and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals under this Act to the District Judge or to the Judicial Commissioner."

According to the section just now quoted:

"to the manner in which such appeals are heard and determined and to all proceedings which may be had in respect of such appeals"

the rules applicable are the same as the rules which govern the procedure relating to appeals under the Code of Civil Procedure in the Court of a District Judge or in the Chief Court as the case may be.

It follows that in the matter of procedure under the Rent Act, the Court of the District Judge and the Chief Court are both Courts of civil jurisdiction. Further, S. 135, Oudh Rent Act, 1886, says that the provisions of the Code of Civil Procedure shall apply to all suits and other proceedings under the same Act. I hold therefore that the rule of procedure as to the revisional jurisdiction of a High Court as enacted in S. 115, Civil P. C, shall be applicable to all proceedings in respect of any appeal decided by a District Judge.

It is said that S. 119-C, Oudh Rent Act, 1886, has the effect of converting the Court of a District Judge and the Chief Court into a Court of Revenue when each Court exercises appellate jurisdiction under the Rent Act respectively. I am unable to accept this argument. S. 119-C is :

"For the purpose of deciding appeals under this Act, a District Judge and the Judicial Commissioner, shall have the powers conferred on a Court by this Act."

This section, to my mind, merely defines the limits within which the appellate jurisdiction would be exercised and has no intention whatsoever of introducing the Court of a District Judge and the Chief Court in the classification of the Courts of Revenue under S 109 already quoted. Instead of making a list of orders and decrees which the Court of a District Judge or the Chief Court may pass in deciding an appeal, the legislature gives by means of this section the same powers to the Court of appeal as it gives in the preceding sections to a Court of Revenue in deciding suits for the cognizance of which they possess exclusive jurisdiction. The provisions of S. 119-C, Oudh Rent Act, really give authority to the Court of appeal to pass such orders as ought to have been passed by the Court or the Courts below which are the Courts of Revenue. The provision is similar to R. 33, O 41, Civil P. C.

3. Section 21, Oudh Courts Act, 1925 is as follows :

"Besides the Chief Court, the Courts of Small Causes established under the Provincial Small Cause Courts Act, 1887, and the Courts established under any other enactment for the time being in force, there shall be four grades of civil Courts in Oudh, namely,"

"(1) The Court of the District Judge.
(2) The Court of the Additional Judge.
(3) The Court of the Subordinate Judge.
(4) The Court of the Munsif."

According to this section the Court of a District Judge in Oudh is a civil Court of first grade and according to the same section the Chief Court is a Court apart from the four grades of civil Courts. The implication that it is the superior Court and the other Courts mentioned are subordinate to it is to my mind, necessarily involved in the provisions of the section. If the District Judge into whose Court an appeal under S. 119, Oudh Rent Act, 1886, is permitted is not the same Court of the District Judge as is constituted by S. 21, Oudh Courts Act, then we will be driven to the anamoly that the Court of the District Judge contemplated in S. 119, Oudh Rent Act, exists without any legal sanction for its existence. Further Chap. 3, Oudh Courts Act, 1925, is headed "Subordinate Civil Courts" and S. 21, already quoted, begins with the expression, "Besides the Chief Court." It follows to my mind, that all other Courts enumerated in the said section are Courts subordinate to the Chief Court.

4. That the District Judge in the exercise of his jurisdiction over appeals under S. 119, Oudh Rent Act is not a Court of revenue is also clear from the provisions of S. 124 of the same Act. S 124 lays down the general subordination of Courts of revenue. The Subordination is prescribed in the same order in which the Courts of revenue are classified in S 109, of the same Act. The final Court to which other Courts of revenue are declared to be subordinate

by S. 124 is the Court of the Board of Revenue In the general scheme of gradation of the revenue Courts as laid down in that section the Court of a District Judge does not find any place. I think, this is so because the Court of a District Judge is not a Court of revenue but is a civil Court and is consequently subordinate to the High Court under S 3, Civil P. C. If this is not so the result will be that the Court of a District Judge functioning as an appellate Court under the provisions of the Oudh Rent Act is not subordinate to any Court. Such a result is to my mind unthinkable as having been intended by the legislature.

Under S. 119-B Oudh Rent Act 1886, appeals from the decrees passed under that Act by the Court of a District Judge are allowed to the Chief Court in all cases in which a second appeal is allowed by the Code of Civil Procedure, 1908. When we look to the phraseology of S 119-B it would appear that that is the general rule. I take it that if there were nothing else it will be agreed that the Court of a District Judge must be held to be a Court subordinate to the Chief Court in those circumstances. The provision in the same section that there shall be no third appeal to the Chief Court from a decree passed by a District Judge as a Court of second appeal is stated in the form of an exception and therefore according to the well recognized principles of interpretation the exception does not affect the general rule. It must be confined within its own limits and strictly to the subject matter embraced within it.

According to S. 119, Oudh Rent Act 1886, it is only in respect of certain classes of suits that a first or a second appeal is permitted to the Court of a District Judge. On a consideration of of the nature of such suits it would appear that they are suits essentially of civil nature involving questions of civil rights. On general principles therefore, it is only right that the Court of a district Judge when functioning as a Court of appeal over such suits should be held to be a Court of civil jurisdiction. This brings me to the decision of their Lordships of the Judicial Committee in the case of *Nilmoni Singh* v. *Tara Nath* (3). I am of opinion that the decision of the Judicial Committee in that case entirely covers the question now under reference The circumstances of the case were as follows The Deputy Commissioner of Manbhoom passed certain decrees under the Rent Act (10 of 1859). He did so as a rent Court established by the said Act Subsequently under certain orders he transferred his decrees to other districts for execution His order of transfer came under the cognizance of the High Court at Bengal under the provisions of 24 and 25 Victoria, Ch. 104, S 15 Those provisions gave power of superintendence to the High Court over inferior Courts. The High Court held that the decrees in question were decrees of a Court of revenue and that the deputy Commissioner had no authority under any law applicable to rent suits in his district to make the order in question. In the result the Deputy Commissioner's order was set aside by the High Court. On an appeal to Her Majesty in Council the Judicial Committee decided two things, first, that the Court of the Deputy Commissioner was an inferior Court and therefore subject to the power of superintendence vested in the High Court under the Statute mentioned above and, secondly, that the Deputy Commissioner had power to make the order of transfer I will now quote some of the observations of their Lordships of the Judicial Committee on the two points decided by them in that case:

"A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point, except that they entirely agree with the view taken by the High Court of their own jurisdiction. Their Lordships then proceeded to decide the second question and in that connexion they notice that by S. 23, paras. 4 and 7, of Act 10 of 1859 all suits for arrears of rent shall be cognizable by the collectors of land revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal, as provided in this Act, should not be cognizable in any other Court or by any other officer, or in any other manner."

It is apparent to my mind that having regard to the provisions of S. 23, just now adverted to the Court of the Collector was in form a Court of revenue. It was agreed that the Deputy Commissioner had no express power of transfer under the Rent Act 10 of 1859. The argument on behalf of the respondents was that having regard to

(3) [1883] 9 Cal. 295=9 I. A. 174 (P.C.).

the provisions of the Rent Act 1859, the Deputy Commissioner in the exercise of his functions as a Court of revenue under that Act was not a civil Court and therefore the provision of the Civil Procedure Code (Act 8 of 1859), S. 284 conferring power of transfer of decrees for execution into another district was not applicable to the Court of the Collector constituted under the Rent Act, 1859. Their Lordships overruled this argument and in doing so made the following observations

"It must be allowed that in those sections (of Act 10 of 1859) there is a certain distinction between the civil Courts there spoken of and the rent Courts established by the Act, and that the civil Courts referred to in S. 77 and the kindred sections mean civil Courts exercising all the powers of civil Courts as distinguished from the rent Courts which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms, but it is entirely another question whether the rent Court does not remain a civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether being a civil Court in that sense, it does not fall within the provisions of Act 8 of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute but that, if the rent Court is a civil Court within the Act 8 of 1859, the Collector has under S. 284 the power of transferring his decrees for execution into another District."

In giving reasons for the view that the rent Court is a civil Court within the Civil Procedure Code of 1859, their Lordships observed:

"No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt founded on rent and a person who is claiming a debt founded on any other transaction."

Their Lordships further referred to the earliest of Civil Procedure Code (Act 23 of 1852), which was an Act passed to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same, and said:

"It is true that in this Act it is said that the word "judgment" means a judgment in a civil suit or proceeding. But suits for the recovery of rent are civil suits or proceedings."

Again.

"Section 160, Act 10 of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a Collector or Deputy Collector shall lie to the zillah Judge. But the zillah Judge is a civil Court to all intents and purposes. It was not disputed that if an appeal went from the Collector to the higher Court to the zillah Judge or to the High Court, and the decree of the collector for rent was there affirmed, it would become the decree of a civil Court, which could not be excluded from the operation of Act 8 of 1859."

In my judgment the observations of their Lordships of the Judicial Committee, which I have quoted above are conclusive. It must therefore be held that the Court of a District Judge in exercising functions of a Court of appeal either in the first instance or in the second is a civil Court and his decrees passed in the exercise of that jurisdiction are decrees of civil Courts.

It appears to me that the only argument in support of the contention that the Court of a District Judge in entertaining and deciding a second appeal in a rent suit is not a Court Subordinate to the High Court is that its decrees passed on second appeals are final in the sense that there is no third appeal to the High Court. To my mind the fact that there is no provision for a third appeal does not lead to the conclusion that his orders and decrees are not liable to be questioned in revision under S. 115, Civil P. C Indeed the section comes into play only in cases where the remedy by way of an appeal is not open What after all is the right of appeal ?

"It is the right of entering the superior Court and invoking its aid and interposition to redress the error of the Court below.

Per Lord Westbury, L C. in *A G v. Sillem* (4). Where there is no right of appeal the High Court's power of interposition is provided by the creation of its revisional jurisdiction and it is significant that that jurisdiction is extremely narrow and limited It only arises in cases of an error of a Court below when such error affects its jurisdiction. I am of opinion that the revisional jurisdiction exists in this case and it could only be destroyed by an express legislative enactment. In cases where the legislature has intended to do away with this jurisdiction of the High Court in certain matters it has made provision to that effect But in the present case it has not. Therefore as already stated, my answer to the question is in the affirmative.

Misra, J.—The question. which has been referred to the Full Bench for decision is :

" Is the Court of the District Judge in the circumstances of this case subordinate to the Chief Court. "

(4) [1864] 10 H. L. C. 704=10 L. T. 434=10 Jur. 446.

The answer to this question in my opinion would depend upon the answer to the following question :

"Is the Chief Court competent to exercise its revisional jurisdiction in a case in which a decree has been passed by the District Judge in an appeal from an appellate decree or order of the Collector or Assistant Collector of the 1st calss ?"

I have given the question my best consideration and have come to the conclusion that no revision can be entertained by the Chief Court in such a case. The revisional jurisdiction possessed by this Court is under S. 115, Civil P. C , 1908. Under S 135, Oudh Rent Act 22 of 1886 the provisions of the Code of Civil Procedure are applicable to all suits and proceedings under the Oudh Rent Act provided they are not inconsistent with the provisions of that Act. It appears to me that to apply the provisions of S. 115, of the Code to such cases would be inconsistent with the provisions of the Oudh Rent Act in two ways, firstly it would offend against the provisions of S. 108, Oudh Rent Act and secondly it would offend against the provisions of S. 119 (B), of the said Act. S 108, Oudh Rent Act runs as follows :

"Except in the way of appeal as hereinafter provided Courts other than Courts of Revenue shall not take cognizance of the following descriptions of suits and those suits shall be heard and determined in the Courts of revenue in the manner provided in this Act and not otherwise."

Suits for arrears of rent are included in the description of suits attached to the section.

It is clear that the Chief Court must be considered as a civil Court when it exercises its revisional jurisdiction, since such a jurisdiction should be deemed to have been conferred on the said Court under the Code of Civil Procedure which relates to the procedure to be followed by the civil Courts. It would be apparent from the provisions of the section quoted above that Courts other than Courts of revenue, which include civil Courts, can only take cognizance of the suits mentioned in S 108 only by way of appeal as provided by the Rent Act. A suit for arrears of rent as stated above is a suit mentioned in S. 108. The conclusion to be drawn therefore is that the Chief Court cannot take cognizance of a suit for arrears of rent on its revisional side. The only way that it can take cognizance of such a suit is by way of appeal since an express provision for it is made in S. 119 (B), Oudh Rent Act To allow a revision in such a case would therefore be to apply a provision of the Code of Civil Procedure, which would be inconsistent with provisions of the Rent Act as laid down in S. 108.

There is a second aspect of the case in which it also appears to me that to apply S 115. of the Code would be inconsistent with the provisions of the Oudh Rent Act. In S 119-B, of the said Act as amended by Act 4 of 1921 (local) and Act 4 of 1925 (local) it is clearly provided that there will be no appeal from a decree passed by a Court of the District Judge against a decree passed by him in an appeal from an appellate decree or order of the Collector or the Assistant Collector of the 1st class. An appeal against his decree is provided for only in those cases which go to the District Judge by way of first appeal. The intention of the legislature, therefore, appears to be that the decrees passed by the District Judge in such cases must be considered as final and no further remedy should be allowed to the litigants after a case has been decided in second appeal by the Court of the District Judge. To allow a revision in such cases by applying the provisions of the Code of Civil Procedure would, therefore, be, in my opinion, inconsistent with the provisions of the Oudh Rent Act as laid down in S 119-B, of the said Act, which makes the decrees passed by the District Judge in such cases final.

The view that revisions can be allowed only in those cases in which appeals are provided for to the Chief Court is supported by an old decision of the late Court of the Judicial Commissioner of Oudh reported in *Maheshwar* v. *Bhikh Chand* (5) in which Dr. Howell with reference to an earlier decision of the Bench of the same Court reported in *Babu Udres Singh* v. *Ram Bharose* (6) observed as follows :

"I am of opinion that the revisional jurisdiction of this Court under S. 622, Civil P. C., read with S. 135, Rent Act is restricted to those cases in which the course of appeal lies to this Court under Ss. 119 and 119 (B), of the latter Act, does not extend to cases in which the course of appeal lies to the Board.

(5) Rent Act Ruling 68 of 1893.
(6) Rent Act Ruling 63 of 1892.

As indicated above no appeal lies to the Chief Court under S 119 (B) against the decrees passed by the District Judge in appeals from appellate decrees or orders of the Collector or Assistant Collector of the 1st class. According to the test laid down by Dr. Howell no revision would, therefore, be entertainable by this Court since no appeal lies to this Court under S. 119 (B)

The view which I have taken of Ss. 135 and 108, Oudh Rent Act is supported by several decisions of the Allahabad High Court in which that Court had to interpret similar provisions laid down in Ss. 167 and 193, Agra Tenancy Act (2 of 1901).

Section 167, Agra Tenancy Act (2 of 1901) runs as follows :

"All suits and applications of the nature specified in Sch. 4 shall be heard and determined by the revenue Courts and except in the way of appeal as hereinafter provided no Court other than a revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made."

Section 193 of the same Act runs as follows .

"The provisions of the Civil Procedure Code shall apply to the procedure in all suits and other proceedings under this Act so far as they are not inconsistent thereunder."

In interpreting these provisions the High Court of Allahabad has consistently held that the proper interpretation to be put on S. 167 is to hold that in case where there was no appeal to the High Court against the decision of the District Judge it was not competent for the High Court to entertain an application in revision from such order. I should like to refer to the following cases .

Damber Singh v. *Shrikisan Das* (7), decided by Richards and Alston, JJ. *Parbhu Narain Singh* v *Harbans Lal* (8) decided by Piggott and Walsh, JJ., *Jamna Prasad* v. *Karan Singh* (9), decided by Abdul Raoof, J., *Muhammad Ehtisam Ali* v. *Lalji Singh* (10) decided by Tudball, J., *Gajkumar Chander* v *Salamat Ali* (11), decided by Stuart and Wallach, JJ., and *Adya Saran* v *Kali Charan* (12) decided by Piggott, J.

A different view was, however, taken by Sulaiman and Boys, JJ , in *Kheri Singh* v *Tirpal Singh* (13) The matter was therefore in a subsequent case referred to a Full Bench. The Full Bench overruled this case and the view taken in the earlier cases quoted above was approved by it. The case was decided by Lindsay, Daniels and Dalal, JJ.. and will be found reported in *Bhagwat Das* v *Chhedi Koeri* (14)

It would appear from the decisions of the Allahabad High Court quoted above that it has been consistently held by that Court that where jurisdiction to decide a revenue case is conferred upon the High Court by the Tenancy Act in the shape of hearing an appeal only, the High Court cannot take cognizance of that case on its revisional side It is not necessary for us to go to that length but it follows as a matter of course that where even the power of appeal is not conferred upon the High Court under the provisions of the Rent Act it would not be open to the High Court to exercise its revisional powers and the District Judge cannot therefore be considered in such a case subordinate to the High Court.

I may point out that owing to this difficulty it has now been expressly provided in S 253, Agra Tenancy Act 3 of 1926 that the High Court will have power to call for the record of any suit or application which has been decided in a subordinate revenue Court and in which an appeal lies to the District Judge and in which no appeal lies to the High Court and if the Subordinate Revenue Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may pass such order in the case as it may think fit. It is unfortunate that no such provision of law exists in Oudh. In my opinion the legislature should interfere and make the law in the province of Oudh uniform with that which now prevails in the province of Agra.

(7) [1903] 31 All. 445=2 I. C. 377=6 A. L. J. 552.
(8) [1916] 14 A. L. J. 291=35 I. C. 279.
(9) [1919] 41 All. 23=46 I. C. 398=16 A. L. J. 859.
(10) [1919] 41 All. 226=49 I. C. 362=17 A. L. J. 123.
(11) [1920] 42 All. 83=52 I. C. 756=17 A. L. J. 1057.
(12) A. I. R. 1923 All. 580=45 All. 567.
(13) A. I. R. 1926 All. 113=48 All. 104.
(14) A. I. R. 1926 All. 399 (F. B.).

but as long as law is not changed the conclusion to which I have arrived appears to me to be the only conclusion that can be arrived at.

My answer therefore to the reference quoted in the beginning of this order is in the negative.

Raza, J.—In my opinion the revisional jurisdiction of this Court under S. 115 Civil P. C., read with S. 135 Oudh Rent Act is restricted to those cases in which the course of appeal lies to this Court. The decisions of the District Judges in cases in which they hear appeals from the appellate decrees or orders of Collectors or Assistant Collectors of first class under S. 119 Oudh Rent Act must be treated as final for all purposes. I think it was meant by the local legislature that no further remedy should be given to the litigants in such cases. To allow revision in such cases by applying the provisions of the Code of Civil Procedure would in my opinion be inconsistent with the provisions of the Oudh Rent Act The word 'appellate' was added in S. 119, Oudh Rent Act by Act 4 of 1921 in order to remove second appeals in rent suits from the cognizance of the Commissioners under S. 116 and to give jurisdiction over them to the District Judges. The Act does not provide for any third appeals or for revisions from the decisions of the District Judges in such cases The District Judge exercises the function of a revenue Court in hearing such appeals. The power of the Oudh Chief Court to interfere in appeals from the decisions of the Revenue Court is limited to the case provided by S. 119-B. As pointed out by the learned Judicial Commissioner in the case of *Kali Bakhsh Singh* v *Bhagwan Das* (15)

"Apart from the limited authority given by S. 119-B and 119-C Oudh Rent Act, a reference to S. 4 Civil P.C., shows that in the absence of any specific provision to the contrary nothing in the Code shall be deemed to affect any special or local law now in force or any special jurisdiction or power conferred by or under any other law for the time being in force."

I am of opinion therefore that no revision lies against an order passed by a District Judge in a second rent appeal. I agree generally with the view taken by a Bench of this Court in *Narayan* v. *Baldeo Singh* (1) I would answer this reference accordingly, and answer the question in the negative.

Nanavutty, J.—The question that has been referred to the full Bench for decision is as under :

"Is the Court of the District Judge, in the circumstances of this case subordinate to the Chief Court."

The facts leading up to the present reference to the Full Bench are briefly as follows :

A suit for arrears of rent was filed in the Court of the tahsildar of Bikhpur who exercised the powers of an Assistant Collector, 2nd Class, under S 108 Oudh Rent Act. On the suit having been dismissed by the tahsildar the plaintiff filed an appeal in the Court of the Deputy Commissioner of Fyzabad. This appeal was allowed and the plaintiff's claim for arrears of rent decreed.

The defendant thereupon filed a second appeal to the Court of the District Judge of Fyzabad The latter allowed the appeal, set aside the appellate decree of the Deputy Commissioner of Fyzabad and restored the decree of the tahsildar of Bikapur and dismissed the plaintiff's suit with costs in all Courts. The plaintiff thereupon filed a revision under S 115 Civil P C in this Court

The defendant respondent argued that no revision lay to this Court. The question therefore for determination is whether the Court of the District Judge is subordinate to the Chief Court in the circumstances of this case.

My answer to this question is in the negative and my reasons are as under ;

In the first place, the Court of the District Judge when deciding this second rent appeal from an appellate order of the Deputy Commissioner was exercising under S 119-C Oudh Rent Act the powers conferred upon a Court of revenue by that Act. S 3 Oudh Rent Act states that a Court means

"any judicial officer presiding in a Court of Revenue for the disposal of matters under this Act."

The Court of the District Judge sitting as a Court of Revenue in deciding such rent appeals is not a Court subordinate to the Chief Court unless there is any provision in the Oudh Rent Act itself which makes it so subordinate. In S 119 Oudh Rent Act the Court of the District Judge is given powers to hear appeals from decrees, orders of Collectors or Assistant Collectors, 1st Class in certain

(15) A. I. R. 1924 Oudh 16.

suits filed under S. 108 Oudh Rent Act, and S. 119-B Oudh Rent Act lays down that from such judgments and decrees by a District Judge, an appeal shall lie to the Chief Court of Oudh in all cases in which a second appeal is allowed by the Code of Civil Procedure and subject to the provisions of the Indian Limitation Act of 1908. It is only in so far as an appeal is allowed by the Oudh Rent Act itself from a decision of the District Judge exercising the powers of a Court of Revenue under the Oudh Rent Act that the District Judge may be said to be subordinate to the Chief Court of Oudh when exercising the powers of a Court of Revenue otherwise, as is clear from S 119-C Oudh Rent Act. for the purposes of deciding appeals under the Oudh Rent Act a District Judge in Oudh and the Chief Court in Oudh shall have the powers conferred upon a Court by that Act.

It is true that the Court of the District Judge is subordinate to the Chief Court of Oudh when deciding Civil cases but no such subordination has been laid down in the Oudh Rent Act when the District Judge hears and decides appeals from Courts of Revenue.

Section 135 Oudh Rent Act also makes it clear that the provisions of the Code of Civil Procedure shall, so far as they are not inconsistent with the provisions of this Act, apply to all suits and other proceedings under this Act. Courts other than Courts of Revenue cannot take cognizance of suits falling within the purview of S. 108 Oudh Rent Act The District Judge and the Chief Court of Oudh therefore are not Civil Courts when, acting under the provisions of the Oudh Rent Act, they hear appeals from decisions from Courts of Revenue.

The learned Counsel for the applicant at the time of hearing of this reference referred to the judgment of their Lordships of the Privy Council reported in *Nilmoni Singh* v. *Tara Nath Mookerji* (3). That decision of their Lordships of the Privy Council was under the Rent Act of Bengal, No. 10 of 1859 and it was held in that case that the Rent Court of the Deputy Commissioner was a Civil Court as defined in Act No 8 of 1859. If Courts of Revenue in Oudh are held also to be Civil Courts, then undoubtedly the Court of the District Judge when hearing an appeal in an arrear of rent case from an appellate decision of the Collector of the District would also be a Court subordinate to the Chief Court.

For the reasons given above I am of opinion that the Court of the District Judge of Fyzabad, in the circumstances of the present case is not subordinate to the Chief Court and I would answer the reference accordingly.

R.K. *Reference answered in negative.*

A. I. R. 1929 Oudh 397

SRIVASTAVA, J.

Prag Narain—Defendant—Appellant.

v.

Dachhina Bux — Plaintiff — Respondent.

Second Rent Appeal No. 47 of 1928, Decided on 12th September 1928

(a) Landlord and tenant—Land continues to be grove although it is cultivated.

Mere fact that land was culturable or has been under cultivation would not by itself prove that the land has lost its character as a grove. [P 398 C 1]

(b) Adverse possession — Grove-holder continuing to hold even after land ceasing to be grove—In absence of any assertion of adverse title he must be considered as holding over and his possession is only of tenant.

Where a grove-holder continues to hold even after the land has lost its character as a grove, he must be considered to be holding over and his possession in the absence of any open assertion of proprietary right by him, cannot be considered to be otherwise than as a tenant . 70 *I. J.* 282, *Dist* [P 398 C 1]

S. N. Roy—for Appellant.

Radha Krishna—for Respondent.

Judgment —One Bhagwan Bakhsh Singh held the plot in suit as a grove-holder. He executed a sale deed in respect of it in favour of the predecessor-in-title of the defendant on 22nd March 1905 The plaintiff instituted the present suit for recovery of arrears of rent and for ejectment under S. 127, Oudh Rent Act against the defendant on 12th November 1926. The only defence with which I am concerned in this appeal, was that the defendant had acquired full proprietary rights in the land by adverse possession extending to a period of over 12 years. Both the lower Courts have rejected the defendant's plea about adverse possession. The argument urged before me in support of the appeal is that on the facts found the defendant should be held to have made out his plea of adverse possession.

It is not denied that the grove was recorded at the time of the First Regular Settlement as tenant's grove and that the status of Bhagwan Bakhsh Singh was that of a tenant grove-holder. There is nothing on the record to show the number of trees which existed on the land at the time of the First Regular Settlement but the entry then made was that the land was culturable. The entries at the Second Settlement and in subsequent years show that the land has actually been under cultivation There are 5 trees standing now on the plot the area of which is 4 bighas and 4 biswas. So the only ground on which the plea of adverse possession rests is that the defendant and his predecessor have been allowed to cultivate the land without any rent being demanded from them and without any rent being paid

It is admitted that there is no evidence of any assertion of proprietary right either by the defendant or his vendor. Reliance has been placed upon the decision in *Nadir Singh* v. *Anpurna Kunwar* (1) in which it was held that where a person is found in continuous possession of property without any right whatsoever, even though he did not at any time make any openly avowed claim of right to it, the circumstances attending his possession may be sufficient to show that he held possession as of right and as such to have acquired title by adverse possession This case is, in my opinion, quite distinguishable. Possession of the defendant in the present case cannot be considered to be possession without any shadow of right The defendant was entitled to retain possession of the land so long as it retained the character of a grove No occasion has arisen till now for any adjudication as to whether the land lost its character as a grove and if so when. The mere fact that the land was culturable or has been under cultivation would not by itself prove that the land had lost its character as a grove. Assuming that the land lost its character as a grove more than 12 years before suit the defendant must be considered to have been holding over and his possession in the absence of any assertion to the contrary, cannot be considered to have been otherwise than as a tenant. For the above reasons I agree with the opinion of the Courts below that the defendant has failed to make out his plea of adverse possession The appeal fails and is dismissed with costs.

(1) [1920] 7 O. L. J. 282=56 I. C. 759.

S.N /R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 398

MISRA AND PULLAN, JJ.

Qadirunnissa— Plaintiff—Appellant.

v.

Qutbul Huda and *another* — Defendants—Respondents

Misc Civil Appeal No. 40 of 1928, D/- on 21st January 1929.

(a) Civil P. C., O. 43, R. 1 (u)—Party asking for remand cannot appeal against remand order merely because ground covered by such order is not so wide as desired by him.

A party who is prejudiced by an order of remand can appeal against such order. But where a party has himself asked for a remand and obtained an order of remand he cannot appeal merely because the ground covered by it is not so wide as that which he himself desired. [P 399 C 1]

(b) Civil P. C., S. 11—Lower appellate Court remanding case ordering one of several documents to be admitted—Case coming up before successor of Judge making that order—He passing another order of remand ordering all documents in question to be admitted—Second order of remand is proper.

Lower appellate Court remanded case directing one of several documents in question to be admitted. When the case came up again before the successor of the Judge who passed the first order of remand, the latter made a second order of remand directing that all the documents should be admitted.

Held, that the successor was not bound by the first order of remand and the second order of remand passed by him was proper. [P 399 C 1]

Hakimuddin Siddiqi—for Appellant.

Ghulam Hasan—for Respondents.

Judgment.—This is an appeal against an order passed by the Subordinate Judge of Lucknow, remanding a case which was under appeal before him to the Court of first instance for a fresh decision after considering the effect of certain documents and the evidence which might be produced in rebuttal of them These documents were tendered in the Court of the Munsif but in the view of that Court they were tendered late. He, therefore, refused to consider them. In appeal the Subordinate Judge decided that out of these nine documents one of them should have been admitted, and he remanded the suit with direc-

tions that the lower Court should consider the effect of that document. The lower Court did so and the matter again came up in appeal before the successor of the learned Subordinate Judge who passed the first order of remand. The second Subordinate Judge after hearing the arguments decided that if these eight documents were produced they might have an important bearing on the decision of the case and he made a second order of remand which is now under appeal before us.

The first point which has been argued is that this remand could not be made because the first order of remand was appealable under the new provisions of O. 43, R. 1 (u) Civil P. C and as no appeal had been preferred against the refusal of the Subordinate Judge to admit those eight documents at that time, the question could not be raised again. Cl (u) O 43, R 1 makes an order of remand appealable, and a party who is prejudiced by an order of remand can appeal against such an order. But where a party has himself asked for a remand and obtained an order of remand he cannot appeal merely because the ground covered by the order of remand is not so wide as that which he himself desired. In this case, therefore, although the defendant may have been aggrieved to some extent by the narrow scope of the first order of remand he could not appeal, and his only proper course was to attempt to press the point at a later stage Thus, had the learned Subordinate Judge subsequently maintained the same position and consistently refused to admit these documents, he could have appealed to this Court on this point while contesting the final decree. As the matter stands the learned Subordinate Judge has differed from his predecessor, but he was not bound by the first order. It is as though the learned Subordinate Judge himself had in the course of hearing the appeal altered his mind on a certain point, and if he considered after further thought that a further remand was necessary he was legally authorized to order such further remand. In our opinion the order passed was a proper order. We need not at this stage consider the merits of the case in any way but we would like to say that in our opinion these documents have been properly admitted by the Court below. We, therefore, dismiss this appeal with costs.

S.N./R.K *Appeal dismissed.*

A. I. R. 1929 Oudh 399

RAZA, J.

Nankhu Singh — Defendant — Applicant.

v.

Girja Bux Singh—Plaintiff—Opposite Party.

Appln. No. 15 of 1929 Decided on 25th July 1929 against the order of Sm C. C. Judge, Unao, D/- 30th November 1928.

Evidence Act S. 91—Suit for money borrowed—Debt evidenced by pro-note—Debt can be proved independently of the pro-note—Promissory note.

Where a person has contracted a debt and has also executed a pro-note in favour of his creditor, the creditor can bring a suit for the money lent and evidenced by a pro-note and can prove the debt independently of the pro-note, S. 91 does not stand in his way 6 *O. C.* 16 ; *A. I. R.* 1924 *Oudh* 249 ; 34 *All.* 158 , *A. I. R* 1928 *All.* 371, (*F. B*) *Rel. on.* [P 400 C 1]

Ishri Prasad—for Applicant.

Radha Krishna—for Opposite Party.

Judgment.—This is an application in revision under S. 25, Sm C C. Act (Act 9 of 1887).

It may be said that the suit was based on a pronote but it was not stated in the plaint that the pro-note was the only evidence of the loan. It was alleged in the plaint that the defendant had borrowed the money (Rs 300) in cash from the plaintiff and that the loan was evidenced by a pro-note (*ba tahrir ruqqai indat talab*) The plaint was subsequently amended. It was stated in para. 1 of the plaint as amended that the defendant had borrowed Rs. 300 from the plaintiff at Rs. 4-11-0 per cent per mensem payable on demand and that the loan was evidenced by a pro-note and a receipt executed by the defendant on the same date. The plaintiff sued to recover Rs. 400 principal and interest, alleging that the defendant had paid nothing on account of the debt contracted by him The claim was resisted by the defendant The pro-note was impounded as it was not duly stamped. However the learned Judge of the Small Cause Court gave the plaintiff an opportunity to prove the debt independently of the pro-note. He found on the evidence that the defendant had borrowed Rs. 300

from the plaintiff at 3 pice per rupee per month. The plaintiff's claim was therefore decreed with costs.

The defendant has filed this application for revision contending that the learned Judge of the Small Cause Court was wrong in allowing the amendment of the plaint and also in giving the plaintiff an opportunity to prove the debt independently of the pro-note.

I have heard the learned counsel on both sides at some length In my opinion the learned Judge was perfectly right in allowing the amendment of the plaint and also in giving the plaintiff an opportunity to prove the debt independently of the pro-note. Even if the learned Judge had not allowed amendment of the plaint the plaintiff was entitled to prove the debt independently of the pro-note in question The defendant had contracted the debt and had also executed the pro-note in question in favour of the plaintiff. It was never stated in the plaint that the pro-note was the only evidence of the loan. It was of course stated in the plaint that the loan was evidenced by a pro-note, but this does not mean that the pro-note was the only evidence of the loan. The suit was primarily based on the loan of which the promissory note was alleged to be evidence. It was not based on the execution of the promissory note in question. The cases of *Bachchu Lal* v. *Kandhai Lal* (1) and *Dwarka* v. *Idu* (2) are authorities for the proposition that if a plaintiff alleges in his plaint that he lent money to the defendant for which the defendant executed a promissory note, a decree may be passed for the amount which is proved to have been lent, even if the execution of the promissory note is not proved or the promissory note is found to be inadmissible in evidence for want of proper stamp. It was held in the case of *Ram Sarup* v *Jasoda Kunwar* (3), that if a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed. It was held by a Full Bench of the Allahabad High Court in the case of *Miyan Bux* v. *Mt. Bodhiya* (4) that a promissory note payable on demand to the lender or the bearer or to order offends against the provision of S. 25, Paper Currency Act (10 of 1923) and, therefore cannot form the basis of a suit. The plaintiff can however sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note

The applicant's learned counsel has referred to S. 91, Evidence Act and relied on the ruling of the Madras High Court in the case of *Muthu Sastrigal* v. *Visvanatha Pandharasannadhi* (5). I should like to note however that the following observations were made in the Full Bench ruling of the Allahabad High Court mentioned above at pp 740 and 741 :

"For instance, where the plaintiff can prove that on a balance of account a sum is due to him he can sue on that obligation, ignoring the fact that in regard to it or part of it an unlawful promissory note was executed. Similarly, if he has evidence, whether oral or otherwise, independent of the promissory note, that he made a loan of a sum of money to the defendant on the condition that the money would be repaid on demand with certain interest, he can sue on that obligation ignoring the existence of the promissory note. Nor in this latter case can it be said that S. 91, Evidence Act will stand in his way. The terms of no 'contract' have in this case been reduced to the term of a contract, for exhypothesi, the agreement embodied in the promissory note was not enforceable by law and was therefore not a 'contract.' Nor without unduly straining language, could the transaction be described as a disposition of property."

I take the same view.

In my opinion the learned Judge of the Small Cause Court was perfectly right in decreeing the plaintiff's claim. Hence I reject the defendant's application for revision with costs.

R.K. *Revision rejected.*

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(1) [1903] 6 O. C. 16.
(2) A. I. R. 1924 Oudh 249=26 O. C. 361.
(3) [1912] 34 All. 158=13 I. C. 138=9 A. L. J. 72.
(4) A. I. R. 1928 All, 871=50 All. 839 (S.B.).
(5) [1914] 38 Mad. 660=26 M. L. J. 19=21 I. C. 864=(1914) M. W. N. 58.

A. I. R. 1929 Oudh 401

PULLAN, J.

Mustafa Khan—Defendant — Appellant.

v.

Dwarka—Plaintiff—Respondent.

Second Appeal No 332 of 1928, Decided on 8th November 1928, from decree of Sub-Judge, Rae Bareli, D/- 8th August 1928.

Easements Act, Ss 4 and 13 — Person building well for public use on municipal land—Neighbour constructing wall surrounding well leaving space of five feet in width and also passage to public road—Builder of well cannot claim any easement and so cannot ask neighbour to demolish wall.

A person who builds a well can claim from the grantor of the land on which the well is constructed what is necessary for a beneficial enjoyment of a well, but he cannot claim that he has obtained any easement in respect of any particular land in the neighbourhood except in so far as it is the land of the grantor. Hence where a person builds a well on the municipal land for the use of the public and the neighbour constructs a wall leaving a space of five feet in width surrounding the well, and also a passage leading to the public road, the latter cannot be asked to demolish the wall although it might have prevented the public from seeing the well from a distance.

[P 401 C 1, 2]

Mohammad Ayub—for Appellant.

H. D Chandra—for Respondent.

Judgment—This second appeal arises from a suit brought by a person who built a well for the benefit of the public on municipal land and who has asked for the demolition of a wall which has been built round that well and a perpetual injunction to restrain the defendant from building any other wall on the north or south of the well. The suit is based on the idea that the plaintiff has a right of easement in respect of his well and reliance is placed on S. 4 and S 13, Easements Act. A person who builds a well can claim from the grantor of the land on which the well is constructed what is necessary for the beneficial enjoyment of the well, but I am not aware that he can claim any more than this or that he has obtained any easement in respect of any particular land in the neighbourhood except in so far as it is the land of the grantor. In the present suit the defendant alleged that he was a lessee from the Municipal Board but the fact was challenged by the plaintiff. An issue was framed and it was found against the defendant. Consequently for the purposes of this suit I cannot regard the defendant as being a lessee from the Municipal Board or as having stepped in any way into the place of the Board. Thus I have to consider what the plaintiff can claim for his well as against this neighbour.

The object of the well is to give water to the public and the public must, therefore, be able to approach the well and draw water from it. It is admitted that the defendant has constructed certain walls leaving a passage which leads from the public road to the well and also leaving a space of five feet in width surrounding the well. There is, therefore, nothing which can prevent the public from going to the well and taking water. On this account the Court of first instance dismissed the suit holding that the plaintiff should himself have obtained more land if he wished his well to be more conspicuous. The lower appellate Court appears to have considered that the plaintiff had a right to have his well seen from a distance by the public. For some reason which is not clear to me he finds that the public are less likely to see the well because most of them are illiterate, but even if the public do find difficulty in seeing the well this does not affect the plaintiff. He has done his part. He has provided the well. He cannot properly bring in Court a case on the ground that the public is deprived of any right which it may have in connexion with the well.

The lower appellate Court has employed a curious analogy when he says that as in the case of a lighthouse it is necessary for ships to see the lighthouse in order to avoid danger, so, in the case of a public well it is necessary for the public to see the well in order to use it or derive advantage from it. Now apart from the fact that mariners do not see the lighthouse but only the light, it should have been clear to the Court that the object of the lighthouse was not that the mariners should go to the lighthouse but that they should keep away from it. The opposite is the case with a public well. In my opinion the plaintiff failed to establish any easement. No doubt he has a grievance chiefly I should suppose against the Municipal Board whom he has not impleaded in the suit, but he can only claim for his well the right of access which enables the public to draw

and that right is not interfered with by the constructions erected by the defendant. I, therefore, allow this appeal with costs, set aside the order of the lower appellate Court and restore the order of the Court of first instance.

S N./R.K. *Order set aside*

A. I. R. 1929 Oudh 402

RAZA, J.

Mubinulnissa—Plaintiff—Appellant.

v.

Ali Husain and *another*—Defendants—Respondents.

Second Appeal No. 369 of 1928, Decided on 30th July 1929 against decree of Sub-Judge, Bara Banki, D/- 18th July 1928.

(a) Civil P. C., S. 100 — Finding of fact based on admissible evidence cannot be impugned.

A finding of fact based upon admissible evidence cannot be impugned in second appeal. There is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however gross or inexcusable the error may seem to be. 18 *Cal.* 23; *A. I. R.* 1929 *P. C.* 152, *A. I. R.* 1929 *P. C.* 190, *Rel. on.* [P 404 C 1]

(b) Cosharer — Adverse possession—One cosharer in possession of entire property—His possession is not adverse to others — Mere entry of that cosharer's name is no proof of adverse possession—Denial of other cosharer's title must be proved—Mere non-participation in profits does not constitute adverse possession.

The lambardar of a mahal is in a fiduciary position in relation to the cosharers in the matter of collections and disbursements. If a property belongs to several cosharers and one co-sharer (the lambardar) is in possession of the entire property his possession cannot be deemed to be adverse to the other cosharers. He must be deemed to be in possession on behalf of the other cosharers and adverse possession cannot be founded on the basis of such exclusive possession unless there has been ouster of the other cosharers. Mere entry of the name of the lambardar would not be proof of adverse possession and where no proof is given to establish that the title of the other cosharers was denied, the mere fact that certain land was entered in the name of the lambardar would not entitle him to contend that his possession was adverse to them. Mere non-participation in the profits by the cosharers and exclusive occupation by the lambardar would not constitute adverse possession against the cosharers in favour of the lambardar: *A. I. R.* 1929 *Oudh* 337; 21 *Mad.* 153; 11 *Bom.* 365, *Rel. on.* [P 404 C 2]

(c) Adverse possession—Ingredients enunciated.

To prove title by adverse possession it must be shown that such possession is adequate, in continuity, in publicity and in extent and it must be actual, visible, exclusive, hostile and continued during the statutory period. Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession: 27 *Cal.* 943 (*P.C.*); 35 *Cal.* 961; *A. I. R.* 1922 *P. C.* 181; 27 *Bom.* 43, *Rel. on.*, 7 *O. L. J.* 282, *Dist.* [P 405 C 1]

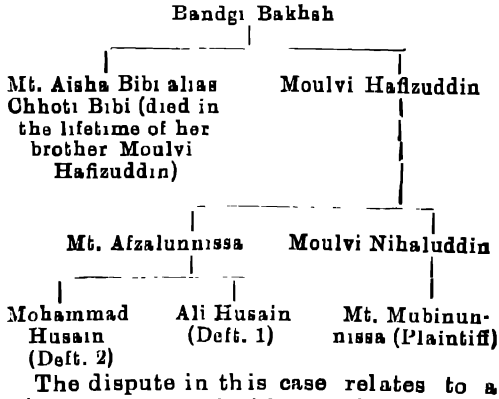
(d) Limitation Act, S. 28—S. 28 has no application unless some one is in adverse possession.

Section 28 does not apply unless there is some one in adverse possession of the property. Until some one is in adverse possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of the property for 12 years. His right is only extinguished at the determination of the period limited by the act to him for instituting a suit for possession of the property. The period cannot be determined unless it has commenced to run and the period will not commence to run until the owner is aware that some one else in possession is also holding adverse to him. *A. I. R.* 1921 *Bom.* 368; *A. I. R.* 1926 *Oudh* 313, *Rel. on.* [P 405 C 2]

Hyder Hussain and *M. M. Ansari*—for Appellant.

Ali Mahomed—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a declaratory suit. The relative position of the parties will appear from the following pedigree:



The dispute in this case relates to a 3/8th share out of 4 bighas odd in mahal Hafizuddin in village Shaikhpur in the district of BaraBanki The plaintiff claims the property in suit under a deed of wakf executed by her father Moulvi Nihaluddin on 13th November 1916.

The defendants claim the property as the heirs of their mother, Mt Afzalunnisa sister of Moulvi Nihaluddin.

Though the property in suit is very small and the net profits of the property amount to a few rupees only, but the parties have shown considerable zeal in the litigation relating to it.

The defendants' names were not entered in the khewat of the village Shaikhpur and so they applied to the Assistant Record Officer, Bara Banki for correction of the khewat. The application was opposed by the plaintiff. The Assistant Record Officer dismissed the defendants, application on 18th April 1925 and their appeal was dismissed by the Deputy Commissioner on 24th June 1925. However, their appeal was allowed by the Commissioner of Fyzabad on 6th February 1926 The plaintiff then appealed to the Board of Revenue, but her appeal was dismissed on 29th May 1926 She then brought the present declaratory suit against the defendants on 15th July 1927

The Additional Munsif, Bara Banki, decreed the plaintiff's claim on 10th April 1928. The defendants appealed and their appeal was allowed by the learned Subordinate Judge, Bara Banki, on 18th July 1928.

The plaintiff has now come to this Court in second appeal.

The learned Subordinate Judge found that the property in suit originally belonged to Mt. Aisha Bibi alias Chhoti Bibi who transferred it by an oral gift to her niece Mt. Afzalunnissa (defendants' mother) in the year 1881 Mt. Afzalunnissa was recorded owner of the property in suit as donee from Chhoti Bibi and she got a chitthi for the same in the partition case to which Moulvi Hafizuddin was also a party, in April 1881. Her name was duly entered in the khewat as a cosharer of 4 bighas 4 biswas 17 biswansis along with her father Moulvi Hafizuddin and her brother Moulvi Nihaluddin, who was the vendee of the share of one Ghulam Jilani.

It was clearly noted in the khewat that she was holding the property as donee from Chhoti Bibi. Moulvi Hafizuddin died sometime before August 1894 and his share was then mutated in favour of his son Moulvi Nihaluddin. From 1315 Fasli onwards the entire khata was shown in the name of Moulvi Nihaluddin though there was no order and no record of any transaction to show how his sister Mt. Afzalunnissa had lost the right which she had acquired in 1881 and 1882. The learned Subordinate Judge found that the village patwari was responsible for this mistake or omission. He found also that there was no evidence on the record to show that the plaintiff was in possession of the property in dispute at the time she instituted the suit. He held that plaintiff's suit for declaration was not maintainable under S 42, Specific Relief Act. The result was that the plaintiff's claim was rejected by the learned Subordinate Judge.

The case was remanded by this Court and now the learned Subordinate Judge has found that the plaintiff has been in possession of the property in suit since 1924 and that before that, her father, Moulvi Nihaluddin was in possession of the entire property including the property in suit Moulvi Nihaluddin died in 1923 and his sister Mt. Afzalunnissa, in 1921 Mt Afzalunnissa and her sons were never in possession of the property during the last 12 years. The learned Subordinate Judge has found that though the defendants could not prove their possession over the property in suit by means of receipt of rents and profits during the last 12 years, but the title to the property was still in them as the plaintiff could not prove that she and her predecessors (lambardars) had perfected their title to the property by adverse possession.

The parties have filed objections. I have gone though the evidence on the record carefully. In my opinion the finding of the learned Subordinate Judge that the plaintiff and her predecessor have been in possession of the property in suit for more than 12 years is unassailable. The learned Subordinate Judge was perfectly right in holding that the defendants and their predecessor were never in possession of the property by means of receipt of rents and profits during the last 12 years. The evidence which the defendants have produced to prove their possession by means of receipt of rents and profits is not reliable at all and was properly rejected by the learned Subordinate Judge. There is no documentary evidence on that point. The oral evidence is quite worthless and appears to have been manufactured.

Now the position is this : It has been found that Mt Afzalunnissa (defendants' mother) was owner of the property in suit. The property in suit originally belonged to Chhoti Bibi who had transferred the same to Mt. Afzalunnissa by an oral gift. Mt Afzalunnissa was recorded owner of the property in place of Chhoti Bibi in the village papers. Her

name was duly entered in the khewat. She was recorded cosharer of the property along with her father Moulvi Hafizuddin and her brother, Moulvi Nihaluddin. Moulvi Hafizuddin was formerly the lambardar of the mahal. His son Moulvi Nihaluddin became the lambardar after his death The plaintiff became the lambardar of the mahal after the death of her father Moulvi Nihaluddin. The entire khata has been shown in the name of Moulvi Nihaluddin since 1315 fasli (1908) There is no order and no record of any transaction to show how the defendants and their predecessor lost the property to which they were rightfully entitled. The plaintiff and her predecessors were lambardars and hence they made collections in the mahal. They were thus in possession of the entire mahal. The defendants and their predecessor never received the rents and profits of the property in suit comprised in the mahal from the lambardars during the last 12 years. The question is : Is the defendants' right to the property in suit extinguished as contended on behalf of the plaintiff?

The finding of the learned Subordinate Judge that the property in suit belonged to Mt. Afzalunnissa as donee from Chhoti Bibi must be accepted by this Court. This finding is a finding of fact based upon admissible evidence and cannot be impugned in second appeal. It has been repeatedly held by their Lordships of the Privy Council that there is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact, however, gross or inexcusable the error may seem to be: see *Durga Chowdhrani* v. *Jawahir Singh* (1) ; *Venkata Kumara* v. *Secretary of State* (2) ; and *Ramji Patel* v. *Kishore Singh* (3) The defendants are entitled to the property in suit as the heirs of Mt. Afzalunnissa. Their title to the property in suit is thus established It has been found of course that the defendants and their predecessor never received the profits of the property in suit from the plaintiff and her predecessor during the last 12 years, but have they lost their right to the property simply for that reason? I think not. The plaintiff is the present lambardar of the mahal in which the property in suit is situate. Her father was formerly the lambardar of the mahal. They were thus in possession of the entire mahal. The defendants and their predecessor were cosharers of the mahal. The lambardar of a mahal is in a fiduciary position in relation to the cosharers in the matter of collections and disbursements. If a property belongs to several cosharers and one cosharer is in possession of the entire property, his possession cannot be deemed to be adverse to other cosharers. He must be deemed to be in possession on behalf of the other cosharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other cosharers. The ouster takes place when the title of the other cosharers is denied. Mere entry of the name of one cosharer would not be proof of adverse possession and, therefore, where no proof is given to establish that the title of the other cosharers was denied, the mere fact that certain land was entered in the name of one cosharer would not entitle him to contend that his possession was adverse to them : see *Bashir Ahmad* v. *Parshotam* (4).

The appellant's learned counsel has contended that it should be held in this case that the plaintiff and her predecessors have been in possession of the property in suit adversely to the defendants and their predecessor for more than 12 years. I am not prepared to accept this contention. It is not really the plaintiff's case that she or her predecessors became the owner of the property in suit by right of adverse possession. No adverse possession was alleged in the plaint. I do not find and have not been referred to any reliable evidence on the record showing that the plaintiff or her predecessor was ever in possession of the property in suit adversely to the defendants or their predecessor. Mere non-participation in the profits by one cosharer and exclusive occupation by another, would not constitute adverse possession, against the former in favour of the latter : see *Itappan* v. *Manavikrama* (5), *Dinkar Sadashiv* v. *Bhikaji Sadashiv* (6). To

(1) [1891] 18 Cal. 23 = 17 I. A. 122=5 Sar. 560 (P.C.).
(2) A.I.R. 1929 P. C. 152=56 I. A. 223 (P.C).
(3) A. I. R. 1929 P. C. 190.
(4) A. I. R. 1929 Oudh 337.
(5) [1898] 21 Mad. 153=8 M. L. J. 92.
(6) [1887] 11 Bom. 365.

prove title by adverse possession, it must be shown that such possession is adequate, in continuity, in publicity and in extent and it must be actual, visible, exclusive, hostile and continued during the statutory period : see *Radhamoni Debi* v *Collector of Khulna* (7) ; *Jogendra Nath Roy* v. *Baladoe Das* (8), and *Kuthali Moothaver* v *Kunharan Kutty* (9). Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession : see *Tarubai* v *Venkatrao* (10). The appellant's learned counsel has contended that the fact that Moulvi Nihaluddin had entered the property in suit in the deed of wakf dated 13th November 1916 shows that there was an open assertion of a hostile title on his part. In the first place the deed does not make any specification of the property in suit The entry relating to the Shaikhpur property is simply this 'Village Shaikhpur Kusumbha—according to Khewat.' In the second place there is nothing on the record to show that the defendants or their predecessor had notice of the entry in question or of any assertion of a hostile title on the part of Moulvi Nihaluddin

The appellant's learned counsel has referred to the case of *Nadir Singh* v. *Mt. Anpurna Kunwar* (11) The case was decided by the late Court of the Judicial Commissioner of Oudh in March 1920. It was held in that case that where it is found that a person has been in continuous possession of some property for more than 12 years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and the circumstances attending his possession clearly show that he intended to hold possession as of right, he has to be declared as having acquired title by adverse possession. So far as I see, that case materially differs from the present case in its facts and the decision itself is not applicable. It is said that Moulvi Nihaluddin had perfected his title to the property in suit by adverse possession. However, there is no reliable evidence on the record to show that he ever intended to hold the property in suit adversely to his sister. Mt. Afzalunnissa. It cannot be held in this case that his acts and the circumstances attending his possession show that he ever intended to hold possession of the property adversely to his own sister, Mt. Afzalunnissa. The property was very small. I attach no importance to the circumstance that Mt. Afzalunnissa did not realize (or did not care to realise) the profits of the property from his brother, Moulvi Nihaluddin In my opinion the appellant cannot appeal to the provisions of S 28, Lim. Act also, in the circumstances of this case. This section does not apply unless there is some one in adverse possession of the property. Until some one is in advese possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for 12 years. Under this section his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property ; that period cannot be determined unless it has commenced to run and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to him : see *Swamirao Shriniwas* v. *Bhimabai* (12), and *Sukhdeo* v *Ram Dulari* (13)

In my opinion the learned Subordinate Judge was perfectly right in holding that the plaintiff has failed to prove that she and her predecessor have perfected their title to the property in suit by adverse possession. The defendants are the rightful owners of the property in suit and they have not lost their right in the property by efflux of time.

The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

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(7) [1900] 27 Cal. 949=27 I. A. 136=7 Sar. 714 (P.C.)
(8) [1908] 35 Cal. 961=6 C. L. J. 735=12 C. W. N. 127.
(9) A. I. R. 1922 P. C. 181=44 Mad. 883=48 I. A. 395 (P.C.).
(10) [1903] 27 Bom. 43=4 Bom. L. R. 721.
(11) [1920] 7 O. L. J. 282=56 I. C. 750.
(12) A. I. R. 1921 Bom. 968=45 Bom. 1020.
(13) A. I. R. 1926 Oudh 313=29 O. C. 131.

A. I. R. 1929 Oudh 406
Full Bench

STUART, C. J AND WAZIR HASAN, AND PULLAN, JJ.

Raghunandan Pershad and *others*—Defendants—Appellants.

v.

Moti Ram and *another*—Plaintiff and Defendant—Respondents

Second Appeal No. 224 of 1928, Decided on 6th August 1929, from decree of Addl. Sub-Judge, Gonda, D/- 13th March 1928

(a) Hindu Law—Joint family— Liability of son to pay father's debts incurred before partition—Son is liable to extent of family property in his hands on partition.

Son is liable to pay the personal debts of his father out of the joint family property that has come into his hands on partition before the decree for such debts is passed in favour of the creditors against father alone, provided the debts are incurred by father when father and son constituted a joint Hindu family and were neither illegal nor immoral. The liability is with the property and the acts of the members of the family cannot divest the property of that liability. *A. I. R* 1928 *Mad* 657 (*F. B*), *A. I. R* 1928 *Bom.* 232, *Foll.*; *A. I. R.* 1927 *All.* 714, *Diss. from*; *A. I. R.* 1927 *Oudh* 180, *A. I. R.* 1926 *Oudh* 470, *A I. R.* 1926 *P.C.* 105, *A. I. R.* 1924 *P. C.* 50, 12 *Mad.* 142 (*P. C.*), 15 *Cal.* 717 (*P. C.*) and 5 *Cal.* 148 (*P. C.*), *Ref.* [P 408 C 1]

(b) Civil P. C., S. 34—Lower appellate Court using its discretion with regard to costs with due care—High Court cannot interfere unless order demonstrably wrong.

Per Pullan, J.—Where the lower appellate Court uses its discretion with regard to costs with due care though differing from the trial Court, the High Court will not interfere with it unless the order is demonstrably wrong. [P 412 C 2]

K. S. Hajela—for Appellants.

Ramapat Ram—for Respondents.

Order of Reference

Pullan, J—This appeal gives rise to what is in my opinion an important question of law on which there is no Bench decision of this Court, namely, the question of the liability of a Hindu son to pay personal debts incurred by his father out of the family property which has come to the son by partition before the decree was passed against the father alone. Apart from the fact that there is no Bench authority of this Court, although a single Judge decision in *Jai Narain* v. *Mahabir Prasad* (1) takes the view that the property obtained by the son in partition is liable, there is a recent decision of a Bench of the Allahabad High Court reported in *Gaya Prasad* v. *Murlidhar* (2), in which both Judges took a diametrically opposite view. Two Judges of the Patna High Court in a case reported in *Ram Ghulam Singh* v. *Nand Kishore Prasad* (*A. I R.* 1925 *Pat.* 688) held that after partition has taken place there are no assets of the father in the hands of the sons and, therefore, there is nothing for the creditor to proceed against so far as the sons are concerned. In Madras there has always been a conflict of opinion which has been accentuated rather than removed by their recent Full Bench decision reported in *Subramina Ayyar* v. *Sabapathy Aiyar* (3), in which three Judges have taken one view and two Judges the other The case for the son, if I may so call it, was stated in that judgment most forcibly by Srinivasa Ayyangar, J, from p. 381. The latest decision of the Bombay High Court reported in *Annabhat Shankarbhat* v. *Shivappa Dundappa* (4) deals with the case in which partition has been effected after institution of the suit and, in such a case it is always possible to hold, following the existing Bench rulings of this Court in *Jageshar Pande* v. *Moni Ram* (5) and *Balbhaddar Singh* v *Hardei* (6), that the partition has been designed to defeat the creditor, while in the present case there is a finding of the Court below that the partition is bona fide and that it took place before the decree was passed against the father. It is not necessary for me to discuss the matter any further at this stage as in my opinion this is a case which should be heard by a Bench, and I accordingly refer the matter for decision to a Full Bench of three Judges under R. 14 (1), Oudh Courts Act.

Opinion

Stuart, C. J.—This is a reference under S. 14, Local Act, 4 of 1925. The learned Judge making the reference has described the question as the question of the liability of a Hindu son to pay personal debts incurred by his father out of the family property which has come to the son by partition before the decree was passed against the

(1) A. I. R. 1927 Oudh 568.

(2) A. I. R. 1927 All. 714=50 All. 137.

(3) A I. R. 1928 Mad. 657=51 Mad. 861 (F.B.).

(4) A. I. R. 1928 Bom. 232=52 Bom. 376.

(5) A. I. R. 1927 Oudh 180=2 Luck. 561.

(6) [1928] 5 O. W. N. 91.

father alone. I prefer to put the question in a different manner. These are the facts of the case : A father Shambhu Dat, managing member of a joint Hindu family, consisting of himself and his sons Raghunandan Prasad, Ambika Prasad and Ganga Prasad, borrowed on 4th June 1922 Rs 700 from Moti Ram Kurmi and executed a simple deed in his favour. In August 1926 Shambhu Dat and his sons Raghunandan Prasad, Ambika Prasad and Ganga Prasad separated and proceeded to partition the family property. It is noticeable that Ambika Prasad and Ganga Prasad are still minors. It is not clear whether Moti Ram instituted his suit on the bond before or after the separation, but he did not obtain his decree upon it until December 1926. The decree was against Shambhu Dat only, Shambhu Dat alone having executed the deed. In execution of the decree obtained Moti Ram proceeded to attach certain cattle. The three sons of Shambhu Dat claimed the cattle as having passed into their possession under the partition. It has been found on the facts that these cattle formed originally the property of the joint family and subsequently passed into the possession of Shambhu Dat's sons under the partition. The sons having successfully asserted their title the suit out of which the present appeal has arisen was instituted by Moti Ram for a declaration that the animals in question were liable to attachment in execution of his decree. Both the Courts have decided in Moti Ram's favour and when a second appeal was filed in this Court the reference in question was made.

There have been a large number of decisions more or less apposite, to the question with which we are now concerned. It appears to me unnecessary to discuss the views taken prior to 1923 as it was in 1923 that their Lordships of the Judicial Committee decided in *Brij Narain* v *Mangla Prasad* (7) the liability of the property of a joint Hindu family in respect of a debt incurred by the father as manager of the family upon which a decree had been obtained. The words of their Lordships are these :

"The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity ; but if he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

Here Shambhu Dat was the manager of the family. He is the father. Raghunandan Prasad, Ambika Prasad and Ganga Prasad are sons. Shambhu Dat incurred debt. The debt was not for an immoral purpose. A decree has been passed for the payment of the debt. So the estate was ordinarily laid open to be taken in execution upon the decree for the payment of that debt. But the question remains : Has the partition which was subsequent to the date on which the debt was incurred rendered the estate not open to be taken in execution ? Their Lordships were not asked to decide that point. There are various decisions on it. The first is that of a Bench of the Allahabad High Court dated 17th May 1927 *'Gaya Prasad* v *Murlidhar* (2) The second is a decision of a Full Bench of the Madras High Court of a later date. This is in *Subramania Ayyar* v. *Sabapathy Aiyar* (3), dated 9th December 1927. The latest is a decision of a Bench of the Bombay High Court in *Annabhat Shankarbhat* v. *Shivappa Dundappa* (4). This is dated 19th January 1928. The Allahabad decision considers that the property which has passed to sons after partition is not liable to satisfy a decree obtained for a debt incurred by the father while the family was joint. The majority of the Full Bench in the Madras High Court took the opposite view. The Bombay Bench considers the Allahabad decision and refused to follow it. They preferred to follow prior Madras decisions. After considering the arguments for and against I am of opinion that the property remains liable after partition. I cannot put the case better than in the words of Waller, J , in *Subramania Ayyar* v. *Sabapathy Ayyar* (3) at p. 369 *of* 51 *Mad.*

"On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition. The creditor advances money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his security by a transaction to which he was not a party and of which he was not aware ? And what becomes of the son's pious obligation ? It was binding as regards the particular debt before partition ; does it cease to apply to that debt simply because there has been a partition ?"

(7) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

It appears to me that it is a necessary corollary from the principle laid down by their Lordships of the Judicial Committee that the family property is liable in execution to satisfy a decree on a debt incurred by the father as manager of the joint family property where the other members are the sons that the property will remain liable even if it is subsequently partitioned. The liability is with the property and the acts of the members of the family cannot divest the property of that liability I would therefore answer these questions accordingly.

Wazir Hasan, J. — The question of law referred to the Full Bench for decision is the question of liability of a Hindu son to pay the personal debt of his father out of the family property which has come into the hands of the son on a partition before the decree for such debt was passed in favour of the creditor against the father alone and the debt was incurred when the father and the son constituted a joint Hindu family and was neither illegal nor immoral.

Admittedly there is no pronouncement of their Lordships of the Judicial Committee directly bearing on the question under consideration. The answer therefore must take the form of a corrollary deducible from the principles of Hindu Law established both by the decisions of their Lordships of the Judicial Committee and the texts. Such principles are to be found in cases relating to the son's liability for the father's debts while the family was joint and possessed of property as such. A careful study of the decisions and the relevant texts on my part has resulted in the formation of the opinion that the question must be answered in the affirmative.

Girdharee Lall v. *Kantoo Lal* (8). I will state so much of the facts as are necessary for the purposes of my judgment. Kunhya Lall and his two sons, Bhikharee Lall and Bujrung Sahye, formed a joint Hindu family. Kunhya Lall died in the year 1850. Kantoo Lall, son of Bhikharee Lall, sold certain portion of the family property under a deed of sale dated 28th July 1856, that is after Kantoo Lall was born. The appeal arose out of a suit brought by Kantoo Lall to set aside the sale just now mentioned and to recover possession of the property conveyed thereby. The High Court awarded to Kantoo Lall a decree for one-half of his father's share, that is one-half of an eight annas share. It is important to bear in mind that the decree for the share which Kantoo Lall obtained from the High Court represented the share of Kantoo Lall in the family estate which would have been allotted to him on a partition. In setting aside the decree of the High Court the Judicial Committee in the judgment delivered by Sir Barnes Peacock said :

"So that upon the death of Kunhya Lall, the property descended to Bhikharee Lall and Bujrung Sahye as his two sons and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. . . . Now it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted ? If his father had died, and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debt ? In the case which has been referred to in argument of *Hunooman Persaud Pandey* v. *Mt. Babooee Munraj Kooniveree* (9) (at p. 421), Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says : 'Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case above cited from the sixth volume of the decisions of the Sudder Dewanny Adawlat, North-Western Provinces, incidently shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not the nature of the estate, whether ancestral or acquired by the creator of the debt.' That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts."

Their Lordships then proceed to make an inquiry into the nature of the debt and come to the conclusion that it was not shown that it had been contracted

(8) [1873] 1 I.A. 321=22 W.R. 56=14 B.L.R. 187=8 Sar. 980 (P.C.).

(9) [1854] 6 M.I.A. 393=18 W.R. 81=2 Suther 29=1 Sar. 552 (P.C.).

for an immoral purpose. In the end the decree of the High Court was set aside and the decree of the Court of first instance dismissing the plaintiff's suit was restored.

Now certain observations fall to be made in relation to the above judgment of the Judicial Committee. It was a case of a joint family to which the rule of survivorship applied and in which there was no devolution of any inheritance of one deceased member on another member or members as heir or heirs; yet their Lordships say that the property descended to the two sons, Bhikharee Lall and Bujrung Sahye, from their father Kuhhya Lall on his death in the year 1850. Further speaking of the interest of Kantoo Lall, their Lordships again state the question as if it were a case of his father dying and leaving Kantoo Lall as his heir and the property having come into his hands in that status From this I make the deduction that the interest coming into the hands of a son on the death of his father by survivorship in a joint Hindu family may still be treated as assets in the hands of the survivor and is liable for the debt of the deceased father in the same way as if it had devolved by inheritance The second deduction is that the liability or freedom of the son to pay the father's debt depends on the nature of the debt and that there is no freedom from the obligation by reason of the fact that the estate out of which the discharge is claimed is ancestral or self-acquired property of the father This antithesis between the ancestral and the self-acquired property is significant; both, though vastly divergent in several legal incidents, for instance, power of alienation, are placed on the same footing in relation to the son's obligation to discharge the father's debt.

The third and the most important deduction is that it is not only the father's interest but also the son's interest in the family estate which lies under the obligation to discharge the legitimate debt of the father This is admittedly so while the family is undivided. But the share which would be allotted to the son on a partition between him and his father represent the same interest in a defined form which the former possessed in the family estate before the partition. To my mind this is indisputable. It follows that the obligation will rest on the share as effectively as it did on the interest.

Suraj Bunsi Koer v. *Sheo Prasad Singh* (10). In this case their Lordships of the Judicial Committee approved of the dictum of Westropp, C. J., in *Udaram Sitaram* v. *Ranu Panduji* (11) which is as follows:

"Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

In this dictum stress is laid not on "undivided" character of the estate but on 'the whole" as opposed to a portion only of the same estate To my mind this dictum would apply to a case in which there is an estate or a portion of an estate in the hands of the sons or grandsons which was at the time when the debt was incurred an undivided estate.

Mt Nanomi Babuasin v. *Modun Mohun* (12) This case contains the well-known dictum of Lord Hobhouse:

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons can not set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is no conflict of authority."

The matter on which I want to lay stress is that in the quotation just now given two different situations independent of each other are contemplated, one is the father's right of alienation and the other is the creditors' remedies for their debts. From this I deduce the argument that it is incorrect to state that the sons' liability for their father's debts is co-extensive with the father's power of alienation and therefore when the latter is lost the former also vanishes.

The other matter to be noted is that the creditors' remedies for their debts are stated in relation to the absence of the sons' rights against such creditors. As soon as a legitimate debt is incurred the son comes face to face with the creditor and the contest lies between them. Surely it cannot be suggested that if the

(10) [1880] 5 Cal. 148=6 I. A. 88=4 C. L. R. 226=4 Sar. 1 (P.C.).
(11) 11 B. H. C. 76.
(12) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P.C.).

son pays into the hands of his father a sum of money equivalent to the debt incurred and for the purpose of satisfying it he is absolved as against his father's creditor's remedies. The right of the creditor vests in him against the son as soon as the validity of the debt is established.

The dicta of Westropp, C J , and of Lord Hobhouse in the cases of *Suraj Bunsi Koer* v *Sheo Prosad Singh* (10) and *Mt Nanomi Babuasin* v *Modun Mohun* (12) respectively were affirmed in *Bhagbut Pershad* v *Mt. Girja Koer* (13) *Meenakshi Naidu* v *Ramaya Kounden* (14). The judgment of their Lordships of the Judicial Committee in this case shows that joint family property in the hands of the son could be treated as " assets " and it is further to be noted that as in the case of *Girdhari Lall* v. *Kantoo Lall* (8), the question of the liability of the son's interest in the family estate arose in the father's lifetime. Lord Fitzgerald, in delivering the judgment of the Judicial Committee, said.

" The Subordinate Judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes . . . . . , that it was a debt contracted by the father and coming within the ordinary rule of Hindu law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his interest in the zemindari was liable, and might be sold for the satisfaction of that debt."

In my opinion it is incorrect to hold that the rule of law making a Hindu son liable for the debt of his father where he has assets in his hands is restricted to a case in which the son has received property by inheritance alone.

This brings me to the latest pronouncement of their Lordships of the Judicial Committee in the case of *Brij Narain* v *Mangla Prasad* (7) The old rule given effect to in the previous decisions that the son's liability commences as soon as the debt is incurred and not only when the debtor is dead was re-affirmed. It seems to me that the following observation of Lord Dunedin, who delivered the judgment of the Judicial Committee in this case, throws a flood of light on the underlying principle of the son's liability :

"It cannot be denied that the law on the subject of what binds an estate when the manager of joint family estate is the father, and the other members are the sons, is in a state which is somewhat illogical and in the absence of binding authority could not be accepted. On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and without any compelling cause so as to bind the other members He can bind it for necessity, the necessity being the necessity of the family, and so far there is no difficulty in principle, though the question of whether in any particular instance there was a necessity, may, like other questions of fact liable to be involved in a question of degree, be difficult to decide. But then there comes in the further doctrine that, a debt having been contracted by the father, the pious obligation incumbent on the son to see his father's debts paid prevents the son from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought."

To my mind nothing could be clearer than this statement of law. It establishes three principles (1). That the debt binds the estate; (2) That the son's interest in that estate is also bound and (3) that the liability may be enforced either under a mortgage by the father or by execution of a simple money decree obtained against the father alone. If therefore these are the principles on which the liability of the son's interest in the family estate rests I for one am unable to see how the liability to purge the debt is wiped off by the fact that what was at the date of the debt an interest has subsequently by the effect of partition become a specified share of the son in the family estate.

In the case of *Masit Ullah* v. *Damodar Prasad* (15), Mr. Ameer Ali, in delivering the judgment of the Judicial Committee, quotes the following from Vijnaneswara :

"Again Vijnaneswara, commenting on the following enunciation of Yajnavalkya (II, 50 (a), 'The father being gone to a foreign country or deceased (naturally or civilly) or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed it must be proved by witnesses,' states that 'Brihaspati says : 'The sons must pay

(13) [1888] 15 Cal. 717=15 I. A. 99=5 Sar. 186 (P.C.).

(14) [1889] 12 Mad. 142=16 I. A. 1=5 Sar. 271 (P.C.).

(15) A. I. R. 1926 P. C. 105=48 All. 518=53 I. A. 204 (P.C.).

the debts of their father when proved as if it were their own (i. e., with interest); the grandson has to pay only the principal while the great-grandson shall not be compelled to pay anything unless he has assets."

His Lordship proceeds :

"The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor. The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangla Prasad* (7), the son's liability is expressly laid down, and their Lordships think that the rule extends equally to grandsons and great-grandsons."

On the authority of the above quotations I am quite clear in my mind that "assets" in the hands of sons, grandsons and great-grandsons must also include the whole of the family estate or a portion thereof. This being so, the liability of the Hindu son must subsist so long as any portion of the family estate is found to be in his hands. Patkar, J , in his able judgment, if I may respectfully say so, in the case of *Annabhat Shankarbhat* v *Shirappa Dundappa* (4), quotes the following comment of Mitakshara on the Yajnyavalkya quoted in Mr. Ameer Ali's judgment

"By the use of the plural number in 'sons and grandsons,' (it is indicated that) if there are several sons who are divided, they should pay according to their respective shares. If they are undivided and are living jointly in a body, giving the managership according to qualifications, it appears that the manager alone should pay. As says Narada (ch. 1, verse 2) Therefore, where the father is dead, the sons should pay the debt each according to his share, when they are divided; or if undivided (it should be paid) by one who holds the lead (in the family.)"

As pointed out in their judgment with reference to the Privy Council decision in *Brij Narain* v. *Mangla Prasad* (7) the liability of the sons to pay the father's debt arose even during the lifetime of the father. On principle therefore I can see no escape from the position that the partition cannot have the effect of absolving the son of his liability where under partition he has received a portion of the family estate

The Bombay case just now mentioned is a direct support in favour of an affirmative answer to the question under consideration and so is the decision of three out of five learned Judges in the case of *Subramania Ayyar* v. *Sabapathy Aiyar* (3). The leading judgment in support of the opposite view was delivered by Srinivasa Ayyangar, J., in the above case For the reasons stated in the preceding portions of my judgment, I am unable to agree with the opinion of the learned Judge. I say so with the greatest respect. Most of the arguments used by the learned Judge would seem to have been considered by me already yet in deference to the learned Judge's view I propose to advert again very briefly to two of such arguments. The one argument is that the liability of the family property for the father's debts depends on the father's power of alienation as the manager of the family. I am unable to accept this view of law The authorities establish beyond any doubt that the father can make an alienation of the family property and also without exercising the power of alienation he:

"may by incurring a debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt, *Brij Narain* v. *Mangla Prasad* (7)."

I am unable to interpret the above quoted propostion of law laid down by Lord Dunedin as merely an extension of the power of alienation or in the sense that if the power of alienation is lost by reason of partition the liability of the estate to be taken in execution is also lost. To my mind the said power and the said liability are not inter-dependent. They are independent of each other.

Another answer to this argument may be this that the debt for which the liability is laid on the family estate was incurred by the father while the family was joint and while he occupied the position of the manager of the family. I think it is reasonable to say that the estate becomes bound from the date of the debt in the incurring of which the power of alienation could have been exercised.

The second argument and this is the argument which has been used in the case of *Gaya Prasad* v. *Murlidhar* (2) is that the affirmative answer to the question leads to the result that the family estate stands charged with the liability yet it is agreed that it is not so

charged. With great respect it seems to me that the argument lays too much stress on the technical sense of the word "charge." According to the decisions of the Judicial Committee already quoted, the family estate including the son's interest is "bound" and "liable" to purge the debt In that sense the debt may be treated as a charge; but the effectiveness of the charge according to the same authorities is restricted to assets in the hands of the son and ceases if the estate passes out of his hand. In that state of things the liability is not a charge and this is so by reason of another principle of law which protects a bona fide transferee We are all familiar with cases of a charge where it operates against one class of persons and does not operate against another class of persons. My answer therefore to the question is in the affirmative and and this answer is consistent with the decision of a Bench of this Court in the case of *Jageshwar* v. *Mani Ram* (15) and with a previous decision of mine in *Jai Narain* v *Mahabir Prasad* (16)

Raza, J—I have very few words to add to the judgments that have already been delivered and in which I concur I would also answer the question in the affirmative In my opinion, though a Hindu son, who has already received his heritage may no longer be compelled to discharge his pious obligations in respect of debts incurred by his father after his separation, but he is liable for debts incurred before partition and for debts after partition to the extent of the father's assets in his hands. The son will of course be liable if the partition was unreal or even, if otherwise, it was made with intent to defeat the father's creditors or had resulted in defeating them. I also prefer to follow the Full Bench decision of the Madras High Court in the case of *Subramania Ayyar* v. *Sabapathy Aiyar* (9) A simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons even after a bona fide partition between the father and the sons. The property will remain liable even if it is partitioned. Sons who are divided are liable for the debts of the father to the extent of the family property which comes to them under the partition.

(16) A. I. R. 1926 Oudh 470=2 Luck. 226.

(After receiving opinion of the Full Bench)

Pullan, J.—The main question raised in this appeal was referred by me for decision by a Full Bench. That decision has been received and the finding is that sons of a Hindu father are liable to pay the personal debts incurred by their father out of the family property which has come to them by partition although the decree was passed against the father alone after the partition This finding establishes the liability of the sons who have contested the present suit. I have been asked to consider a further question namely, whether the failure of the creditor to make the sons parties to the suit has any effect on the present case. This question was clearly included in my order of reference and it was considered by the learned Judges who constituted the Bench Although no particular stress was laid in their judgments on this aspect of the case, I cannot conclude that it did not receive the full attention of the learned Judges, and I am bound to accept their decision as it stands The sons therefore are liable to the extent of the family property which they received by partition and the judgment of the lower Court is correct and must be affirmed

The only other question raised in appeal is that of costs. The Munsif laid the costs on the parties and the lower appellate Court altered that finding and decided that the plaintiff ought to receive the costs of the suit as he was successfull in the main. I have to consider the order of the lower appellate Court, and I must hold that that Court exercised its discretion in the matter of costs with due care He was clearly at liberty to differ on this point from the view taken by the Munsif As he did so, I am bound by the view of the lower appellate Court unless it is demonstrably wrong. As the order of the lower appellate Court is a reasonable and proper order, I decline to interfere.

The appeal is dismissed with costs

V.B./R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 413

STUART, C. J. AND RAZA, J.

Chandrapal Dube—Plaintiff — Appellant.

v.

Muhammad Salamatullah and *others* Defendants—Respondents.

First Appeal No 103 of 1928, Decided on 7th August 1929, from decree of Offg., Sub-Judge, Partabgarh, D/- 16th May 1928.

(a) Civil P C, O. 21, R. 53 — Holder of decree becomes representative of holder of attached decree from date on which attachment is ordered and not on date on which he applies for attachment—Suit under O 21, R. 63, by such representative is barred if not brought within time.

A held a simple money decree against *B* who held two decrees against *C*. *B* attached the share belonging to *C* in execution of one of his decrees *C*'s husband *D*, however, brought an objection under O 21, R. 58, which was allowed and the property was released. *B* who ought to have contested the release within one year took no action. *A* applied to attach the rights of *B* under the two decrees within time but his application being out of order was put up just after the period of one year had expired, when the order for attachment was passed

Held that *A* could not bring a suit to contest the release of the property from attachment as he became *B*'s representative under O. 21, R 53, not on the day when he applied for attachment of *B*'s decree but on the day when the attachment of *B*'s decree was ordered and as on that date *B* could not have brought a suit to contest the release of property from attachment by reason of the prescribed period of one year having expired, neither could his representative bring a suit.

[P 414 C 1, 2]

(b) Jurisdiction—Suit for declaration that property released is liable to attachment—Value of decree and not of property attached determines jurisdiction.

A suit for declaration that property released from attachment in execution of decree is liable to attachment does not lie in a Court other than the Court of Munsif, when the amount of decree is within the pecuniary limit of the jurisdiction of the Court of a Munsif, the value of the property attached is not material *A. I. R.* 1916 *P. C.* 18, *Foll* [P 414 C 1]

Radha Krishna and *S. N. Srivastava* for Appellant

Ali Muhammad—for Respondent 1

Judgment.—The plaintiff-appellant Chandrapal Dubey is the holder of a simple money decree for Rs. 4,543-5 against Lachman Prasad. Lachman Prasad is the holder of two decrees against Saera Bibi in respect of costs incurred in a litigation in which they were opposite parties. One decree is for Rs. 993-11-7. This is dated 18th February 1926. The other decree is for Rs 52. This is dated 22nd April 1927. Lachman Prasad attached a share of 4 annas 10½ pies belonging to Saera Bibi in Chak Adil Khan in execution of his decree of 18th February 1926. Muhammad Salamatullah, the husband of Saera Bibi, objected on 8th November 1926 under O. 21, R. 58 that the share in question was not the property of Saera Bibi, as she had mortgaged the share to Zainab Bibi and as Zainab Bibi had obtained a preliminary decree for foreclosure in respect of that share. He continued that he was a transferee of Zainab Bibi's rights and that he had obtained a final decree for foreclosure and that he was thus the sole proprietor of the share. His claim being accepted by the Court executing Lachman Prasad's decree the property was released on 4th December 1926. Lachman Prasad was then obliged under the provisions of O. 21, Rs 63, if he contested the correctness of this decision, to institute a suit within a year, that is to say, up to 5th December 1927, as 4th December 1927 was a Sunday. Lachman Prasad took no action in the matter.

Chandrapal Dubey applied to attach the rights of Lachman Prasad in the two decrees which he held against Saera Bibi. He applied to attach these rights on 3rd December 1927. On 5th December 1927 he instituted the suit out of which this appeal arises against Muhammad Salamatullah, Saera Bibi, Zainab Bibi and Lachman Prasad for a declaration that the transfer by Saera Bibi was fictitious, that Zainab Bibi had obtained no rights under that transfer, that Muhammad Salamatullah had obtained no right from Zainab Bibi and that the share of 4 annas 10½ pies in Chak Adil Ali was still the property of Saera Bibi and liable to attachment in Lachman Prasad's decree Now it is to be noted that on 5th December 1927 Chandrapal Dubey had not attached the decree held by Lachman Prasad against Saera Bibi As we have said he applied for the attachment on 3rd December 1927. Unfortunately a copy of his application is not on the record But we know this much—that the application was not in order, for we find from Ex A-1 that his application, which admittedly was of 3rd December 1927, was put up on 6th

December 1927 after correction and the order for attachment was passed on 6th December 1927 The learned Judge who heard the suit has dismissed it on two grounds He dismissed it on a finding that Chandrapal Dubey on the date he filed the suit had no right to execute the decree held by Lachman Prasad, and that on the earliest date when he had a right to execute the decree held by Lachman Prasad any suit of the nature was time-barred. He dismissed it in the second place because he held that the suit should have been filed in the Court of a Munsif The learned counsel for the appellant admits that the suit should have been filed in the Court of a Munsif. He accepts the decision of their Lordships of the Judicial Committee in *Radha Kuar* v. *Reoti Singh* (1) as showing that the suit did not lie in a Court other than the Court of a Munsif It is clear that as far as Chandrapal Dubey is concerned he could obtain no more than Rs. 1,045-11-7 and that the value of the share in Chak Adil Khan is not material.

The learned counsel has rightly pointed out that if we take the view that Chandrapal Dubey had a right to bring this suit we could give him all that he desires which would be an order returning the plaint to the Court of a Munsif for determination on the merits. We, however, are of opinion that Chandrapal Dubey has no right in the matter. His right to be considered the representative of Lachman Prasad is based on the provisions of O. 21, R. 53 (3), Civil P. C. Chandrapal Dubey is the holder of a decree against Lachman Prasad. He is seeking to execute that decree by the attachment of a decree for payment of money held by Lachman Prasad. Thus he is a representative of Lachman Prasad. But when did he become the representative of Lachman Prasad? Clearly not on the day on which he applied for the attachment of Lachman Prasad's decree but on the day when the attachment of Lachman Prasad's decree was ordered. That day was 6th December 1927 and as the learned trial Judge rightly remarks, on 6th December 1927 Lachman Prasad could not have brought a suit to contest the release of the property from the attachment and if the holder could not have brought a suit on that date his representative certainly could not bring a suit either. In these circumstances we uphold the decision of the learned trial Judge and dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) A. I. R. 1916 P. C. 18=38 All. 488=43 I. A. 187 (P.C.).

A. I. R 1929 Oudh 414

PULLAN, J.

Ram Sewak and *others*—Defendants—Appellants.

v.

Lalta Pershad and *another*—Plaintiffs—Respondents.

Second Appeal No 275 of 1928, Decided on 1st November 1928, against decree of Addl. Sub-Judge, Hardoi, D/- 30th April 1928.

Cosharer—Person entitled to joint possession may be granted decree for joint possession even if he has never been in possession at all.

A person who is entitled to possession jointly with others can be granted a decree for joint possession not only if he was originally in joint possession and has been subsequently ousted but even if he had never been in possession at all *A. I. R* 1927 *Oudh* 467, *A I.R.* 1921 *Oudh* 105, 31 *Ind.* 150, *Rel. on.*

[P 415 C 1]

K. P. Misra—for Appellants.

Radha Krishna—for Respondents.

Judgment.—The subject-matter of the suit from which this second appeal arises is the khudkasht land of a certain Bhawani Din This Bhawani Din owned 16 biswansis share in the village and he executed a deed of gift on 26th April 1920, by which he gave two-thirds of this khudkasht property to his daughter-in-law Mt. Mithni and one-third share to his brother Hira Lal. Bhawani Din died shortly afterwards, and we find that in the year 1924, Mt. Mithni was shown to be in exclusive possession of certain plots and in joint possession along with Hira Lal of certain other plots. In 1925 Mt. Mithni herself gifted her two-thirds share to her son-in-law and her daughter. It appears that this gift by Mt Mithni was objectionable to Hira Lal and his son and other members of the family who took possession of the plots, which had been in the exclusive possession of Mithni's donees to get footing either in these plots or in the four plots which were recorded jointly in the names of Mithni and Hira Lal. The donees of Mithni brought this suit for possession and damages, accruing from the loss which they sustained owing to their

being unable to obtain the profits of the land. Both the Courts below agreed that they could give possession to the plaintiffs of the numbers which had been entered as in the exclusive possession of Mt. Mithni, but the Court of first instance was of opinion that the civil Court could not award any sum by way of damages, as this was of the nature of profits, and also that it was impossible to grant a decree for joint possession of the remaining four numbers. The lower appellate Court disagreed on this point and passed a decree for joint possession of the four numbers which had been entered in the papers as being owned jointly by Mithni and Hira Lal, and also passed a decree for damages as mesne profits, the amount of which was to be determined later

It is argued in appeal that this decision is correct and that the plaintiffs' only remedy in a case of this kind is by way of a suit for partition or a suit for profits or both in the revenue Court. There is, however, a decision of the late Court of the Judicial Commissioner of Oudh which has not been dissented from but rather accepted as authority by a Bench of this Court in the case of *Jalaluddin Khan* v. *Rampal* (1) which is distinctly in favour of the plaintiffs in the present suit I refer to the case of *Ram Bahadur Singh* v. *Lal Narsingh Partab* (2) This ruling itself is based upon a decision of the Allahabad High Court, *Jagarnath Ojha* v. *Ram Phal* (3) which held that a plaintiff who is entitled to possession jointly with other person can be granted a decree for joint possession not only if he was originally in joint possession and has been subsequently ousted but even if he has never been in possession at all. This case referred to cosharers in village rights and appears to me to be applicable to the case before me. This is even a stronger case, because it can hardly be said that the present plaintiffs were never in possession, for they inherited the rights of their donor Mt Mithni who was undoubtedly in undisputed possession of all the four numbers in dispute along with her cosharers. The lower appellate Court finds, I consider rightly, that the appellants are in the position of persons who have taken wrongful possession of property and are virtually trespassers in so far as the share obtained by the plaintiffs from Mt. Mithni is concerned. This is not a case in which the parties should be sent to obtain an order of partition from the revenue Court. It might be necessary to do so in their own interests later on but a decree for joint possession, even if it is not what the plaintiffs specifically ask for in their plaint, can on the authority of the Judicial Commissioner's Court to which I have referred, be properly granted Nor is there any difficulty as to granting a decree for mesne profits or damages, whichever it may be considered to be, as this is in no way the same as a suit for profits between cosharers contemplated in the Oudh Rent Act In my opinion, therefore, the decision of the Court below is correct and I dismiss the appeal with costs.

S.N /R.K *Appeal dismissed.*

(1) A. I. R. 1927 Oudh 467=2 Luck 740.
(2) A. I. R. 1921 Oudh 106=24 O. C. 227.
(3) [1912] 34 All. 160=13 I. C. 79=8 A.L.J. 1912.

A. I. R. 1929 Oudh 415

WAZIR HASAN, J

Bindha Din Tewari—Plaintiff—Appellant.

v.

Ram Harakh Dubey — Defendant—Respondent.

Second Appeal No. 55 of 1929, Decided on 31st July 1929, from decree of Addl. Sub-Judge, Sultanpur, D/- 20th November 1928.

Deed—Construction— Words naslan bad naslan and batan bad batan denote absolute estate in gifted property.

Where the donor states that the donee is to possess rights in the gifted property naslan bad naslan and batan bad batan (generation after generation) and that he and his heirs and successors shall have no right left in the gifted property, then or in future, the donee gets an absolute estate. The words naslan bad naslan and batan bad batan have always been held as words denoting an absolute estate unless the document is full of contradictions which take away the literal meaning of these expressions : 14 *Cal.* 296 (*P. C.*), *A. I. R.* 1922 *Oudh* 42 and *A. I R.* 1926 *Oudh* 561, *Ref.* [P 416 C 2]

Khaliq-uz-zaman—for Appellant.

Hyder Husein—for Respondent.

Judgment.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Sultanpur dated 20th November 1928, reversing the decree of the Munsif of Musafirkhana dated 8th September 1928. The case is such a

simple and clear one that I propose to dispose it of in a few words

One Mt. Munni obtained title to certain plots of land under a deed of shankalp executed by her father on 24th September 1890 and again under a will made by the same gentleman on 9th September 1894. The father died more than 20 years ago. Mt Munni entered into possession of the property covered by the shankalap and the will and continued in possession till 27th April 1916. On that date she made a gift of that property in favour of the plaintiff. The plaintiff's case is that the defendant has unlawfully dispossessed him from the property gifted to him by Mt Munni The defence, with which we are concerned in the present appeal, is that Mt Munni had no title to confer for the reason that under the gift and the will of her father she acquired only a life-estate in the property in suit.

The Court of first instance on the interpretation of the two documents mentioned above came to the conclusion that they both clearly and unequivocally conferred an absolute estate on Mt. Munni The result was that the plaintiff's suit was decreed by that Court. On appeal by the defendant the learned Additional Subordinate Judge interpreted the two documents as conferring an estate for life only. It is urged that the view taken by him as to the interpretation of the two documents in question is entirely wrong.

Obviously the first thing done by the learned advocate for the appellant was to read the two documents When I read them with him, I confess I received a shock at the reasoning with which the learned Additional Subordinate Judge persuaded himself to the interpretation that the two documents conferred a bare life estate on Mt. Munni. He has entirely ignored the effect of the words used in those documents . not only their effect but it seems to me that he has also ignored the words themselves if he knew the obvious and the only meaning of those words. He has used two arguments in support of his opinion One is that the donee is a Hindu female. The second is that the documents confer merely right to possession. Of course as a fact it is true that the donee is a Hindu female but that in itself is not a sufficient reason to deprive the words used of their natural import. The second reason employed by the learned Additional Subordinate Judge is altogether incorrect on merits. Both the documents purport to transfer haqiat (rights) and the hissa (share) of the donor in favour of the donee.

Coming to the words used in the two documents I find that no more emphatic language could be employed to denote a gift of absolute estate. The donee is to possess rights in the gifted property naslan bad naslan and batan bad batan (generation after generation). Further, the donor states that he and his heirs and successors shall have no right left in the gifted property either then or in future. The words naslan bad naslan and batan bad batan have always been held as words denoting an absolute estate They may not be words of art but the meaning which those words bear cannot connote any other estate than an estate of inheritance and I cannot conceive in the context of any document unless the document is full of contradictions words which can take away or cut down the literal meaning of those expressions. In the present case, however, there is nothing in the context to produce that effect.

Having regard to the fact that there is still a possibility of the subordinate judicial Courts interpreting a document of this nature as conveying or bequeathing a bare life-estate it is desirable that reference may be made to some decided cases on the subject. The foremost in the class of such cases is the decision of their Lordships of the Judicial Committee in *Harihar Bakhsh* v. *Uman Pershad* (1). The other case to which reference may be made is *Karim Dad Khan* v. *Mt Bibi Ghafuran* (2) and lastly to the case of *Ahmad Azim* v. *Shafi Jan* (3).

The appeal is allowed, the decree of the lower appellate Court is set aside and the decree of the Court of first instance restored. The plaintiff-appellant will get his costs in all the Courts.

R.M./R.K. *Appeal allowed.*

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(1) [1897] 14 Cal. 296=14 I. A. 7=4 Sar. 766 (P.C.).
(2) A. I. R. 1922 Oudh 42.
(3) A. I. R. 1926 Oudh 561.

A. I. R. 1929 Oudh 417

WAZIR HASAN AND SRIVASTAVA, JJ.

Durga Prasad Manna Lal—Appellant.

v.

Cawnpore Flour Mills Co. Ltd.—Respondent.

Second Appeal No. 457 of 1928, Decided on 18th July 1929, against decree of Sub-Judge, Mohanlalganj, Lucknow, D/- 11th September 1928.

(a) Contract Act, S. 230—Cases of presumption in S. 230 are not exhaustive.

The three cases mentioned in S. 230 in which contract to that effect may be presumed are by no means exhaustive. [P 418 C 2]

(b) Contract Act, S. 230—Agent having special property or interest in subject matter of contract can sue in his own name on contract.

Where an agent has a special property or a beneficial interest in the subject matter of the contract he is entitled to enforce it even though his representative character may have been declared at the time of the contract : 24 *Mad.* 130, *Foll.* ; *Williams* v. *Millington*, 2 *R. R.* 724, *Rel. on.* [P 418 C 2]

(c) Contract Act, S. 230—Agent by having powers to contract does not become principal.

The position of an agent cannot be improved so as to give him the status of a principal by the mere fact of his being given extensive powers or being allowed to make contracts in his name. [P 417 C 2]

Ali Zaheer—for Appellant.

J. K. Tandon—for Respondent.

Judgment.—This is a second civil appeal arising out of a suit for damages for breach of contract. A joint stock company known as the Karaundia Industrial Development Company owned a flour mill named as the "Lucknow Flour Mills." On 9th January 1925, the K. I. D. Company entered into an agreement with the Cawnpore Flour Mills Ltd., under which agreement the Cawnpore Flour Mills were to take over the Lucknow Flour Mills and to work it for the period of ten years on certain terms and conditions set forth in the agreement. The plaintiff's case is that in December 1925, the defendants purchased some bags of flour, as detailed in the plaint from them, at the rates agreed upon between the parties, and that subsequently they did not take delivery of the goods which resulted in loss to the plaintiff company. This suit was originally instituted in the name of the Lucknow Flour Mills but subsequently at the instance of certain creditors of the K. I. D. Company an order of compulsory winding up of the said company was made by this Court. An application was made for amendment of the plaint, which was allowed and as a result thereof the name of the Cawnpore Flour Mills was substituted as plaintiff in place of the Lucknow Flour Mills.

One of the defences raised on behalf of the defendants was that the transactions in suit took place between the Lucknow Flour Mills and the defendants and that the Cawnpore Flour Mills who were merely in the position of agents for the Lucknow Flour Mills were not entitled to maintain the suit. The learned Munsif who tried the suit accepted this plea of the defendants and dismissed the suit. On an appeal by the plaintiff company the learned Subordinate Judge of Mohanlalganj disagreed with the view taken by the trial Court as regards the plaintiff's right to maintain the suit and decreed the plaintiff's claim.

The defendants have filed this second appeal and the only contention urged on their behalf in support of this appeal is that the position of the Cawnpore Flour Mills in relation to the Lucknow Flour Mills is merely that of an agent and this being so they are not entitled to maintain the present suit.

As regards the question of the relationship between the Cawnpore Flour Mills and the Lucknow Flour Mills the position taken up on behalf of the respondents is that the contract of agency was confined to the working of the mills and did not extend to the sale of the goods. We have carefully examined the terms of the deed of agreement dated 9th January 1925. The plaintiff company have been described in this document as "the working agents" and under its terms they are authorised to work the mills and to carry on all its business including contracts, sales, purchases, receipts and payments."

Emphasis has been laid on the fact that they were allowed the sole control and management of the business and they were also authorised to make contracts, sales and purchases, etc. in their own name. We are clearly of opinion that the position of an agent cannot be improved so as to give him the status of a principal by the mere fact of his being given extensive powers or being allowed to make contracts in his name. On a careful examination of all the terms of the agreement we are satisfied that the posi-

tion of the plaintiff company was only that of an agent, as contended by the defendants-appellants.

The learned counsel for the plaintiff company also contended that the transaction in suit was as a matter of fact made between the defendants and the plaintiff company acting in their own right and not as agents of the Lucknow Flour Mills. We cannot accept the argument. Ex. 1 embodies the original contract. It shows that the offer for purchase was made by defendants to the Cawnpore Flour Mills, who were described as the working agents of the Lucknow Flour Mills. We, therefore, hold that the Cawnpore Flour Mills were the agents of the Lucknow Flour Mills and the contract in suit was made by them as such.

The next question is whether the plaintiff company, even if they entered into the contract as agent, can maintain the present suit It has been contended by the learned counsel for the plaintiff-respondent that the Cawnpore Flour Mills had an interest in the contract and that they are therefore entitled to sue in their own name We think that the contention is correct and must succeed. Cl. 14 of the agreement between the two companies provides that

"all stores, stocks, goods, produce and moveable property relating to the business together with all book debts, outstandings and the benefit of all contracts in connexion with the business shall belong to and be owned by the working agents."

Clause 15 further provides that

"these stores, stocks etc., shall be taken over by the K. I. D Co., on the termination of the agreement, after payment in cash."

Admittedly the transactions in suit related to flour which was the produce of the Lucknow Mills and there can be no doubt that the Cawnpore Flour Mills have under this clause of the agreement an interest in the said goods, and therefore an interest also in the contract relating to the sale thereof. In *Williams* v *Millington* (1) it was held that an auctioneer employed to sell the goods of a third person by auction can maintain an action for goods sold and delivered against a buyer, though the goods were known to be the property of such third person. The reason given for this view was :

"that an auctioneer has a possession coupled with an interest in goods which he is employed to sell and not a bare custody like a servant or shopman."

(1) 1 H. Bl. 81=2 R. R. 724.

In Bowstead on Agency (6th edition) p. 431 the proposition has been stated in the following terms :

"An agent may sue in his own name on contracts made by him on behalf of his principal in the following cases, namely ..... .

(b) Where as in the case of factors, and auctioneers, he has a special property in, or lien upon the subject matter of the contract, or has a beneficial interest in the completion thereof."

The rule set forth above does not in any way conflict with the Indian Law on the subject. S. 230, Contract Act is as follows :

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Such a contract shall be presumed to exist in the following cases :

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

(2) Where the agent does not disclose the name of his principal.

(3) Where the principal, though disclosed, cannot be sued.

The three cases mentioned in this section in which a contract to that effect may be presumed are by no means exhaustive. Thus there can be no difficulty in presuming such a contract in a case in which the agent has an interest in the transaction. Apart from this the position of an agent in such a case is virtually that of a principal to the extent of the interest, which he has in the contract. This rule is based upon general principles and not on any technicalities peculiar to the English Law. It has been followed in the Indian Courts as well. Reference may be made to *Subramania Pattar* v. *Narayanan Nayar* (2), in which their Lordships of the Madras High Court after discussing *Williams* v. *Millington* (1) and certain other English cases remarked that :

"the real proposition of law which these and other cases establish is that where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name."

We are therefore of opinion that where the agent has a special property or a beneficial interest in the subject-matter of the contract, he is entitled to enforce it even though his representative character may have been declared at the time of the contract. As pointed out before, there can be no doubt that the Cawnpore

(2) [1901] 24 Mad. 180.

Flour Mills were not bare agents so far as the goods in question are concerned, but at the least the position in the case was of an agency coupled with interest. For these reasons we agree with the decision of the learned Subordinate Judge and dismiss this appeal with costs.

V.B./R.K. . *Appeal dismissed.*

A. I. R. 1929 Oudh 419

WAZIR HASAN, AG. C J., AND RAZA, J.

Awadhraj Singh — Plaintiff—Appellant.

v.

Dharamraji Kuar and *another*—Defendants—Respondents.

Second Appeal No. 300 of 1928, Decided on 12th March 1929, against order of Dist. Judge, Gonda, D/- 18th May 1928.

Court-fees Act, S. 7 (iv) (c)—Suit for possession of property and in alternative for cancellation of some document is not suit for declaration with consequential relief and S. 7 (iv) (c) does not apply

Where the plaintiff claims possession of certain property and prays in the alternative for a decree for cancellation of some documents he cannot be considered to be asking for two reliefs separately. Such a suit is not suit for declaration with consequential relief so as to make S. 7 (iv) (c) applicable : *A. I. R.* 1924 *All.* 612, *A. I. R.* 1928 *All.* 248, *Dist.*, *A I. R.* 1926 *Oudh* 380, *Ref.* [P 420 C 1]

Ali Zaheer—for Appellant.

Judgment—This matter has come before us on the report of the Chief Inspector of Stamps. The Chief Inspector of Stamps has submitted in his note of inspection that the court-fee paid in this case is insufficient and that the plaintiff should be required to pay the court-fee on the value of the property in suit.

We have considered the note of the Chief Inspector of Stamps We have also heard the learned counsel on both sides. We think the court-fee paid in this case is sufficient.

We have examined the plaint carefully. The plaintiff sues for possession of certain zamindari shares questioning the validity of a certain compromise and and a decree passed on the basis of the compromise. He has brought the suit against his sister-in law, Mt. Dharamraji Kuar who is a Hindu widow. It is alleged that she held the property under the compromise and the decree, the validity of which is questioned by the plaintiff. She executed a mortgage in favour of defendant 2 after the decree mentioned above was passed by the Court. The plaintiff questions the validity of that mortgage also alleging that it is invalid even if the compromise and the decree mentioned above are held to be binding on him. He therefore prays for the following reliefs

(a) A decree for possession of the zamindari shares by setting aside the compromise and the decree mentioned above.

(b) If relief (a) be not granted for any reason, then a decree for cancellation of the mortgage mentioned above.

The plaint contains also a prayer for general relief and costs of the suit.

The plaintiff has paid a court-fee of Rs. 10-8-0 on five times the Government revenue. The Chief Inspector of Stamps has submitted with reference to the ruling in *Mt Ganga Dei* v. *Sukhdeo Prasad* (1), followed in *Tula Ram* v. *Dwarka Das* (2), that the court fee paid in this case is insufficient We are not prepared to agree with him. In the case reported in *Mt. Ganga Dei* v *Sukhdeo Prasad* (1), the plaintiff was the wife of a man who had been adjudged a lunatic. She had sued as manager of her husband's property. Her husband prior to his being adjudged a lunatic and while the proceedings were pending, had executed the deed of gift in favour of the defendant and he had taken possession of the property thereunder The plaintiff in that case alleged that her husband was a lunatic at the time when the deed of gift was executed and she brought the suit for the following reliefs:

(a) that it may be declared that the deed of gift executed by her husband was invalid and void and that the defendant had thereby acquired no right in the property mentioned in the deed;

(b) for actual possession of the land conveyed by the deed and

(c) for the recovery of the amount which the defendant had recovered under the deed;

It was held in that case that the suit was clearly one for a declaration with consequential relief and the court-fee was payable under S. 7 (iv) (c), Court-fees Act. That suit was of course a suit for

(1) A. I. R. 1924 All. 612=47 All. 78.
(2) A. I. R. 1928 All. 248=50 All. 610.

a declaration with consequential relief. The question to be decided is whether the case before us is also a case for a declaration with consequential relief. We are of opinion that the case before us is not a case for a declaration with consequential relief. It is a suit for possession of the zamindari shares principally and the plaintiff prays in the alternative for a decree for the cancellation of the mortgage-deed in question also In the present suit the real relief which the plaintiff claims is the relief for possession of the property Where the plaintiff claims possession of a certain property and it is stated in the plaint that he sues for possession by cancellation of some document or documents, he cannot be considered to be asking for two reliefs separately. The Chief Inspector of Stamps has referred also to a case decided by a Judge of this Court in November 1925—*Sarju* v. *Sheoraj* (3). We think that case was rightly decided by our learned brother Misra, J. As we find that the present suit is not a suit for a declaration with consequental relief, we hold that the court-fee paid by the plaintiff is sufficient. We should like to note that the learned counsel on both sides agree that the court-fee paid in this case is sufficient and we agree with them.

R M./R.K. *Appeal dismissed.*

(3) A. I. R. 1926 Oudh 380.

A. I. R. 1929 Oudh 420

MISRA AND PULLAN, JJ.

Raghunandan—Defendant—Appellant.

v.

Ram Dat—Plaintiff—Respondent.

Second Rent Appeal No. 37 of 1928, Decided on 4th January 1929, against decree of First Addl. Dist. Judge, Barabanki, D/- 6th February 1928.

(a) Interest Act (32 of 1839)—Agent not shown to be appointed under deed providing for payment of sums realized at stated time or that money was demanded from him in writing—Interest cannot be claimed.

Where it is not shown that an agent was appointed under deed providing payment of sums of money realized by him at a stated time or that money was demanded from him in writing the case is not covered by the provisions of the Interest Act (32 of 1839) and the principal is not entitled to claim interest : 41 *All.* 254, *Ref.* [P 421 C 2]

(b) Interest—Agent called upon to render account and refusing to do so is liable to pay interest.

It is a settled rule of all Courts of equity that an accounting party may under certain circumstances be charged with interest. An agent called upon to render accounts refusing to do so is liable to pay interest. The date of demand should be noted in such case *Turner* v. *Burkinshaw*, 15 *W. R.* 753, *Ref.* [P 421 C 2]

Piarey Lal Verma—for Appellant.

Bisheshar Nath Srivastava—for Respondent.

Judgment—This is an appeal arising out of a suit for rendition of accounts under S. 108, Cl. 5, Oudh Rent Act, 22 of 1886. The suit was brought by the plaintiff-respondent against the defendant-appellant for recovery of a sum of Rs. 2,725-5-9 on account of principal and interest by rendition of accounts for the years 1326 fasli to 1331 fasli. The plaintiff's allegation was to the effect that the defendant was his agent and in that capacity realized the money on his behalf. Out of the sum,claimed Rs 1683-10-9 was on account of principal and Rs. 1,041-11 on account of interest at the rate of 1 per cent per mensem calculated from the end of every fasli year for which realization had been made

The defence put forward by the appellant was to the effect that he was not the agent of the respondent but had been collecting rent in the capacity of a thekadar under a thekanama executed by one Mathura Prasad the former lambardar in respect of the entire mahal of which collections had been made. The period of the theka was alleged to have expired in 1330 fasli and the collections for the year 1331 fasli were alleged to have been made by the appellant in the capacity of a cosharer, his own sons who were joint with him having acquired in that year a share in the mahal. This defence has been overruled by both the Courts below. They have held that the alleged theka was never put into force and the revenue Courts did not recognize it when mutation was sought for by the appellant on the basis thereof. In that view of the case the trial Court passed a decree in favour of the plaintiff-respondent for the sum claimed and that decree has been upheld by the learned First Additional District Judge of Lucknow at Bara Banki.

In second appeal before us only one point has been raised and that is the point relating to interest

We have heard arguments on this point at some length and are of opinion that the defendant-appellant cannot be held liable to pay interest until it be shown by the plaintiff-respondent that the former was called upon by the latter to give account and that he refused to do so. In *Lalman* v. *Chinta Mani* (1) it was held by Piggot and Walsh, JJ. that where money is recoverable by a principal from an agent as having been received by the agent on the principal's behalf, the agent is not as a rule liable for interest unless by virtue of an express agreement or of some mercantile usage. The learned Judges observed on p. 256 as follows :

"The only grounds upon which interest can be claimed upon such a sum of money when the liability for the sum is established are to be found, either in S. 73, Contract Act, illustration (n), or in the Interest Act (32 of 1839). Illustration (n) deals with express contract by one person to pay a sum of money to another on a day specified and provides that whatever loss the obligee can show by failure to pay he can only recover interest from the due date up to the date of payment. That illustration clearly deals with the breach of an express contract and the view taken in Pollock's Indian Contract Act, and we agree with it, is that it does not intend to abolish the ordinary rule or to supersede the Act of 1839. This case clearly does not come within that illustration. Act 32 of 1839 provides that interest shall be payable upon all debts or sums certain, payable at a certain time or otherwise, if such debts or sums be payable by virtue of some written instrument, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. It is not suggested that the case comes within that provision. That Act goes on to provide that interest shall be payable in all cases in which it is now payable by law. The question, therefore, remains, whether by the general or common law interest is payable in respect of such a transaction as this. The rule of English Common law was that interest was not payable on ordinary debts unless by agreement or by mercantile usage, nor could damages be given for non-payment of mere money debts."

It is clear from the facts of the case before us that no express agreement to pay interest was either alleged or proved; nor was any evidence given of any usage or village custom. In the absence of such evidence one other ground upon which interest can be claimed is under the Interest Act (32 of 1839) which provides that a Court has to allow interest in cases where certain debts or sums of money are payable at a certain fixed time and the payment is not made. In such cases the Court has power to allow interest in cases where certain debts or sums of money are payable at a certain fixed time and the payment is not made. In such cases the Court has power to allow interest to the creditor from the time when such debts or sums were payable. It also provides that if such debts or sums of money are payable at a fixed time otherwise then by virtue of some written instrument and the payment has not been made, the interest may be awarded from the date fixed for such payment provided the payment of it is demanded in writing. It is admitted that the case before us is not covered by any of those provisions embodied in the Interest Act (32 of 1839) since it is not shown that the defendant-appellant was appointed agent on behalf of the plaintiff respondent under any deed providing payment of sums realized by him at a stated time or that money was demanded from him in writing. We are therefore of opinion that under the provisions of Act 32 of 1839, the plaintiff-respondent is not entitled to claim interest.

It, however, appears to us to be a settled rule of all the Courts of Equity that an accounting party may under certain circumstances be charged with interest. In *Turner* v *Burkinshaw* (2), Lord Chelmsford, L. C. observed :

"It is the duty of an agent to be constantly ready with his accounts. But this must mean that the agent must be ready to render his accounts when they are demanded. If no demand is made upon him it is the simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay; and there is no case, of which I am aware, under such circumstances without anything more, the agent has been made to pay interest."

It would thus appear that if the appellant was called upon to render accounts and refused to do so he would be liable to pay interest.

The learned advocate for the respondent referred us to para. 3 of the plaint where an allegation was made to the effect that the defendant refused to pay the amount due from him or to render

(1) [1919] 41 All. 254=49 I. C. 696=17 A. L. J. 169.

(2) [1867] 2 Ch. 488=15 W. R. 753.

any accounts in respect of it and it was contended by him on the basis of this allegation that the respondent had made a demand upon the appellant to render accounts and that he had failed to do so. There is no doubt that this allegation is to be found in the plaint but the difficulty about it is that it does not specify as to when this demand was made and without this information we are unable to calculate the interest which ought to be awarded to the plaintiff.

It was next contended that the attitude of the defendant-appellant throughout had been that he had denied the fact of his agency and under those circumstances he ought to be presumed to have refused to render accounts. We are of opinion that we cannot make any presumption as to the refusal to render accounts at any period prior to the institution of the suit. The refusal embodied in the written statement would only take us to the period when that allegation was made or at any rate when the suit was instituted It cannot obviously, unless there is any evidence to that effect, take us to any anterior date

The learned advocate for the respondent next urged, and we think rightly, that the plaintiff-respondent had been prevented from proving a specific demand made by the plaintiff calling upon the appellant to render accounts by the attitude which the defendant-appellant took in the case. His contention was to the effect that the appellant had denied the very fact of agency and had never taken the present plea. There is no doubt that this is true and in order to do justice in the case we are of opinion that an opportunity should be given to the plaintiff-respondent to prove as to whether he made a demand upon the defendant-appellant to render accounts, and if so, when.

We, therefore, send an issue down to the lower appellate Court to the following effect :

Did the plaintiff-respondent make any demand upon the defendant-appellant to render accounts in respect of realizations, and if so, when ?

The lower appellate Court will give opportunity to both the parties to produce such evidence as they may like to produce in respect of this issue. The finding is to be returned within six weeks. Parties will be allowed to file objections within ten days from the date of the finding.

R M./R.K. *Case remanded.*

A. I. R 1929 Oudh 422

MISRA, J.

Jagannath Singh—Plaintiff—Appellant.

v.

Gurcharan Singh and *others*—Defendants—Respondents.

Second Appeal No. 309 of 1928, Decided on 19th November 1928, from decree of Sub-Judge, Malihabad, D/- 23rd May 1928.

(a) Hindu Law—Alienation—Mortgage by widow—Mortgagee must prove consideration independently of recitals.

Recitals in a deed, though binding on the parties to that deed, cannot be considered to be binding upon third parties, who are not in any way connected with the deed [P 423 C 1]

Where creditor seeks, under a mortgage executed by a widow, to recover money from the reversioners, it is necessary for him to establish the passing of consideration independently of the recitals contained in the deed itself. [P 423 C 1]

(b) Hindu Law—Debts—Necessity — Payment of decree for arrears of rent is not by itself necessity.

The payment of a decree for arrears of rent cannot by itself be considered to be legal necessity, unless there is evidence to show that the widow had no means to pay that decree . 19 *C. W. N.* 313 ; 11 *M. I. A.* 241 (*P. C.*) , 30 *Cal.* 550 (*P. C.*) , 16 *C. W. N.* 1070 and 17 *C. W. N.* 337, *Foll.* [P 423 C 2]

M. L. Saksena—for Appellant

G C. Sinha—for Respondent 1.

Judgment.—This appeal arises out of a suit in which the plaintiff appellant seeks to recover his money by sale of the mortgaged property. The facts of the case are that one Mt. Menda inherited certain property from her husband Narain Singh. On 1st November 1909 she executed a mortgage in respect of a portion of that property which consists of house No 17 situate in village Lachha Khera, district Unao, in favour of plaintiff appellant Jagannath Singh for a sum of Rs. 99. The present suit has been brought by the mortgagee appellant to recover the money due on the basis of that mortgage. Mt. Menda died somewhere in the year 1913 and the defendants respondents are the reversioners of her husband. The present

suit was instituted in April 1927. The suit was resisted by the defendants respondents on two grounds, among others that no consideration passed under the deed and even if it did pass it was not justified by legal necessity. The learned Munsif, North Unao, who tried the suit came to the conclusion that the deed was for consideration but was justified by legal necessity only to the extent of Rs. 64-4-3 which amount according to his finding, had been borrowed by Mt. Menda from the appellant for the payment of a rent decree obtained by the superior proprietor Kunwar Bahadur against her. The decree for the said amount with proportionate costs was passed in favour of the plaintiff appellant on 18th July 1927.

On appeal against this decree the learned Subordinate Judge of Maliahabad has taken a different view. He has held that the passing of the consideration under the deed in suit has not been established and even if that be held to have been proved it was not established that the money had been borrowed for legal necessity. It was observed by the learned Subordidate Judge that it had not been proved that it was necessary for the widow to borrow this sum for the payment of the decree for arrears of rent obtained against her. He therefore accepted the appeal and dismissed the plaintiff's suit by his decree dated 23rd May 1928. In second appeal it is contended before me that the learned Subordinate Judge was not right in holding that the payment of consideration was not established and that the money borrowed by Mt. Menda was justified by legal necessity. I have heard the arguments in this case at length but it appears to me that the plaintiff appellant's case must fail on both points. As to the passing of consideration, there is no independent evidence besides the recital in the mortgage-deed. It is a settled rule of law that the recitals in a deed though binding on the parties to that deed, cannot be considered to be binding upon third parties who are not in any way connected with the deed, and in order to establish that consideration passed under that deed it would be necessary for a creditor seeking to recover money under that deed to establish the passing of such consideration independently of the recitals contained in the deed itself. It is admitted by the larned advocate for the appellant that there is no evidence on the record, apart from the recitals in the deed of mortgage, which could establish the passing of the consideration. Under those circumstances I am compelled to agree with the learned Subordinate Judge that the payment of the consideration is not established

As to the legal necessity, I also agree with the opinion of the learned Subordinate Judge It has been held in several cases decided by their Lordships of the Privy Council and by the High Courts in India that the payment of a decree for arrears of rent cannot by itself be considered to be legal necessity unless there is evidence to show that the widow had no means to pay that decree and that the borrowing was necessary in order to discharge the debt which if not discharged, would have resulted in the sale of the property in her hands and which she has inherited from her husband. It this were not the rule of law it would be open to a widow to appropriate the entire profits of the property for her own use and benefit without paying rent or revenue which is actually charged on the profits accruing from the property A Hindu female cannot be considered to be entitled, while she is in possession of the property inherited by her, to appropriate the gross profits of the property and to throw the burden of the payment of legitimate charges like those of rent and revenue upon the reversioners I am of opinion that she is only entitled to the net profits of the property which might remain in her hands after the payment of the Government revenue or the rent as the case may be which she must pay in order to continue in possession of the property inherited by her. I would in this connexion refer to two rulings of their Lordships of the Privy Council reported in *Nugenderchunder Ghose* v. *Kaminee Dossee* (1) and *Jiban Krishna Roy* v. *Brojo Lal Sen* (2) and three cases of the Calcutta High Court reported in *Mahomed Sadat Ali* v. *Hara Sundari* (3), *Direswar Das* v.

(1) [1866] 11 M. I. A. 241=8 W. R. 17=2 Suther 77=2 Sar. 275 (P. C.).
(2) [1903] 30 Cal. 550=30 I. A. 81=8 Sar. 444 (P. C.).
(3) [1912] 16 C. W. N. 1070=15 I. C. 351.

Kamal Kumar (4), and *Rameswar Mandal* v. *Provabati Debi* (5). The subject is discussed at great length in the last case by a Bench of the Calcutta High Court consisting of Mookerji and Beachcroft, JJ. It has been held in the last case that the mere fact that money is raised for the payment of rent and applied for that purpose is not sufficient to prove legal necessity. The appeal therefore fails and is dismissed with costs.

W S /R.K. *Appeal dismissed.*

(4) [1919] 17 C. W. N. 337=16 I. C. 437.
(5) [1915] 19 C. W. N. 313=25 I. C. 84=20 C. L. J. 23.

A. I. R. 1929 Oudh 424

WAZIR HASAN, J

H. Hunter and *others*—Defendants—Appellants.

v

Ram Ratan and *others*—Plaintiffs—Respondents.

Second Appeal No. 18 of 1929, Decided on 31st July 1929, from decree of Sub-Judge., Barabanki, D/- 21st May 1928.

Wajib-ul-arz — Entry giving rights to plaintiffs in abadi has binding force even though they lose proprietary right.

Where the wajibularz records the rights of the plaintiffs in the abadi of the village, the entry to the effect that no tenant can build a new structure in the village without the permission of the plaintiff, has binding force even though the plaintiffs lose the proprietary rights, where these rights in the abadi were remnants of the ancient proprietary title of the village which was for a period of over 400 years in the hands of the plaintiffs' family. [P 425 C 2]

Bishambar Nath—for Appellants.

A. P. Sen—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Subordinate Judge of Bara Banki dated 4th October 1928, affirming the decree of the Munsif of Ram Sanehighat, dated 21st May 1928.

The subject matter of controversy in the suit, out of which this appeal arises, is a certain right in the abadi of the village Debipur, Pargana Haidergarh, in the district of Bara Banki. Defendant 1, Mr. H. Hunter, has succeeded to the proprietary title of the village by a purchase at a public auction in execution of a decree against the late taluqdar of the village. The other defendants are cultivators residing in the village of Debipur and have recently started to build a structure on plot 84 comprised within the abadi of the village. The plaintiffs' case is that a tenant is not entitled to construct a new building on any portion of the abadi land without the consent of the plaintiffs. The question in the case therefore is as to whether the plaintiffs are possessed of the right which they claim.

The Courts below have answered this question in the affirmative and after hearing arguments I have come to the conclusion that the decision arrived at by those Courts is correct and should be maintained. Ex facie it looks somewhat extraordinary that persons who are not proprietors of the village, as the plaintiffs are admittedly not, should have a right to interfere with the proprietor's mode of enjoyment of lands of which he is the owner. One of such usual modes is to grant permission to tenants to build houses within the abadi site of the village either gratuitously or on receipt of consideration. In this particular case, however, when the matter is approached with care and in the light of the history showing the vicissitudes of title in respect of the ownership of the village the extraordinary nature of the proposition disappears.

According to the narrative recited in that portion of the wajibularz which relates to the history of the title, the village of Debipur was originally founded by one Debi Pande, who was admittedly a remote ancestor of the plaintiffs of this suit. Till the year 1249 fasli both the title and the possession of the village remained with one Loka Pande, a descendant of Debi. In the year 1250 Fasli the village was mortgaged presumably with possession to Chaudhari Lutfullah, the predecessor-in-interest of the first statutory taluqdar of the village Chaudhari Sarfraz Ahmed. Soon after the mortgage the village was incorporated in the taluqdari qabuliat of Lutfullah, a fate not uncommon to a large number of villages now within the territorial limits of most of the taluqa in the provice of Oudh. Finally the grant of the sanad by the British Government at the resettlement of the province after the confiscation of 1858 perfected the taluqdar's title in respect of the village of Debipur. It is

quite clear from the record of the case, however, that the vestiges of the old title in the Pandes remained with them and I am happy to observe that at the first regular settlement of the village they were reconsidered and maintained by the then taluqdar.

It appears that the first regular settlement of the village of Debipur was effected and completed in the year 1870-1871. At that time the head of the Pande family was one Sheo Shankar. In the Courts of settlement he instituted three claims in respect of his rights in the village; (1) claim for a certain area of *sir* lands; (2) claim for rights in the abadi lands of the village and lastly a claim for a certain number of groves. Undoubtedly these were modest and reasonable claims and equally reasonably they were all settled amicably with the result that a compromise petition was presented to the Court on 21st January 1871 in the matter of all the three claims. In the present case we are concerned only with the claim as to the rights in the abadi of the village. In that behalf the petition of compromise states that Sheo Shanker shall be entitled to under-proprietary rights in one bigha of the abadi land which at that time was designated by No. 217. For the rest of his claim in the abadi the compromise states that the plaintiff withdraws it on condition that he would be entitled to re-agitate it in a Court of law in the event of an interference by ejectment from the residential house by the taluqdar (Ex. B-4). The judgment and the decree which follow give effect to the compromise (Exs. B-5 and B-2).

It is argued on behalf of the appellants that the effect of the compromise was to extinguish all rights of the Pandes in the village abadi except that of residence in the house then in their occupation.

This interpretation of the compromise is not to my mind altogether devoid of plausibility but on a careful consideration of the claim and the grounds on which it was made as embodied in Sheo Shanker's petition of 16th March 1870 and of the language of the judgment and the decree following the compromise I have come to the conclusion that Sheo Shanker's claim of rights in the abadi of the village was withdrawn from the cognizance of the Court and left unadjudicated upon with liberty to reagitate it should an interference with his existing rights be made by the taluqdar in future; and this dispossession from residential house was to be reckoned to be the symbol of interference. I realize that this is the right interpretation of the records mentioned above when I come to consider the terms of the wajibularz of the village presumably prepared after the settlement operations had been concluded and judicial pronouncements made in respect of claims of title in relation to the village of Debipur It is true that Pandes lost the village but when the Record-of-Rights, that is the wajibularz came to be prepared, several rights besides the rights which were decreed in favour of the Pandes by the settlement Court came to be recorded in their favour and the record was accepted as correct and valid on behalf of the taluqdar as the endorsement by the Settlement Officer relating to the verification of the wajibularz shows. The wajibularz records the Pandes' rights in the manure and the scattered and stray trees of the village and also their rights in the abadi of the village. These rights are not to be deemed to have been created for the first time by the entries in the wajibularz but the entries in respect of them must be taken to be a record of pre-existing rights The interpretation of the entry in respect of the Pandes' rights in the abadi of the village is not in question. It is agreed that according to that entry no tenant can build a new structure in the village abadi without the permission of the Pandes. These rights to my mind are as I have already said, remnants of the ancient proprietary title of the village which admittedly was for over a period of 400 years in the hands of the Pande family. In this view of the matter the argument that the entry relating to the rights in the abadi is an entry of a custom and that the said custom being unreasonable should not be enforced, need not be considered by me.

The last argument on behalf of the appellant was that the structure in question had been put up on a piece of land already possessed for some time past by the tenants defendants and, therefore the right upon which the plaintiffs rely cannot be exercised in respect of that structure. This argument is answered by the finding that the encroachment is only a recent one.

The appeal fails and is dismissed with costs.

R M /R.K. *Appeal dismissed.*

** A. I. R. 1929 Oudh 426

Full Bench

STUART, C. J., WAZIR HASAN AND RAZA, JJ.

C Cursatji—Judgment-debtor — Appellant.

v.

Har Govind Dayal—Decree-holder—Respondent.

Execution Decree Appeal No. 80 of 1928, Decided on 23rd August 1929, from order of Dist. Judge, Lucknow.

**** Civil P. C., S. 135 (2)—Person coming to appear as accused in criminal case is exempt from arrest — Money paid to secure release should be refunded — Civil P. C., S. 144.**

Where a person is ordered to appear as an accused in a criminal case and comes from another place to attend the Court, he is exempted from arrest under S 135 (2) and such an arrest is illegal. The immunity from arrest is not for the benefit of the Court but for the furtherance of public interest and the better administration of justice. The person arrested is entitled to a refund of money which he paid in order to secure his release from arrest. 4 *Mad* 317, *Ref.* [P 426 C 2]

Ali Muhammad—for Appellant

Opinion

Stuart, C J.—In this reference it is not stated explicitly what is the question which is referred to the Full Bench under the provisions of S. 14, Local Act 4 of 1925. But it would appear that our opinion is asked as to whether the unreported decision in *S. C. Mitra* v. *Sajjad Husain* (*Execution of Decree Appeal No* 61 *of* 1927) states the law correctly. I was a party to the decision of that appeal and I do see no reason to doubt the correctness of the decision of the Bench. But the present case appears to me to stand on a somewhat different footing. In so far as the illegality of the arrest is concerned the position of the appellant Cursatji is a very strong one. He was ordered to appear as an accused in a criminal case before the City Magistrate on 28th September 1927. He came from the Indian State of Bharatpur. He arrived in Lucknow on 20th September 1927 and he was arrested on 27th September 1927. It is quite clear that if this arrest had been allowed to remain he would not have been able to be present in person before the criminal Court on 28th September and he was thus clearly exempted from arrest under S. 135, Civil P. C. "while going to or attending such tribunal for the purpose of the case."

His arrest was, therefore, illegal. On the second point I see no reason to differ from my previous view. When a man is arrested illegally and in order to save himself from the consequences of the illegal arrest pays up a sum of money he should be put in the same position as though that arrest had not taken place and if it be possible should obtain restitution Whether in the particular circumstances of the present case he will obtain restitution remains to be seen. But on the law I have no doubt. This is my answer to the reference

Wazir Hasan, J.—My answer is the same as given by the Honourable, the Chief Judge. The privilege given to a person mentioned in S. 135 (2), Civil P. C., of immunity from arrest is a privilege not appertaining to such a person but is enacted in the interest of the Court. If a person is summoned to attend a Court in a particular case and he is arrested while he is going to or attending the Court from which the summons issued before the date on which he is expected by the Court to answer the summons it is obvious that the cases before the Court cannot proceed. As observed by Kernan, J., in *Shiva Bux, In the matter of* (1), a party whose cause is in the list is priviledged *eundo, morando et redundo.* The question is always one of reasonableness. I have nothing more to add.

Raza, J.—I have very few words to add to the judgments which have already been delivered and in which I concur. In my opinion the exemption conferred by S 135, Civil P. C., is not for the benefit of the individual but for the furthering of public interest and the better administration of justice. The exemption from arrest continues during such period as is reasonably occupied in going to, attending at and returning from the place of trial. My answer to the questions referred to the Full Bench for decision is the same as given by the Hon'ble the Chief Judge.

R.M /R.K. *Reference answered.*

(1) [1882] 4 Mad. 317.

* A. I. R. 1929 Oudh 427

STUART, C J., AND RAZA, J.

Mt. Kalawati and *others*—Defendants—Appellants.

v.

Raghuraj Singh—Plaintiff—Respondent.

First Appeal No. 85 of 1928, Decided on 29th July 1929, from decree of Addl. Sub-Judge, Sitapur, D/- 25th April 1928.

*** (a) Hindu Law—Joint family—Separation of stepson from a family does not automatically separate remaining members when they choose to remain undivided—Joint members must prove that they continued to be joint—They cannot be presumed to have separated.**

Where a stepson separates from a family consisting of himself, his father, his stepmother and his step-brother, his separation does not automatically separate the remaining members of the family, who may remain united. It has to be seen whether they did or did not continue to be joint. Person alleging that after separation the remaining coparceners are to be considered as a joint Hindu family must prove that there was no separation among the remaining members originally and where the evidence shows that they clearly desired to live together and did continue to live jointly, they cannot be deemed to have separated. There can be no question of reunion as they had never disunited. *A I.R.* 1924 *P. C.* 126, *A. I. R.* 1925 *P. C.* 49, *A. I. R.* 1927 *Oudh* 149 and *A. I. R.* 1927 *Oudh* 580, *Ref. A. I. R.* 1927 *Oudh* 489, *Dist.* [P 430 C 2]

(b) Land Revenue Act (1901), S. 111—No suit lies where plaintiff has no right to object to separation of share in favour of joint family.

Where a son separates from a joint Hindu family consisting of himself, his father, his stepmother and his stepbrother, he cannot have any right in revenue proceedings to object to separation of a three-fourth share in favour of the remaining member of the family who choose to remain joint and a suit by him on question of title should not be entertained. [P 433 C 1]

A. P. Sen, *S. C. Das*, and *K. P Trivedi*—for Appellants.

Ali Zaheer, *Radha Krishna* and *S. N. Srivastava*—for Respondent.

Judgment.—This is an appeal by Raghubar Singh, his wife Kalawati and his minor son Raja Bakhsh Singh against a declaratory decree granted to Raghuraj Singh, who is a son of Raghubar Singh by a wife now deceased whom he married before he married Kalawati. It is necessary to state the facts leading up to the present suit before we state the points for determination in the appeal. The facts are these. In the year 1917 Raghuraj Singh the present respondent, who then stated that he was about 19 years of age, instituted a suit for partition against his father Raghubar Singh and his stepmother Kalawati. Raja Bakhsh Singh had not then been born. It is admitted on both sides that at that time the family was a joint Hindu family governed by the Mitakshara Law consisting of Raghubar Singh the father and Raghuraj Singh the son, Kalawati having a right to maintenance and nothing more. Raghuraj Singh claimed an eight annas share. It was not necessary for him to do more than claim a share as a member of the family, but he added in his plaint allegations of an unpleasant character against his father asserting that he was addicted to intoxication and was of immoral habits The plaint in the suit is Ex. 5. Raghubar Singh filed a written reply in which he asserted that Raghuraj Singh was a minor at the time of the institution of the suit. He further asserted that Kalawati was pregnant and that if she bore a son the shares in the family would be altered, and further it was claimed on behalf of Kalawati that she would be entitled to a 5 anna 4 pies share at the time of partition.

It is not known what would have happened if the suit had proceeded to decision on the merits It did not proceed to decision on the merits as the parties arrived at a compromise on 2nd August 1917 This compromise is unfortunately not on the record but we are informed by the learned counsel for the plaintiff-respondent that under this compromise his client withdrew his claim to partition agreeing that the family should remain joint, in consideration of receiving a monthly allowance from his father and in consideration of having his debts paid. The plaintiff-respondent was not, however, content to leave the matter as decided by this compromise and we find that in 1921 he instituted another suit for partition By this time Raja Bakhsh Singh had been born. In this suit, again alleging the existence of a joint family he gave as its members Raghubar Singh himself, Raja Bakhsh Singh, and Kalawati, Raja Bakhsh Singh's mother. Later on the names of three daughters born to Kalawati were added. There is no dispute as to the fact that these girls were Kalawati's daughters

and the plaintiff-respondent's stepsisters. The second plaint is Ex. 7. Here it is again asserted that the plaintiff's father was a drunkard and of licentious habits. The plaintiff instituted the suit for a one-third share of the property. A written reply was put in on behalf of Raghubar Singh, Raja Bakhsh Singh and Kalawati. This is Ex. 8. In this it was stated that the plaintiff's share could not be more than one-fourth as Kalawati was entitled to a one-fourth share. In the plaint Ex. 7 Kalawati's rights were ignored but there was no reason given to show why they were ignored. The learned trial Judge quoted para. 9, Ex 7, as affording a reason for the exclusion of Kalawati; but on reading this paragraph it is clear that it has no reference to her. The paragraph which is very difficult to understand reads as follows:

"That according to law and terms of the compromise the plaintiff is entitled to get separate possession of his right and share after dividing the family property which comes to one-third according to law and custom, because defendant 1 should get one-third share by way of maintenance during his lifetime."

Defendant 1 was not Kalawati but Raghubar Singh. The paragraph is not comprehensible, but it does not apply to Kalawati. We find that in the written statement Ex. 8 the claim under the Hindu Law of Kalawati is asserted in para. 20. The plaintiff-respondent filed a replication Ex. 9 in which he stated that the paragraph asserting Kalawati's claim was not admitted and that the answer was entered in para. 9 of the plaint. As we have pointed out para. 9 of the plaint has nothing whatever to do with the subject. Ex. A-19 would show that the plaintiff-respondent's pleader when asked to state what he meant by the local custom stated that he meant the custom prevailing in the United Provinces of Agra and Oudh. We are unable to attach any meaning to this. He further stated that by tribal custom he meant the custom prevailing in the United Provinces. This remark is equally difficult to understand. However we have this much. Ex. A-20 shows that ten issues were framed and the fifth issue (based upon pleadings which have not been revealed to us) said: Is the wife of defendant 1 excluded from a share on partition by any local, family or tribal custom? This would appear to show that the plaintiff-respondent then asserted that Kalawati was debarred from a share under some unspecified custom. Now it is to be noted that according to the pleadings and according to these issues the defendants intended to fight the plaintiff's case largely on the ground that he was debarred by having entered into the previous compromise from applying for partition. It is impossible to say what would have been the result if the case had been decided on the merits as it was decided by another compromise. This is Ex. A-24, which was arrived at on 14th November 1922.

Under this compromise the defendants agreed that the plaintiff should receive a share of one-fourth in the property to be divided off and that he should further receive Rs. 1,600 in cash in respect of his share in the moveable property in addition to such moveables as were in his possession. The plaintiff-respondent agreed that he would pay one-fourth of the amount due under certain mortgage deeds and that he would pay Rs. 2,500 out of Rs. 10,000 in respect of the marriage expenses of each of his stepsisters. He further agreed to pay one-fourth of the maintenance due to a certain Lachmin Kuar. There is nothing in this compromise to show why the plaintiff's share was fixed at one-fourth. He had claimed one-third. The other side had said that under the law he could not be entitled to more than one-fourth but had further asserted that he was entitled to nothing. It is by no means certain that he obtained anything like a one-fourth share in the moveables and he certainly would not ordinarily have been liable under the law to pay such a proportion of the marriage expenses of his stepsisters, girls who were living in the family from whom he had separated. All that the compromise standing by itself establishes is that the plaintiff-respondent had a quarter share divided off. Not one word is said in it as to the relations amongst themselves of Raghubar Singh, Kalawati and Raja Bakhsh Singh. The family property had previously been entered in the name of Raghubar Singh alone as head of the joint family. After the compromise the name of Raghuraj Singh was entered in respect of one-fourth, and the name of

Raghubar Singh remained as entered in respect of three-fourths. The entries in the revenue papers have of course no evidential value as to title, but they are sufficient to show that the revenue authorities accepted the entry of the name of Raghuraj Singh in respect of one-fourth of the property and retained the entry of Raghubar Singh's name in respect of the remaining three-fourths, though the responsibility of paying the land revenue in respect of the whole was retained by Raghubar Singh.

The suit out of which the present appeal arises has come into being in the following manner. At some time (apparently in 1927) Raghubar Singh applied for a partition of the three-fourths share standing in his name in certain villages. A certain Chitrakhet Singh (who has nothing to do with this family) also applied for partition of his share in certain villages. The partition applied for was partition by the revenue Courts under Ch 7, Land Revenue Act (2 of 1901). In the course of these partition proceedings Raghuraj Singh took an objection on the question of title to the effect that the recorded proprietary share of Raghubar Singh included the share of his wife Kalawati and his son Raja Bakhsh Singh. Raghuraj Singh was thereupon ordered under the provisions of S. 111, Act 3 of 1901 to institute within three months a suit in the civil Court for the determination of the question whether the recorded proprietary share of Raghubar Singh included the shares of his wife Kalawati and his minor son Raja Bakhsh Singh and the extent of the shares. The present suit was accordingly instituted and was decided on 25th April 1928 in favour of Raghuraj Singh who was given a declaratory decree to the effect that the three-fourths in the name of Raghubar Singh was held as follows:

"One-fourth by Raghubar Singh separately, One-fourth by Raja Bakhsh Singh separately, and one-fourth by Kalawati in lieu of maintenance."

It is against this decree that the present appeal is filed. The plaint did not assert definitely whether the three-fourths share in the name of Raghubar Singh was the property of a joint Hindu family consisting of himself and his son Raja Bakhsh Singh with his wife entitled to maintenance or whether it was held in separate shares. But on the subsequent pleadings it was clearly asserted that the family of Raghubar Singh and his son Raja Bakhsh Singh was not a joint Hindu family. The plaintiff Raghuraj Singh asserted that after his separation one-third of the income was paid to Kalawati and two-thirds was retained by Raghubar Singh and Raja Bakhsh Singh. His assertion was not accepted and his evidence was disbelieved. The learned trial Judge has said:

"The oral evidence on the record shows that after the plaintiff's separation, the defendants all lived in one and messed in one, being husband, wife and son from that wife. The plaintiff was the son of the first wife and so a discordant element. He, therefore, went out leaving behind him a harmonious family . . . . My finding, therefore, on this issue is that though in fact the three defendants continued to live jointly after the plaintiff had gone out, the separation of the plaintiff was the virtual separation of the defendants also."

The learned trial Judge took this position on the ground that under the law as it stood the only possible conclusion was that Raghubar Singh, Raja Bakhsh Singh and Kalawati had separated inter se. His view was that though they had not separated in fact they nevertheless had separated in law. The learned counsel for the plaintiff-respondent has not endeavoured to disturb the conclusion of fact that Raghubar Singh, Raja Bakhsh Singh and Kalawati had continued to live as a joint Hindu family, and it would have been difficult for him to do so in face of the evidence. Shankar Bakhsh Singh has sworn that these persons are members of a joint Hindu family of which Raghubar Singh is the karta. When asked what he meant by a joint Hindu family he said that he meant Raghubar Singh, his younger son and Raghubar Singh's wife lived in one and messed in one. He also said this because leaving out Raghuraj Singh's one-fourth, Raghubar Singh, his wife and his other son possessed his remaining property. Kali Charan Patwari deposed that in respect of one village Raghubar Singh made collections and Raja Bakhsh Singh and Kalawati never made collections. Har Charan Singh another patwari stated that the same conditions prevailed in the village in which he was patwari. Raghuraj Singh himself said that Raghubar Singh,

Raja Bakhsh Singh and Raghubar Singh's wife lived in one house and messed jointly. The collection of rent was done at Raghubar Singh's door but he could not say on whose behalf. He subsequently supplemented the statement by saying that Raghubar Singh, his wife and Raja Bakhsh Singh, after partition lived in one and messed in one but the money of their shares were divided after the partition. He continued that his mother was separate (he meant his stepmother), his father was separate working as manager of his brother, and his brother was separate in ownership. He thus apparently endeavoured in some way to meet the case of jointness but clearly failed. Our finding is clear.

On the evidence the family consists of Raghubar Singh, Raja Bakhsh Singh and Kalawati and all the outward incidents of the family are the incidents of a joint Hindu family governed by the Mitakshara Law. Kalawati is not proved to receive any separate income or anything except maintenance by the family. Accepting this view (which is the view of the learned trial Judge), how can his conclusion be supported ? He has quoted a large number of cases of which we need only refer here to two The position in a joint Hindu family governed by the Mitakshara law after partition has been discussed in two comparatively recent judgments of their Lordships of the Judicial Committee. One is *Hari Bakhsh* v *Babu Lal* (1) and the other is *Palani Ammal* v. *Muthuvenkatachala Moniagar* (2). The law as laid down by their Lordships decides that when a separation has been effected between brothers who constitute a joint Hindu family governed by the Mitakshara Law, the fact of such separation raises no presumption that there is a separation of the joint family constituted by one of the brothers and his descendants. It was further laid down that the filing of a plaint claiming partition by a member of the joint Hindu family, if the plaint had been withdrawn before trial, did not result in the family being separate at a later date, although it afforded evidence that an intention to separate had been entertained by the plaintiff. It was further laid down that when one member of a joint family has separated an agreement by the remaining members to continue undivided may be inferred from the way in which their business was carried on after the separation.

Now here it is perfectly clear that the manner in which Raghubar Singh, Raja Bakhsh Singh and Kalawati have carried on their business after the separation of Raghuraj Singh is very strong evidence of their intention to remain undivided. The learned counsel for the plaintiff-respondent has urged that these decisions have no direct bearing because their Lordships were not considering a case such as this where a son has separated from a father leaving behind him that father, that father's son by another wife and the stepmother. His case was that the authority of their Lordships was to the effect that in such circumstances as these it must be considered that automatically not only did the stepmother separate herself from her husband but that the minor son, here a child of some four or five years of age, incapable of expressing a choice himself and on whose behalf nobody had communicated any desire to separate, had also automatically separated from his father. We do not consider that there is anything in the decisions of their Lordships which afforded an authority for such a proposition nor can we find anything in the Hindu Law which affords authority for that view. The proposition in itself does not appeal to us as good in law and thus as the case stands we have no hesitation in finding that the mere separation of Raghuraj Singh did not automatically separate the remaining members of the family It has to be seen whether they did or did not continue joint. On the evidence they clearly desired to live together. This was the first point which was discussed. The second point, however, is based upon a finding of the learned trial Judge which is in the nature of the finding of fact. According to him on the pleadings and the conduct of the parties in the previous litigation it must be held that a one-fourth share was granted separately to Raghubar Singh, a one-fourth share was granted separately to Raja Bakhsh Singh and a one-fourth share was awarded separately to Kalawati in lieu of maintenance. He has argued from what he finds in the

(1) A. I. R. 1924 P. C. 126=5 Lah. 92=51 I. A. 163 (P.C.).
(2) A. I. R. 1925 P. C. 49=48 Mad. 254=52 I. A. 83 (P.C.).

pleadings and the conduct of the parties. In the first place, as we have already pointed out he has drawn an inference from para. 9 in the plaint Ex 7 which is based on a confusion between Raghubar Singh, the defendant of whom mention is made and Kalawati, the defendant of whom mention is not made.

His main argument is something of this character. As Kalawati was joined as a party in both litigations it must be taken that Raghuraj Singh had recognized her right to a share in event of partition and was endeavouring to prevent her getting one. There is not much force in this argument. The mere joining of Kalawati means very little for in the second proceedings the names of Kalawati's three minor daughters were entered as parties. They certainly had no right to share Their names were apparently entered in order to open the way to the determination of the expenses of their marriages. The next argument is this. In the second proceedings the plaintiff would have been entitled to a one-third share if Kalawati had been ignored and the general law applied, and he would have been entitled to a one-fourth share if Kalawati's claims were recognized to receive a one fourth share. The learned Judge draws a conclusion from this that Kalawati's claim must have been recognized. An attempt is made to establish these facts by evidence but the learned Judge has not made reference to that evidence. The evidence in question on the side of the plaintiff-respondent consists only of his own deposition. He said:

"I had sued for one-third but I agreed to one-fourth as the pleaders said one share must be given to the mother, one share to my father and one share to my younger brother. This was said by my pleader and by Pandit Chand Narayan, pleader for defendants 1 to 3."

"Cross-examined: My pleader was B. Narayan Lal. The compromise was arranged in Court premises. The compromise was settled a month or two before it was filed in Court. The compromise filed in Court was the compromise arrived at and it was written with the advice of pleaders. . . . When I had filed my plaint of the partition suit my pleader had said that I should get one-third. Subsequently, at the first compromise my pleader said that I could not get more than one-fourth."

Now all this was to show that he reduced his share from one-third to one-fourth in order to provide for a share for Kalawati. It is to be noted, however, that there is not one word in the compromise to this effect. Further there is direct evidence against this statement. Raghubar Singh has deposed:

"Raghuraj Singh had brought another suit in which he was given maintenance from joint family funds. He was given Rs. 137-8-0 per mensem as allowance for maintenance. He again brought a suit for partition. In that suit by compromise the plaintiff was given one-fourth and the rest remained with me. Nobody else separated at the time of that partition. The remaining members of the family remained joint. The share of nobody else was determined. No share was fixed for my wife Kalawati or for Raja Bakhsh. No share was reserved for my wife Kalawati. There was no talk about her share. Even now my family is joint. Raja Bakhsh Singh is seven or eight years of age now. I have got five daughters now. I bear the expenses of the minor son and of the daughters. I am the karta of the family. I make collections of the 12 annas and I take the profit."

Cross-examined. The plaintiff's share was determined as one-fourth without any calculation. The plaintiff agreed to take that share and it was given him . . . . . The one quarter share given to the plaintiff in his second suit was not given on the understanding that my share was one-fourth, my second son's share one-fourth, my wife's share one-fourth. The plaintiff was the eldest son and he was given one or two villages for his subsistence as was the practice in our family and amongst the Thakurs. The plaintiff agreed to take one-fourth and he was given one-fourth. In the second suit the plaintiff claimed one-third. . . . . The partition took place with mutual consent. The compromise in the second suit was also arranged with the advice of my pleaders . . . . . *Q.* Can you give any reason why the plaintiff's share was fixed at one-fourth in the compromise of the second partition suit? *A.* The plaintiff was asking for much more and I was giving much less. By and by it was settled that plaintiff should be given one-fourth."

There was also a man Anrudh Singh who said he was present at the time and supported this statement. It was argued against the acceptance of the evidence of these two witnesses that Raghubar Singh had said:

"Nobody got the dispute between me and the plaintiff settled. I and he settled the the dispute. I had not named anything specially which I was offering."

But Anrudh Singh has said that he got the compromise brought about.

We do not find that there was real discrepancy between these statements. Anrudh Singh was a friend of the parties. He happened accidentally to be present in the Court precincts while the question was being discussed. Accord-

ing to his statement he interposed in favour of a settlement. He added to his statement:

"The plaintiff of his own accord said that he should be given one-fourth. At first he was demanding more. Raghubar Singh said he would give nothing. Plaintiff was at first demanding one-third. I can give no reason why plaintiff agreed to take one-fourth. It was his will."

We see no reason why the evidence of Raghubar Singh and Anrudh Singh should not be accepted against the unsupported evidence of Raghuraj Singh. These two men deposed that the matter was settled by a process of haggling. The son asked a third: the father offered nothing. Finally they settled at a quarter. There does not appear to have been any discussion as to the rights of the parties under the law This sounds the most probable way of arriving at a compromise. According to Raghubar Singh pleaders were present but the settlement was left to the parties. This evidence stands unsupported by the evidence of pleaders When Raghuraj Singh produced his evidence Raghuraj Singh could have called his own pleader to contradict the previous allegations He did not do so. Now it appears to us that the conclusion that the matter was settled by pure bargaining and haggling apart from any recourse to claims under the law is supported in a variety of ways. In the first place if the compromise had been, as the plaintiff-respondent suggests, a compromise based on the provisions of the Mitakshara whereby it was settled that Raghubar Singh was entitled to one-fourth, Raja Bakhsh Singh was entitled to one-fourth, Kalawati was entitled to one-fourth in lieu of maintenance and Raghuraj Singh to the remaining one-fourth, why were not these particulars entered in the compromise? They were not entered in the compromise. In the second place as far as we can gather Raghuraj Singh did not receive a quarter share in the moveables. He appears to have received less

In the third place Raghuraj Singh consented to pay Rs 7,500 towards the marriage expenses of his stepsisters. This appears to have made a reduction in his share which was not justified by the ordinary law. When we have it that the most natural way in which to conduct the terms of this promise would have been by bargaining and haggling, when we have it that the compromise contains no specification of the shares of Raghubar Singh, Kalawati and Raja Bakhsh Singh, when we have it that those three persons have continued to live as a joint Hindu family ever since, we find the conclusion to be that Raghuraj Singh took as much as he thought he would get without further trouble and that the remainder was left joint family property. The learned trial Judge appears to us to have fallen into error in assuming that if the case had been fought out to a legal decision Raghuraj Singh would necessarily have obtained a decree. His father Raghubar Singh had said from the very beginning that Raghuraj Singh was estopped from bringing the case owing to his conduct in the previous litigation. We express no opinion as to whether that plea was a good plea or a bad plea. It has not been decided. We are in no position to assume what would have been the result of the litigation if the suit had been decided on the merits . The suit might well have gone up to their Lordships of the Judicial Committee for the point was a point which could have been a point of difficulty and the valuation was Rs. 50,000. But once it is taken into account that there were points of difficulty in the case, that the litigation might be protracted and that Raghuraj Singh might not have been in a position to find funds for protracted litigation why should it be assumed (as the learned Judge has apparently assumed, for we do not find that he accepted Raghuraj Singh as telling the truth on the subject) that it must have been intended to award a quarter share to Kalawati in lieu of her maintenance? We find that there is no justification for this view.

We return once more to the law on the subject. We have already discussed the decisions of their Lordships of the Judicial Committee in *Hari Bakhsh* v. *Babir Lal* (1) and *Palani Ammal* v. *Muthuvenkatachala Moniagar* (2). We refer now to three decisions of this Court: *Deputy Commissioner of Partabgarh* v. *Sheo Nath* (3) and *Sarju Prasad Singh* v. *Nandgopal Singh* (4). The second laid down:

"That when it is proved that one member of a joint Hindu family has separated from

(3) A. I. R. 1927 Oudh 149=2 Luck. 459.
(4) A. I. R. 1927 Oudh 580.

his coparceners, a person, who subsequently alleges that the remaining coparceners are to be considered a joint Hindu family among themselves, must prove one of two things. He must either prove that there was no separation among the remaining members originally or he must prove that there has been a separation followed by subsequent reunion.

"Under the Mitakshara Law there is a presumption when one coparcener separates from the others that the latter are separated and any agreement among the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

The last decision is *Mt. Menda Kuer* v. *Mirtunjai Bakhsh Singh* (5). This is the decision to which the learned Judge has referred as 1 *Luck. Cases* p 516. He considered that this decision supported his view. We are unable to find that it supported his view in any way and his conclusion that though in fact the three defendants continued to live jointly after the plaintiff had gone out the separation of the plaintiff implied the virtual separation of the defendants inter se is not borne out Apart from anything else there is strong evidence from their conduct that they had not separated and had continued to live jointly As they continued to live jointly there is no question of reunion They had never disunited. The position of Mt. Kalawati is exactly the same as the position of any wife in a Hindu joint family She is entitled to maintenance. Nothing separate has been assigned to her for maintenance. In any circumstances it would be difficult to see what right the plaintiff could have in revenue proceedings to object to the separation of the three-fourth in favour of a family which alleged itself to be a joint family. We, therefore, allow this appeal and direct that the plaintiff-respondent's suit stand dismissed The plaintiff-respondent will pay his own costs and the costs of the opposite parties in both Courts. The defendants will receive one set of costs.

R M./R.K. *Appeal allowed.*

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(5) A. I. R. 1927 Oudh 489=3 Luck. 220.

A. I. R. 1929 Oudh 433

PULLAN, J.

Sat Narain Misir and *another*—Plaintiffs—Appellants.

v.

Deputy Commissioner, Manager, Court of Wards, Ajodhia Estate—Defendant—Respondent.

Second Appeal No. 102 of 1929, Decided on 23rd August 1929, against decree of Sub-Judge, Sultanpur, D/- 17th December 1928.

(a) Oudh Rent Act, S. 3 (8)—In suit for under-proprietary rights claim cannot be put to agricultural land.

Plaintiffs suing for under-proprietary or other possession of certain plots against the taluqdar can have no claim as to agricultural land. They can set adverse possession but such adverse possession is only that of a tenant and the mere fact that they were formerly village zamindars does not give them any title. [P 433 C 2, P 434 C 1]

(b) Oudh Rent Act, S. 3 (8)—Exclusive right of fishing does not convey under proprietory right to land below tank.

An exclusive right of fishing in a tank does not amount to a right in the land below the water and plaintiffs possessing such rights are not entitled to be considered as under-proprietors of that land. [P 434 C 1]

(c) Adverse possession—Under-proprietors—It is not necessary to prove actual litigation with taluqdar.

To prove adverse possession it is not necessary that there must have been litigation on the subject between the taluqdars and the claimant. It is sufficient if it is proved that the title is entirely opposed to the interests of the taluqdar and that the latter being aware of the title has stood by and done nothing. Where the claimants establish that they got under-proprietary rights under a sale which has not been contested by the taluqdar, they are entitled to the rights claimed: *A. I. R.* 1919 *P. C.* 62, *Ref*; *A. I. R.* 1927 *Oudh* 141, *Dist.* [P 434 C 2]

Naimullah—for Appellant.

H K Ghosh—for Respondent.

Judgment.—This is a plaintiff's appeal in a suit for under-proprietary or other possession of certain plots against the taluqdar. The plaintiffs were ejected from some numbers by the revenue Court and they then brought this suit in respect of these numbers and certain others The suit was entirely dismissed by the Court below. The numbers may be divided into three groups; the old Nos. 624 and 476 are tanks, No. 452 is a grove and the other numbers are agricultural land As to the latter, the plaintiffs have no claim. They can only

set up at best adverse possession, but such adverse possession is only that of a tenant, and the mere fact that they were formerly village zamindars does not give them any title.

As to the tanks it was never denied by the defendant that the plaintiffs had an exclusive right of fishing in these tanks. This is the only right which was conceded to the predecessor-in-title of the plaintiffs by the settlement decree of 1872. An exclusive right of fishing does not amount to a right in the land below the water, and, in my opinion, the plaintiffs are not entitled to be considered under-proprietors of that land, although had their claim to an exclusive right to fishing in the water been contested they would no doubt have been able to obtain a declaration in their favour in accordance with the settlement decree. But as their right was not denied, I agree with the Court below that they were not entitled to any decree of this nature.

There remains No. 452, now No. 484. At the time of the settlement decree of 1872 the plaintiff's predecessor Bhawani Prasad obtained an entry in his favour as to three out of four groves, one of which was No. 452, but later the decree was amended in the year 1877 when it was ordered that the number not granted to Bhawani Prasad was No. 452 which was entered as belonging to one Bhandan Pande. Who Bhandan Pande was is not known, but he was described as a stranger and, therefore, he could not have been a member of the plaintiff's family. The plaintiffs, therefore, were unable to prove that No. 452 belonged to them from the time of the settlement decree and they had to fall back on the second plea which was raised in the plaint in respect of all the numbers, namely a plea of adverse possession. The lower Courts have not done justice to the evidence on this subject. It is proved that at the time of the new settlement in 1893 this grove was described as being in the possession of a mortgagee from the mortgagor Bhawani Prasad. Consequently, in spite of the settlement decree of 1877, it appears that Bhawani Prasad, who was the plaintiffs' predecessor-in-title, was able to re-assert the claim in this grove which he had made in the year 1872. In 1897 Bhondu who is the nephew of Bhawani Prasad, together with Pothi Ram, who was his own nephew, sold the grove No. 452 to one Mahabir. Mahabir in his turn sold the grove to a stranger in the year 1912 and Bindeshri Misir, who is the father of one of the plaintiffs and the nephew of Bhondu Misir, brought a suit for pre-emption and obtained a decree and dhakil dihani. This order of possession was given in the year 1914 and the plaintiffs have been in possession over since.

It has been stated in argument that these facts are insufficient to establish a title by adverse possession in view of a ruling of this Court reported in *Barjor Singh* v. *Sidh Nath* (1). In that ruling it was laid down that such possession had to be actual, physical, exclusive, hostile and continued from the time necessary to create a bar under the statute of limitation. In this case there is in my opinion no question that the plaintiff who obtained possession or who recovered possession by a pre-emption decree, obtained actual, physical, exclusive, and continued possession. The word "hostile" cannot be considered to mean that there must have been litigation on the subject between the taluqdar and the plaintiffs It is sufficient if it is proved that the title is entirely opposed to the interest of the taluqdar, and that the latter, who must have been aware of the title so set up,

> "stood by and did nothing while the plaintiffs continued in possession in direct contravention of his alleged rights."

These are the words used by their Lordships of the Privy Council in defining adverse possession in the case of *Arunachellum Chetty* v. *Venkatachalapathi Guruswamigal* (2).

The plaintiffs, therefore, have in my opinion established a title to the grove No. 452, and the title must be that which the vendor purported to sell in 1912 by means of the sale-deed for which they obtained a decree of pre-emption, seeing that the taluqdar has never attempted to contest that sale. I have read the sale-deed and it appears that the title was one equivalent to under-proprietary rights and has been described correctly by the plaintiffs as dehdari. The plaintiffs, therefore, are entitled in my opinion to a decree for dehdari rights in respect of grove No. 452, now No. 484

(1) A. I. R. 1927 Oudh 141=29 O. C. 395=1 Luck. 441.
(2) A. I. R. 1919 P. C. 62=43 Mad 253=46 I. A. 204 (P.C.).

only, but their suit has been rightly dismissed in respect of the other numbers subject, as I have said, to their fishing rights in Nos. 625 and 476.

The appeal is thus partially dismissed and partially allowed, and proportionate costs will be allowed throughout

R.M./R.K. *Order accordingly.*

A. I. R. 1929 Oudh 435

SRIVASTAVA, J.

Abdul Rahman — Objector — Appellant.

v.

Gaya Prasad and *another*—Decree-holder and Judgment-debtor — Respondents.

Execution Decree Appeal No. 18 of 1929, Decided on 23rd August 1929, against order of Sub-Judge, Kheri, D/- 19th January 1929.

(a) Mahomedan Law—Gift—Registration is not necessary to complete gift.

When the ingredients necessary for the completion of a valid gift under Mahomedan Law are proved to have been present, the gift is complete and registration is not necessary to complete the gift and is a superfluous act. [P 436 C 1, 2]

(b) Civil P. C., Sch. 3, R. 11—Property under control of Collector cannot be given as gift without his written permission.

Where the property which forms the subject matter of the gift is admittedly under the control of the Collector on the date of the gift it cannot be given as a gift without the written permission of the Collector and such gift is incompetent. [P 436 C 2]

(c) Civil P. C., Sch. 3, R. 11—Judgment-debtor cannot enter into any transaction in contravention of R. 11.

While the property is under the control of the Collector the judgment-debtor is disqualified from entering into any transaction in contravention of the terms of R. 11. The disqualification imposed by the rule is absolute in its nature making all such transaction void and cannot be said to be applicable only to those cases in which a sale has been actually made by the Collector . *A. I. R.* 1918 *P. C.* 168, *Rel. on.* [P 437 C 1]

Ali Zaheer—for Appellant.

Radha Krishna and *Rauf Ahmad*—for Respondents.

Judgment.—The material facts relating to the dispute which has given rise to the present appeals are that one Ganesh Prasad obtained a simple money decree against Munna, father of Abdul Rahman, the objector appellant and of Abdul Hamid minor who is respondent 2 in these appeals. The decree-holder Ganesh Prasad applied for attachment and sale of the property in suit in execution of his decree. As the property sought to be sold was ancestral the decree was transferred for execution to the Collector on 30th June 1921. The sale was fixed before the Collector for 20th July 1921 but it did not take place on that date as the judgment-debtor paid a part of the decretal debt and got the sale postponed to 20th October 1921. About a month later, on 23rd August 1921 the judgment-debtor Munna executed a deed of gift in respect of the property in suit in favour of his two sons Abdul Rahman appellant and Abdul Hamid respondent 2. It is the validity of this gift which is the principal matter of controversy in the present appeals On 19th October 1921 the judgment-debtor paid off the balance of the decretal amount and on 20th October 1921 the property was released by the Collector On the same date Munna also got the deed of gift dated 23rd August 1921, registered.

Another chapter of the case begins with a pronote dated 18th July 1921 executed by Munna in favour of Gaya Prasad respondent 1. This money was borrowed in order to make part payment of the decretal debt of Ganesh Prasad and seems to have constituted part of the money which as stated before was paid by Munna to Ganesh Prasad on 20th July 1921. On 2nd September 1925 Gaya Prasad obtained a decree on the basis of the pronote just mentioned. Gaya Prasad also had another similar decree against Munna. After the death of Munna the decree-holder respondent Gaya Prasad applied for execution of his two decrees by attachment and sale of the property in suit claiming it to be the assets of his deceased judgment-debtor Munna. Abdul Rahman appellant filed objections in both the execution cases on the allegation that the property sought to be attached and sold did not belong to Munna at the date of his death inasmuch as it had been transferred by him to the appellant and his minor brother respondent 2, under the deed of gift dated 23rd August 1921 and was therefore not liable to attachment or sale in execution of the decree against Munna. Both the objections were tried together and dismissed by the learned Munsif on the

ground that the deed of gift dated 23rd August 1921 was void under R. 11, Sch. 3, Civil P. C. This decision has been upheld on appeal by the learned Subordinate Judge.

The objector has come here in second appeal. Two contentions have been urged on his behalf in support of the appeal. The first contention is that the transaction of gift relied upon by him was inchoate and incomplete on 23rd August 1921 and became a completed transaction only on 20th October 1921 when the deed of gift was registered. The argument is that as the property had been released by the Collector before the registration of the deed of gift therefore the alienation was not invalidated by R 11, Sch. 3, Civil P. C. I find myself unable to accept this contention. Both the lower Courts are agreed in finding that the transaction of gift was completed on 23rd August 1921 and I think that the finding arrived at by them is quite correct. The learned counsel for the appellant admits that the only ingredients necessary for the completion of a valid gift under the Mahomedan Law are the declaration by the donor, acceptance by the donee, whether express or implied, and the delivery of possession to the donee, either actual or constructive. He concedes that registration is not necessary to complete a gift under Mahomedan Law. The only one of these ingredients which is said to have been wanting on 23rd August 1921 was the element of delivery of possession. But the matter is concluded by the finding of both the lower Courts. In fact it seems to me that no other finding was possible The deed of gift, Ex. 1, speaks of possession having been delivered to the donees who were both the sons of the donor one of whom was a minor. In the case of the minor son at least the mere declaration by the father was sufficient. As for the elder son who is the objector appellant, we have his express admission contained in the petition of objection dated 23rd July 1928 to the effect that he had been put in possession of the gifted property from the date of the gift. I have, therefore, no hesitation in agreeing with the Courts below, that when the deed of gift had been executed on 23rd August 1921 the transaction was accompanied with delivery of possession to the donees and the transaction of gift was therefore complete on that date. As rightly conceded by the learned counsel for the appellant the subsequent registration was wholly unnecessary under the Mahomedan Law and was a superfluous act. S. 47, Registration Act lays down that:

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

Thus it will be clear that the registration of the deed of gift on 20th October 1921 cannot have the effect of novation of the gift. If any such object was intended the proper course for the donor to have adopted was to execute a fresh deed of gift. As it is, the deed of gift dated 23rd August 1921 must be deemed to take effect from the date of its execution even though it was registered some months later As admittedly the property which formed the subject of gift was under the control of the Collector on the date of the gift and as no written permission of the Collector was obtained as required by R 11, Sch. 3, Civil P. C. the gift was incompetent, and the decision of the lower Court is quite correct.

The next contention urged by the learned counsel for the appellant is that R. 11, Sch. 3, is applicable only to those cases in which a sale has actually been made by the Collector and where the alienation made by the judgment-debtor is in conflict with the transfer made by the Collector. He has argued that if the decree is satisfied by the judgment-debtor and no occasion arises for the Collector to take any action for the enforcement of the decree, then in such a case R. 11, Sch 3, has no application and any transfer made by the judgment-debtor must be held to be valid. He has in support of his argument referred by way of analogy to cases of private alienation of property after attachment and of transfers pendente lite and pointed out that in both these classes of cases the transfers are invalid only as against the claims enforceable under the attachment or claims arising under the decree or order passed in the pending suit. I regret I am not impressed with the soundness of this argument. The argument will be sufficiently answered by a comparison of the language used by the legislature in R. 11, Sch. 3, with the

language used in S, 64, Civil P. C. and S. 52, T. P. Act. In S. 64, Civil P. C., it is expressly provided that the alienation "shall be void as against all claims enforceable under the attachment." Similarly in S. 52, T P. Act the words use are that.

"The property connot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein."

Thus it is perfectly clear that in the case of attachment as well as in cases of transfers pendente lite the legislature has in express terms defined the extent to which the transfers would be invalid. On the contrary the language used in S. 11, Sch. 3, is quite different. The rule provides that in cases to which the rule applies the judgment-debtor:

"Shall be incompetent to mortgage, charge, lease or alienate any such property or part except with the written permission of the Collector"

The use of the word "incompetent" seems to show clearly that whilst the property is under the control of the Collector the judgment-debtor is disqualified from entering into any transaction in contravention of the terms of R. 11, Sch. 3. The disqualification imposed by the rule is absolute in its nature, making transactions entered into by the judgment-debtor contrary to the provisions of R 11 altogether void, and not merely voidable as against the Collector or persons claiming under him. The matter is concluded by the decision of their Lordships of the Privy Council in *Gauri Shankar Balmukand* v. *Chinnumaya* (1). In that case, it appears that a somewhat similar contention, with reference to S. 325-A, Civil P. C. (Act 14 of 1882) which corresponds to R. 11, Sch. 3 of the present Civil Procedure Code as urged before their Lordships Their Lordships make reference to the contention urged before them in the following terms:

"It is contended that S. 325-A is not to be read in the complete and operative sense natural to the words, that is to say, of incompetency to mortgage such property, but must be read with an implied limitation. The limitation suggested is that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's administration had ended."

Their Lordships rejected the contention and held that the mortgage made by the judgment-debtor while the Collector could exercise the powers given to him by Ss 322 to 325 Act 14 of 1882, was absolutely void and not merely voidable as against the Collector and those claiming under him. This contention also is, therefore, without force.

The appeals therefore fail and are dismissed with costs.

R.M./R.K. *Appeals dismissed.*

(1) A. I. R. 1918 P. C. 168=46 Cal. 183=45 I. A. 219 (P. C.).

A I R. 1929 Oudh 437

PULLAN, J

Sangam Madho—Defendant — Appellant.

v.

Ram Narain—Plaintiff—Respondent.

Second Appeal No. 153 of 1929, Decided on 8th August 1929, against decree of 3rd Addl. Dist. Judge, Lucknow, D/- 15th April 1929.

(a) Easements Act, S. 18—Privacy—Right acknowledged in award cannot be infringed.

Where a right of privacy appertains to the dominant owner's house and it is acknowledged by the parties at an award by arbitrators, the servient owner cannot open a window not used for the legitimate purpose of obtaining light and air and thus infringe upon the right of privacy possessed by the dominant owner. 29 *All.* 582 : *A. I. R.* 1926 *Oudh* 541 ; 5 *O. W. N.* 538, *Ref.* [P 438 C 2]

(b) Easements Act, S. 32—Constructions infringing upon rights of dominant owner cannot be allowed.

Where an award states that the wall of the servient owner shall not be constructed in such a way as to interfere with the rights of the dominant owner in respect of his existing constructions, the servient owner cannot, construct eaves or use the dominant owner's chabutra or do other acts infringing upon the servient owner's rights. [P 438 C 1]

Radhe Krishna—for Appellant.

Hakimuddin and *Naziruddin* — for Respondent.

Judgment.—This appeal arises out of a dispute between two neighbours in the town of Unao. The first dispute took place in 1926 when the present defendant, who is the appellant before me, wished to construct a wall adjoining the wall of the plaintiff's house. The dispute was submitted to arbitration and the arbitrator, who is stated to be the Government Pleader of Unao, made an

award containing inter alia the following clause :

"That the wall on the side of Munshi Ram Narain shall be absolutely blank, i. e., it shall have no cornice, eaves, drains, spouts, doors or window in it on the side of Munshi Ram Narain."

and there is another condition namely :

"that a parapet over the house roof shall be at least six feet in height so as to prevent people peeping through it to the north."

The intention of this award is manifest. It is in the first place that the wall of the defendant shall not be constructed in such a way as to interfere with the rights of the plaintiff in respect of his existing constructions, and in the second place it is intended to provide that the defendant shall not by his further constructions interfere with the right of privacy possessed by the plaintiff, otherwise there is no point in the order requiring the parapet to be six feet high. The defendant not being satisfied with this state of affairs proceeded to extend his wall beyond the boundary of Munshi Ram Narain's house, and on a portion of it, which he has constructed across a plot of land described now as rasta or path, he has in the first place constructed two doors. One an entrance to his house and the other an entrance to a new latrine and above this he has constructed a wall with a window in it which has been shown by the personal inspection of the Munsif to overlook about one-third of the court-yard of Munshi Ram Narain. There is no question that by making these constructions the defendant has offended against the spirit of the award made by the arbitrator.

The Munsif dismissed the suit and owing to the position of the defendant, who is a vakil practising in Unao, an application was made by the plaintiff to have the appeal heard in Lucknow. This application was granted by Hasan, J., and the appeal was heard by the Third Additional Judge of Lucknow and almost entirely decreed.

The defendant now appeals. The first point raised deals with the window. Now it was certainly intended by the arbitrator that no window should be made in the wall of the defendant which could overlook the court-yard of Munshi Ram Narain and the learned Judge has, with great fairness towards the defendant, allowed that the award should be restricted to that portion of the wall which was in dispute in the first case and should not be further applied to an extension of the wall. But even on this view he has felt constrained to interfere with the window. Had this been a window of a room used for the legitimate purpose of obtaining light and air, there might have been something to be said for the defendant, but the Munsif himself found that the window was useless. It is merely set in a wall and gives neither light nor air at any room. Sir George Knox remarked in the case of *Abdul Rahman* v. *Bhagwan Das* (1) :

"there is a great deal to be said in favour of the right of privacy being more substantially and materially invaded by apertures which would permit a person to look on without being observed, than by the existence of an open space where the presence of the looker on would at once be conspicuous and could easily be guarded against."

This ruling is perhaps not intended for general application and the remarks should certainly be read with the previous remark in the same judgment that every case of this kind must be governed by its particular facts and that the question in every such case is whether the construction amounts to a substantial interference with the right of privacy. A right of privacy is assumed to exist in all Indian towns, and this has been laid down both by the late Misra, J., in the case of *Mt Subhaga* v *Mt. Janki* (2), and Raza, J., in the case of *Sardar Husain* v. *Ahmad Husain* (3). Misra, J., in the first of these rulings also said that the mere fact that the house was not at the time occupied by pardahnashin ladies would not affect the right of privacy enjoyed by the owner. In the present case I have no doubt that a right of privacy appertains to the plaintiff's house and that his was acknowledged by the parties themselves at the time of the arbitrator's award. I also find that a window such as that constructed by the defendant does infringe upon the right of privacy possessed by the plaintiff, and I consider that the order passed by the lower Court in respect of this window is a proper one and should be maintained

The second question relates to the construction of certain eaves on the wall. These are in my opinion in direct contravention of the award. At the best it

(1) [1907] 29 All. 582=4 A.L.J. 445=(1907) A.W.N. 188.
(2) A I.R. 1926 Oudh 541=29 O.C. 136.
(3) [1928] 5 O.W.N. 588.

could only be said that they are constructed on an adjoining extension of the old wall, and they are bound to cause damage to the plaintiff's wall underneath by the fall of water. I agree with the lower Court that these eaves should be removed or dealt with in such a way that they no longer project from the defendant's wall.

The third point for consideration is the latrine constructed by the defendant to the west of the new main door. The finding of the Court below is that this latrine opens on to a chabutra which belongs to the plaintiff in the sense that it was built by him along with the rest of his house some 12 years ago. I see that when the defendant applied to the Municipal Board for permission to make his new building he did not in his map show any outside door to this latrine. This appears to be an afterthought and consequently was not necessary to the original design. It has been argued at length that as the plaintiff was unable to prove that he owned the land on which the chabutra stands, the defendant has a good right to use that chabutra as a means of access to his new latrine. I cannot accept this view. Whatever may have been the right of the plaintiff to the land, he is certainly entitled to the use of his own chabutra and the defendant has no right to interfere with that right. I find, therefore, that he is not entitled to open a door on to the chabutra nor is he entitled to have his napdan placed on the chabutra. An alteration of his napdan will not cause him much trouble as I see by the map that he took the precaution of constructing it so that it can equally well be opened on to the lane. As to the door it is argued that it need not be removed.

This argument cannot be rebutted. The only question is whether it can be used and it certainly cannot be used. If it is any satisfaction to the appellant the order as to the removal of the door may be converted into one ordering it to remain permanently closed. The only remaining subject of dispute between the parties is about certain water spouts which are made so as to discharge their water on the plaintiff's chabutra. This point was not seriously pressed in appeal and I see no reason to interfere with the very proper order passed by the Court below.

A cross-objection was made as to the main door on the ground that that controverts the award in the former suit and an attempt also was made to raise the question as to the plaintiff's right or ownership in the land on which the chabutra has been built. I do not consider that the award could be made to extend to the door leading on to the lane beyond the plaintiff's house, and I hold that the finding of the Court below as to the ownership of the land is a question which cannot be challenged in second appeal.

I am therefore not disposed to interfere with the judgment of the Court below either in the interests of the appellant or in that of the respondent, and I dismiss both the appeal and the cross-objection with costs.

R.M./R.K. *Appeal dismissed*

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* A. I. R. 1929 Oudh 439

WAZIR HASAN AND PULLAN, JJ

Sadiq Ali—Plaintiff—Appellant.

v.

Mt. Amiran — Defendant — Respondent.

Second Appeal No. 59 of 1929, Decided on 3rd September 1929, from decree of Sub-Judge, Sitapur, D/- 7th November 1928.

*** Mahomedan Law—Maraz-ul maut—Gift from husband to wife in lieu of dower is not a bequest and is not subject to doctrine of marazulmaut.**

A gift by a husband to his wife during marazulmaut, in satisfaction of his obligation to pay the dower debt cannot be treated as testamentary for the simple reason that had not the husband discharged his legal obligation, his estate in the hands of his heirs would have been liable to satisfy the same obligation. Such a gift being for consideration, is irrevocable and cannot be treated as bequest and, therefore, it is not subject to the doctrine of marazulmaut.

[P 440 C 2; P 441 C 1]

Naziruddin—for Appellant.

Ali Muhammad and *Ishwari Prasad*—for Respondent.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Sitapur, dated 7th November 1928, affirming the decree of the Munsif of the same place, dated 23rd May 1928.

One Ahmad Ali made a gift of all his property in favour of the defendant,

Mt. Amiran. The gift was evidenced by a deed dated 17th August 1927. Ahmad Ali died on 5th September 1927. The plaintiff, Sadiq Ali, is Ahmad Ali's uncle and claims title to the gifted property on the ground of inheritance.

The deed recognizes the defendant as a lawfully wedded wife of Ahmad Ali and purports to make the gift in consideration of the dower of Rs. 500 due from the donor. The value of the subject-matter of the gift is also stated in the deed approximately to be Rs. 1,000.

The plaintiff challenged the validity of the gift on various grounds but only one of such grounds now survives and constitutes the sole point of argument in this appeal. The lower Courts are agreed that the defendant was the married wife of Ahmad Ali and they are further agreed that the gift was made by Ahmad Ali during marazulmaut. The attack by the plaintiff on the gift in question is based on the last mentioned finding. It was argued in the Courts below and the argument is repeated before us that the gift having been made during marazulmaut operates in law as a bequest and being in favour of an heir is wholly void under the Hanafi Mahomedan law. The question for decision, therefore, is as to whether the gift of 17th August 1927 is subject to the doctrine of marazulmaut The Courts below have answered this question in the negative and the main ground on which the answer rests is that the gift being for consideration is virtually a sale and the decision of the Calcutta High Court in the case of *Eshaq Chowdhry* v. *Abedunessa Bibi* (1) is cited in support of the view taken

We are far from affirming broadly the proposition that all transactions known in Mahomedan law as hibabilewaz are or can be treated as transactions of sale. That the two transactions may bear close analogy in their results is not a sufficient ground in our opinion for holding that they are convertible terms. One of us had occasion to consider this matter at some length in the case of *Bashir Ahmad* v. *Mt. Zubaida Khatun* (2) and again in *Talib Ali* v. *Kaniz Fatima Begam* (3).

(1) [1915] 42 Cal. 361=28 I. C. 692=19 C. W. N. 925.
(2) A. I. R. 1926 Oudh 186=1 Luck. 82.
(3) A. I. R. 1927 Oudh 204=2 Luck. 575.

We are of opinion that the decree under appeal should be upheld but on a different ground. The general proposition of Mahomedan Law is that a gift, simple or bilewaz, is subject to the doctrine of marazulmaut and the effect of that doctrine is that the gift inter vivos acquires for all practical purposes the character of a testamentary disposition, though technically it is not a "legacy": Ch. 8, Book 8, Baillie's Digest of Mahomedan Law, Vol. 1

In the Baillie's Digest referred to above several illustrations of cases are given where a gift made during marazulmaut is placed on the footing of a bequest These illustrations, it is significant to note, are all cases of revocable gifts and there is not one single case of an irrevocable gift. Being a testamentary disposition in its nature and incidents, it follows that a gift in marazulmaut can be revoked and we think that the converse proposition that where the gift is not revocable it cannot be treated as a bequest is equally true. A gift of the latter description, therefore, is not subject to the doctrine of maraz-ulmaut.

In this case it must be held that the gift by Ahmad Ali to his wife, the defendant, cannot be placed on the footing of a bequest. Such a gift :

"cannot be retracted because the object of the gift is an improvement of affection (in the same manner as in the case of presents to relations) and as the object is obtained, the gift cannot be retracted"

Hamilton's Hedaya by Grady, p. 446 "The increase of affection excited in the wife by the gift is supposed, by the law, to be a return which she pays for it, and which consequently deprives the donor of the power of retraction . see the foot-note in Hamilton's Hedaya by Grady, p. 496."

When, therefore, there is a gift bilewaz by a husband in favour of his wife the consideration underlying it is not merely the material value of the thing received by him in exchange but also the personal element of the improvement of affection and love which naturally does not exist in a disposition to take effect after the death of the husband. Further when a gift is made during marazulmaut by a husband to his wife in satisfaction of his legal obligation to pay the dower debt as in the present case, such a gift cannot be treated as

ambulatory or testamentary for the simple reason that had the husband not discharged his legal obligation by means of the gift his estate in the hands of his heirs would be liable to satisfy the same obligation. If, therefore, the nature of this particular gift is such that it cannot be treated for the purposes of the distribution of the assets on inheritance as a bequest it follows according to our judgment that it is a gift not subject to the doctrine of marazuzmaut It may be added that a wife is a relation within the prohibited degrees and, therefore, a gift simple or bilewaz in her favour is irrevocable

We accordingly dismiss this appeal with costs

R M /R.K. *Appeal dismissed.*

A I. R. 1929 Oudh 441

STUART, C. J., AND RAZA, J.

(*Amir*) *Haider Khan*—Plaintiff—Appellant.

v.

Kanhaiya Baksh Singh—Defendant—Respondent

First Appeal No. 137 of 1928, Decided on 26th August 1929, from decree of Sub-Judge, Rae Bareli, D/- 1st September 1928.

(a) Civil P.C., Sch. 3, Para. 11—Construction—Provisions must be construed strictly and sale by judgment-debtor without Collector's written permission is void.

The provisions of para. 11 must be construed strictly and the declaration that a judgment-debtor shall be incompetent to alienate his property must be read in the exact and plain sense which the words imply. Where therefore a judgment-debtor effects a sale of property under attachment in execution of a money decree, and the permission of Collector has not been obtained the transfer is not only voidable but is void . *A. I. R.* 1918 *P. C.* 169, *Rel on.* [P 443 C 2]

(b) Civil P. C., Sch. 3, Para. 11—Permission by sale officer to deposit amount in satisfaction of decree does not amount to implied permission in writing.

Where the Collector is never asked to give his permission in writing and signs nothing, the mere fact that the officer conducting the sale of immovable property attached in execution of a money decree permits the alienee to pay a certain amount in satisfaction of the money decree in execution of which the property of the judgment-debtor is under attachment does not amount to an implied permission in writing of the Collector authorizing the judgment-debtor to alienate his property. [P 445 C 2]

A. P Sen and *S. C. Das*—for Appellant.

Prithi Nath Chaudhri—for Respondent.

Judgment.—This is an appeal by the plaintiff Thakur Amir Haider Khan against the dismissal of the suit which he brought to redeem a mortgage dated 14th September 1889 (Ex. A-1). This mortgage was executed by Saadat Khan in favour of Rawat Sheoratan Singh. The deed mortgaged with possession a share of 3 annas 3 pies 2 karants and 3 jaos in the village Jugrajpur and the hamlets of Rukunpur and Takhatnagar. The plaintiff asserted that he had obtained the right to redeem this mortgage by virtue of a sale deed Ex. 1 dated 18th July 1918 by which Mahomad Husain Khan the successer-in-interest of Saadat Khan transferred to him by sale the property mortgaged by Ex. A-1 in addition to properties in Rajapur and Rampur. In order to understand the questions for determination in this appeal, it is necessary to state the facts of other transactions which took place after the execution of Ex A-1.

A certain Nidha Bibi obtained a simple money decree against Mahomad Husa in Khan. This decree was passed on 20th January 1912 in Suit No. 125 of 1911. Some time towards the end of 1914 Nidha Bibi attached in execution of this decree a share in village Jugrajpur, which admittedly included the property mortgaged by Ex. A-1. The execution of the decree was transferred to the Collector (in this case the Deputy Commissioner of Rae Bareli) under the provisions of S. 68, Civil P. C The Collector was in a position to exercise or perform in respect of the judgment-debtor's immovable property the powers or duties conferred or imposed on him by paras. 1 to 10, Sch 3, Civil P. C. A suit was brought by the Court of Wards, which was then in charge of the estate of Rawat Kanhaiya Bakhsh Singh (who was the successor-in-interest of Rawat Sheoratan Singh the mortgagee under Ex. A-1) against Mahomad Husain Khan. This suit was based upon Ex. A-1 and certain deeds which were alleged to be deeds of further charge. This suit was brought some time in 1915 after the order of attachment had been made It did not proceed to judgment on the merits. We find from Ex. A-9 that Mahomad Husain Khan (who was

recognized as the successor-in-interest of Saadat Khan by the Court of Wards which was managing the estate of Rawat Kanhaiya Bakhsh Singh) and the Court of Wards arrived at a compromise, under which it was agreed that the claim should be settled for a nominal amount of Rs. 20,930. It was further, however, agreed that no money should be paid, but that the whole of the property mortgaged under Ex. A-1 should be transferred by deed of sale from Mahomad Husain to the Court of Wards as representating the estate of Rawat Kanhaiya Bakhsh Singh. The result should have been to give the mortgagee full proprietary title in the mortgaged property.

In pursuance of this compromise a sale deed Ex A-7 was executed on 17th April 1916. This sale deed was signed by Mr. H. S Rix, I. C S, as representing the Court of Wards in charge of the estate of Rawat Kanhaiya Bakhsh Singh. He was also the Deputy Commissioner of Rae Bareli. It does not appear to have been brought to the notice of this officer that at that time he was in charge of the proceedings in attachment in connexion with the share in Jugrajpur and the connected hamlets While the execution proceedings in attachment of the sale were proceeding, the plaintiff-appellant Thakur Amir Haider Khan appears to have entered into negotiations with the same Mahomad Husain (whom he also recognised as the successor-in-interest of Saadat Khan the mortgagor under Ex. A-1) and on 18th July 1918 Mahomad Husain executed the sale deed Ex. 1, to which we have already referred, by which he transferred to Amir Haider Khan the property which we have already described, that is to say, the property mortgaged under deed Ex. A-1, and some other property in Rajapur and Rampur. After the execution of Ex. 1 the plaintiff-appellant applied to the sales officer on 25th February 1919 (application Ex. 16) for permission to deposit the amount due to Mt. Nidha Bibi under her decree and thus obtain a release of the attachment. The copy containing the reference to the application and the order does not bear the name of the sale officer, but we have ascertained from the subsequent proceedings that the sale officer in question was a Deputy Collector called Lala Ram Gopal who was Treasury Officer of Rae Bareli This officer was not the Collector. He had been deputed by the Collector to conduct the execution proceedings On 5th March 1919, the plaintiff-appellant's agent was ordered to deposit Rs 6,000. He did so. It is to be noted that at that time there had been a change in the office of Deputy Commissioner. During February and March 1919 Mr. C. E. D. Peters, I. C. S., was Deputy Commissioner. The Civil List shows that Mr A. G. Shirreff, I. C. S., became Deputy Commissioner of Rae Bareli on 23rd April 1919. On 25th April 1919 Mr. Ram Gopal noted that Rs. 6,000 had been deposited (Ex 10), but that the balance of the decretal amount due had not been deposited. On 17th May 1919, Rs. 776-15-6 more were deposited on behalf of the plaintiff-appellant (Ex. 11). On 28th July 1919 Mr. Ram Gopal paid the full amount of Rs. 6,776-15-6 to Mt Nidha. The attachment was removed.

In the trial Court the defendant who is the representative of the mortgagee under Ex. A-1 questioned the right of the plaintiff to redeem on the ground that he had not obtained the written permision of the Collector, which is required by the provisions of para. 11, Sch. 3, to the alienation of the property by Mahomad Husain Khan. The plaintiff-appellant replied that the defendant-respondent, who asserted that he had obtained complete proprietary title in the property under the provisions of Ex. A-7, had also not obtained the written permission of the Collector to the alienation in his favour. The learned Judge decided that the alienation in favour of the plaintiff was void owing to his failure to obtain the written permission in question He decided that the alienation in favour of the defendant was also void owing to his failure to obtain the written permission in question in so far as Sch. 3 was concerned, but that it was a good alienation inasmuch as it was not a private transfer of the property attached within the meaning of S. 64, Civil P. C.

The learned counsel for the defendant-respondent has argued that the alienation in his favour was good, and that on that ground alone the suit of the plaintiff-respondent should be dismissed We consider that we are justified in the finding that it cannot be held to be good as a transfer other than a private transfer. In respect of the other ground which he pressed that he had obtained the written

permission of the Collector to the alienation in his favour, inasmuch as the Collector himself signed the deed Ex. A-7, we have only to say that we consider that in the present case it is advisable not to decide that point, as it cannot be decided finally now against persons other than the plaintiff in his present capacity, and as its decision is not necessary for the decision of this appeal. It is of course clear that Mahomad Husain Khan's right to redeem may still be brought forward in a subsequent suit, and to hold definitely either that the defendant-respondent has acquired full proprietary rights or that he has not acquired full proprietary rights would only complicate decision in a future suit, in which such a pronouncement would not operate as res judicata.

It is, however, clear that the plaintiff-appellant must succeed on the strength of his own title and not by questioning the proprietary rights of the defendant-respondent. We can decide this case simply on the following point. Has Thakur Amir Haider Khan obtained a right to redeem the mortgage Ex. A-1? He bases this right in the first place upon a purchase of the right to redeem from Mahomad Husain Khan, that is to say on Ex. 1. We are not concerned greatly with the question as to whether Mahomad Husain Khan was the sole successor-in-interest of Saadat Khan. We consider that the defendant-respondent was not wise in suggesting that he was not sole successor. It seems that he himself treated him as sole successor. But we find that the execution of Ex 1 has given the plaintiff-appellant no right to redeem. The provisions of para 11, Sch. 3, must be construed strictly. In *Gauri Shankar Balmakund* v. *Chinnumaya* (1) their Lordships of the Judicial Committee were dealing with S. 325-A of the old Civil P. C. (Act 14 of 1882). That section is identical with the present para 11, Sch. 3. There the case was a case of transfer by mortgage. Here it is a case of transfer by sale. But the nature of the transfer is immaterial. It was pressed before their Lordships that S. 325-A was not to be read in the complete and operative sense natural to the words, that is to say, of incompetency to mortgage such property, but must be read with an implied limitation. Their Lordships repelled that suggestion. They considered that the words must be read to give the obvious meaning and that there was a complete incompetency. They say :

"In short the sole point in this appeal is whether a declaration by statute that a judgment-debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense, which the words imply."

They went on to hold that the declaration must be read in the exact sense which the words imply. In these circumstances the transfer was not only voidable. It was void, because the written permission of the Collector had not been obtained.

The learned counsel for the plaintiff-appellant has argued that the written permission of the Collector was obtained to the alienation in his favour. He admits that the Collector signed nothing, and he admits that the Collector was never asked to give his permission in writing; but he suggests that the fact that the officer conducting the proceedings permitted the plaintiff-appellant to pay Rs. 6,776-15-6 in satisfaction of the decree in favour of Mt Nidha must be taken as an implied permission in writing. The argument appears to us to be a dangerous argument for the plaintiff-appellant to put forward, for if it were considered that a failure to object on behalf of the Collector to an alienation is tantamount to a written permission to alienate, the defendant-respondent would be on much stronger ground owing to the fact that the Collector himself had signed the sale deed Ex. A-7 in his favour, the sale deed in question being of a date prior to the date on which Ex. 1 was executed. But in any circumstances there cannot be a decision in favour of the appellant on this point. In the first place the officer conducting the sale (who is generally known as the "sales officer") was not the Collector and he had no authority to give any written permission. The facts that he permitted the plaintiff-appellant to deposit the money and thereupon withdrew the attachment do not to our mind show that he gave permission to the alienation in the plaintiff-appellant's favour. But in any circumstances he had no authority to give permission. The plaintiff-appellant's appeal must fall upon that ground.

(1) A. I. R. 1918 P. C. 168=46 Cal. 183=45 I. A. 219 (P. C.).

The learned counsel for the appellant has argued further that under the provisions of S. 91, Act 4 of 1882, he has a right to redeem. His case here is that Mt. Nidha Bibi was the judgment-creditor of the mortgagor, and that she had obtained execution by attachment of the mortgagor's interest in the property. Under S. 91 she could redeem the property. That is so. But the plaintiff-appellant was not a judgment-creditor of the mortgagor The learned counsel argues that, having paid off Mt. Nidha Bibi's decree, he had acquired her right to redeem We cannot accede to that proposition. He further suggested that he must be held, because he had paid off the amount due on the decree, to have an interest or charge on the right to redeem the property. We are unable to accept that argument. It appears to us that the plaintiff-appellant had no interest in the payment of Mt Nidha Bibi's decree. S. 69, Act 9 of 1872, would not apply. But even if he had an interest in the payment of Mt. Nidha Bibi's decree his remedy would have been against Mahomad Hussain Khan for reimbursement We consider that it is possible that he might have had a claim under S. 70 Act 9 of 1872, as he had lawfully paid the money for Mahomad Husain Khan, and did not intend to do so gratuitously, and Mahomad Husain Khan had enjoyed the benefit of his payment But that fact would give him only a remedy against Mahomad Husain Khan. It would not enable him to redeem the mortgage Ex. A-1. The learned counsel for the plaintiff-appellant has urged the hardship on his client who, as he points out, has paid Rs. 6,776-15-6 and obtained no benefit for having done so. That fact, however, cannot give him a right to redeem when he does not possess one otherwise. It is to be noted, that his sale deed not only covers the property mortgaged which was attached under Mt. Nidha Bibi's decree, but also other property which was not attached under the decree. In so far as the property not attached under the decree is concerned the transfer in his favour appears to have been a good transfer. We dismiss this appeal with costs.

Certain cross-objections were filed. The learned counsel has explained that he only filed these cross-objections in order to be in a position in event of it being found that the plaintiff-appellant was entitled to redeem the property to obtain an increase of the amount payable on redemption. As the appeal has failed the cross-objections fail automatically The parties will pay their own costs of the cross-objections

R M./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Oudh 444

WAZIR HASAN AND SRIVASTAVA, JJ.

Ganpat Prasad—Judgment-debtor—Appellant.

v.

Kashmiri Bank Ltd., Fayzabad—Decree-holder—Respondent.

Execution Decree Appeal No 71 of 1928, Decided on 18th July 1929, from order of Addl. Sub-Judge, Fyzabad, D/- 5th October 1928.

*** Civil P. C., S. 60, Proviso—Right of Gangaputra to receive offerings is right of personal service and cannot be attached—But right of occupation of particular spot on bank together with physical articles is liable to attachment.**

The right of Gangaputra to receive offerings is merely a right of personal service and as such cannot be attached. But his right of occupation of a particular spot on the banks of the river for the purpose of putting up his chauki is distinct from the personal right of receiving offerings and as such is not exempt from attachment or sale in execution of a decree. Similarly the physical articles, namely chaukis or wooden platforms are properties which are liable to attachment: (*Case law considered*). [P 445 C 2, P 447 C 1]

Hyder Husein—for Appellant.

Mahabir Prasad for *R. D Sinha*—for Respondent.

Judgment. — The Kashmiri Bank Ltd., Fyzabad, in liquidation, obtained a simple money decree on 25th November 1919, against Panda Ganpat Prasad Gangaputra of Ajudhya, district Fyzabad. The decree-holder made an application for execution of the decree by attachment and the sale of certain properties belonging to the judgment-debtor. One of the items of property sought to be attached and sold, with which alone we are concerned in this appeal, is described in the application for execution in the following terms.

"Chaukis on the bank of river Sarju City Ajudhya, Pergana Haveli Awadh, Tahsil and District Fyzabad, numbered below in the name of Panda Ganpat Prasad son of Joti Sarup. 20, 77, 78, 79, 150, 164, 165, 184, 254,

255, 256, 293, 299, 300, 323, 324, 325, 334, 340, 341, 345, 348, 349, 350, 95, 96, 97, 98, 99, and 100. Total 30 plots."

The judgment-debtor objected that the chaukis sought to be sold did not constitute any property, which could validly form the subject of attachment and sale in execution of the decree. He pleaded that the right to chaukis was only a personal right, which was exempt from attachment by virtue of S. 60, Cl. (f), Civil P. C. The Munsif accepted the objection of the judgment-debtor On an appeal by the decree-holder the learned Additional Subordinate Judge of Fyzabad set aside the order of the Munsif and declared that the chaukis in dispute were liable to attachment and sale in execution of the decree The judgment-debtor Panda Ganpat Prasad has come here in the second appeal.

Mr. Hyder Husein the learned counsel for the judgment-debtor appellant has contended that the right to chaukis consists merely of the right to receive offerings from pilgrims, who go to bathe at the ghats of river Sarju in lieu of services rendered by the Gangaputras. He argued that such a right is merely a personal right, which is exempted from attachment by S. 60, Cl. 5, Civil P C. The learned counsel for the respondent has on the other hand maintained that the right to chaukis consists not merely of the right to receive offerings from the clients but also of the right of occupation of particular spots on the bank of the river and that both these rights constitute property, which is heritable as well as transferable It will be clear, on the contentions of the learned counsel of the parties, as set forth above, that the determination of the question in controversy between the parties must rest to a great extent upon the determination of the nature of the rights possessed by the judgment-debtor which are sought to be attached and sold. We have already quoted the description of the property as given in the application for execution. We regret that the trial Court did not clearly elucidate the position of the parties as regards the right to chaukis, which formed the subject of controversy in the execution proceedings. However, the learned counsel for the parties are agreed before us that the bank of river Sarju is Government Nazul land and that the various Gangaputras are in occupation of different spots on the ghats of the river Sarju, on which spots they place wooden chaukis or platforms where the pilgrims come and sit. These pilgrims generally after they have had their bath make voluntary offerings to the particular Gangaputra on whose chauki they sit and put their clothes. Though the Gangaputras have no proprietary right in the land on which they place their chaukis, and whatever may be the rights as between them on the one hand and the Government Nazul department on the other, yet there can be no doubt that they have at the least a right of occupation of the particular spot in their possession. The question therefore is whether this right of occupation of the particular spot on which the judgment-debtor is entitled place his chauki, assuming it to be nothing more than a possessory right, can be subject to attachment and sale or not. In order to answer this question let us analyse the position a little more closely. The right to chaukis may consist of one or more of the following four rights

(a) right to ownership of the land on which the chaukis are placed,

(b) right to receive offerings from the persons who visit the ghats for bathing,

(c) right to the occupation of the particular spot on which the judgment-debtor is entitled to put his chaukis independently of the rights between him and the Government Nazul, and

(d) right to ownership of the wooden platform called the chauki.

As regards the right to the ownership of the land it is admitted that the judgment-debtor has no such right of ownership No claim for attachment or sale can therefore be based on this ground.

As regards the right to receive offerings from pilgrims we have no doubt that such a right is merely a right of personal service, which cannot be the subject of attachment and sale. This right of a Gangaputra or ghatia to receive offerings from pilgrims is similar to the right of a shebait or poojari to receive offerings at a Hindu shrine or the right of a Mahabrahman to get alms and offerings on the death of any person. The nature of such rights has been the subject of discussion in various cases

In *Ganesh Ramchandra Date* v. *Shankar Ramchandra* (1), it was held that the vritti by virtue of which certain religious ceremonies were performed on the river Godavari on behalf of the pilgrims who paid fees to the holders of priestly offices for the performance of such religious ceremonies at or about the time of their performance was a hereditary priestly office and that it was a

"right of personal service within the meaning of Cl. (f), S. 266, Civil P. C. (Act 14 of 1882), and therefore protected from attachment."

Similarly in *Govind Lakshman* v. *Ramkrishna Hari* (2), it was held that jyotishi vritti was a right to receive certain emoluments as a reward for personal service and therefore not liable to attachment.

In *Raja Ram* v. *Ganesh* (3), Ranade, J., in an instructive judgment held that a vritti cannot be sold in execution of a decree. He remarked on p. 135 that:

"compulsory alienation by way of sale in execution decrees has been disallowed in all cases as being not only opposed to Hindu Law and public policy but against the provisions of S. 266 as being right of personal service . . . . . Such compulsory sales might transfer such properties to persons disqualified to perform the duties of the office. In the case of private alienation this objection does not hold equally good and private alienations are not absolutely prohibited."

Further on p. 136 he observed:

"That the rules of succession depend upon the nature of each particular foundation or office and in respect of it custom and practice must govern and prevail over the text law which admittedly prohibited both partition and alienation . . . . . By force of custom, however, a limited right of partition and alienation might be established and custom must be ascertained by evidence in each class of cases."

We are in entire agreement with this exposition of the law on the subject

In *Kali Charan Gir* v. *Bangshi Mohan Das* (4) and *Jaggurnath Roy* v. *Kishen Pershad* (5) it was held that the rights of a shebait or other person to perform worship of a Hindu idol cannot be transferred. Similar view was taken by the Madras High Court in *Narasimma Thatha Acharya* v. *Anantha Bhatta* (6).

(1) [1886] 10 Bom. 395.
(2) [1888] 12 Bom. 366.
(3) [1899] 23 Bom. 131.
(4) 15 W. R. 339=6 B. L. R 727.
(5) 7 W. R. 266
(6) [1882] 4 Mad. 391.

In *Jhumman Pande* v. *Dinoonath Pandey* (7), *Durga Prasad* v. *Genda* (8) and *Durga Prasad* v. *Shambhu* (9), it was held that birt mahabrahmani is a right of personal service and cannot be attached. The same principle underlies the decisions of the late Court of the Judicial Commissioner of Oudh, relating to mahabrahmani dues in *Bhagwan Din* v. *Mani Ram* (10); *Baddu* v. *Babu Lal* (11) and *Mahesh Prasad* v. *Bharath* (12)

The learned counsel for the respondent has relied upon four cases: *Sukhlal* v *Bishambhar* (13); *Lokya* v. *Sulli* (14); *Suraj Prasad* v. *Ganesh Ram* (15) and *Gaya Din* v. *Gur Din* (16) In *Sukhlal* v. *Bishambhar* (13), there was a mortgage by one Mahabrahman in favour of another Mahabrahman and the mortgage was upheld. In *Lokya* v. *Sulli* (14), the only question was whether the birt jajmani was heritable and partible. In *Suraj Prasad* v *Ganesh Ram* (15), it was held that the right of a ghatia was a right to property and heritable under Hindu Law. Lastly in *Gaya Din* v. *Gur Din* (16), it was held that the right to receive offerings was capable of passing to the heirs by inheritance and also therefore subject to partition. We do not wish to express any opinion as regards the heritability or the power of making partition or private alienation in respect of such rights as no such questions arise in the present case, but we have no hesitation, on a review of all the authorities cited before us, in holding that the right of a Gangaputra to receive offerings is merely a right of personal service and as such cannot be sold in execution of a decree.

As regards the judgment-debtor's right of occupation of a particular spot on the banks of the river for the purpose of putting his chauki in order to carry on his profession it is unnecessary for us to enter into the question as regards the rights possessed by him in this respect

(7) 16 W. R. 171.
(8) [1889] A. W. N. 169.
(9) [1919] 41 All. 656=51 I C. 539=17 A.L.J. 842.
(10) [1902] 5 O. C. 225.
(11) [1908] 11 O. C. 212.
(12) [1920] 23 O. C. 252=59 I. C. 677.
(13) [1917] 39 All. 196=37 I. C. 661=15 A. L. J. 41.
(14) A. I. R. 1921 All. 286=43 All. 35.
(15) A. I. R. 1921 All. 235=43 All. 581.
(16) A. I. R. 1929 Oudh 257.

as against the Government Nazul, but we are inclined to agree with the learned Additional Subordinate Judge, that such a right of occupation of specific portions of the river bank as described by various numbers given in the application for execution is quite distinct from the personal right of receiving offerings and as such is not exempt from attachment or sale in execution of the decree. Similarly the physical articles namely chaukis or the wooden platforms placed on the ghat are also properties which are liable to attachment and sale.

For the above reasons we agree with the learned Additional Subordinate Judge and dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

A I R 1929 Oudh 447

PULLAN, J.

Muhammad Khan and *another*—Plaintiffs—Appellants.

v.

Sheo Bhikh Singh and *others*—Defendants—Respondents

Second Appeal No. 77 of 1929, Decided on 8th August 1929, from decree of Sub-Judge, Partabgarh, D/- 24th January 1929.

(a) Civil P. C., S. 100 — Appellate Court cannot interfere if decision of lower Court, though defective is based on findings of facts.

The appellate Court cannot interfere with the decision of the lower Court in second appeal only on the ground that it is defective if it is based on findings of facts. But where the lower Court goes beyond findings of facts, and its decision is wrong, the appellate Court can interfere. [P 447 C 2]

(b) Evidence Act, S. 91—Grant reduced to form of document — Document itself is only evidence—Secondary evidence is inadmissible where document not shown to have been lost.

Under S. 91 the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Only Cl. (c), S. 65, which makes secondary evidence of lost originals admissible can be applied to such a case; but where there is no evidence on record that the document has been lost Cl. (c) is inapplicable and a finding of Court based on existence of an ijazatnama which is said to be lost is erroneous in law. [P 448 C 1]

(c) Custom—Land cannot be claimed as reserved for burning corpses in absence of special custom, merely because some dead bodies had been burnt there.

Failing evidence that there is some special custom by which the land is reserved for the purpose of burning the dead bodies, the mere fact that certain dead bodies have been burnt there, gives them no title to a person to resist the claim to occupy the land by virtue of a lease. [P 448 C 1]

(d) Possession—Court of Wards representing zamindar holds possession of parti land of village presumed to be in possession of zamindar — Mere possession without title does not confer any right to possession.

The parti land of a village is presumed to be in the possession of the zamindar and Court of Wards representing the zamindar must be held to be in possession of the land. Mere physical possession without any title gives no right and, where the defendants are unable to set up any title though they may have been in physical possession of the land, they cannot set up any right. [P 448 C 1]

Ali Zaheer—for Appellants.

Radha Krishna—for Respondents.

Judgment—In this case the plaintiffs obtained a lease from the Court of Wards managing the estate of the Raja of Dalippur in respect of two numbers which are described in the revenue papers as parti land. The case was brought because possession was contested by the defendants who alleged that the greater portion of this land had been granted to them by the Raja himself by means of an ijazatnama for the purpose of planting a grove and that furthermore they had a right to burn their dead on the land.

The first Court decreed the suit but the lower appellate Court reversed this finding and I am asked in appeal to restore that of the Court of first instance.

There can be no question that the judgment of the Court below is in many respects defective but I could not on this ground alone interfere with it if it were held to be based on findings of fact arrived at by the Court below. I have considered all the findings of the Court below very carefully and I am of opinion that in so far as they are findings of fact they have no effect on the suit, and where they go beyond being findings of fact they are demonstrably wrong. The defendants base their title on an ijazatnama which they said they lost and which is supposed to have been granted to them six years ago by the Raja of Dalippur before his estate was taken under the Court of Wards. Under S. 91,

Evidence Act, the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible Secondary evidence could only be admissible under the terms of S 65, Evidence Act, and the clause applicable could only be Cl. (c), but this clause is not applicable because there is no evidence on the record to show that the document is lost. Thus any finding of the lower Court based upon the existence of the ijazatnama is erroneous in law

The second finding is that the defendants used some portion of this land as chiari, that is to say, they had on occasions burnt corpses on the land Failing evidence that there was some special custom by which this land was reserved to the defendants for the purpose of burning their dead, I am unable to hold that the mere fact that certain dead bodies had been burnt there gives the defendants any title to resist the plaintiffs' claim to occupy the land in virtue of the lease

The other two findings of the Court appear to be, first, that the Court of Wards was not in possession and secondly that the defendants were in possession, but the Subordinate Judge does not say when the Court of Wards was not in possession, or how the defendants came into possession. Mere possession is admitted by the plaintiffs but possession without title cannot give any right to the defendants. Nor can it be understood how it could be found that the Court of Wards was not in possession They represented the zamindar. The parti land of the village is presumed to be in the possession of the zamindar, and as the defendants have been unable to set up any title, although there may have been physical possession, the Court of Wards must be held to be in possession as zamindar.

I cannot, therefore, hold that the findings of fact arrived at by the Court below make a decision based as it is on a most inadequate appreciation of the facts of the case, insusceptible to failure in second appeal. On the facts I have no doubt that the plaintiffs obtained a valid lease from the Court of Wards for a plot of land which the Court of Wards was entitled to give on lease, and the defendants had no title whatever on which to resist the plaintiffs. The evidence of the Raja himself in so far as it is admissible is of very little value He did not even remember if the land was parti or a grove, and although he attempted to help the defendants by writing a letter to the Court of Wards after the plaintiffs' lease was granted, and he ventured also to say that the land appeared to be chiari, he could only say that he had been told that the ijazatnama had been lost, and he was unable to state on what ground he held the land to be chiari. In my opinion the Court of first instance was right and the lower appellate Court was entirely wrong

I allow this appeal, set aside the order of the lower Court and restore that of the Court of first instance with costs throughout.

R M /R.K. *Appeal allowed.*

A. I. R 1929 Oudh 448

PULLAN, J.

Pirthipal Singh — Defendant — Appellant.

v.

Hari Saran Das and *another*—Plaintiffs and Defendant—Respondents.

Second Rent Appeal No. 32 of 1928, Decided on 27th February 1929, from an order of Addl. Dist Judge, Gonda, D/- 1st January 1928.

Local Rates Act (1 of 1914), S. 8 (a)—Under-proprietor is liable to pay for maintenance of rural police under Cl. (a).

Section 8 clearly lays down two payments which are connected by the word "and" immediately preceding the letter (a) which commences the second portion of that section. This portion prescribes a payment in lieu of an amount previously collected under the United Provinces Local and Rural Police Act, which is now to be levied as a local rate. An under-proprietor is liable to pay for the maintenance of rural police under Cl (a).

[P 449 C 1]

K. P. Misra—for Appellant.

Mahesh Prasad—for Respondents.

Judgment.—This second appeal has been filed by an under-proprietor in order to contest his liability to pay local rates to the taluqdar. In the Court of first instance a calculation was made which is now admittedly incorrect. In first appeal the matter was not decided at all because the Judge satisfied himself by saying that nothing was shown in support of the plea. Now the appel-

lant accepts the arithmetical accuracy of the calculation which has been filed by the learned advocate for the respondent ; but he admits only his liability to pay the first portion of the sum arrived at, namely, an item of Rs. 6-9-9 which is the sum due as local rates under the first portion of S. 8, Local Rates Act (1 of 1914). He contests his liability as to a sum of Rs. 7-6-3 alleged to be due under Cl. (a) of the same section, contending that under S. 17 of the same Act no sum is now due from under-proprietors for the maintenance of the rural police and, therefore, Cl. (a) can only refer to sums due before 1914 when the United Provinces Local and Rural Police Rates Act, 1906, was repealed by Act 1 of 1914. In my opinion the contention is incorrect. S. 8 clearly lays down two payments which are connected by the word "and" immediately preceding the letter (a) which commences the second portion of the section. This portion prescribes a payment in lieu of an amount previously collected under the United Provinces Local and Rural Police Rates Act, which is now to be levied as a local rate. And S. 17 carries this further by pointing out that as the police rate is now included in the local rate no additional sum can be levied from an under-proprietor for the maintenance of the rural police.

The last point raised by the appellant is that even if this is the case he should not have to pay, because there is no proof that at the time of the commencement of the Act he was liable for payment of any of the rates payable under the United Provinces Local and Rural Police Rates Act, 1906. He says that if he paid anything at all he paid it under an agreement of the year 1866. It may be that his agreement was entered into in the year 1866, but it continued to subsist after the Act of 1906 was passed ; and whatever payment was made for the upkeep of the police after the passing of that Act must be held to be a payment made under that Act. Moreover this point was decided by the Court of first instance and has not been clearly challenged in appeal. In my opinion the appellant is liable both for the sum of Rs. 6-9-9 per annum due as local rates proper and for the sum of Rs. 7-6-3 due as local rates in substitution for the old police rate. The amount due, therefore, for one year is Rs. 14 and for one and a half years is Rs. 21. I allow the appeal to this extent that the decree of the local Court is modified and the sum of Rs. 21 is substituted for the amount previously decreed on account of local rates. As the difference between this decree and that of the Court of first instance is only Rs. 0-9-2, this practically amounts to dismissal of the appeal ; but under the circumstances of the case I order the parties to bear their own costs in this Court.

R.M./R.K. *Order accordingly.*

A. I. R. 1929 Oudh 449

STUART, C. J., AND RAZA, J.

Jagannath Prasad and *another* — Plaintiffs—Appellants.

v.

Naurang Singh and *others*—Defendants—Respondents.

First Appeal No. 104 of 1928, Decided on 31st July 1929, from decree of Sub-Judge, Bara Banki, D/- 30th April 1928.

(a) Transfer of Property Act, S. 74—Subrogation—Where mortgagee takes renewal of previous liabilities in full satisfaction no question of subrogation arises.

Where a deed of mortgage is executed in satisfaction of amount due on prior deeds and an advance in cash, there being prior and puisne mortgagees, the subsequent mortgagee cannot claim priority on the ground that the deeds have been kept alive and can be pleaded to give them priority over subsequent alienations by the mortgagor. It is not a case where a subsequent mortgagee has paid off prior liabilities incurred by the mortgagor in favour of third parties and no question of subrogation arises. [P 450 C 2]

(b) Transfer of Property Act — Mortgagee allowing right to recover money on basis of previous liabilities to be lost by time, cannot claim priority.

A mortgagee taking fresh deed in satisfaction of previous liabilities cannot claim priority on basis of the earlier mortgages when he allows his right to recover money on basis of earlier mortgages to be lost by lapse of time: 33 *Cal.* 527 (*P.C.*) and 17 *O. C.* 33, *Rel. on.* [P 451 C 1]

Hyder Husein and *A. C. Mukerji*—Appellants.

H.N Misra and *Kunj Behari Shukla*—for Respondents

Judgment.—The facts of this appeal are as follows : The plaintiffs-appellants came into Court for relief on the basis of a deed of simple mortgage dated 7th

August 1914. There is no doubt as to execution of the deed. There was, however, contest on many points. The deed had been executed by a certain Autar Singh and professed to transfer joint family property. Although Autar Singh was held competent to transfer the property the learned trial Judge found in respect of his sons (who now represent the family) that they were not obliged to pay interest at the rate which Autar Singh had agreed to pay and the amount claimed was substantially reduced. The reduction of interest is not challenged by the plaintiff-appellants. In the array of parties were certain persons who were joined as puisne mortgagees It was put forward on contest not only that there were puisne mortgagees but that there were many prior mortgagees The prior mortgages were set forward and in the decree provision was made for the recognition of these prior mortgages The suit was instituted on 6th August 1927. Later on the plaintiffs applied for permission to amend the plaint. The main modification proposed was this The deed of mortgage on which the suit was based was executed in satisfaction of the amount due on two prior deeds and an advance in cash. In the proposed amendment it was set forth that the plaintiffs should be allowed priority in respect of the amounts due under the prior deeds The learned trial Judge refused to permit the amendment of the plaint and did not touch on the point in his judgment. The appeal before us has been argued upon the basis that the amendment had been allowed but that the point had been decided against the plaintiffs.

It will be necessary in the first place to state particulars as to the dates of these respective deeds. There are in the first place two registered deeds of mortgage, one of 4th May 1904 and the other of 5th March 1909, in favour of third parties. There can be no doubt as to the fact that the holders of these deeds can claim priority against the appellants. The next deed which we come to is a deed dated 21st July 1909 (Ex. 2) This is in favour of the plaintiffs' predecessor in-interest. It is a deed of simple mortgage for Rs. 500 cash This is Ex. 2. Then follow deeds in favour of third parties of 27th July 1909, 14th October 1910, 22nd July 1912, 1st July 1913 and 8th August 1913. Next comes a deed of further charge dated 23rd December 1913, in favour of the plaintiffs' predecessor-in-interest. This was a deed for Rs 200 This deed is Ex. 3.

Now we have it that the deed of 7th August 1914 which is for Rs. 2,200 was executed for the following consideration:

For satisfaction of the principal on two deeds Exs. 2 and 3 ...	... Rs.	700
For interest on the two deeds Ex. 2 and 3 ...	... "	1,000
Paid in cash ..	... "	400

This is the deed on which the plaintiffs claimed for principal and interest Rs 39,651.

It will be observed that the plaintiffs would not have as great advantage in setting up Ex. 3 as setting up Ex. 2. What the plaintiffs are doing is this They are asserting their rights under the deeds Exs. 2 and 3 claiming that those rights have been kept alive and can be pleaded to give them priority over subsequent alienations by the mortgagor It is not a case in which a subsequent mortgagee has paid off prior liabilities, incurred by the mortgagor in favour of third parties This is a case in which the mortgagee has himself taken a renewal of previous liabilities in full satisfaction. As we understand it there can be no question of subrogation in the particular circumstances. But even if it were possible for such a claim to be put forward the rule laid down by their Lordships of the Judicial Committee in *Mohammed Ibrahim Husain* v. *Ambika Prasad Singh* (1) is sufficient to show that these pleas are barred by limitation. The facts there were as follows :

A certain Girwar Singh had executed a zarepeshgi lease on 20th November 1874 Twelve thousand rupees due under this lease were repayable in September 1887. On 17th Feburary 1888 the successor of Girwar Singh executed a deed of mortgage One of the conditions of the mortgage was the payment of the amount due under the zarepeshgi lease. When the suit was brought eventually on the basis of the mortgage of 17th February 1888, certain persons set up transfers of dates between 20th November 1874 and 17th February 1888. The holders of the mortgage of 17th February 1888 claimed priority because they had

(1) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).

paid off the amount due under the zarepeshgi lease. Their Lordships rejected this plea for the following reasons :

"But as the Rs. 12,000 were under the zarepeshgi deed of 20th November 1874, repayable in Jeth 1294 Fasli (September 1887) and this suit was not brought until 22nd September 1900, the claim of the plaintiffs to priority is barred by Art. 132, Sch. 2, Lim. Act."

The facts here are similar. On the date when the present suit was brought, 6th August 1927, all reliefs based on Ex. 2 and Ex. 3 were time barred. A somewhat similar matter was before the Judicial Commissioner in 1913 The then Judicial Commissioner, Mr. Lindsay decided the appeal in this matter : *Deputy Commr. of Lucknow* v. *Sukhnandan* (2) He discussed the question at pp. 43 to 46. We are in full accord with what has been stated in that decision. This disposes of the only grounds on which the appeal was argued The learned counsel abandoned grounds 5 to 7. The appeal is dismissed with costs. There will be two sets of costs. Raja Bhagwan Bukhsh Singh will get his costs separately and the remaining respondents who are represented by the same learned counsel will receive one set of costs.

R.M./R.K. *Appeal dismissed.*

(2) [1914] 17 O. C. 38=23 I. C. 448.

A. I. R. 1929 Oudh 451

WAZIR HASAN AND PULLAN, JJ.

(*Hakim*) *Bashir Ahmed*—Defendant—Appellant.

v.

Sadiq Ali—Plaintiff—Respondent.

Second Appeal No. 42 of 1929, Decided on 26th August 1929, against decree of Sub-Judge, Lucknow, D/- 12th October 1928.

Civil P. C., S. 96 (3)— Agreement to abide by decision of Court bars appeal — Agreement is not barred by Contract Act, S. 28.

Where the parties give their consent to the Court as to the procedure which the Court is to adopt in matter of coming to a decision on the merits of the case and they also give their consent that such a decision will be binding on them, it is tantamount to saying that the decision will be final and no right of appeal will be exercised by the parties. The parties cannot resile from the agreement and an appeal is incompetent. S 28, Contract Act, does not apply to the case and it is not necessary that the agreement should be considered to be an adjustment within the meaning of O. 23 or that the effect of the agreement should be to constitute the Court an arbitrator in the controversy : *A. I. R.* 1923 *Mad.* 444, 14 *M. I. A.* 203 (*P. C.*), *Ref.*; *A. I. R.* 1926 *P. C.* 139, *Rel. on.* [P 452 C 1, 2]

Wasim and *Zahur Ahmad*—for Appellant.

Mahabir Prasad Srivastava—for Respondent.

Judgment.—This is the defendant's appeal from the decree of the Subordinate Judge of Lucknow, dated 20th October 1928 confirming the decree of the Munsif, South Lucknow, dated 18th May 1928. The plaintiff brought the suit out of which this appeal has arisen for a declaration of certain easement rights in relation to his residential house The proceedings in the suit while it was pending in the Court of first instance abruptly terminated under an agreement of the parties. That agreement was as follows:

"At this stage the parties agree to leave the case for decision to the Court. They agree that they will not produce any oral or documentary evidence. They agree to abide by the decision of the Court whatever it may be. They give to the Court power to take into account the documents already on the record and to summon any evidence it likes. They do not put any sort of limitation on the powers of the Court. "

In pursuance of this agreement the Court pronounced its decision and it happened to be in favour of the plaintiff. From the decision of the first Court the defendant preferred an appeal to the Court of the Subordinate Judge of Lucknow who, on a preliminary objection taken by the plaintiff, held that the appeal was incompetent. He accordingly dismissed the appeal.

In second appeal it is contended that the agreement on its construction does not preclude the defendant from exercising his right of appeal which is given to him by law, that is S. 96, Civil P. C, 1908, and secondly that, in any event the decision of the Court being neither a decision of an arbitrator nor on a settlement or adjustment of the claim, as contemplated by O 23, R. 1, Civil P. C. the decree of the Court of the first instance was appealable, notwithstanding the agreement.

The learned advocate for the appellant cited the decision of the High Court of Madras in *Sankaranarayana Pillai* v. *Ramaswamiah Pillai* (1). This decision, if we may respectfully say so, is exhaustive in its nature and deals with

(1) A. I. R. 1923 Mad. 444=47 Mad. 39.

cases decided both in England and in India bearing on the question now being considered. Reference was made to the decision of their Lordships of the Judicial Committee in the case of *Pizani* v. *Attorney General for Gibralter* (2), and to the decision of the House of Lords in *Burgess* v. *Morley* (3). Amongst other cases reference was made also to the case of *Saiyan Zain* v. *Kalabhai Lallubhai* (4) and *Nidamarthi Mukkanti* v. *T. Ramayya* (5).

Little need be said on the question of construction of the agreement, which we have reproduced in extenso in the foregoing part of this judgment. We think that the words are clear and emphatic. The parties gave their consent to the Court, to the procedure which the Court was to adopt in the matter of coming to a decision on the merits of the case then before it and they also gave their consent that such a decision will be binding on them. This is tantamount to saying that the decision shall be final and no right of appeal will be exercised by either of the parties. This being our construction of the agreement in question, we think that there is nothing in general principles which will have the effect of permitting any one of the parties to resile from the agreement Reference in this connexion was made to the provisions of S 23, Contract Act, 1872. We are of opinion that that section has no application to the present case. The agreement with which we are concerned in the present case is not an agreement by which any party

"is restricted absolutely from enforcing his rights under or in respect of any contract."

In the first place there is no absolute restriction placed on any party from enforcing his rights. Indeed the rights were in controversy between the parties in the suit in which the agreement was arrived at. What was restricted was the right to challenge the propriety of the decree of the Court of first instance. That clearly was a right in a rule of procedure provided by law. Secondly the case in which the agreement was made was not a case to enforce rights under or in respect of any contract.

Decisions in the High Courts in India have mainly proceeded on two lines, one that there is no right of appeal, if the agreement is considered to be an adjustment of a suit within the meaning of O 23, Civil P. C., and secondly if the effect of the agreement is to constitute the Court an arbitrator in respect of the controversy in the suit. We are of opinion that it is not necessary that an agreement to support the exclusion of the right of appeal must always rest on one or the other of the two grounds just now mentioned If the agreement is not void by the effect of any rule of law, we see no reason why it should not be enforced as an agreement We have already rejected the contention that S. 28, Contract Act, 1872, makes the agreement void. This agreement has all the necessary elements of a valid contract. It is not disputed that it is supported by consideration and is free of any taint of undue influence, mistake or misrepresentation. We think that it is legally binding on the parties and according to the decision of their Lordshtps of the Judicial Committee in the case of *Moonshi Amir* v. *Inderjeet Singh* (6), it is equally binding on the conscience of the parties.

The only matter which now remains to be considered is the argument that S 96, Civil P. C., gives a right of appeal to every party who feels aggrieved of the decision of the Court of first instance and that this right is not subject to any contract which may exist between the parties. It appears to us that there are two answers to this argument. The right of appeal is clearly made subject to "any other law for the time being in force." One of such laws is the law of contract. According to that law a party is entitled to the benefits of an agreement if it is a valid and enforceable agreement. We have already said that the agreement before us is of such a nature. Another answer is that sub-S. (3), S 96, Civil P. C., 1908 clearly provides that no appeal shall lie from a decree passed by the Court with the consent of parties. As against the applicability of this subsection, the argument on behalf of the appellant is that there is "no decree passed by the Court with the consent of parties" in the present case, because there was no adjustment of the suit under O. 23, Civil P. C. We are unable to accept this argument.

(2) [1874] 5 P. C. 516=22 W. R. 900=39 L.T. 729.
(3) [1896] A. C. 136.
(4) [1899] 23 Bom. 752.
(5) [1903] 26 Mad. 76.
(6) [1870] 14 M. I. A. 209=9 B. L. R. 460=2 Suther. 479=2 Sar. 731 (P. C.).

Sub-S. (3) to which reference has just now been made does certainly include decrees passed in consequence of an adjustment under O. 23, Civil P. C., but the subsection is not limited to that class of decrees only. There may be other decrees than decrees on adjustment passed by the Court with the consent of parties, and the decree in the case before us was such a decree. There can be no doubt on a proper construction of the agreement that the parties gave their consent to a decree which the Court may pass in the subject matter of the controversy involved in the suit. This being so, we are of opinion that the appeal in the Court below was incompetent and so is the second appeal in this Court. This view would seem to be in accordance with the view of their Lordships of the Judicial Committee in *Ramchandra Deo Garu* v. *Chaitana Sahu* (7).

The appeal is dismissed with costs.

R.M./R K *Appeal dismissed.*

(7) A. I. R. 1920 P.C. 139=47 I.A. 200 (P.C.)

A. I. R. 1929 Oudh 453

WAZIR HASAN AND SRIVASTAVA, JJ.

Lachhmi Narain and *another*—Defendants—Appellants.

v.

Mangal Prasad—Plaintiff—Respondents.

Second Appeal No. 2 of 1929, Decided on 3rd September 1929, from decree of 1st Addl. Dist. Judge, Lucknow, D/- 22nd November 1928.

(a) Civil P. C., S. 100—Findings of facts to preclude second appeal must be precise and definite.

To preclude a second appeal on a question of fact there must be a precise and definite finding on that question. Mere rambling suggestions and a bare possibility of certain view of evidence being plausible are not findings of facts against which appeals could be excluded. [P 453 C 2 ; P 454 C 1]

(b) Hindu Law—Antecedent debt—Sums admitted to be paid in part consideration of deed do not constitute antecedent debt.

Where the plaintiff suing on a deed of charge admits that certain sums were paid by him as part consideration of the deed, the sums do not constitute an antecedent debt. [P 454 C 1]

Khaliquzzaman—for Appellants.

Ghulam Hasan—for Respondents.

Judgment.—This appeal arises out of a suit for sale of certain immovable property on the foot of a deed of mortgage dated 16th April 1914 and a deed of further charge dated 6th March 1916. Both these deeds were executed by one Ram Adhin. Ram Adhin has since died and his sons are the defendants to the suit. The plea in defence is that the mortgaged property being joint family property could not be burdened by Ram Adhin for debts which were not binding on the family. The plaintiff did not admit that the property was ancestral joint family property but the Courts below have decided this matter against the plaintiff and the decision has been accepted as correct and binding before us on behalf of the plaintiff-respondent. The question which remains for consideration is as to the binding character of the debts incurred under the two deeds mentioned above.

The deed of 16th April 1914 was executed in lieu of a debt of Rs. 500 principal. It carried interest at the rate of 15 per cent per annum. The details of the total amount of the consideration were specified in the deed and with the exception of a sum of Rs. 50 which was admittedly advanced in cash at the time of the execution of the deed the rest of the consideration was a debt previous in time The question which arose in those circumstances was as to whether the previous loans could be treated as items of antecedent debt or were advances made in connexion with the mortgage transaction The Court of first instance decided this question against the plaintiff. On appeal by the plaintiff, the learned Additional District Judge of Bara Banki took a contrary view of the evidence in the case bearing on this part of the controversy. He held that according to the evidence, the entire sum of Rs. 450 ranked as antecedent debt Before we accept this decision of the learned Judge as a finding of fact conclusive in second appeal we must emphasize a point of view which is occasionally lost sight of by the Courts below. The law allows second appeals only on questions of law and on such questions as are stated in the rules of procedure and a second appeal on no other question is allowed. From this it follows that there is no second appeal on a question of fact ; but to preclude a second appeal on a question of fact there must be a precise and definite finding on that question. Mere rambling

suggestions and a bare possibility of a certain view of evidence being plausible are not findings of facts against which appeals could be excluded.

In this particular case though we do hold that having regard to the contents of the judgment under appeal as a whole there is a finding of fact that the sum of Rs. 450 constitutes antecedent debt in the sense that it is made up of previous loans disassociated with the mortgage in suit the learned Judge in the Court below has indulged in remarks and observations which are indefinite, vague and open to more than one interpretation

So far as the consideration for the mortgage of 16th April 1914 is concerned, it remains now to decide the validity or otherwise of the remaining item of Rs 50 admittedly borrowed at the time of the execution of the deed of mortgage Clearly it is not an antecedent debt. The learned Judge of the Court below upholds it on the ground of legal necessity. This again is a finding of fact having regard to the evidence on which it could be based and which the learned Judge has accepted as reliable. This disposes of the deed of mortgage.

The deed of further charge dated 6th March 1916 was executed for a total consideration of Rs 150. This is divided into three items of Rs. 33, Rs. 35 and Rs. 82 As regards the first sum of money, the learned Judge in the Court below is of opinion that this was advanced for legal necessity and having held that the evidence was trustworthy he finds it proved as such. This finding must be accepted.

As regards the other two sums of money forming the consideration of the deed of further charge, he is of opinion that they constitute antecedent debts. It is agreed now that the learned Judge was in error in doing so. The plaintiff clearly admitted that these two sums of money were paid by him as part consideration of the deed in question This being the plaintiff's case the learned counsel for the respondent was right in disassociating himself from the finding of the learned Judge in the Court below that these sums of money constituted antecedent debts. The argument before us is that their validity is justified by legal necessity. In support of the argument reliance is placed solely on the evidence of the plaintiff himself. In these circumstances we are called upon to decide a question of fact in this second appeal and our decision is that the plaintiff's evidence alone is not sufficient to support the case that these sums were advanced by the plaintiff to Ram Adhin for purposes which would amount to legal necessity under the Hindu Law; but apart from this the evidence in itself is vague. We accordingly hold that the plaintiff has failed to prove that the loan of Rs. 35 and Rs. 82 is justified by any legal necessity.

We, therefore, allow this appeal and modify the decree of the Court below by dismissing the plaintiff's suit in respect of the two sums of Rs. 35 and Rs. 82 and the interest thereon which were claimed as part consideration of the deed of further charge dated 6th March 1916 (Ex 2). The rest of the decree is upheld. The parties will receive and pay costs in all the three Courts in proportion to their success and failure. A fresh decree of sale according to law shall be prepared in this Court allowing six months' time to the defendants to satisfy the amount for which the decree will now be made (The fact that the appeal was from an order of remand was not brought to the notice of their Lordships at the time of hearing. But it was subsequently brought to their notice whereupon the following order was passed.

Order.—This appeal was from an order of remand which our judgment upholds. A finding of the lower appellate Court as to the amount of mortgage money due to the mortgagee was modified. At the time when we were dictating our judgment in Court it was not brought to our notice that we were hearing an appeal from an order of remand under O. 41, R. 23, Civil P. C. This being so, we directed that a fresh decree of sale be prepared in this Court This was obviously erroneous. We accordingly withdraw the last portion of our judgment now quoted :

" The parties will receive and pay costs in all the three Courts in proportion to their success and failure. A fresh decree of sale according to law shall be prepared in this Court allowing six months' time to the defendants to satisfy the amount " for which the decree will now be made. "

As to the costs so far incurred in all stages of the litigation our order is that they will abide the event.

R.M./R.K. *Appeal allowed*

A. I. R. 1929 Oudh 455

PULLAN, J.

Jagannath—Applicant.

v.

Sheo Shankar and *another*—Opposite Party.

Civil Revn. No. 40 of 1929, Decided on 7th August 1929, against order of Sub-Judge, Unao, D/- 8th April 1929.

Civil P. C., S. 11, Expln. 4—Omission by sub-mortgagee to claim amount due on sub-mortgage does not bar fresh suit.

It is not incumbent on the sub-mortgagee to claim payment in a redemption suit by a puisne mortgagee. By failing to do so he risks his own security but he cannot be barred from bringing a suit against his own mortgagor to recover the sum advanced by him. The first suit does not also operate as res judicata when the matter in issue (that the sub-mortgage was fictitious) in the suit was not brought to the knowledge of the sub-mortgagee whose presence was not compulsory at the hearing; 15 *Bom* 692 and 28 *All.* 638, *Dist.* [P 455 C 2]

S. N. Srivastava for *Radha Krishna*—for Applicant.

Zahur Ahmad and *Chandika Prasad*—for Opposite Party.

Judgment.—This is an application for revision of an order passed by a Judge of the Small Cause Court. The plaintiff Sheo Shankar is a sub-mortgagee and he has brought this suit under S. 68, T. P. Act, to recover his share of the sub-mortgage executed in his favour on 17th June 1921 by the prior mortgagee Jagannath. This Jagannath had in his favour a mortgage dated 5th June 1912 and this was redeemed by one Sidh Gopal, a puisne mortgagee, by means of a suit in the Court of the Munsif which was decided on 28th November 1927 In that suit the present plaintiff was impleaded as a defendant. He made no appearance and in his absence a decree was passed for redemption on payment of a sum of Rs. 1,200 to Jagannath.

This application has been admitted on the ground that the lower Court made a mistake in law and that he should have held that the decision of the Munsif dated 28th November 1927, operates as res judicata against the present suit The plea of res judicata was taken in the Court below in reference only to an alleged finding by the Munsif that the sub-mortgage in favour of the present plaintiff was fictitious. What the Munsif said was:

"defendant 1, (i. e. Jagannath) swears that the mortgage-deed executed by him in favour of defendants 2 and 3 (one of whom is the present plaintiff) is fictitious. Under the circumstances I decree the plaintiff's claim for redemption on payment . . . . . of the sum of Rs. 1,200."

No doubt this is equivalent to a finding by the Munsif that the sub-mortgage can be disregarded as being fictitious, but it is evident that this finding is based entirely on a statement made in Court by Jagannath and the matter was not in issue to the knowledge of the present plaintiff whose presence at the date of hearing was not compulsory. The lower Court was therefore right in holding that the judgment of the Munsif in so far as this finding is concerned, did not operate as res judicata in the present suit. But in the grounds of revision before me a slightly different position is taken. It is argued not that this specific finding of the Munsif operates as res judicata but that the failure of the present plaintiff to claim the amount due on his sub-mortgage in the previous suit is the bar. It is sought to bring this omission under Expln. (4), S. 11, Civil P. C. It is argued that the sub-mortgagee was a necessary party to a suit for redemption and he must claim payment of his sub-mortgage in the redemption suit Reliance is placed on a ruling of the Bombay High Court reported in *Narayan Vithal* v. *Ganoji* (1) and on a ruling of the Allahabad High Court reported in *Gokul Das* v. *Devi Prasad* (2), but neither of these rulings help the applicant in the present case. All that they lay down is that if the person claiming redemption so desires he is entitled to have an account taken of the sub-mortgages if any. But there is nothing in these rules or, as far as I know, elsewhere which makes it incumbent on the sub-mortgagee to claim payment in the redemption suit. By failing to do so he risks his security but it has never been held that he cannot bring a suit against his own mortgagor to recover the sum advanced by him under S. 68, T. P. Act Thus I am unable to find that the lower Court is in error either on the issue which he decided or on the question raised in a different form for the first time in this Court. The plaintiff was entitled to his

(1) [1891] 15 Bom. 692.
(2) [1906] 28 All. 638=3 A. L. J. 548=(1906) A. W. N. 162.

decree and I reject the application with costs.

R.M /R.K. *Application rejected.*

A. I. R. 1929 Oudh 456

STUART C. J., AND RAZA, J.

Lalta Prasad—Defendant—Appellant.

v.

Brahma Din and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 136 of 1928, Decided on 22nd August 1929, from decree of Addl. Sub-Judge, Sitapur, D/-16th August 1928.

Civil P. C., O. 20, R. 18—After preliminary decree in partition suit, application for final decree is proper course and fresh suit for absolute partition does not lie—Art. 181, Lim. Act, does not apply to such application — Such application, however, affects properties then in suit and not new properties.

Where in a partition suit a preliminary decree has been passed, the proper course for parties asking for partition is to make a further application for final decree for partition and a fresh suit for absolute partition does not lie. Such an application can be made at any time as there is no limitation to an application made in partition suit after the passing of a preliminary decree. Art. 181 does not apply to such a case. An application for the passing of a final decree in continuation of a preliminary decree can, however, affect only the property that was then in suit and new properties cannot be added : 29 *O. C.* 281 *Rel. on* and 18 *All.* 390, *Dist.*

[P 457 C 2]

K. P. Misra and *P. L. Varma* — for Appellant.

M Wasim and *Khaliquzaman*—for Respondents.

Judgment.—The parties to this appeal were originally members of a joint Hindu family governed by the Mitakshara Law. In the year 1915 Brahma Din, Sitaram, Ganesh Prasad and Jwala Prasad instituted in the Court of the first Subordinate Judge, Sitapur, a suit for partition of the joint family property against Lalta Prasad, Ram Dayal and Ram Kumar and one of the female members of the family who was entitled to maintenance The suit was determined by a compromise in 1916. In the compromise the property was divided into 256 shares out of which Brahma Din was declared to be entitled to 112 shares, Sita Ram, Ganesh Prasad and Jwala Prasad to 63 shares, Ram Dayal and Ram Kumar to 52 shares and Lalta Prasad to 29 shares. The decree passed was in the main a preliminary decree of the nature for which provision is made in O. 20, R. 18. The property partitioned consisted of :

1. Revenue paying land owned by the family.
2. Land mortgaged to the family.
3. Groves owned by the family.
4. Groves mortgaged to the family.
5. Ten houses belonging to the family.
6. One house mortgaged to the family.
7. Rights under deeds and decrees and amounts due on parol debts.
8. Moveable property.

While the decree in part was a preliminary decree it was to a certain extent a final decree for it provided for the immediate partition of the moveable property It was stated that the revenue paying land belonging to the family should be partitioned by the revenue Courts. This has been done. The mortgaged property and the rights under the deeds and the amounts due as debts have also been partitioned. This much is admitted. In fact the only portions of the family property which have not been partitioned are the ten houses to which we have referred as item 5. Two of those houses have fallen down. Whatever has been done in partition by the parties has been done without the assistance of the civil Courts. On 30th January 1928 Brahma Din instituted a suit for an absolute separation of his 112/256th share in the ten houses in question. When the case was examined, it was found that two of the houses had fallen down. There was no opposition from the other members of the family except from Lalta Prasad. Sita Ram is now dead. Lalta Prasad had asserted that no partition could take place because the houses had already been partitioned. He further took exception that there were two other houses belonging to the joint family which had not been included in the previous suit. He desired that they should be added. He next took the plea (which was hardly consistent with the other pleas) that no suit could lie as Brahma Din had exhausted all his remedy by instituting the previous suit. The learned trial Judge passed a decree of this nature. He found that two of the houses had fallen down and he added the other two houses which Lalta Prasad suggested were joint

family property. He found that there had been no previous partition and that Lalta Prasad's plea to that effect was without foundation. He then proceeded not to partition of Brahma Din's share of 112/256 but to grant another declaratory decree (in other words another preliminary decree) that Brahma Din held a share of 112/256 in the eight houses formerly in suit and the two houses added and that Ganesh Prasad held a 63/256th share in the same houses. It is to be noted that the decree as it stands cannot be executed. It will be necesssary for Brahma Din, Ganesh Prasad and Jwala Prasad, if they wish to have their share separated, to apply for a final decree They, however, seem satisfied with the relief which they have obtained. Lalta Prasad has appealed. In his grounds of appeal he reiterated that the houses had already been partitioned. His learned counsel has, however, not argued on that portion of the appeal, and has accepted the decision against his client in respect of that plea The learned counsel has pressed the plea that the present suit did not lie and that Brahma Din's remedy was to obtain a final decree upon the preliminary decree of 1916. The Allahabad decisions which the learned trial Judge has quoted against his view are based in the main on the pronouncement of a Bench of the Allahabad High Court in *Nasratullah* v. *Mujibullah* (1). It is to be noted that this decision was prior to the passing of Act 5 of 1908. Act 5 of 1908 laid down for the first time explicitly that in a partition suit there could be both a preliminary and a final decree. Previous to the passing of that Act there could be only one decree in a partition suit and that decree could undoubtedly become time barred. The decision of the Bench of the Allahabad High Court at p. 313 said :

"It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition and desiring to partition has his right challenged it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable."

We lay stress on the words "provided his prior decree is not still enforceable." As we understand it the preliminary decree of 1916 is enforceable. We adopt the view which was taken by the late Court of the Judicial Commissioner in *Tajammul Husain* v *Bande Raza* (2). In our opinion Art. 181, Sch. 1, Act 9, of 1908, cannot apply in a matter like this

"There is no limitation applicable to an application made in a partition suit after the passing of a preliminary decree by which the shares of the parties are defined, in order that the proceedings may be continued for the purpose of actually effecting a partition and that a final decree in partition may be prepared."

This is the head note of that decision. We accept it as a correct statement of the law on the subject. In these circumstances Brahma Din's proper course was to apply for a final decree under which his share in the houses could be partitioned. Such an application is not time barred. It is the case for the learned counsel for the appellant Lalta Prasad that such an application is not time barred. But a second suit is not permissible because it is covering the same ground. But it is noticeable that an application for the passing of a final decree in continuation of the preliminary decree of 1916 can only affect the property that was then in suit. The addition of the two houses mentioned in list A attached to Lalta Prasad's written statement is not justified. The question is simply a question of procedure. Its decision will make little difference in expenditure of time or in any other way, for the present decree before us is not a final decree, and it would be necessary for Brahma Din, Ganesh Prasad and Jwala Prasad to have a final decree passed upon it Whether the final decree is based upon the present decree or upon the previous decree is obviously of little moment. But on the legal aspect of the case we have no choice except to allow the appeal and dismiss the suit. We have already indicated that the fact that

(1) [1891] 13 All. 309=(1891) A. W. N. 117.

(2) [1920] 23 O. C. 281 = 60 I. C. 493 = 7 O. L. J. 538.

we are taking this course will in no way prevent Brahma Din, Ganesh Prasad and Jwala Prasad from applying at once to have a final decree as a consequence of the preliminary decree of 1916. The appeal is allowed, and the suit is dismissed. In the circumstances of the case we direct the parties to bear their own costs.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 458

STUART, C. J. AND RAZA, J.

Chotkao Singh—Objector—Appellant.

v.

Hasan Baqar — Decree-holder — Respondent.

Execution Decree Appeal No. 6 of 1929, Decided on 6th May 1929, from order of Sub-Judge, Bara Banki, D/- 12th January 1929.

(a) Hindu Law — Debts — Whole joint family property is liable under decree unless debt by father is tainted with immorality.

Where father incurs debts and a decree is passed in that respect, it is open to the creditor to take all joint family property in execution of that decree and son cannot object to it unless the debt was incurred for immoral purposes : *A. I. R.* 1924 *P. C.* 50, *Foll.* [P 458 C 2]

(b) Hindu Law — Debts — Speculation by itself does not make the debt immoral.

Speculation is not usually repugnant to good morals and if the transaction in question is speculative the debt cannot be considered to be tainted with immorality unless it is tainted with fraud : *A. I. R.* 1928 *Oudh* 10, *Rel. on.* [P 458 C 2]

R. B. Lal—for Appellant.

Naimullah—for Respondent.

Judgment.—The facts of the case out of which this appeal arises are these. Syed Hasan Bakar obtained a decree on 5th November 1925 against Sheo Narain Singh Sheo Narain Singh died on 5th March 1928 In execution of this decree Saiyed Hasan Bakar has attached certain property. The present appellant Chotkao Singh, a minor son of Sheo Narain Singh, has objected to the attachment on the ground that the property being joint family property the share of Sheo Narain Singh at the most could be attached ; and on the further ground that the debt on which the decree was passed was tainted with immorality. The learned trial Judge finding against him on both points, he has appealed here. The main questions have been decided definitely by their Lordships of the Privy Council in *Brij Narain* v. *Mangla Prasad* (1). At p. 139 (*of* 51 *I. A*) their Lordships said :

"If he (the meaning member) is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

Thus the plea that the property is joint family property is of no value. Here Sheo Narain Singh incurred a debt. A decree was passed upon the debt and the whole of the estate is open to be taken in execution proceeding upon that decree unless the debt has been incurred for an immoral purpose. We now come to the second plea : Was the debt incurred for an immoral purpose? The judgment-debtor at the very commencement gave up the suggestion that his father Sheo Narain Singh was guilty of immoral connexions with women, but he proceeded to add that Sheo Narain indulged in intoxicating drugs as a result of which he embarked in speculative transactions The learned Judge has found on the evidence before him that it is not established that Sheo Narain Singh indulged in intoxicating drugs. We agree with that finding Even if the transaction in question were speculative we would not consider that the debt was tainted with immorality, for we hold, agreeing with the view taken in *Mohammad Ali* v *Jhao Lal* (2), that speculation in itself does not enter into the question. Speculation is not usually repugnant to good morals. It may be foolish but it is not, unless tainted with fraud, immoral. Apart from that we find on the facts that the transaction was not greatly speculative. It was certainly risky. As we have held that the debt was not tainted with immorality we uphold the decision of the Court below and dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

(2) A. I. R. 1928 Oudh 10.

A. I. R. 1929 Oudh 459

MISRA, J.

Bisram Singh and *another*—Plaintiffs—Appellants.

v.

Danna—Defendant—Respondent.

Second Rent Appeal No 29 of 1927, Decided on 17th August 1928, against decree of Dist Judge, Sitapur, D/- 21st April 1927.

(a) Landlord and Tenant—Rent—Suit for—Tenant pleading payment of rent to third person—Third person must be impleaded as co-defendant.

It is usual rule that whenever a tenant pleads payment of rent to third person such third person is invariably impleaded as defendant. [P 460 C 2]

(b) Oudh Rent Act (22 of 1886), S. 126—Cosharer entitled to collect rent by custom—Commutation from kind to fixed money rent by lambardar is not binding upon co-sharers.

Where there exists a local custom in mahal by virtue of which every cosharer of that mahal is entitled to collect rent, tenants paying rent in kind, it is not legally open to the lambardar to commute their rent into cash rent without the consent of all the co-sharers. The action of the lambardar thus commuting the grain rent into cash rent is not binding upon other cosharers. [P 463 C 1]

(c) Custom — Every cosharer of mahal Mathura Singh (Oudh) is entitled to collect his share of rent.

It is established that there exists in mahal Mathura Singh of village Khairapara in Oudh a custom by virtue of which a cosharer of that mahal is entitled to collect his share of rent. [P 463 C 1]

Ali Zaheer and *P. L Verma*—for Appellants.

Ishwari Prasad and *R. N. Shukla*—for Respondents.

Order of Remand

Misra, J.—(*29th March* 1928).—This appeal arises out of a suit brought by the plaintiffs-appellants against the defendant-respondent for arrears of rent for the year, 1333 Fasli in respect of the land situate in mahal Mathura Singh of village Khairapara, District Sitapur. The said mahal is owned by the appellants, Bisram Singh and Thakurain Raj Kuar as well as by Hem Singh and other co-sharers. Thakur Hem Singh is the lambardar of the mahal. It was alleged by the plaintiffs that the produce of the defendant's holding for the year 1333 Fasli on accouut of the rabi crop was worth Rs. 264-11-0 and that on account of kharif crop it was worth Rs. 4, only, the total being Rs 268-11-0. Out of this amount, the plaintiffs alleged themselves to be entitled to a sum of Rs. 126-15-3. They have also claimed Rs. 6 5 0 on account of interest, the total amount claimed thus being Rs. 133-4-3.

The defence raised by the defendant was to the effect that he was not liable to pay the rent as claimed by the plaintiffs since his grain rent had been commuted by Thakur Hem Singh lambardar into cash rent, it being fixed at Rs. 42 a year. It was alleged by him that he had paid this amount of rent to the lambardar and he was not in any way liable to pay any sum. It was also pleaded in defence that the plaintiffs were not legally entitled to bring the present suit under the provisions of S. 126, Oudh Rent (22 of 1886), since mahal Mathura Singh constituted a joint estate in which a division had not been made among the cosharers, and the plaintiffs not being managers authorized to collect rent on behalf of all the cosharers, were not en-entitled to bring the present suit. It was also pleaded that Thakur Hem Singh lambardar was entitled to make collections; and that the defendant had in good faith paid his rent to him. The plaintiffs urged in their replication that a custom prevailed in this mahal by virtue of which all the cosharers therein were entitled to collect their rent, and consequently the plaintiffs were entitled to bring the present suit for their share of the rent They also contended that they were not bound by the lease which had been executed by Hem Singh lambardar in favour of the defendant under which the latter's grain rent had been commuted into cash rent, because that was an act of the lambardar obviously injurious to the interests of the plaintiffs and other cosharers and consequently they could not be considered to be bound by that action of the lambardar.

The learned Assistant Collector who tried the case framed the following issues:

(1) Is Hem Singh alone as lambardar entitled to collect rent?

(2) Is the land in suit grain rented, or is it held on a cash rent of Rs 42 a year?

(3) Has the rent in suit been paid to Hem Singh? And if so, whether in good faith or otherwise?

I may just state here that no issue regarding the custom pleaded by the plaintiffs was framed by the trial Court

nor was any issue framed as to the validity of the patta granted by Hem Singh to the defendant under which the latter's rent had been commuted into cash rent.

The learned Assistant Collector decided issue 1 in favour of the plaintiffs by holding that each cosharer was entitled to collect rent of his share and that Hem Singh alone was not entitled to collect the entire rent as lambardar. As to issue 2, the Court decided that Hem Singh alone not being entitled to grant the patta the defendant was liable to pay grain rent. As to issue 3, the trial Court came to the conclusion that in view of its finding on issues 1 and 2 the payment made by defendant to Hem Singh could not be considered as valid payment of rent due to the plaintiffs. On these findings a decree was passed in favour of the plaintiffs for the entire sum claimed

The defendant appealed to the learned District Judge of Sitapur who found that the custom as to collection by the different cosharers of their share of rent had not been made out, and that the lambardar was, therefore, entitled to collect the rent and as such the payment made to him by the defendant was good payment. In this view of the case he decreed the appeal and dismissed the plaintiff's suit

In second appeal it is contended before me that the finding of the learned District Judge on the question of custom should not be accepted since in arriving at that finding he had ignored the entire evidence produced by the plaintiffs in respect of that issue. It is also argued that the patta granted by Hem Singh as lambardar was not for the benefit of all the cosharers and could not, threfore, be considered as binding on them It was urged that decree for the entire claim should have been passed in favour of the plaintiffs for their share of the rent as claimed.

I have heard this appeal at great length and have come to the conclusion that the finding arrived at by the learned District Judge is vitiated by the error that it has not been arrived at after considering the entire evidence on the record. If he had considered the entire evidence on the point and then come to the conclusion to which he has arrived I would have had no hesitation in accepting his finding and deciding the appeal in accordance therewith. I, however, find that no less than six witnesses were examined by the plaintiffs to prove that the custom in mahal Mathura Singh was to the effect that every cosharer collected his share or rent. The defendant himself went into the witness-box and denied that such a custom prevailed. Thakur Hem Singh lambardar also deposed to the same effect. There were three other witnesses examined on behalf of the defendant who deposed that lambardar alone used to collect rent and to issue pattas commuting grain rent for cash rent I have been taken through the entire evidence on the record and the patwari's evidence appears to me to to be good evidence in favour of the plaintiffs.

No mention is, however, made of this evidence one way or the other in the judgment of the learned District Judge. He has only referred to the evidence of P. W. No 3 Gangadin, and to that also only so far as a small passage is concerned I am not, therefore, satisfied with the finding arrived at by the learned District Judge on the question of the custom pleaded by the plaintiffs-appellants. I would have either arrived at a fresh finding myself or remanded the case for fresh finding after consideration of all the evidence on the record It is, however, not possible for me to take any of these two courses since I find that the issue framed by the trial Court on this point is an incomplete issue. The issue which the Court ought to have framed on the pleadings should have been

"whether there existed any local custom in mahal Mathura Singh by virtue of which the cosharers in that mahal were entitled to collect their share of the rent"

This has not been done

I also realize the necessity of Thakur Hem Singh being impleaded as a party in the case. It is usual rule that whenever a tenant pleads payment of rent to a third person such third person is invariably impleaded as a co-defendant.

I should have also expected the trial Court to have framed an issue to the effect whether a lambardar was entitled in law or by custom to commute the grain rent for the cash rent without the consent of the cosharers The second issue that has been framed by that Court is merely to the effect whether the land in suit is grain rented or held on a cash rent. In my opinion this defect should also be removed.

I also find from the evidence on the record that the kankut proceedings which are alleged by the plaintiffs-appellants, are not satisfactorily proved to have taken place in the presence of the defendant-respondent, Danna. Under those circumstances it is doubtful whether he would be liable to pay rent at the rate at which the plaintiffs claim. Prima facie it appears to me to be an exorbitant rate. An inquiry has to be made in respect of this matter also.

On a consideration of all these points I have come to the conclusion that it would not be proper for me to decide the case on the materials which exist at present on the record. I am, therefore, obliged to remand this case to the learned Assistant Collector, Sitapur, with a direction that he will implead Thakur Hem Singh as a co-defendant in the case and that he would allow the parties to produce any further evidence which they may like to produce on the issues which I am now remitting to him for trial

1. Does there exist any local custom in mahal Mathura Singh of village Khairepara by virtue of which every cosharer of that mahal is entitled to collect his share of the rent? Or whether the lambardar alone is entitled to collect the rent?

2. Are the cosharers of mahal Mathura Singh bound by the action of Hem Singh lambardar in commuting grain rent for cash rent? Is his action in commuting grain rent of the defendant for cash rent justified by any benefit to the cosharer?

3. Were any kankut proceedings held in the year 1333 Fasli in respect of the crops standing in the holding of the defendant Danna? If so, were they held in his presence and are they binding upon him?

4. If not what is fair and proper rent for the holding in dispute?

5. Has the defendant paid Rs 42 to Thakur Hem Singh lambardar, and if so, was that payment made in good faith and is it binding upon the plaintiffs?

The learned Assistant Collector will allow the parties to produce before him such oral and documentary evidence as they may like to produce and will then submit his finding on the above issues. He is also requested to deal with the evidence now on the record and the evidence to be produced before him in detail. Findings are to be returned to this Court within a period of four months from this date. Parties will be given 10 days' time to file their objections against the findings, time to be reckoned from the date when the findings are notified to them by the learned Assistant Collector.

Judgment—The facts of this case are sufficiently stated in my order of remand dated 29th March 1928.

The findings on the issues remitted by me have now been submitted by the learned Assistant Collector. It appears from them that he has held an elaborate and exhaustive enquiry and the findings submitted by him have been of great help to me in deciding this case.

The issues submitted by me were as follows

(1) Does there exist any local custom in mahal Mathura Singh of village Khairepara by virtue of which every cosharer of that mahal is entitled to collect his share of the rent? Or whether the lambardar alone is entitled to collect the rent?

(2) Are the cosharers of mahal Mathura Singh bound by the action of Hem Singh lambardar in commuting grain rent for cash rent? Is his action in commuting grain rent of the defendant into cash rent justified by any benefit to the cosharers?

(3) Were any kankut proceedings held in the year 1333 Fasli in respect of the crops standing in the holding of the defendant Danna? If so were they held in his presence and are they binding upon him?

(4) If not, what is fair and proper rent for the holding in dispute?

(5) Has the defendant paid Rs. 42 to Thakur Hem Singh lambardar, and if so, was that payment made in good faith and is it binding upon the plaintiffs?

I may state that I had directed the learned Assistant Collector to make Hem Singh a party to the suit and also allow the parties to produce such more oral and documentary evidence as they may like to produce. I find that this has been done and the findings returned by the learned Assistant Collector are to the following effect:

As to issue 1 he has found that the custom pleaded by the plaintiffs that in mahal Mathura Singh of village Khairepara every cosharer of that mahal is entitled to collect his share of rent is

established; and that the lambardar alone is not entitled to collect the rent.

As to issue 2 he has found that the lambardar had no authority to commute the rent of the grain paying tenant and that his action in commutting rent of defendant Danna into cash rent was not justified by any benefit to the cosharers since the holding can be let out on rent for Rs. 100, whereas the cash rent fixed by Thakur Hem Singh was only Rs. 42.

As to issue 3 he has found that it is proved that kankut proceedings were held in the year 1333 Fasli in respect of the crops standing in the holding of defendant Danna, and that he was present when such proceedings were held, but they are not binding on him since the valuation of the crops was immensely exaggerated.

As to issue 4 he has found that the fair and proper rent for the holding in dispute amounts to Rs. 79.

As to issue 5 he has found that it is not proved that the defendant paid Rs 42 to Hem Singh and in any case the said payment was not made in good faith and is not binding upon the plaintiffs.

Objections have been filed by defendant-respondent, Danna, in this Court and by Hem Singh defendant in the Court below, to all these findings, and the case has been argued before me at great length.

I now proceed to give my decision in regard to each of the issues remitted by me.

Issue 1.—This issue relates to the existence of the local custom alleged by the plaintiffs to prevail in mahal Mathura Singh of village Khairapara by virtue of which every cosharer of that mahal is entitled to collect his share of the rent. As remarked by the learned Assistant Collector this is the most important issue in the case. (His Lordship referred to the evidence and proceeded) There is, therefore, left no doubt in my mind that this evidence shows satisfactorily that the rent belonging to Raj Kuar has been collected separately for a long time. This would not have been the case, if the rent had been collected by the lambardar alone and not by the cosharers separatley.

I may also refer to the evidence of Hem Singh himself, who was examined in this case as D. W. 1. He stated clearly in cross-examination that in the case of bitai tenants he never took more than his own share while other cosharers took their shares. He also stated that he did not give any share out of his collections to any cosharer. This goes clearly in support of the custom alleged by the plaintiffs.

I should now like to refer to the wajibularz produced in the case (Ex. B-7). Para. 3 of the said wajibularz shows that the fixation of rent and other matters connected with the management of the estate took place with the consent of the cosharers. If there had been a custom in mahal Mathura Singh to the effect that the lambardar used to collect rent all alone, such a state of affairs as is pointed out by the wajibularz would not have existed. In that case it would have been recorded in the wajibularz that it is the lambardar, who is responsible for the fixation of the rent and for doing other acts in the course of management. The wajibularz further provides that every cosharer pays separately his quota of the Government revenue. This also supports the custom alleged by the plaintiffs

It was argued on behalf of the defendant that since in para 2 of the wajibularz the entire mahal was stated to have been bilijmal no such custom ought to be presumed to exist in that mahal. I do not see any force in this contention, because the custom like the one alleged by the plaintiffs is recognized by law to prevail in joint estates, and if it is found to exist its validity has to be recognized: vide S. 126, Oudh Rent Act

Reference was also made on behalf of the defendant to the statement of Bhagwant Singh P W. 2 made in a previous suit (Ex. B 16) in which he had stated that his share of profits was still due from Hem Singh, and consequently the latter suit against him should not be decreed. It was contended on the basis of this statement that this proved collection of the rent by the lambardar Hem Singh. I am unable to accept this contention for two reasons: firstly that this was a statement made by Bhagwant Singh in a suit brought against him by Thakur Hem Singh for recovery this share of the Government revenue and might have been made by him falsely to suit his purposes of defence in the case;

secondly that there are certain shamilat lands in mahal Mathura Singh, which belong to all the cosharers and it may have been that the profits mentioned by Bhagwant Singh as due to him were in respect of those shamilat lands.

On a consideration of all the oral and documentary evidence I am of opinion that the finding as to custom arrived at by the learned Assistant Collector is correct and must be maintained.

Issue 2 —As to issue 2 I am of opinion that Hem Singh, lambardar, was not justified in commuting grain rent into cash rent in respect of the holding of defendant Danna. The learned Assistant Collector has found that ordinarily the holding would fetch Rs. 100 and that the fair rent for that holding, taking all circumstances into consideration, would be Rs. 79. Under these circumstances the commutation of the rent of his holding to Rs. 42 cannot be justified, and the cosharers of mahal Mathura Singh cannot be considered to be bound by his action. Apart from this I am of opinion that in the case of tenants paying their rent in kind it is not legally open to the lambardar to commute their grain rent into cash rent without the consent of all the cosharers. Such an action on his part could not, in my opinion, be considered to be an action in the ordinary course of management of the village. He may be entitled to collect rent from the tenants as it stands, i e., if the tenants are paying cash, to collect rent in cash and if they are paying their rent in kind, to take grain instead. I am not, however, prepared to hold that he would be entitled for the purpose of management to convert the grain rent into cash rent, since such conversion would alter the very system of collection for which the lambardar cannot be considered to have any authority in law. I am, therefore, of opinion that the action of Hem Singh, lambardar, in commuting the grain rent of defendant, Danna, into cash rent is not binding upon the other cosharers of mahal Mathura Singh The same view was taken by the revenue Courts which did not uphold the validity of the leases granted by Hem Singh to other tenants: vide Exs. A-1 and A-2. Hem Singh admitted this fact in his evidence and stated further that when he gave the pattas to these tenants he had taken verbal consent of all the cosharers. There is no proof of such consent having been taken in the case of defendant Danna. (After deciding issues 3 to 5, his Lordship concluded). The result of these findings is that the plaintiffs would be entitled to get a decree for their share of the rent payable by Danna; that kankut proceedings held in the year 1333 Fasli in respect of Danna's crops cannot be upheld, and that the fair and proper rent for his holding is Rs. 79. According to that calculation the plaintiffs would be entitled to Rs. 37-2-0 as their share of rent.

I, therefore, set aside the decree of the learned District Judge of Sitapur, dated 21st April 1927, and also discharge the decree passed by the learned Assistant Collector on 15th January 1927, and in lieu of these decrees I pass a decree for Rs. 37-2-0 in favour of the plaintiffs as their share of rent in the holding of the defendant Danna in respect of the year 1333 Fasli

As to costs my order is that the defendant Danna and Hem Singh will pay their own costs of all the Courts and will further pay the costs of the plaintiffs appellants in all the Courts proportionately to the amount now found due to them.

R K *Appeal allowed.*

A. I R. 1929 Oudh 463

MISRA AND PULLAN, JJ.

Abdul Wahid Khan and *another*—Plaintiffs—Appellants.

v.

Ali Husain—Defendant— Respondent.

Second Appeal No 146 of 1928, Decided on 8th November 1928, from decree of Addl. Dist. Judge, Gonda, D/- 20th January 1928.

Civil P. C., S. 11—Prior mortgagee who is also puisne mortgagee impleaded in suit by mesne mortgagee as subsequent mortgagee—No contest as to prior mortgage—Prior mortgagee's rights are not barred by res judicata—Civil P. C., O. 34, R. 12.

If a prior mortgagee with a paramount title who is also a puisne mortgagee is impleaded in a suit by a mesne mortgagee as a subsequent transferee and there is no contest in that suit regarding the prior mortgage, the right of the prior mortgagee is not lost to him. [P 466 C 1]

If, however, there is controversy about the prior mortgage and that controversy is de-

cided against him whether by actual decision or in default, his remedy is barred as res judicata : *A. I. R.* 1920 *P. C.* 81 and *A. I. R.* 1929 *Oudh.* 83, *Foll.* [P 466 C 1]

Niamatullah and *Naimullah*—for Appellants.

M. Wasim—for Respondent.

Judgment.—This is an appeal arising out of a declaratory suit which has been dismissed by the two lower Courts.

The facts of the case are that one Mohammad Khan was the owner of a three annas share in village Bargadhi which constitutes a hamlet of a bigger village Chhach-hundahi-Singhahya mohal Mustahkam pergana Utraula, District Gonda. This share of three annas now represents a six annas share by virtue of partition. Mohammad Khan mortgaged the aforesaid share in favour of two persons named Abdul Wahid Khan and Bhiku who were the plaintiffs before the Court of first instance and appellants before this Court. The mortgage was a usufructuary mortgage executed on 14th November 1914 for a consideration of Rs. 5,000. Subsequently on 19th May 1915 Mohammad Khan executed a simple mortgage deed in respect of two annas share out of the same property in favour of S. Ali Husain the defendant-respondent. About a month later, that is on 17th June 1915 Mohammad Khan executed two deeds of further charge, one for Rs. 1,000 in favour of Abdul Wahid Khan named above and the other for Rs. 100 in favour of Bhiku also named above Abdul Wahid Khan has died during the pendency of the appeal and is now represented by Mt. Sandal and others (appellants 1 to 5) who are his legal representatives.

On 10th April 1923, S. Ali Husain instituted a suit for sale of the mortgaged property (two annas share) in the Court of the Subordinate Judge of Gonda on the basis of his mortgage-deed dated 19th May 1915. He impleaded Mohammad Khan the mortgagor and several other persons as defendants in the suit. Two of these persons were Abdul Wahid Khan and Bhiku who were arrayed as defendants 39 and 40 in that suit. They were impleaded on the allegation that they were subsequent transferees of the property in suit : vide Ex. 2. Abdul Wahid Khan and Bhiku did not put in an appearance and the preliminary decree for sale was passed ex parte in favour of S. Ali Husain on 25th October 1924. The decree was for recovery of Rs 29,469-13-10 by sale of the property mortgaged.

On 29th August 1925 Abdul Wahid Khan and Bhiku the plaintiffs of the present suit and who were defendants 39 and 40 in the suit for sale brought by the respondent, put in an application in the Court of the Subordinate Judge of Gonda to the effect that they were mortgagees in possession under the deed dated 14th November 1914 and the two deeds of further charge both dated 17th June 1925 in regard to the three annas share against two annas out of which the decree for sale had been obtained by S Ali Husain, and that their lien in respect of the three aforesaid mortgages be declared at the time of the sale : vide Ex. 4 The parties appeared before the Court on 29th August 1925. Abdul Wahid Khan and Bhiku were present in person with Babu Avadh Behari Lal, pleader; and S. Ali Husain the decree-holder was present through his agent S. Iqbal Husain. On behalf of the decree-holder the deed of Rs. 5,000 of 1914 was admitted and no objection was raised in respect thereof. But the other two deeds of further charge executed in 1915 were not admitted. Thereafter a decree absolute for sale was passed on 7th October 1925.

Subsequently another application was put in by Abdul Wahid Khan and Bhiku on 18th October 1926 praying for the same relief : vide Ex 6. On 19th October the Subordinate Judge passed an order to the effect that as prior transferees they were not necessary parties to the suit brought by S. Ali Husain and if they wanted priority in respect of that deed they could bring a regular suit for the purpose and get the question settled : vide Ex. 7. Abdul Wahid Khan and Bhiku thereupon brought the present declaratory suit on 27th November 1926 and this is the suit in which the present appeal has been filed. The relief prayed for by them was to the effect that they had a prior charge under their mortgage dated 14th November 1914 and the defendant S. Ali Husain who had purchased the two annas share mortgaged to him on 20th October 1928 could not get possession of the property without redeeming the said mortgage in favour of the plaintiffs.

The defendant S. Ali Husain contested the suit on the ground that the plaintiffs had lost all their rights under the mortgage deed dated 14th November 1914 since they had not set up those rights in the suit brought by the defendant in which they had been impleaded as defendants. In short his contention was to the effect that the decree for sale obtained by him in execution of which he had purchased the two annas share was res judicata between the parties so far as the above mortgage was concerned.

The Additional Subordinate Judge of Gonda, to whose file the suit had been transferred, accepted the defence of the respondent S Ali Husain and has by his decree dated 12th May 1927 dismissed the plaintiff's suit. The decree passed by him has been affirmed by the learned Additional District Judge of Gonda by his decree dated 20th January 1928

The plaintiffs have appealed to this Court against the decree passed by the Court below dismissing their suit and the only question involved in the case is whether the decree for sale obtained by the respondent bars the plaintiffs-appellants from claiming the relief asked for by them on the basis of their mortgage deed 14th November 1914.

We have heard the parties at great length and have come to the conclusion that the appeal must be allowed and we now proceed to give our reasons for taking that view.

The latest case decided by the Privy Council on the subject will be found reported in *Radha Kishun* v. *Khurshed Hossein* (1). The fact of that case were that one Radha Kishun, the appellant, had instituted a suit for recovery of his mortgage money by sale of the property mortgaged on the basis of a mortgage dated 13th May 1892 of which he had taken a transfer from one Bakhtawar Mal, the original mortgagee. A portion of the property in suit had been previously mortgaged to the defendants by means of a usufructuary mortgage, called zerpeshgi, on 25th February 1891 and was then subsequently mortgaged to the same defendants under a simple deed of mortgage dated 28th April 1894.

In 1906 a suit was brought by the defendants for recovery of their money under the deed of 1894. In that suit the appellant Radha Kishun was also impleaded and the decree for sale was passed against him also. Radha Kishun the appellant then subsequently in 1907 brought a suit on the basis of his mortgage of 1892 and impleaded the mortgagees under the deed of 1894 as parties to the said suit Their defence was that the appellant could not obtain a decree in respect of the property mortgaged to them since Radha Kishun being a party to the suit of 1906 brought by them had never put forward his mortgage of 1892 as a defence in the case, and that, therefore, the decree passed in their favour in the year 1906 operated as res judicata im their favour and in the face of that decree the suit of Radha Rishun the appellant was not maintainable. This defence was accepted by both the Courts in India and Radha Kishun's suit was consequently dismissed

On appeal their Lordships of the Privy Council took a different view and Sir Lawrence Jenkins in delivering the judgment of the Judicial Committee observed as follows :

"The rule of res judicata is contained in S. 11, Civil P. C., 1908, which provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on Expln. 4 which provides that any matter which might and ought to have been made a ground of defence in such former suit, shall be deemed to have been directly and substantially in issue in such suit. The mortgage deed of 13th May 1892, it is urged, might and ought to have been made a ground of defence in the former suit No. 100 of 1906, and by the omission the present suit is barred. The rule is clear; the controversy is narrowed down to the question whether the facts invite its application. It becomes necessary, therefore, to see what was the position of Bakhtaur Mull in the former suit No. 100 of 1906. It was a suit brought by the Sahus to enforce against the mortgagor their mortgage-deed of 24th April 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear.

"Bakhtaur Mull's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

"The case, therefore, came within the terms of S. 96, T. P. Act, 1882, which expressly provides that where property, the sale of which is directed, is subject to a prior

(1) A. I. R. 1920 P. C. 81=47 Cal. 662=47 I. A. 11 (P.C.).

mortgage the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

"Bakhtaur Mull's position, therefore, was that he was prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of res judicata it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority.

"But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same."

"The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in suit No. 100 of 1906 has not been produced, and this omission is not supplied by the summary of the plaint set out in the extracts from the decree. That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtaur Mull's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable."

The rule of law laid down by their Lordships in the above case is to the effect that if a prior mortgagee with a paramount title is impleaded in a suit brought by the puisne mortgagee and there is no contest in that suit regarding the prior mortgage the right of the prior mortgagee would not be lost to him. If, however, there is a controversy and that controversy is decided against him whether by actual decision or in default, his remedy would be barred and the rule of res judicata would stand in his way of asserting his claim under the prior mortgage.

This question was recently discussed by a Bench of this Court, to which one of us was a party, in a case reported in *Bansi Dhar* v. *Jagmohan Das* (1). In that case also a prior mortgagee was a party to the suit and set up his claim under his mortgage which was of a prior date. It appears that subsequently he withdrew his claim based on the prior mortgage and a decree was passed. It was held by this Court that under those circumstances the question of the prior mortgage not having been inquired into could not be treated as an issue directly and substantially raised in the previous suit, and that the claim of the prior mortgagee was not in any way affected by the decree which had been obtained by the puisne mortgagee.

(1) A. I. R. 1929 Oudh 88=3 Luck. 472.

Reliance has been placed before us, as was done in the Court below, upon several cases decided by their Lordships of the Privy Council and also by the different High Courts in India. Some of those decisions, it is sufficient for us to observe, were cases which had arisen before the passing of the present Code of Civil Procedure in which it has been clearly laid down: vide O 34, R. 1, that a puisne mortgagee may sue either for foreclosure or for sale without making a prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. It, therefore, appears to us that whatever may have been the state of law prior to the passing of the Code of Civil Procedure, 1908, it is clear that after the passing of the Act of 1908, the mere fact that a prior mortgagee has been made a party to a suit brought by the puisne mortgagee would not destroy his prior mortgage unless there is a clear controversy in that suit and the controversy decided adversely to him.

The only point which we have, therefore, to decide is whether in the suit brought by the respondent S Ali Husain there was any controversy relating to the prior mortgage of the appellants and whether that controversy resulted in an adjudication against them either expressly or impliedly. We may mention that this would in each case depend upon the facts and the circumstances existing in that case. The rule of law is clear but the actual point to be decided in each case is whether the facts of that case are such as would invite the application of that rule.

We now turn to the facts of the present case. We have got on the record the plaint of the former suit brought by the respondent S. Ali Husain It is clear from para. 8 of the plaint that defendants 39 and 40 were impleaded as puisne mortgagees. The actual words

used in that paragraph are "*bataur muntagil ilaihim madab*" which, when translated, mean "as subsequent transferees." Our attention has not been drawn to any other allegation in the plaint besides this, from which it may appear that the rights of defendants 39 and 40, who are the plaintiffs in the present suit, as prior mortgagees were in any way denied. There can be no doubt as would appear from the facts of the case stated above that these defendants were puisne mortgagees or subsequent transferees, as the respondent called them in his plaint, by virtue of the two deeds of further charge dated 17th June 1915

We are, therefore, unable to infer by necessary implication that the respondent in his suit actually intended to raise any controvesy regarding the right of the plaintiffs of the present suit in respect of their prior mortgage dated 14th November 1914. It can very well be said that the only thing which the respondent wanted in that case was to destroy the rights of the present plaintiffs as they existed under their two deeds of further charge dated 17th June 1915. It has been strenuously argued on behalf of the respondent that the mere fact that the plaintiffs of the present suit were impleaded in the suit brought by the respondent as subsequent transferees was sufficient to show that the respondent denied their rights as prior mortgagees. We regret we are unable to take that view. If no subsequent mortgages had existed in favour of the plaintiffs of the present suit and the respondent impleaded them in his suit as defendants on the allegation that they were subsequent transferees, there would have been some room for argument that the respondent wanted to assail their rights as prior mortgagees We are to a great extent supported in this conclusion of ours by what the agent of the decreeholder himself stated before the Court on 29th August 1925, when the parties were present before the Subordinate Judge The plaintiffs of the present suit had asked the Court to declare their lien in respect of the deed of 1914 and the two deeds of further charge of the year 1915. It was clearly stated on behalf of the decree-holder in reply that there was no objection so far as the deed of 1914 was concerned but the right of the applicants, so far as the deeds of 1915 were concerned, was denied. It was contended on behalf of the respondent that nothing which was stated on behalf of the decreeholder after the passing of the decree should be taken into consideration in deciding whether the question relating to the prior mortgage was in controversy in the suit brought by the respondent. We regret we are unable to exclude this evidence from our consideration The evidence consists of a statement made by the agent of the respondent and is good evidence to show what he actually understood in that case when he impleaded the plaintiffs of the present suit as defendants calling them subsequent transferees.

We are, therefore, of opinion that when the respondent Ali Husain impleaded the plaintiffs of the present suit as defendants in his own suit he never intended to question their rights as prior mortgagees under the deed of 1914. Indeed as observed by their Lordships of the Privy Council in the case quoted above it was necessary for him, if he wanted to destroy the title of the plaintiffs in the present suit, to lodge a distinct case in his plaint in derogation of the claim of the appellants relating to priority in respect of the deed of 1914. We, therefore, hold that the rule of res judicata which has been applied in the present case by the Courts below does not stand in the way of the plaintiffs and that his suit must be decreed.

There is no other question regarding which the parties are at issue, the mortgage in favour of the plaintiffs-appellants being admitted throughout.

We, therefore, set aside the decrees of the Courts below and grant a decree to the plaintiffs-appellants that their suit as brought will stand decreed with costs in all three Courts.

W S /R.K. *Appeal allowed.*

A. I. R. 1929 Oudh 467

WAZIR HASAN AND SRIVASTAVA, JJ.

Muhammad Usman Khan—Judgment-debtor—Appellant.

v.

Bankey Lal—Decree-holder—Respondent

Execution Decree Appeal No. 8 of 1929, Decided on 22nd July 1929, against order of Sub-Judge, Lucknow, D/- 5th January 1929.

(a) Oudh Civil Rules, R. 190 (b)—Village forming part of estate as defined in Oudh Estates Act 1869 is ancestral so long as property is governed by Oudh Estates Act.

Village forming part of an estate as defined in the Oudh Estates Act 1869, is ancestral land within the definition of the term as given in R. 190 (b) only so long as the property continues to be governed by the provisions of the Oudh Estates Act. The property must be considered to form an estate or part of an estate as defined in the Oudh Estates Act so long as the property continue to be governed by the Oudh Estates Act but it cannot be considered to be such estate or a part of an estate when it ceases to be governed by that Act. [P 468 C 2]

(b) Oudh Estates Act 1869, S. 14—Judgment-debtor, person mentioned in Cl. (2) of S. 13 (A)—He is subject to same conditions and rules of succession as testator.

Where the judgment-debtor is one of the persons mentioned in Cl. (2), S. 13 (A), he holds the village bequeathed to him by his grandfather subject to the same conditions and to the same rules of succession as the testator, under S. 14. *A. I. R* 1925 *Oudh* 709, *Rel. on.* 16 *O. C.* 277, *Dist.* [P 468 C 2]

D. K. Seth—for Appellant.

Makund Behari Lal—for Respondent.

Judgment.—This is an execution of decree appeal by the judgment-debtor. The point involved in the appeal is a very short one, namely, whether the 16 annas share in village Ataria, which has been attached and put up for sale in execution of a decree is an ancestral property or not. The learned Subordinate Judge of Lucknow relying on Cl. (a), R. 190, Oudh Civil Rules, has held that the property must be considered to be the self-acquired and not the ancestral property of the judgment-debtor. The contention urged on behalf of the judgment-debtor in this appeal is that the village in question forms part of an estate as defined in the Oudh Estates Act 1869, and is therefore "ancestral land" within the definition of the term as given in Cl. (b), R 190, Oudh Civil Rules. The parties are argeed that the village in question is a part of taluqa Kasmandikhurd, which belonged to Mohamad Ahmad Khan, grandfather of the judgment-debtor, who was the original taluqdar, and had come in the possession of the judgment-debtor under a will executed by his grandfather in his favour about 30 years ago. The name of Mahomad Ahmad Khan is entered against Nos. 10 and 7 of lists 1 and 3 respectively, prepared under S. 8, Oudh Estates Act.

The learned counsel for the judgment-debtor argues that the village having admittedly once been a part of an estate as defined in the Oudh Estates Act it must be considered to be ancestral property irrespective of the question whether in the hands of the judgment-debtor it continues to be governed by the Oudh Estates Act or not The learned counsel for the decree-holder maintains, on the other hand, that Cl (b), R 190, can apply only when an estate or a part of an estate is in the hands of the original taluqdar.

We think that both parties have pitched their contentions too high and that the correct position lies somewhere midway between the two. In our opinion, so long as the property continues to be governed hy the provisions of the Oudh Estates Act, it must be considered to form an estate or part of an estate as defined in the Oudh Estate Act, but it cannot be considered to be such estate or a part of an estate when it ceases to be governed by that Act. The parties are agreed before us that the judgment-debtor appellant was not the immediate heir of his grandfather, but there can be no doubt that he was a possible heir. Ss. 14 and 15 of the amended Oudh Estates Act have been given retrospective effect. The judgment-debtor is clearly .

"A person who might, in the absence of of other heirs, have succeeded to such estate or portion under the provisions of the Oudh Estates Act",

and is, therefore, one of the persons mentioned in Cl. (2), S. 13 (A), Oudh Estates Act It follows that he holds the village in question which had been bequeathed to him by his grandfather, subject to the same conditions and to the same rules of succession as the testator, under S. 14, Amended Oudh Estates Act. The same view was taken by Mr. Lindsay (now Sir Benjamin Lindsay) and Pandit Kanhaiya Lal in Execution of Decree Appeal No 16 of 1915 It was a case relating to property held by one of the younger sons of the same Mahomad Ahmad Khan. In the course of their judgment in that case they remarked that:

"The father of the judgment-debtor, Mahommad Ahmad Khan, was a taluqdar, whose name appears in lists 1 and 3 prepared under the Oudh Estates Act. We are also told that the village now in dispute forms part of the estate granted by the sanad. It seems to us therefore that having regard to the definition of the "ancestral land" in the paragraph o

the Oudh Civil Digest, just referred to, this property does constitute ancestral land for the purposes of execution of the decree."

It may be mentioned that Cl. (b), R 190, Oudh Civil Rules, is word for word the same as Cl. (b), para. 179, Oudh Civil Digest, above referred to. The view taken by us is also in consonance with the decision of the late Court of the Judicial Commissioner of Oudh to which one of us was a party reported in *Ameer Mirza Beg* v. *Udit Pershad* (1). In that case the property was not held to be ancestral because the case did not fall within S. 14 but was one governed by the provisions of S. 15, Oudh Estates Act. The learned counsel for the respondent has relied upon the decision reported in *Asghari Khanam* v *Raj Bibi* (2). It is a case relating to a certain property which at one time formed part of the Maniarpur estate. It is obvious from the facts of the case and the history relating to the Maniarpur estate that the property in the hands of Mt. Asghari Khanam, the judgment-debtor, was subject to the provisions of S 15 and not S. 14, Oudh Estates Act. The reference made in the judgment to Ss. 14 and 32-A Oudh Estates Act seems to us, if we may respectfully say so, to be based on some misapprehension of facts and confusion of ideas. If the learned Judges meant to hold that property governed by S 14, Oudh Estates Act, cannot be considered as ancestral property as defined in the rules, we must respectfully dissent from that view. We may also point out that if the construction placed upon the decision by the learned counsel for the respondent is correct, then the decision is also directly in conflict with the later decision of Messrs. Lindsay and Kanhaiya Lal in the unreported case to which reference has been made above. It might also be pointed out that S. 32-A, Oudh Estates Act, which gives the taluqdars the power to declare any non-taluqdari property owned by them as subject to the Act has no application to the case of property governed by S. 14.

For the above reasons we are of opinion that the village Ataria which is under sale is not the self-acquired but the ancestral property of the judgment-debtor, and falls within the terms of Cl. (b) R. 190, Oudh Civil Rules. We, therefore, allow this appeal with costs and setting aside the order of the lower Court declare the property in suit to be ancestral property.

R.M./R.K. *Appeal allowed.*

(1) A. I. R. 1925 Oudh 709.
(2) [1913] 16 O. C. 277=22 I. C. 267.

A. I. R. 1929 Oudh 469

STUART, C. J. AND RAZA, J.

Udairaj Singh—Plaintiff—Appellant.

v.

Mt Raj Kunwar and *others*—Defendants—Respondents.

First Appeal No. 52 of 1928, Decided on 26th July 1929, from decree of Addl. Sub-Judge, D/- 23rd December 1927.

(a) Hindu Law—Mitakshara — Adoption —Boy whose mother adopter could have legally married can only be adopted.

Among twice born Hindus governed by the Mitakshara law an adoption can only be made of a boy whose natural mother could before her marriage have been legally married by the adoptor : 21 *All.* 412 (*P.C.*) and *A. I. R.* 1915 *P. C.* 15, *Rel. on.* [P 475 C 1]

(b) Wajibularz—Custom permitting adoption of sister's son in absence of sons of collaterals—Right of adoption comes into being only when no such sons exist.

When the wajibularz provides for a custom permitting the adoption of sister's son or daughter's son in absence of collaterals, such custom even though taken to have conferred right to adopt brother's daughter's son, would give the right of adoption only in the absence of the existing sons of collaterals. Where it is clearly established that there were existing sons of collaterals, a brother's daughter's son could not be adopted. [P 475 C 2]

(c) Practice—Where trial Judge intelligently examines evidence value of his opinion is great.

Where the trial Judge applies his mind fairly and intelligently to the examination of evidence the value of the Judge's opinion is very great. [P 471 C 2]

Piare Lal Banerji, *A. P Sen*, *Ali Zahir* and *S. C. Das*—for Appellant.

M. Wasim, *Manni Lal* and *Shankar Sahai*—for Respondents.

Judgment.—This is an appeal against a decree dated 23rd December 1927, of Babu Jagdamba Saran, Additional Subordinate Judge of Hardoi, dismissing the suit brought by the plaintiff-appellant Udai Raj Singh, a minor whose age is stated to be seven years on 23rd November 1926, brought through his next friend Madho Singh. This suit is for the possession of certain property in the Hardoi District. It is admitted on both sides that the property in question belonged to a joint Hindu family consisting

of two brothers Shankar Singh and Jangu Singh whose personal law was the Mitakshara. Shankar Singh died on 24th November 1914. Jangu Singh then became proprietor of the whole property by survivorship. He, however, permitted the name of Raj Kuar, the widow of Shankar Singh, to be entered in the revenue papers in respect of a portion of the property The lady in question had admittedly only the right to maintenance in the property. The two brothers resided together in the village of Samrauli in the Hardoi district. It is now accepted on both sides that after Shankar Singh's death his widow Raj Kuar continued to reside in the same house with her brother-in-law. Shankar Singh and Raj Kuar had five daughters. Jangu Singh died on 29th October 1923 At the time of his death three of Shankar Singh's daughters were still unmarried, When Jangu Singh died there was no male issue of either Shankar Singh or Jangu Singh and in the ordinary course of law intestate succession would have been to the collaterals. Sanwal Singh now deceased was the collateral who ordinarily would have been entitled to succeed.

On 13th November 1923, Sanwal Singh applied to the revenue authorities to have his name recorded to engage for the revenue of the whole property, the estimated value of which is Rs. 1,25,000 and the income of which is over Rs. 5,000 a year. His application is dated 13th November 1923. On 8th December 1923, Raj Kuar filed an objection before the revenue authorities to the entry of Sanwal Singh's name and asked that her own name should be recorded on the ground that Jangu Singh had devised all his rights to her by a nuncupative will. The nature of her claim is stated in detail in Ex. H-4 dated 7th February 1924. It is to be noted that she made no suggestion either in her objection or in the statement of her pleader to the effect that Jangu Singh had adopted a son On 7th February 1924, Madho Singh as next friend of Udai Raj Singh put in another objection to the claim to the revenue authorities in which he stated that Jangu Singh had prior to his death adopted Udai Raj Singh the present plaintiff-appellant as his son. The Deputy Collector who decided the first proceeding in mutation found that Udai Raj Singh was the adopted son of Jangu Singh and directed his name to be entered. This order is Ex. 14. It is dated 10th December 1924. The Deputy Commissioner of Hardoi on appeal reversed this order In the meantime Sanwal Singh and Raj Kuar had compromised. Under the terms of the compromise Sanwal Singh's name was to be recorded subject to certain condition. The Deputy Commissioner's order which is Ex. H-9, dated 6th May 1925, directed Sanwal Singh's name to be recorded. It was against the plea of adoption of Udai Raj Singh but the entry was mainly on the basis of possession. This order was confirmed on 14th September 1925 by the Commissioner of the Lucknow Division by his order Ex. H-10. The suit of Udai Raj was filed on 23rd November 1926.

The learned trial Judge has found that there was never any ceremony of adoption of any kind and that the whole of the evidence adduced on behalf of the plaintiff-appellant to prove the factum of adoption is unreliable He has found that the evidence adduced by the defendants to show that there was no form of adoption is reliable Apart from that he has found that Udai Raj Singh could not have been legally adopted by Jangu Singh as Udai Raj Singh's natural mother was the daughter of Shankar Singh. The family are Chatris and as such twice born. He found against the plea advanced on behalf of the plaintiff-appellant to the effect that there was a custom in the family under which a brother's daughter's son could be validly adopted. His finding there was that no custom had been established varying the law and that the alleged custom even if accepted as valid would not justisfy the plaintiff-appellant's adoption, if such adoption had taken place, as it only permitted a person such as himself to be adopted if there were no sons of collaterals available He found that sons of collaterals were available.

Before we proceed to discuss the evidence adduced on behalf of the plaintiff-appellant to establish the form of adoption it will be better to state certain facts. We have already stated that when Jangu Singh died there were in existence three unmarried daughters of Shankar Singh. There were two other daughters who had married before the death of

Jangu Singh. One of them was called Ram Dulari. She had married Raghuraj Singh of Bargawan in the Sitapur District. Raghuraj Singh was the son of Shiwa Singh. Shiwa Singh's cousin was Madho Singh the next friend of the plaintiff-appellant. Madho Singh resides in Bargawan. Udai Raj Singh the present plaintiff-appellant was the son of Raghuraj Singh and Ram Dulari. Jangu Singh had been married more than once. He had a son who died on 6th May 1921.

His wife, the mother of that son, died on 24th May 1921. Ram Dulari is proved to our satisfaction to have died on 4th October 1921. Udai Raj Singh was born, according to the story set up on his behalf, on 15th May 1920, but according to the evidence adduced by the defendants, which we believe, he was born on 17th October 1920. The case for the plaintiff-appellant is that Udairaj Singh was adopted on 20th November 1921. He was thus at the time of his alleged adoption a little more than one year old and according to this story he was adopted within six weeks of his mother's death.

The village of Bargawan in the Sitapur District is more than 20 miles distant from the village of Samrauli in the Hardoi District. The map shows that between the two villages the river Gomti flows. This fact is mentioned to show that according to the usual method of village conveyance the villages are about a day's journey apart. A large number of witnesses were called on behalf of the plaintiff-appellant to establish the fact that an adoption ceremony took place in Samrauli on 20th November 1921, in which Jangu Singh adopted Udai Raj Singh as his son. The learned trial Judge has refused to accept this evidence as reliable. In the course of his careful judgment he has explained that in examining the evidence he has kept in mind certain principles laid down by their Lordships of the Judicial Committee in previous cases of alleged adoptions and has judged the evidence according to those principles.

But apart from the use of these principles, valuable as they are, the main point in support of his finding on the value of the evidence is that his judgment shows that he applied his mind to the consideration of the evidence of all the witnesses produced and that he carefully studied the evidence of each witness who was produced before him, and applied his mind to the evidence of Raj Kuar who was examined on commission. In all cases of this nature it is easy to criticize the reasons given by the trial Judge for the rejection of the evidence of individual witnesses. But the fact remains that in a case such as this in which the trial Judge has applied his mind fairly and intelligently to the examination of the evidence the value of the Judge's opinion is very great. We had the advantage of having the appeal argued by an experienced advocate who has taken us in detail through the evidence of every witness called on his client's behalf. He has addressed us intelligent and careful arguments to show that the learned trial Judge was not right in rejecting their evidence. But after having given due weight to the arguments of the learned counsel we find ourselves in agreement with the views taken by the learned trial Judge on the value of the evidence. We add certain reasons, some of which have already been taken by the learned trial Judge, in support of this conclusion.

We find upon the evidence before us that Jangu Singh was at the time of the alleged adoption a man not much more than 40 years of age. He was on our finding on the evidence healthy and well preserved. He died on 29th October 1923, but his death does not appear to have been due to previous debility or long-standing disease. Such a man would not have reason to anticipate an early death. He had already begotten several children. Some had died He left two daughters surviving. He had the prospect of marrying again and begetting a son. We have it on evidence, which we believe, that he was contemplating marrying again. In these circumstances there was not on the face of it any great reason why he should wish to adopt a son. But if he did wish to adopt a son it is difficult to understand why he should have wished to select Udai Raj Singh for the purpose. Udai Raj Singh was the son of his brother's daughter. Apart from the question of legality of such an adoption (a question to which we shall refer later) such a selection would be peculiar. There are further points. Udai Raj Singh was an only son. His mother had died some six months before the alleged date of the adoption. Although the ad-

option of an only son is not prohibited under the law it is not considered amongst respectable Chatrias (such as the parties profess to be) fitting to give an only son in adoption to another man. Further Udai Raj Singh was at the time a baby. Jangu Singh could not possibly have had any idea as to how his character would develop. What then are the reasons put forward which are supposed to have actuated Jangu Singh? There is evidence adduced on behalf of the plaintiff-appellant to the effect that Jangu Singh had formed such a dislike to his natural heirs that he did not wish his property to descend to them. But this evidence the learned trial Judge found to be unsatisfactory and we agree with him that it is unsatisfactory. Nothing definite has been made out to show a real dislike or in fact any dislike and in our opinion the suggestion that Jangu Singh desired that the whole of the family property should go eventually to a boy whose natural father came from another district and whose mother was his brother's daughter is improbable. The desire of a Hindu to have a son who would bring him salvation after his death would exist to no great extent in the case of a man like Jangu Singh who had every prospect of marrying again and begetting a son.

There are certain circumstances in connexion with the alleged facts of the adoption that tell strongly against it. Jangu Singh was not an ordinary peasant. He was a zamindar possessed of valuable landed property and to a certain extent a man of affairs. Such a man would know, if he wished to adopt a son, that such an adoption was likely to be challenged by his natural heirs after his death. We have it admitted that no deed of adoption was executed. There would not have been the slightest difficulty in executing such a deed and registering it. Not only was Jangu Singh a man of affairs. Madho Singh we find is a man of considerable astuteness and Raghuraj Singh is a man of some education. No real attempt is made to show why a deed was not executed. The only reply is that no one thought it necessary to execute a deed. We have left so far another explanation which was put up. Here the position taken up in the mutation proceedings is not the same as the position taken up in the trial Court. In the mutation proceedings it would appear from the statement of Raghuraj Singh which has been proved and brought upon the record (Ex H-19), that the adoption took place because Jangu Singh was anxious that one of the unmarried daughters of Shankar Singh, i. e., a sister of Ram Dulari, should marry Raghuraj Singh. It is in evidence that this girl eventually did marry Raghuraj Singh. She is now also dead. This is what Raghuraj Singh stated:

"First of all the question of marriage was broached. Jangu Singh proposed it. It was refused on my behalf. When he agreed to take my son in adoption then I agreed to marry at the recommendation of the Mirza Sahib."

The Mirza Sahab is Mirza Ahmad Shah (P. W-28). We shall consider his evidence later. The story then was that Jangu Singh had considered the adoption of Udai Raj Singh as an afterthought and that he was so anxious to marry one of the three unmarried daughters of his brother to Raghuraj Singh that he was ready in consideration to adopt the son of Raghuraj Singh. This story has now been changed. In the trial Court it was put forward that Jangu Singh desired for his own reasons, wishing to adopt a son, to adopt Udai Raj Singh and that the marriage of Raghuraj Singh with the other daughter of Shankar Singh was a secondary consideration. There are further peculiar circumstances about the alleged adoption. From the evidence of the alleged adoption it appears that a considerable amount of money would have been spent on the ceremony. A large number of guests were invited. Many brahmans were employed and a nautch was held. It is in evidence that the famliy kept accounts but no accounts have been produced. It is difficult to see how the accounts could have been made away with, for it is in evidence that Raghuraj Singh and Jangu Singh lived together and Raj Kuar is now palpably siding with the plaintiff-appellant.

We now take in detail the evidence of the witnesses for the plaintiff We take first Madho Singh P. W. 35. He is regarded as the head of the joint family of which his brother's son Raghuraj Singh is a member. According to him Jangu Singh came to Bargawan a month or a month and a half before the

alleged date of adoption. The alleged date of adoption was 20th November 1921. So he came on some day in the first half of October 1921. As we have already stated Ram Dulari died on 4th October 1921. Madho Singh says that Jangu Singh asked the family to give him Udai Raj Singh in adoption. The boy's mother was just dead. The family at once agreed to the adoption according to Madho Singh's statement. He said that at the same time Jangu Singh suggested that an unmarried daughter of Shankar Singh should marry Raghuraj Singh. The proposal was hardly seemly as her sister had just died. The proposal was refused by Madho Singh but not, according to him, because it was not seemly proposal but because he said he hoped to get a bigger dower from the father of some other woman for the marriage of Raghuraj Singh. Then Mirza Ahmad Shah appeared on the scene. Mirza Ahmad Shah (P. W.28) is a taluqdar residing in Qutubnagar in the Sitapur District He admits that all his property is heavily encumbered and that he is not in possession of any village to which he has title.

According to Mirza Ahmad Shah, Jangu Singh came to him and asked him to use his influence with Madho Singh to induce Madho Singh to accede to the marriage of Raghuraj Singh with Shankar Singh's unmarried daughter. In consequence he and Jangu Singh went to Bargawan to the house of Madho Singh and persuaded Madho Singh to accede to the marriage. There is nothing inherently impossible in a Mahomedan gentleman being brought in to assist in the settlement of a marriage between Chatris, but read with other circumstances it does not sound very likely that he would have had sufficient influence with Madho Singh to induce Madho Singh to accept a smaller dower. According to this story the adoption of Udai Raj Singh had already been settled. It is asserted that this adoption was conducted according to the ideas prevalent amongst high class Chatris. A large number of brahmans had to officiate, and an auspicious date had to be selected for the ceremony. This brings us to the evidence of P. W-5 Vidya Dhar Brahman. Vidya Dhar is a Pandit of Bargawan. According to his story he was asked to fix an auspicious date for the ceremony. He is the Pandit of Madho Singh. It is not made clear why Jangu Singh should wish to select Madho Singh's Pandit to fix a date instead of selecting his own Pandit. According to Vidya Dhar he fixed the date at once. This must have been some time in October 1921. He fixed it for about a month ahead. He said that at the time he made, a note in a printed calendar which he kept. He has produced the calendar. The entry could have been made at any time. Once the date was settled invitations were sent out to a large number of persons. Mirza Ahmad Shah, according to his story, took the trouble to come from Qutubnagar to Samrauli to attend the ceremony. It is stated by other witnesses that a nautch took place. Mirza Ahmad Shah has no recollection of a nautch taking place. We now come to the evidence of Raghuraj Singh (P. W. 36). According to him, Madho Singh approved of the adoption and asked him if he was willing to give his boy in adoption. We now quote his own words:

"I said I was quite willing to do so because it would go to perpetuate the line of Jangu Singh. As I am very young, I did not care that I was giving away my only son in adoption for I hope to have more sons in future. I did not give any thought to the future of the plaintiff in giving him in adoption. My first son was born two years after my first marriage. He died. Plaintiff was born a year and a half or a year and nine months after his death. The first son died at the age of ten months . . . . . I came to know that the matter of adoption was settled after the coming of Mirza Saheb to Bargawan. Jangu Singh had come to Bargawan ten or thirteen days before the Mirza. I did state then that when Jangu Singh agreed to take my son in adoption I then agreed to marry. This is true. I did state there that the Mirza said that when Jangu Singh was saying that he would take my son in adoption where was the hitch about the marriage and what more could I expect. I heard this from my uncle and stated like that. I do not recollect if I stated there that only Jangu Singh was present at that time. I stated there that my father and Madho Singh were present at that time."

According to the story for the plaintiff as soon as the boy was adopted he went to live with Jangu Singh. He was looked after by Raj Kuar and Raj Kuar's unmarried daughter, apparently the daughter who subsequently married Raghuraj Singh. There were two other daughters in the house. This arrangement would have been a very suitable one but

there seems no reason why it should not have continued after Jangu Singh's death. Madho Singh has, however, deposed that as soon as he heard of Jangu Singh's death he went to Samrauli and took the plaintiff away to his own house taking him from the care of Raj Kuar. He says that he did not know about Jangu Singh's death for some time. These are his words :

"I was at Lucknow when Jangu Singh died. When I returned from Lucknow after 15 days I came to know that Jangu Singh had died. I came to Samrauli to take away the plaintiff as there was no male member to look after him. I did not come to know there if any application had been made by any one for mutation of names. I applied for mutation in the name of Udai Raj Singh three months after taking him away. I came to know some day before that that Sanwal Singh and Raj Kuar had already applied for mutation. I fell ill. I remained ill for a month and a half. Then I sent men to take possession over the property. This is the cause of the delay to apply for mutation. I applied as guardian of the plaintiff."

We come next to the evidence given on commission by Raj Kuar. It is now admitted that the family was a joint family. Yet we find that Raj Kuar on Jangu Singh's death not only asserted that it was a separate family but claimed the whole property under a nuncupative will which she has made no attempt to establish. She further ignored in her claim the alleged adoption of the plaintiff. To explain this peculiar action on her part she has asserted that she is an ignorant illiterate woman who did not know what was happening and that such actions as had been taken on her behalf were undertaken without her knowledge. Against this, however, it is to be noted that one of her other daughters married a certain Dwarka Singh who is a pleader in Sitapur. Ex. H-2 shows that her application in mutation was filed on 8th December 1923 and Ex H-3 shows that on the same date she executed a power-of-attorney in favour amongst others of her own son-in-law Thakur Dwarka Singh. Apart from Raj Kuar's conduct in this matter there are other points about her statement. She has endeavoured to strengthen the appellant's case by antedating the proposal to adopt the plaintiff emanating from Jangu Singh six or seven months before the alleged adoption. But as she places Jangu Singh's visit to Bargawan in order to make the proposal as having taken place on the death of Raghurai Singh's wife and as it is established that Raghuraj Singh's wife died on 4th October 1921, she has shown her inaccuracy on that point. According to her Madho Singh took the boy away after Jangu Singh's death on the ground that the boy would feel lonely. As he was living with his mother's mother and his mother's sisters this suggestion does not find acceptance

It will, however, be seen that for the first time that we can get any definite information as to where the baby was after Jangu Singh's death, he is found to have been living with Madho Singh. This circumstance would be compatible with his never having been adopted at all and with his never having left Bargawan. We now come to the remaining witnesses for the plaintiff. They are many of them apparently respectable people. Many of them are zamindars. A large number are Chatris. Most of them deposed to having been present at the adoption ceremony or knowing something about it. It is unfortunately, however, by no means unknown in cases of this kind for apparently respectable witnesses to depose absolutely falsely either to oblige their friends or from less reputable motives. The remarks apply not only to the witnesses who have given evidence as having been present at the time of the alleged adoption but to witnesses who have given evidence in respect of other incidents. Little can be based here upon apparent respectability for the defendants have produced a large number of witnesses who are also respectable. If their evidence is believed it is practically impossible that any such adoption could have taken place.

In these circumstances we come back to the impression left on the mind of the learned trial Judge as to the relative credibility of the witnesses. He refused to accept as credible any of the evidence produced on behalf of the plaintiff and he accepted as credible on the whole the evidence produced by the defendants We have already noted the peculiar circumstances of the case. The allegations as to the adoption can be criticised as they have been criticised both by the learned trial Judge and ourselves from many points of view unconnected with the personality of the witnesses. We have considered this case carefully and we have no hesitation in accepting the findings of

the learned trial Judge as to the alleged ceremony. We agree with him in the finding that the evidence adduced by the plaintiff is not reliable and that the evidence adduced by the defendants is on the whole reliable and as a result we find that Jangu Singh is not established to have desired to adopt the plaintiff appellant and that he did nothing to attain that object. Upon this finding of facts the appeal must fail.

The remaining points are academic. As, however, the learned counsel for the appellant has pressed us to express some opinion as to the validity of an adoption by Jangu Singh of a son of a daughter of ShankarSingh we shall state findings upon the legal points. As we understand the decision of their Lordships of the Judicial Committee in *Bhagwan Singh* v. *Bhagwan Singh* (1) their Lordships accepted the authority of the Dattaka Mimansa and Dattaka Chandrika in respect of twice born Hindus governed by the Mitakshara law Their Lordships were there considering the question as to whether the adoption of a sister's son in a twice born family governed by the Mitakshara law was or was not valid. They decided that such an adoption was not valid. But it appears to us that this decision is further an authority for the proposition that amongst twice born Hindus governed by the Mitakshara law an adoption can only be made of a boy whose natural mother could before her marriage have been legally married by the adoptor. We are supported in this position by the decision of their Lordships of the Judicial Committee in *Puttu Lal* v. *Parbati Kuar* (2) for at the end of that judgment it is said :

"In *Srivamulu* v. *Ramayya* (3) the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu law that a legal marriage must have been possible between the adoptor and the mother of the adopted boy refers to their relationship prior to marriage."

On this view of the law it is clear that Jangu Singh could not have adopted the son of the daughter of his brother Shankar Singh for he could not have married the daughter of his brother Shankar Singh when she was unmarried.

The learned counsel for the appellant has put forward a further argument. He has referred to the wajibularz of the village Koiyan from which the ancestors of Jangu Singh came. In this wajib-ul-arz it is stated that a member of the family who is without issue can adopt the son of one of his male collaterals and it continues that if none of his male collaterals has any son he is competent to adopt a daughter's son or a sister's son. This wajib-ul-arz is Ex. 1. But we cannot see that even if this were held to be a valid custom it would assist the plaintiff for as we read it, if the right to adopt a daughter's son or sister's son includes a right to adopt a brother's daughter's son the right would only come into being in the absence of existing sons of collaterals. It is clearly established that there were existing sons of collaterals who could have been adopted. We find for example on the record of this case as a defendant Sant Bakhsh Singh, the son of the deceased Sanwal Singh, who was seven years old at the time of the institution of the suit. He must have been born in 1919 These questions as we have said before are, however, academic for the plaintiff having failed to establish on reliable evidence that there was any apparent adoption and having failed completely as to the factum of adoption the appeal fails on the facts without going into any question of law. We accordingly dismiss the appeal. Madho Singh, the next friend of the minor plaintiff appellant, will pay his own costs. Raj Kuar and Sant Bakhsh Singh minor were not represented in this appeal. The remaining respondents were represented by the same learned counsel. The respondents who are represented will receive their costs of appeal from Madho Singh the next friend of the minor whom we hold personally responsible for their costs.

R.M./R.K. *Appeal dismissed.*

(1) [1899] 21 All. 412=26 I.A. 153=7 Sar. 474 (P.C.).
(2) A.I.R. 1915 P.C. 15=37 All. 359=42 I.A. 155 (P.C.).
(3) [1881] 3 Mad. 15.

A. I. R. 1929 Oudh 475

STUART, C. J AND WAZIR HASAN, J.

Krishna Pal Singh—Plaintiff—Appellant.

v.

Mt. Raj Kuwar and *others* — Defendants—Respondents.

First Appeals Nos. 90 and 93 of 1927, Decided on 7th November 1928, from an order of King, J., D/- 7th January 1927.

Oudh Estates Act (1 of 1869), S. 22 (10)—Plaintiff claiming declaration to reversionary title has to prove that he is nearest male agnate according to rule of lineal primogeniture.

Plaintiff claiming declaration as to his reversionary title to an impartible estate has to prove that he is the nearest male agnate according to the rule of lineal primogeniture. Where the plaintiff fails to establish that his grandfather's father was the first born son of his father and was senior in age to his other brothers he cannot obtain the declaration : 20 *Cal.* 619 (*P.C.*), *Dist.* [P 476 C 2]

A. P. Sen, *Ali Zahir*, *M. H. Kidwai* and *S C. Das*—for Appellant.

B. N. Srivastava, *Oudh Behari Lal* and *G. H. Thomas*—for Respondents.

Judgment—These are the plaintiff's appeals from the decrees dated 7th April 1927, passed by Mr. Justice King sitting on the original side of this Court. They respectively arise out of two suits which the appellant instituted for obtaining the relief of a declaration as to his reversionary title to the estate of Uriadih situate in the District of Partabgarh in the Province of Oudh. Thakurain Sri Raj Kuar, defendant 1, in both the suits is the widow of Lal Bankateshar Bahadur Singh the last male holder of the aforesaid estate, and is in possession of the same. On 18th January 1922, she executed a perpetual lease in respect of certain lands situate in three villages comprised in the said estate in favour of Babu Ram, Ram Bharos, Nand Kumar, Parbhu Nath, Raghunath and Sri Nath, defendants 2 to 7 in one suit, and a sale-deed on 26th June 1919, in respect of village Sindhaura, within the estate in question in favour of Rani Jaggi Kumari defendant 2 in the other suit. Rani Jaggi Kumari died during the pendency of the suit and on her death the Deputy Commissioner of Partabgarh as Manager in charge of the estate of the deceased and Peshapat Partab Bahadur Singh, Taj Partab Bahadur Singh, Biamond Raj Kumari, Lath Raj Kumari and Kunari Sahiba, Raj Kumari, minors, were impleaded as defendants.

The plaintiff attacks the validity of these two deeds and bases his right to do so on his reversionary title to the estate. The primary and the only question for determination in the appeals is the said title of the plaintiff. The validity of the alleged title solely depends upon the proof of a pedigree * which the plaintiff filed together with the plaints of the two suits. It is admitted that the plaintiff is not the reversioner nearest in degree to the last male holder but he claims title under the provisions of Cl. (10), S. 22, Act 1 of 1869, as amended by the latest enactment (Act 3 of 1910) of the Legislative Council of the United Provinces of Agra and Oudh. The clause is as follows :

"or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture subject as aforesaid."

The plaintiff has, therefore, to prove that he is the nearest male agnate according to the rule of lineal primogeniture. According to the decision of the learned Judge of the trial Court the plaintiff has succeeded in proving every step in the pedigree but he has failed to prove the primogeniture of one Zabar Singh in relation to his two brothers Pahalwan Singh and Gambhir Singh. On this ground the learned Judge has dismissed both the suits and the appeals before us, both in the memoranda and the arguments were confined to the last mentioned matter alone.

Zabar Singh was the father of the plaintiff's grandfather, Prithipal Singh. After the annexation, the taluqa of Uriadih was settled with Diwan Harmangal Singh, whose name was entered in Lists 1 and 2 of the lists prescribed by S. 8, Act 1 of 1869, in respect of that estate By virtue of the statutory effect and the character of List 2 the estate of Uriadih must be deemed to be an impartible estate.

We may mention at the outset that at the hearing of the appeals the respondents' learned counsel challenged the correctness of the finding of the learned trial Judge in respect of one step only in the pedigree propounded by the plaintiff. Zabar Singh mentioned above was the son of Zorawar Singh. The learned Judge has found that Zorawar Singh was senior in age to his brother Bhup Singh. This is the finding which has been impeached by the respondents. We have come to the conclusion that the finding of the learned trial Judge that the plaintiff has failed to establish that Zabar Singh was the first born son of Zorawar Singh must be upheld. Having regard to this conclusion we refrain from deciding the matter relating to the seniority

* (For pedigree please see p. 477 infra.)

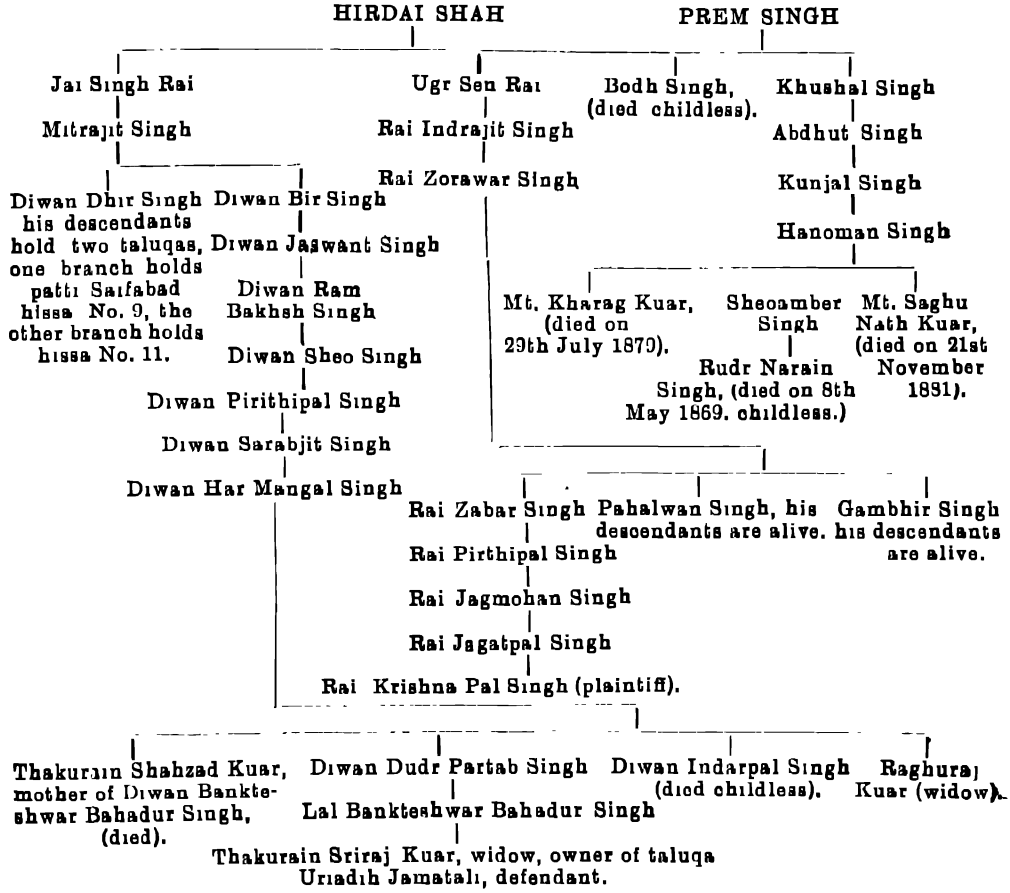
of Zorawar Singh in relation to his brother, Bhup Singh. Obviously the onus lies on the plaintiff to establish the fact that Zabar Singh was senior in age to his other brothers. If we are satisfied, as we are and as the learned trial Judge was, that the plaintiff has failed to discharge that onus it is not necessary to consider other pleas urged in defence.

Apart from the evidence which is really very slender in proof of the fact that Zorawar Singh was the first born of the sons of his father it was argued on behalf of the appellant that having regard to the entry of the estate in List 2 and the provisions of S. 10, Act 1 of 1869, there is a conclusive presumption that Zabar Singh having held the estate in his possession at the time of his death was senior in age to his other two brothers Pahalwan Singh and Gambhir Singh. In support of this argument reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Narindar Bahadur* v. *Achal Ram* (1). The estate involved in that case was an estate placed in List 2 of S. 8 of Act 1 of 1869 and not in List 3 as is the case here. In delivering the judgment of the Committee Lord Hobhouse said :

"The effect of that is that the estate is labelled as one which, according to the custom of the family, descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and, it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over line according to the classification under the Act ; though if two collaterals, are persons in the line of heirship equal in degree, then as the property can only go to one, recourse must be had to the seniority of line to find out which that one is."

The precise line of the argument before us is that Zabar Singh being equal in degree with his two other brothers must be presumed to have been the most senior in age for the reason that accord-

(1) [1893] 20 Cal. 649=20 I.A. 77 (P.C.).



ing to the rule of family custom stated by their Lordships of the Judicial Committee the most senior of the brothers had the title to the estate. It may be that the argument is one aspect only, and that is, that in a case of competition of titles based on inheritance, Zabar Singh, if he were the most senior in age of his brothers, would succeed to the estate under the rule of the family custom, and if it were shown that he did, as a matter of fact, possess the estate on the basis of such a title, presumption may be raised that he was the most senior in age. But there is absolutely no evidence on the record to show this. True there is some evidence that the family held some property for instance Ex. A-71, the wajib-ul-arz of Raipur Bishaur, which recites the tradition :

"Therefore in paraganna Pattim Nath Singh's son Dula Rai and his son Basant Rai and his son Bhagwat Rai and his son Jagdish Rai and his son Hirday Shah succeeded one another as single owners. In short when the time of Hirday Shah was reached a fresh series of partitions commenced.....In short, the facts as to the separation and division of taluqas of paraganna patti and as to the acquisition of this taluqa are described in this way that Hirday Shah the common ancestor of the owners of patti, contracted two marriages, the first was Moong Dei while the second was Parbati. Mt. Moong Dei the first wife gave birth to three sons (1) Jai Singh Rai, among whose descendants are the taluqdars of Oriadih, 9 shares and 11 shares, (2) Paran Singh whose deecendants hold taluqa Dasrathpur, (3) Ugrasen Singh, Ugrasen Singh's son was Indarjit Singh whose son was Zorawar Singh whose son was Rai Zabar Singh and his sons is Rai Pirthipal Singh the present possessor of the taluqa."

On the basis of this recital it may be held that there was some ancestral property, and having regard to other evidence on the record, equally consisting of tradition, it may further be held that Zabar Singh in his time held the nucleus of the estate of Raipur Bichaur But this is not enough. Zabar Singh was the most intrepid adventurer as compared to his three brothers and there is also the tradition, as appears from the evidence on the record, that his possession of the estate originated in bloodshed. The learned trial Judge of the trial Court is of opinion, and we think rightly, that Zorawar Singh acquired the estate by force or otherwise but not by inheritance Further the presumption raised by List 2 and S 10 is limited to presumption of impartibility and does not go further. We accordingly reject this argument. (After discussing evidence the judgment proceeded) Other evidence in this connexion is a pedigree, Ex. 152, which was filed by Rai Jagmohan Singh, the plaintiff's grandfather in a suit against one Diwan Ran Bijai Bahadur Singh for possession of the estate of Dasratpur which originally belonged to a member of the same family Hanuman Singh, whose name was entered in Lists 1 and 2 of Act 1 of 1869. This case was finally decided by their Lordships of the Judicial Committee in the year 1890 and the judgment of their Lordships is reported as *Bisheshar Baksh Singh* v *Ran Bijai Bahadur Singh* (2). The pedigree seems to have been admitted by the opposite party Dewan Ran Bijai Bahadur Singh In this case no question arose as to the seniority of Zabar Singh The claim which eventually succeeded was founded upon nearness of degree and the pedigree by itself does no more than mention the three sons of Zorawar Singh and mentions Zabar Singh's name first Obviously it will be highly unsafe to base a finding in favour of the plaintiff's case on such a slender foundation.

Finally we have three judgments in a case which arose in the year 1895. This was also a claim by a member of the same family, one Jageshar Bakhsh Singh for possession of the taluqa of Dasratpur. The plaintiff in that case founded his title on the seniority of Pahalwan Singh brother of Zabar Singh. The trial Court dismissed the suit on the finding that it was not established that Pahalwan Singh was senior in age to Zabar Singh vide Ex. 30. On appeal by the plaintiff a Bench of the late Court of the Judicial Commissioner of Oudh reversed the decree of the Court of first instance and decreed the suit vide Ex. A-122. The defendant then appealed to His Majesty in Council and his appeal was allowed by their Lordships of the Judicial Committee and the suit was eventually dismissed. The judgment of their Lordships is reported as *Jagatpal Singh* v *Jageshar Baksh Singh* (3). The finding of their Lordships was:

"It has not been proved that Pahalwan Singh was older than Zabar Singh, and the respondent's case, therefore, fails. The bur-

(2) [1891] 18 Cal 111=17 I. A. 173=5 Sar. 590 (P.C.).

(3) [1903] 25 All. 143=30 I. A. 27=8 Sar. 367 (P.C.).

den of proof was on the respondents and that burden they have failed to discharge."

Much stress was laid on this decision of their Lordships but we are unable to construe the finding quoted above as a finding in favour of the seniority of Zabar Singh. The case was dismissed on the sole ground that they had failed to discharge the onus of proof which as plaintiffs they were bound to sustain We are taking the same view of the burden of proof in the present case, and in agreement with the finding of the learned trial Judge we hold that appellant has failed to discharge that burden.

It now remains to say a few words as regards the oral evidence tendered on behalf of the plaintiff. We may mention that the appellant's learned counsel read to us the names of witnesses on whose evidence he wanted to rely in support of the appeal. We have ourselves read the evidence of those witnesses and are unable to disagree with the opinion which the trial Court formed in respect of it, that it is wholly unconvincing and worthless.

Before we take leave of the case there is one important matter which must be stated. The plaintiff who is the appellant before us, had brought another suit on the original side of this Court for a declaration of his reversionary title in respect of the estate of Patti Saifabad hissa No. 11, coupled with a declaration that the adoption of Dewan Rameshar Prasad Singh made by the widow, Thakurain Gajraj Kuar was invalid. To that suit both Thakurain Gajraj Kuar and Dewan Rameshar Prasad Singh were parties. The Courts in India held that Dewan Rameshar Prasad Singh was validly adopted by Thakurain Gajraj Kuar and the plaintiff's appeal to their Lordships of the Judicial Committee has also been dismissed. It is admitted on behalf of the plaintiff that Dewan Rameshar Prasad Singh in his character of an adopted son of Dewan Rajinder Bahadur Singh, the deceased husband of Thakurain Gajraj Kuar has a preferential reversionary title to the estate of Uriadih now in question as against the present plaintiff. There is no doubt that the decision in that suit constitutes res judicata as between the plaintiff and Dewan Rameshar Prasad Singh in the matter of the title founded on pedigree, to the estate of Uriadih. This being so it is obvious that the present appeal is wholly frivolous and is prompted by the litigious spirit of the appellant. We were asked by the respondent to admit in evidence the judgment of our Court in the previous suit and we have acceded to their prayer. There was no objection on behalf of the appellant as the judgment was delivered four days after the decision of the two suits, out of which these appeals arise, by the trial Court

We accordingly dismiss these appeals with costs. The Deputy Commissioner of Partabgarh was separately represented before us in Appeal No 90 of 1927 by the Government Advocate of this Court. He would, therefore, be entitled to his separate costs in that appeal.

A short pedigree which we have made out will be attached to our decree.

R.M./R K. *Appeals dismissed.*

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* A. I. R. 1929 Oudh 479

WAZIR HASAN AND PULLAN, JJ.

Narain Das—Decree-holder— Appellant.

v.

Chandrawati Kuar—Judgment-debtor —Respondent.

Execution Decree Appeal No. 77 of 1928, Decided on 3rd September 1929, from order of Dist. Judge, Fyzabad, D/- 21st August 1928.

(a) Limitation Act (1908), S. 19—Acknowledgment must be shown to have been made within period prescribed by law of limitation

A letter by the general agent written at the instructions of the judgment-debtor can serve as a valid acknowledgment only when it is shown that it was made within the time prescribed by the law of limitation for the recovery of debt due under a decree and where it is not so shown the acknowledgment does not save limitation. [P 480 C 1]

*** (b) Limitation Act (1908), S. 20—Money paid on general account cannot be said to be paid for interest "as such"—Ordinary law of appropriation does not affect S. 20.**

The rule enacted in S. 20 is wholly independent from the rule that in absence of defined appropriation money received in respect of a debt should be at first applied in payment of interest and then in payment of the capital. Payment of interest must be made "as such" and money paid on a general account without a defined appropriation on the part of the debtor cannot be held to have been paid for

interest "as such": 3 *Bom.* 198 ; 31 *All.* 495; 19 *I. C.* 825 *A.I.R.* 1925 *Cal.* 1030, *Ref.*[P 480 C 2]

K. P. Misra—for Appellant.

Bhagwati Nath—for Respondent.

Judgment.—This is the decree-holder's appeal in execution proceedings from the decree of the District Judge of Fyzabad dated 21st August 1928, affirming the decree of the Subordinate Judge of the same place dated 20th January 1928.

The appellant's application for execution of his decree has been rejected by the Courts below on the ground that the execution is barred by limitation. The appellant's case is that the execution is not barred on two grounds: (1). Acknowledgment by the judgment-debtor which saves limitation under S. 19, Lim. Act, 1908, and (2) payments made by the judgment-debtor from time to time towards the judgment-debt. Both these grounds were examined carefully and rejected by the Courts below. Having heard arguments we have come to the conclusion that the view taken by the said Courts is correct.

On the question of acknowledgment reliance is placed upon a letter dated 9th June 1925. It is a letter written by the general-agent of the respondent and the lower Court finds in agreement with the Court of first instance that it was written at the instructions of the judgment-debtor. It is signed by the agent The Courts below are of opinion that the letter would have served the purpose of a valid acknowledgment within the meaning of S. 19, Lim. Act, had it been shown that it was made within the time prescribed by the law of limitation for the recovery of the debt due under the decree. The finding in this behalf is that it is not so shown. The matter stands thus : Several payments were made by the judgment-debtor both before and after the letter in question but these payments in themselves are of no avail unless they are of such a nature as would fall within the terms of S 20 of the aforementioned Act and thus keep the limitation alive so as to enable the acknowledgment relied upon to become effective. The judgment-creditor has therefore to prove that before the date of the letter of acknowledgment payments were made for interest as such or for principal and in the latter case :

"acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making the payment. vide S. 2 Act 1 of 1927.

It may be stated that the first part of the proviso to sub-S. 1, S. 20, Lim. Act, 1908, as amended by S 2, Act 1 of 1927,is inapplicable to the present case because the alleged payment of interest was made before the first day of January 1928. In this case there is no evidence of an acknowledgment of the nature required by the proviso and therefore the payment of any part of the principal cannot have the effect of saving limitation

As to the payment of interest, it is true that the decree-holder invariably credited the payments made by the judgment-debtor partly in payment of the interest and partly of the principal. Such an appropriation by the decree-holder, however, does not satisfy the requirements of the law. The payment must be a payment of interest "as such" and not towards the reduction of the general account in which each payment has been treated by the judgment-creditor as having the effect of reducingthe consolidated liability both for the principal and the interest of the judgment-debtor see : *Hanmantmal* v. *Rambabai* (1) ; *Muhammad Abdulla Khan* v. *Bank Instalment Co., Ltd* (2) *Chanderpal Kunwar* v *Dunia Prasad* (3) and *Mahamed Kamel* v. *Ahmad Ali* (4).

The rule enacted in S. 20, Lim. Act, 1908 as to the effect of the payment of interest is wholly independent of the other rule that where a debt is due which carries interest and payments are received by the creditor without a defined appropriation on the one side or the other the money so received is first applied in payment of interest and when that is satisfied then in payment of the capital. It seems to us clear that where money is paid on a general account without a defined appropriation on the part of the debtor no part of that money can be held to have been paid for interest 'as such.'

The appeal therefore fails and is dismissed with costs

R.M./R K. *Appeal dismissed.*

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(1) [1878] 3 Bom. 198.
(2) [1909] 31 All. 495 = 2 I. C. 379 = 6 A. L. J. 611.
(3) [1913] 19 I. C. 825.
(4) A. I. R. 1925 Cal. 1030.

A. I. R. 1929 Oudh 481

WAZIR HASAN, Ag. C. J.

Sarfaraz Singh—Defendant— Appellant.

v.

Deputy Commr., Gonda — Plaintiff— Respondent.

Second Rent Appeal No. 50 of 1928, Decided on 17th January 1929, from decree of Dist. Judge, Gonda, D/- 2nd May 1928.

(a) Oudh Rent Act, (22 of 1886), S. 127—Decree for ejectment is appealable in civil Courts along with appeal against decree for arrears of rent.

A decree for ejectment is appealable to civil Courts along with the appeal against the decree for arrears of rent and no separate appeal lies to a Court of revenue against the decree for ejectment *A. I. R.* 1929 *Oudh* 79, *Foll.* [P 482 C 1]

(b) Civil P. C., O. 32, R. 3 — Guardian though not properly appointed conducting suit properly—Minor cannot challenge result alleging no notice was given to him.

If a minor is sufficiently represented in a suit and his guardian though not properly appointed conducts the suit in a proper manner the minor cannot be allowed to challenge the result of that suit by alleging that at the time of the appointment of the guardian ad litem of the minor no notice was given to him. [P 482 C 2]

(c) Oudh Rent Act, S. 127 — Position of mortgagee after ejectment of mortgagor—Occupancy tenant ejected—Mortgagee becomes trespasser or tenant if so recognized—He can be treated as tenant under S. 127.

Where an occupancy tenant mortgages his holding and the occupancy tenure is extinguished by virtue of relinquishment or ejectment, the interest of the mortgagee in respect of that holding also ceases from that date. His position thereafter is either that of a trespasser or that of a tenant if so recognised by the landlord. He can be treated as a tenant under S. 127. [P 482 C 2 ; P 483 C 1]

Naimullah for *H. Husain* — for Appellant.

H K. Ghosh—for Respondent.

Judgment.—This appeal arises out of a suit for arrears of rent brought under S. 127, Oudh Rent Act (22 of 1886), by the Court of Wards, Ajodhya Estate, against Sarfaraz Singh the appellant. The suit was decreed by the Assistant Collector of Gonda on 9th August 1926, and while passing the decree for arrears of rent he passed a decree for ejectment of the appellant also. This decree has been confirmed on appeal by the learned District Judge of Gonda on 2nd May 1928. The appellant has now appealed to this Court

The facts of the case are that the land in suit consisted of the occupancy holding of two miniors, named Raghuraj and Ram Raj. The land had been mortgaged to the appellant Sarfaraz Singh under various deeds, some of which were executed by one Ramnidh, uncle of the minors, and others were executed by Mt. Hubraji their mother. The minors failed to pay rent and on 1st September 1919, a decree for arrears of rent was obtained by the Court of Wards against the said minors under guardianship of their mother Mt. Hubraji. The decree remained unsatisfied and on the basis thereof the Court of Wards brought a suit for ejectment of the minor from the said holding and obtained a decree on 30th September 1920. The mortgagee was not made a party to either of these two suits and he continued to remain in possession. In June 1923, the Court of Wards took out execution proceedings and took delivery of possession of the said holding. In spite of the decree for ejectment against the tenants and in spite of the delivery of possession through Court the appellant continued to remain in possession. The Court of Wards thereupon brought the present suit on 23rd March 1926. They treated the appellant as a tenant under S. 127, Oudh Rent Act and claimed a decree for arrears against him and also prayed for his ejectment. The rent was determined and as stated above a decree for the amount so found was passed against the appellant and a decree for ejectment was also passed against him.

When the appeal came on for hearing before a single Judge of this Court a preliminary objection was taken on behalf of the respondent that no appeal lay to this Court against the decree of the Courts below so far as it directed the ejectment of the appellant. The contention was that an appeal against decree for ejectment would lie to a Court of revenue and not to a civil Court. The learned Judge of this Court thereupon referred this case for decision of a Bench of two Judges and the case has now been laid before us.

Regarding the preliminary objection we may state that this very point was raised in Rent Appeal 22 of 1928 which has been decided by a Bench of this Court and will be found reported as *Ram Bahadur Singh* v.

Dharam Raj Singh (1). It has been held in that case that the decree for ejectment passed in such cases is appealable to the civil Courts along with the appeal against the decree for arrears of rent and that no separate appeal would lie to a Court of revenue against the decree for ejectment. The learned counsel for the respondent accepts this decision for the purposes of this appeal. The preliminary objection fails and is, therefore, rejected

As to the merits the learned advocate for the appellant has raised three points in support of his appeal; firstly, that the tenure in suit is not an occupancy tenure but is an under-proprietary tenure conferred upon the ancestors of the mortgagors under a settlement decree dated 31st January 1872, secondly, that the decree for ejectment is not a valid decree and is in any case not binding upon the appellant since he was no party to the ejectment suit brought against the mortgagors by the Court of Wards, and, thirdly, that the Court of Wards have accepted rent from the appellant and it was not open to them to treat him as a tenant under S. 127, Oudh Rent Act.

As to the first point we have carefully read the decree of the Settlement Court. After its perusal we are of opinion that it did not confer any under-proprietary rights and that the rights which were conferred under it upon the ancestors of the minors named above consisted only of occupancy rights The judgment clearly states that the claimants failed to establish any proprietary or under-proprietary right in respect of the eight annas share of the village in which these lands are situate. After that declaration it is clear that when the Settlement Court decreed "qabzadari" rights they meant only heritable and non-transferable rights and not rights in the nature of an under-proprietary tenure We, therefore, reject the first contention.

As to the second contention the argument that was addressed to us was of a two-fold character. One was to the effect that the decree is not valid and binding on the minors since no notice of the appointment of their guardian was given to them in the suit in which the decree for ejectment was passed and the other was to the effect that the appellant not being a party to that decree it could not be considered binding upon him.

As to the first argument it appears to us that it cannot be sustained since, in our opinion, the mother of the minors actually contested the suit and the interest of the minors were sufficiently protected during the trial of the suit. It is now a settled rule of law that if a minor is sufficiently represented in a suit and his guardian, though not properly appointed conducts the suit on behalf of the minor in a proper manner the minor cannot be allowed to challenge the result of that suit by alleging that at the time of the appointment of the guardian ad litem of the minor no notice thereof was given to him. The argument, therefore, fails.

As to the second argument we may state that it has also no force. It is now settled by a series of decisions that where an occupancy tenant mortgages his holding and the occupancy tenure is extinguished by virtue of relinquishment or ejectment the interest of the mortgagee in respect of that holding also ceases from that date. This was held by Piggott, J., in *Ram Racha Dube* v. *Gokul Rai* (2). It was a case where an ex-proprietary tenant whose tenure, we may observe, is of the same character as that of an occupancy tenant had mortgaged his holding and the question arose as to whether the rights of the mortgagee in respect of that holding could continue after the ejectment of the occupancy tenant. It was held that whatever rights were possessed by the tenant were extinguished by the ejectment and that after the ejectment the ex-proprietary tenure which formed the subject of mortgage ceased to exist. The same view has been taken by the Board of Revenue in several cases : vide *Naubat Bibi* v. *Raghubar Koeri* (3), decided by Messrs. Freemantle and Hopkins and *Haji Husain Khan* v. *Faujdar Khan* (4) decided by Messrs. Oakden and McNair and reported in Revenue Cases for the year 1927, p. 422. We are, therefore, of opinion that the occupancy tenure ceased to exist when the tenants Raghuraj and Ram Raj were actually ejected in June 1923, in execution of the decree for ejectment passed against them. The position of the mortgagee would

(1) A. I. R. 1929 Oudh 79.

(2) [1914] 25 I. C. 201.
(3) 5 U. D. 230
(4) 12 R. D. 286.

thereafter be held either to be that of a trespasser or that of a tenant if so recognized by the landlord.

As to the third point the learned advocate for the appellant drew our attention to several receipts on the record showing that rent had been accepted by the Court of Wards from the appellant On examination, however, it appears that those receipts relate to a period anterior to ejectment. The Court of Wards accepted rent only on behalf of the occupancy tenant and in no way recognized the validity of the mortgage in his favour. No rent was accepted by the Court of Wards after the ejectment. The appellant had sent by money order rent for the subsequent period but the Court of Wards had refused to accept it. Under those circumstances it appears to us to be clear that the appellant has never been recognized as a tenant by the Court of Wards by virtue of acceptance of rent

The result of all these findings is that the rights of the appellant as mortgagee of the occupancy holding came to an end when his mortgagors were ejected in 1923, and that thereafter the position of the appellant was that of a pure trespasser and the Court of Wards was justified in treating him as a tenant under S. 127, Oudh Rent Act. The decree for ejectment has, therefore, been rightly passed. No question as to the amount of rent for which the decree was passed against him was raised in appeal

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

R.M /R.K. *Appeal dismissed.*

A. I. R. 1929 Oudh 483 (1)

STUART, C. J , and RAZA, J

Durga Prasad and *others*—Defendants—Appellants.

v.

Surat Singh and *others*—Plaintiffs—Respondents.

First Appeal No 79 of 1928, Decided on 30th July 1929, against decree of Sub-Judge, Kheri, D/- 30th April 1928.

Court-fees Act, S. 12—Power to compel payment of additional fee can be exercised by appellate Court only before decision of appeal.

The question of payment of additional fee ought to be raised when the appeal is heard. Where the Court of appeal which decides the matter becomes functus officio, it has no power to compel payment of additional Court-fee when the appeal is decided before the question of additional fee is raised : *A. I. R.* 1929 *Oudh* 321, *Rel. on. [P 483 C 2]

L S. Misra—for Appellant.

S. C. Das—for Respondent.

H. K. Ghose—for the Crown.

Judgment.—The view of the Chief Inspector of Stamps is borne out by the decision in *Hem Nath* v. *Wilayat Ahmad* (1). But this Court has now no power to require a party to pay an additional fee. The power to compel the payment of the additional fee is given to a Court by S 12, Court-fees Act of 1870. Primarily the power should be exercised by the Court in which the plaint or memorandum of appeal which is deficiently stamped has been filed but by the second portion of the section, the same power can be exercised by a Court of appeal, reference or revision if in its opinion the question has been wrongly determined to the detriment of the revenue. The Court must either be the Court in which the plaint or memorandum of appeal has been filed or a Court sitting as a Court of appeal, reference or revision. Undoubtedly the question could have been raised when the appeal was heard. But the appeal was decided on 21st January 1929, before the question was ever raised. We are not a Court of appeal, reference or revision in respect of this question and the Court which decided the matter is now functus officio. In these circumstances we can take no action in the matter.

R.M /R.K. *Order accordingly.*

(1) A. I. R. 1929 Oudh 321.

A I. R. 1929 Oudh 483 (2)

SRIVASTAVA, J.

Brij Kishore and *another*— Plaintiffs —Appellants.

v.

Beni Pershad and *others*— Defendants —Respondents.

Second Appeal No 184 of 1929, Decided on 12th September 1929, from decree of Sub-Judge, Hardoi, D/- 3rd April 1929

(a) Civil P. C., O. 6, R. 17—Court has wide discretion to amend pleadings—Amendment was allowed.

A sued *B* for redemption of a mortgage. *B* denied the existence of the mortgage and pleaded that he was in possession of the property under two other deeds of mortgage executed

by the predecessor of *A*. *A* explained that the mortgage deed under which he sued for redemption was executed in lieu of the earlier deeds and also applied for amendment of plaint and asked permission to add an alternative relief for redemption of the two mortgages set up by *B* in case the existence of mortgages set up by him was not established.

Held, that this was a fit case for amendment of plaint. R. 17, O. 6, gives wide discretion to the Court in the matter of amendment of pleadings 18 *All*, 403 and 3 *O. C.* 173, *Dist* [P 485 C 1]

(b) Evidence Act, S. 90—S. 90 is not confined only to those cases where original is produced.

The words in S. 90 "where any document··· is produced," as they stand, do not confine the application of S. 90 to cases in which the original document is actually produced before the Court. There is nothing in S. 90 to prevent the Court making a presumption of the genuineness of the original when a certified copy of a plaint is produced to show acknowledgment for the purposes of limitation: *A. I. R.* 1923 *Mad.* 1 (*F.B.*), *Relied on*. [P 486 C 1]

Ishri Prasad—for Appellants.

Hyder Husain—for Respondents

Judgment.—This appeal arises out of a suit for redemption of a mortgage. The plaintiffs' case, as originally put forward in the plaint, was that their predecessor-in-interest Pahalwan Singh had on 10th June 1869, made a mortgage with possession in favour of Moti, the predecessor-in-interest of the defendants, for Rs. 99 and they claimed to be entitled to a decree for redemption of the said mortgage. The defendants denied the existence of the mortgage set up by the plaintiffs. They pleaded that they were in possession of the property in suit under two other deeds of mortgage, one for Rs. 32 dated 6th September 1863 (Ex. A-1) and the other for Rs. 36-14-0 dated 21st October 1866 (Ex. A-2). Both these deeds were executed by Jodhan Singh the predecessor of Pahalwan Singh. The explanation offered by plaintiffs with regard to the two mortgages, Exs. A-1 and A-2 was that the mortgage deed in in suit dated 10th June 1869 was executed in lieu of them and that these earlier deeds had merged in the latter deed. However, in order to be on the safe side they also applied for an amendment of their plaint and asked for permission to add an alternative relief for redemption of the two mortgages set up by the defendants in case the existence of the mortgage deed set up by the plaintiffs was not established. This application for amendment was at first opposed by the defendants but subsequently the opposition was withdrawn and the amendment was made accordingly. The defendants were given an opportunity to meet the alternative case introduced into the pleadings by means of the amendment and they sought to meet it by pleading that the plaintiffs' claim for redemption of the two mortgages, Exs. A-1 and A-2 was barred by limitation. The plaintiffs answered the plea of limitation by setting up an acknowledgment said to have been made by Moti on 14th May 1869.

The parties went to trial on these pleadings and the learned Munsif found that the plaintiffs had failed to prove the existence of the mortgage, dated 10th June 1869. He, however, found the alleged acknowledgment by Moti of two mortgages dated 6th September 1863 and 21st October 1866 established and as a consequence of this finding he gave the plaintiffs a decree for possession by redemption of the two mortgages aforesaid. On appeal the learned Subordinate Judge has reversed the decision of the Munsif and dismissed the plaintiffs' suit. He bases his decision on two grounds, namely, (1) that the Munsif was wrong in allowing amendment and decreeing the claim on the basis of the two mortgages set up by the defendants and (2) that no valid acknowledgment was proved and therefore the claim for redemption in respect of the two mortgage deeds was barred by limitation.

The plaintiffs-appellants have come here in second appeal They impugn the findings of the lower appellate Court on both the points mentioned above. As regards the question of amendment I am constrained to say that the view taken by the lower appellate Court is astonishing. It is true, as pointed out by the lower appellate Court on the authority of *Sheo Prasad* v. *Lalit Kuar* (1) and *Salik Ram* v. *Ramanand* (2), that in a suit for redemption the plaintiff can get a decree only on foot of the mortgage set up by him and if he fails to prove such mortgage he cannot be given a decree for redemption on any other mortgages which might be found to subsist between the parties. But this, in my opinion, affords all the more reasons why the plaintiff in such a case should be allowed to amend his plaint if he wishes

(1) [1896] 18 All. 403=(1896) A. W. N. 132.
(2) [1900] 3 O. C. 179.

to do so. O. 6, R. 17, Civil P. C, gives wide discretion to the Court in the matter of amendment of pleadings.

As pointed out before the objection raised against the amendment on behalf of the defendant was subsequently withdrawn by them. Under the circumstances I find myself wholly unable to follow the process of reasoning by which the learned Subordinate Judge came to the conclusion that the trial Court was not justified in allowing the amendment All that Mr Hyder Hussein, the learned counsel for the defendants-respondents could say in support of the judgment of the lower appellate Court was that the amendment was improper as it had the effect of introducing a new cause of action. However, he had to concede that he could not object to such amendment, if the relief for redemption of the two mortgages was claimed in the alternative. Para 2 (b), which was added as a result of the amendment clearly shows that the plaintiffs in the first place asked for redemption of the two earlier mortgages set up by the defendants. I must, therefore, accept the contention of the appellants and hold that the learned Subordinate Judge is wrong in questioning the amendment which was made in the trial Court.

Next as regards acknowledgment. It is admitted that the present suit was instituted more than 60 years after the execution of the two mortgages, Exs. A-1 and A-2. The plaintiffs seek to bring their claim within limitation by relying upon an acknowledgment made by the mortgagee Moti on 14th May 1869. The acknowledgment is said to be contained in the plaint of a suit to contest a notice of ejectment which was instituted by Moti in the revenue Court Ex. 4 is the copy of the said plaint. It appears that one Durga issued a notice of ejectment against Moti alleging him to be a mere tenant. Moti instituted a suit to contest the notice setting up his rights as a mortgagee under the two mortgages in question. Moti was ultimately successful in his suit and the notice of ejectment issued against him was cancelled. The judgment and decree passed in the said suit are the defendants' own Exs.A-2 and A-4 of this case. The plaintiffs produced Ex. 4 which is a certified copy of the aforesaid plaint on 26th September 1928, which was the date fixed for the framing of issues. The trial Court on that very day presumed it to be genuine under S. 90, Evidence Act. The learned Subordinate Judge has held that the genuineness of Ex. 4 could not be presumed because no presumption under S. 90, Evidence Act, can be made in favour of a copy when the original has not been produced before the Court. The learned counsel for the defendants-respondents laid great stress upon the fact that it was a matter in the discretion of the lower Courts whether the genuineness of Ex. 4 should be presumed or not and the lower appellate Court having in the exercise of its discretion refused to presume its genuineness, the discretion of the lower appellate Court cannot be questioned in second appeal. It might be remarked in passing that obviously the principle emphasised by the learned counsel for the respondents has been violated by the learned Subordinate Judge. It might also be pointed out that the genuineness of the document having been presumed by the trial Court on the very date when the document was produced in evidence, there was hardly any occasion for the plaintiffs to summon the original of the document before the Court. Under the circumstances, if the view of the lower appellate Court, that it was essential for the Court to have the original before it in order to enable it to make a presumption under S 90, is correct, the proper course for that Court to have adopted would have been to give an opportunity to the plaintiffs to summon the original before the Court, rather than to throw out the claim on that ground. However, apart from all these circumstances I am satisfied in the present case that there has been no exercise of discretion by the lower appellate Court. The learned Subordinate Judge took a certain view of law and held in accordance therewith that no presumption could be raised under S. 90 because the original had not been produced before the Court.

The whole question, therefore, which requires consideration is whether the view of law taken by the learned Subordinate Judge is correct or not. The lower appellate Court has never approached the case from the standpoint that if the terms of S. 90 permitted the Court to presume the genuineness of a copy whether the present case was a fit one or not

for the raising of such presumption. For these reasons I think that I am free to consider the validity of the view taken by the learned Subordinate Judge in light of the law on the point. The words used in S. 90, Evidence Act are : " When any document ... . is produced." These words as they stand do not confine the application of the section to cases in which the original document is actually before the Court. It is admitted by the learned counsel for the defendants-respondents that the certified copy of the plaint filed in Court was admissible as secondary evidence of the original which formed part of a public record. In my opinion, therefore, there was nothing in S. 90 to prevent the Court from making a presumption of the genuineness of the original. If authority were needed I may refer to the Full Bench decision of the Madras High Court reported in *P. Subramanya Somayajulu* v. *Seethayya* (3) It will suffice for me to quote the relevant portion of the head-note which is as follows:

" The presumption under S. 90, Evidence Act, with regard to documents 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original."

I am, therefore, of opinion that the second ground relied upon by the learned Subordinate Judge is also untenable. Before leaving this part of the case it might be mentioned that the learned counsel for the defendants-respondents contended that the lower appellate Court was justified in refusing to presume the genuineness of Ex. 4 because there was evidence before it which went to show that Moti was illiterate. This is answered by what I have said before that in my opinion the learned Subordinate Judge has not applied his mind at all as to whether it was a fit case for the exercise of discretion or not. Reference to the illiteracy of Moti was made only in support of the view that it was the duty of trial Court to insist on the production of the original before it.

For the above reasons I allow the appeal, set aside the decision of the lower appellate Court and restore that of the trial Court. The plaintiffs-appellants will get their costs in this Court as well as in the lower appellate Court.

R.M./R.K. *Appeal allowed.*

(3) A. I. R. 1923 Mad. 1=46 Mad. 92 (F.B).

A. I. R. 1929 Oudh 486

MISRA AND RAZA, JJ.

Abid Ali Khan—Plaintiff—Appellant.

v.

Har Prasad and *another* — Defendants—Respondents.

First Appeal No. 87 of 1928, Decided on 8th May 1929, against order of Sub-Judge, Unao, D/- 15th May 1928.

(a) Pre-emption—Suit for—Fictitiousness of consideration—Burden of proof.

As to the fictitiousness of consideration it is a settled rule of law that a very slight proof will shift the burden on vendees to prove the actual payment of the price entered in the deed : 4 *O. C.* 247, *Foll.* [P 487 C 2]

(b) Pre-emption—Suit for—One item of consideration entered in sale deed fictitious—Irresistible conclusion is that entire consideration is fictitious and not bona fide.

In a suit for pre-emption if one item of consideration is proved to be fictitious, the entire consideration entered in the sale deed of which this item forms a part must be deemed to be fictitious and the conclusion is that the sale consideration entered in the deed is not bona fide. [P 488 C 1, 2]

(c) Pre-emption—Suit for—Criterion for determination of market value of property in dispute is amount actually paid under sale deed.

In order to determine the market value of the property in dispute in a pre-emption suit it is advisable first to determine what amount was actually paid under the sale deed, for that amount is a good guide to help in determining the market value if it cannot otherwise be fully established : 10 *O. C.* 88, *Foll.* [P 488 C 2]

K. P. Misra—for Appellant.

A. P. Sen, *S. C. Das* and *Lakshmi Narayan*—for Respondents.

Judgment.—This appeal arises out of a pre-emption suit. One Akhtar Ali who is defendant 3 in this suit sold two annas nine pies share out of the entire village situate in Patti Salabat Khan of Village Bhugaita, District Unao, to Pandit Har Prasad and Pandit Ganga Sewak, alias Manni Lal for Rs. 12,500 The sale deed was executed on 14th August 1926. The consideration as stated in the deed was made up of the following items :

1. Due under a mortgage deed dated 24th July 1924, executed by Akthar Ali in favour of Har Prasad and Ganga Saran ... Rs. 4,804-5-3
2. Due under 5 pro-notes of different dates executed by Akhtar Ali in favour of those very gentlemen ... ... Rs. 2,052-0 0
3. To be paid to the plaintiff Abid Ali under a pro-note executed by Akhtar Ali in favour of Abid Ali ... ... Rs. 2,350-0-0

4. Cash paid at the time of the registration	... ...	Rs. 3,000-0-0
5. Costs of stamp and registration expenses	... ...	Rs. 293-10-9
	Total	Rs. 12,500-0-0

The plaintiff-appellant Abid Ali Khan is a cosharer in patti Salabat Khan of Village Bhugaita and therefore has brought the present suit claiming pre-emption in respect of the share sold. The main allegation on which he brought the suit was that the consideration entered in the sale deed was fictitious, and denied that the first item was actually due on the mortgage deed dated 24th July 1924. He admitted the genuineness of that item of the consideration to the extent of Rs. 2,713-12-0 but denied the pro-notes alleging that they were all fictitious and therefore denied the genuineness of the entire item shown in the sale deed as due on that account. The rest of the items were admitted The result was that he admitted the genuineness of the consideration entered in the sale-deed to the extent of Rs. 8,063-12-0. He alleged that that was the real price for which the property had been sold. He further alleged that the third item consisted of Rs. 2,350 which was due to the plaintiff under a pro-note executed in his favour and which had not been paid by the vendees and out of the first item he also alleged that Rs. 1,000 shown in the mortgage deed dated 24th July 1924, to be payable to one Chandika Singh, who was in possession of a portion of the property as a prior mortgagee, had not been paid and consequently the plaintiff was entitled to deduct that amount also. In all he claimed a deduction for Rs. 3,350 leaving a balance of Rs. 4,713-12-0 on the payment of which amount he said he was entitled to claim pre-emption.

The vendees who are defendants respondents in this case contended in their defence that none of the items was fictitious and that the price entered in the sale deed was actually the price which was settled between the parties. They said that Rs. 12,500 was also the market value of the property in suit and even if any portion of the consideration money was found to be fictitious the plaintiff-appellant could not claim pre-emption on payment of any sum less than Rs. 12,500. It is not necessary to mention other pleas taken in defence since none of them were pressed in the trial Court and all of them were therefore overruled.

The two main points around which the contest raged in the trial Court were the questions of fictitious nature of the consideration and the market value of the property sold. The learned Subordinate Judge of Unao who tried the case found that no item of the consideration was fictitious, but he held that the sum of Rs. 1,000 payable to Chandika Singh under the mortgage-deed dated 24th July 1924, had not been paid nor had the item of Rs. 2,350 payable to the plaintiff been paid. The learned Subordinate Judge also found that Rs. 12,500 was the market value of the property sold. He therefore passed a decree for pre-emption in favour of the plaintiff-appellant on payment of the entire consideration money, minus the sums mentioned above The result was that he allowed pre-emption on payment of Rs 9,150 The date of his decree is 15th May 1928

In appeal the same two points have again been urged and we have heard arguments in this case at considerable length. We now proceed to give our findings in respect of both these two points.

As to the fictitiousness of the consideration it is a settled rule of law that a very slight proof will shift the burden to the vendees to prove the actual payment of the price entered in the deed : vide *Dwarika* v. *Ludar* (1).

As to item 1 entered in the sale deed due on account of the deed dated 24th July 1924, we are clearly of opinion that the amount entered in the sale deed was a fictitious item. The learned counsel for the plaintiff-appellant contended that the sum actually due on account of the mortgage deed at the time when the sale deed was executed was only Rs. 2,713-12-0. He arrived at this sum by calculating the compound interest from 24th July 1924 to 14th August 1926, and by adding it on to the principal amount. We have ourselves calculated the amount and it appears to us that the compound interest on Rs. 2,500 at as. 9 per cent per mensem compoundable yearly, calculated from the 24th July 1924 to 14th August 1926 comes to Rs. 358 total Rs. 2,858; but it is admitted by the parties that out of the sum of Rs. 2,500, Rs. 1,000 payable

(1) [1901] 4 O. C. 247.

to Chandika Singh had not been paid. The sum due to the defendants-respondents under the mortgage deed was Rs. 1,500 plus compound interest thereon at as. 9 per cent per mensem compoundable yearly which comes to Rs. 215. The total sum therefore due to the mortgagees was Rs. 1,715. In place of this the mortgagees entered Rs. 4,803-5-3 as due to them under the deed. We are therefore clearly satisfied that this item of the consideration is a ficititious one, not being due on the date when the sale deed was executed

The learned counsel for the respondents admitted that no interest should have been charged on Rs. 1,000 payable to Chandika Singh nor should that item have been included in the principal sum due under the mortgage deed. He, however, contended as was contended on behalf of his clients before the trial Court that his clients were entitled to charge interest for 10 years, the period fixed in the mortgage deed. The argument put forward was that if the property had been sold to a third person the mortgagees were entitled to claim interest for the entire period fixed in the mortgage deed. We do not think that the mortgagees were entitled to claim interest for this period when they themselves had purchased the property, the fact of their purchasing the property having in our opinion the effect of extinguishing the mortgage. If the mortgage was extinguished we fail to see how it could be kept alive for the purpose of calculating interest. We are therefore of opinion that the item of Rs. 4,804-5-3 was a fictitious item not having been due on the date when the sale took place.

As to the item due under the five pronotes we are not inclined to disagree with the finding of the learned Subordinate Judge. We think that the fictitious nature of the item of consideration due on these pro-notes is not established. We have not thought it proper to go into detail in regard to the items due on account of these five promissory notes, because our finding in regard to item 1 makes it unnecessary for us to deal at length with the said item. If one item of the consideration is proved to be fictitious the entire consideration entered in the sale deed of which this item forms part must be deemed to be fictitious. Our finding therefore on the first point is that the consideration entered in the sale deed dated 14th August 1926, is a fictitious item, and that the sale consideration entered in the deed was not bona fide.

Having arrived at this conclusion it is necessary for us to determine the market value of the property in suit. In order to determine the market value we proceed first to determine what amount was actually paid under the sale deed. According to our finding all the items of consideration under the sale deed are genuine except item 1 under which head only Rs. 1,715 had been paid. If the item payable to Chandika Singh be added, it would come to Rs. 2,715. The item actually entered in the deed on this account was Rs. 4,804 5-3. The excess which was not due and which was entered in the deed therefore comes to Rs. 2,089-5-3. Deducting this from the entire sum of Rs. 12,500 we got the figure at Rs. 10,410-10-9. We have only tried to ascertain this sum since it will be a guide to help us in determining the market value, if it is not otherwise fully established: vide *Abilakh* v *Rabban Singh* (2)

On the question of the market value the learned Subordinate Judge has principally relied on the sale transaction embodied in Ex. A-32 which is dated 28th January 1924 A suit for pre-emption was lodged by the plaintiff himself in respect of this sale deed and the decree passed in his favour is Ex A-20. The sale deed was in respect of a 3 annas 3 pies share in patti Salabat Khan and was for a sum of Rs. 13,500 Calculating the price according to the rate entered in this sale deed the price of 2 annas 9 pies' share would come to Rs. 11,423. It was urged by the learned counsel for the plaintiff-appellant that the price entered in this sale deed was also a fancy price and should not be considered as a true criterion for determining the market value of the share in dispute, and in support of his contention he relied upon a counter claim for pre-emption put forward by the defendants-respondents in respect of this very sale, as will appear from Ex. 4 In this document the defendants-respondents alleged that the market value of the property sold was not more than Rs. 11,500. Although a

(2) [1907] 10 O. C. 88.

decree was passed in this case in favour of the plaintiff-appellant in preference to the defendants-respondents on payment of Rs. 13,500, it does not appear from the record as to whether the question of the market value of the share sold was actually determined, or whether the decree was passed merely on confession or compromise of the parties. In the absence of any such material to help us we think that it would be safe for us if we put the market value of the property in suit at Rs. 11,000 which comes roughly to about 50 times the profits of the property The sum of money actually paid under the deed according to our finding on the first point comes to Rs. 10410-10-9 and the price according to the rate entered in Ex. A-32 comes to Rs. 11,123. We, therefore, prefer to take a rough average and fix the market value of this property in suit at Rs 11,000.

The learned Subordinate Judge has also relied in this connexion upon a mortgage-deed executed by the plaintiff-appellant in respect of this very property but in our opinion that can be no test for determining the market value of the same. The mortgage may be a mortgage to the very hilt or it may be with a little margin Under these circumstances we do not consider it safe to reply upon that transaction as a guide for determining the market value.

On behalf of the respondents reliance was placed on two other sale deeds which were executed on 22nd March 1919 and 7th July 1923 and which were in respect of a 2 annas 8 pies share of patti Wali Muhammad. They are Exs 2 and 3 respectively. As they belong to a different patti altogether and as there is no definite proof before us as to what is the difference in the quality of land of patti Wali Muhammad and patti Salabat Khan we discard these documents from our consideration.

Our finding, therefore, is that the market value of the property in suit is Rs. 11,000.

We, therefore, modify the decree passed by the learned Subordinate Judge to this extent that the plaintiff-appellant will be entitled to pre-empt the property in suit on payment of Rs. 11,000 instead of Rs. 12,500 as decreed by the Subordinate Judge. Out of this sum of Rs. 11,000 the plaintiff-appellant will be entitled to deduct Rs. 3,350, i. e., Rs. 2,350 on account of the sum payable to the plaintiff-appellant himself which has not yet been paid by the vendees and Rs. 1,000 which they have not paid to Chandika Singh under the mortgage deed dated 24th July 1924. The total sum to be deposited by the plaintiff will thus be Rs 7,650.

Regarding costs our order is that as both parties have partially succeeded and partially failed and as the pre-emptive right of the plaintiff-appellant is not questioned we direct that the parties should bear their own costs in the lower Court as well as in this Court.

V.B./R.K. *Order accordingly.*

A. I. R. 1929 Oudh 489

MISRA, J

Chatterpal Singh and *another*—Plaintiffs—Appellants

v.

Raghubir Singh — Defendant — Respondent

Second Appeal No. 384 of 1928, Decided on 15th February 1929, from a decree of Sub-Judge, Rae Bareli, D/- 8th September 1928.

(a) Cosharer—Partition—Grove belonging to one cosharer standing in joint land—That land in partition allotted to another cosharer—Title to trees cannot be claimed by the grove-holder unless the right was preserved at partition proceedings.

If there is a grove land belonging to a cosharer standing in the joint land and the said land either wholly or partially falls at the time of the partition into the share of another cosharer, the latter becomes entitled to both the land and the trees, unless the former's title to the trees and his status as a grove-holder is secured to him by the partition proceedings. In absence of such evidence of the partition proceedings it cannot be held that the rights as a grove-holder were preserved to the cosharer claiming them.

[P 490 C 2, P 491 C 1]

(b) Limitation Act, Arts. 142 and 144—In case of parti land possession follows title.

In the case of parti land the presumption of law is that possession must follow title. Where, therefore, certain cosharer got title after partition possession is presumed to have passed to him and suit for possession brought by him long after partition is not barred. [P 491 C 1, 2]

Kashi Prasad Srivastava—for Appellants.

Radha Krishna Srivastava—for Respondent.

Judgment —This appeal arises out of a suit for possession of certain land situ-

ate in village Lakhra, District Partabgarh. At the time of the First Regular Settlement there was a plot of land No. 349, measuring 5 bighas 11 biswas 12 biswansis situate in that village, which was recorded as a grove in possession of two persons Parag Singh and Dwarika Singh who were ancestors of the defendant This plot was the joint land of all the cosharers in the village including Parag Singh and Dwarka Singh having been recorded as shamlat deh (common to the whole village.) In the year 1885 there was a partition between the cosharers of the village with the result that a portion of the plot No. 349 was allotted to the share of Jagannath Singh, the father of plaintiff 1. The number of the plot was 349-3 and its area was 1 bigha 7 biswas. In the second Settlement which took place in 1300 Fasli (1893-94) this number 349-3 was converted into No. 1107 The total area of number 1107 was recorded as 1 bigha 12 biswas 17 biswansis, the excess belonging to one Mt. Sukh Raj Kuar.

It appears that shortly after the partition proceedings the defendant constructed his house on the portion of plot No. 1107 belonging to the the said lady with her permission. The portion of No. 1107 which belongs to the plaintiffs now bears Nos 1020 (Be) and 1023 (Alif) according to the recent Settlement. Two mahua trees belonging to the defendant are also to be found on the land in dispute. It further appears that the defendant has recently brought a portion of the land in dispute under his cultivation. The plaintiffs brought a suit against the defendant for rent in respect of this land under S. 127, Oudh Rent Act, but his suit was dismissed on 29th August 1927. This has given the plaintiffs their cause of action to bring the present suit. The plaintiffs now claim possession of the aforesaid land, that is, plots Nos 1020 (Be) and 1023 (Alif) of the current Settlement corresponding to plot No. 1107 of the second Settlement. They have also claimed damages and injunction restraining the defendant from cultivating the land in suit.

The defendant denied the plaintiffs' title and their possession within limitation but contended that he was in adverse possession of the said land and had become owner thereof. His case in the alternative was that the land having been recorded at the First Regular Settlement as the grove of his ancestors was his own grove and that the plaintiff was not entitled to the possession of the land since his trees still stood on the said land.

The learned Munsif of Partabgarh who tried the suit held that the land in suit had been allotted to the share of Jagannath Singh father of Chhaterpal Singh plaintiff 1 and was, therefore, the property of the plaintiffs but held that the land prior to its having been cultivated by the defendant was parti (fallow) and that the defendant had begun to cultivate it only a few years prior to the suit. Their possession within limitation was held to have been established and in this view of the case he decreed the plaintiff's suit exempting the land on which the defendant's house stood. He, however, did not award any damages to the plaintiffs, since none were proved.

On appeal the learned Subordinate Judge of Rae Bareli has reversed the decree of the learned Munsif on the ground that the land in suit constituted the grove land of the defendant and that the plaintiffs were not, therefore, entitled to the possession thereof. He has, however, passed a declaratory decree in favour of the plaintiffs to the effect that they are the owners of the land in suit.

The plaintiffs have now come up to this Court in second appeal and the main point urged on their behalf is that the status of the defendant in respect of the land in suit cannot be treated in law as that of the grove-holder and that the plaintiffs are entitled to the actual possession of the land in suit. They have, however, given up their claim to the two mahua trees standing on the said land which they have admitted are the property of the defendant-respondent. I have heard the arguments in this case at length and have come to the conclusion that the contention raised on behalf of the appellants is sound and the plaintiffs' suit must be decreed

I now proceed to give my reasons for this conclusion.

It appears to me to be clear that if there is a grove land belonging to a cosharer standing on the joint land and the said land either wholly or partially falls at the time of the partition into the share of another cosharer, the latter

becomes entitled to both the land and the trees, unless the former's title to the trees and his status as a grove-holder is secured to him by the partition proceedings. The ordinary presumption of law is that the trees pass along with the soil on which they stand. The case of a tenant holding a grove on a plot of land allotted to a cosharer is a quite different one. The cosharer to whose share that land is allotted cannot in such a case become the owner of the trees since the trees did not belong to the person, who was the owner of the land. In such a case the possession of the tenant as a grove-holder cannot be disturbed by the cosharer in whose share the land has fallen. No such position, as stated above can be attributed to a cosharer who is the owner of the land as well as of the trees. None of the parties in this case has chosen to produce the partition proceedings I cannot, therefore, in the absence of such evidence hold that the rights of the defendant-respondent as a grove-holder were preserved to him. There is no dispute regarding the two mahua trees which still exist on the lands in suit because the plaintiffs-appellants have admitted the right of the defendant-respondent to hold these trees. That does not, however, mean that they ought to be deemed to have admitted the status of the defendant-respondent as a grove-holder in respect of the land in suit. I am, therefore, unable to take the view which the learned Subordinate Judge has taken, namely, that the defendant-respondent ought to be treated as a grove-holder of the land, which has fallen into the share of the ancestors of the plaintiffs-appellants.

During the course of arguments the learned advocate for the defendant-respondent contended that the plaintiffs-appellants' suit was barred by limitation since they had brought the suit for possession long after the partition of 1885. I regret I cannot accept that contention. It is clear from the evidence on the record that the nature of the land was parti and that it has only been recently brought under cultivation by the defendant-respondent. The nature of the land being parti the presumption of the law is that in such a case possession must follow title. The claim of the plaintiffs-respondents, therefore, cannot be thrown out on the ground that they have brought their suit for possession long after the partition

I may just point out that the plaintiffs-appellants did not claim the land on which the house stands since it was constructed by the defendant with the permission of Mt Sukhraj Kuar. The learned advocate for the defendant-respondent urged that his client's right to possess land on which the house stands must not be disturbed and that he should also be given free right of access to that house. This position is quite a reasonable one and the plaintiffs cannot claim possession of any portion of the land on which the house of the defendant-respondent stands. They must also allow him a right of free egress and ingress. The plaintiffs-appellants will, however, be declared to be the owner of the land on which the house stands if any portion of it belongs to them

I am, therefore, of opinion that the plaintiffs-appellants are entitled to a decree for actual possession of the land claimed by them on condition that they will not be allowed to take possession of the land on which the house of the defendant-respondents stands, if any portion of it, be the property of the plaintiffs-appellants.

I therefore, set aside the decree of the Subordinate Judge and restore the decree passed by the learned Munsif with costs in all the three Courts.

R.M /R K. *Appeal allowed.*

A I. R. 1929 Oudh 491

STUART, C. J., AND RAZA, J.

Kuber Saran—Plaintiff—Appellant.

v.

Raghubar and *another*—Defendants—Respondents.

First Appeal No. 38 of 1929, Decided on 8th August 1929, from decree of Sub-Judge, Mohanlalganj, D/- 20th March 1929.

Court-fees Act, S. 7 (iv) (c)—Suit for declaration that certain deeds are voidable with prayer for their cancellation—Ad valorem fee must be paid.

Where a person not only asks for a declaration that certain deeds are voidable against him because his consent to their execution has been caused by fraud or misrepresentation but also asks that the deed should be cancelled and delivered up. The suit is distinctly a suit for declaration with a prayer for consequential relief and ad valorem fee must be paid under the provisions of S. 7 (iv) (c)

and stamp of Rs. 10 is insufficient: 29 *Bom.* 207, *Rel. on* ; 5 *All.* 331 (*F. B.*) and 1 *O. C.* 129, *not Foll.* [P 493 C 1]

Daya Kishen Seth—for Appellant.

Judgment.—The facts are as follows: The appellant Kuber Saran instituted a suit on 10th November 1928, asking for the cancellation of three deeds dated 23rd August 1928, 12th September 1928, and 15th September 1928 executed by him in favour of other persons on the ground that the execution of these deeds had been caused by fraud and misrepresentation. He valued the property covered by these deeds at Rs. 6,000 and valued the suit for the purposes of jurisdiction at Rs. 6,000.

He paid a court-fee stamp of Rs. 10 on the relief on the ground that this was a suit of declaratory nature The learned trial Judge considered that this was a suit under S. 39, Specific Relief Act (1 of 1877). It clearly was such a suit. It was a suit for a declaration and also for consequential relief by cancellation of of the document in question. The learned trial Judge taking this view directed the appellant to make up the deficiency of Rs. 295. The appellant did not take exception to this order. He was granted time within which to make up the deficiency. He did not make up the deficiency but applied to amend his plaint. The amendment of the plaint altered to a large extent the character of the suit and the learned trial Judge refused to allow the plaint to be amended. The learned trial Judge says

"Instead, however, of paying court-fees on the valuation, plaintiff has applied for amendment of the plaint by asking for a relief that the plaintiff's possession be maintained. And it is argued now that the suit has been converted into one for possession and court-fee is therefore payable on five times the land revenue. I am unable to accede to the argument The device is transparent Plaintiff is in possession. He does not state even now that he has been dispossessed. He does not ask for a decree for possession. He only states that his possession be confirmed and maintained. This relief does not make the suit one for possession."

The learned trial Judge then passed a final order and fixed a date on which the deficiency was to be made up and stated that he would grant no extension in any circumstances. On that date the deficiency had not been made up. The learned Judge then rejected the plaint under the provisions of O. 1, R. 11 (c) of the Code which provides that where the relief claimed has been properly valued but the plaint has been written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so, the plaint may be rejected. It is to be noted that in these circumstances the provisions of O. 7, R. 13, may apply in future. The plaintiff-appellant has now presented an appeal here and has taken a somewhat peculiar position. It is to be noted that in the lower Court his counsel first argued that this was a suit for a declaration only but when the order was finally passed against him to the effect that it was a suit for a declaration and consequential relief he accepted that order and asked for time to pay the money. Having failed to pay the money within the time allowed he now contests the validity of the order In our opinion it is the duty of a plaintiff, who is ordered to pay a certain court-fee, to obey the order or to take consequence of the rejection of his plaint. He suffers no real hardship thereby for a door is open to him to take up the matter in appeal afterwards and in event of his success the money will be refunded. This circumstance affects the position of the plaintiff-appellant here, but apart from that we are of opinion that the view of the learned Judge is correct. An examination of S. 39, Act 1 of 1877 leads us to the following conclusions.

In the case in which a person alleges that the execution of a written instrument can be challenged on the ground that the instrument is voidable because his consent has been obtained by coercion, fraud or misrepresentation the person taking this position can adopt more than one course. He can ask for a declaration that his consent was obtained by coercion, fraud or misrepresentation. If he obtains that declaration, the declaratory decree may afford him sufficient relief in certain circumstances. But if he wishes to go further he can ask for the consequential relief of having the document delivered up and cancelled, and in the case of a registered document relief can be given by correcting the entries in the books of the registering authority These reliefs do not follow automatically as a consequence of the granting of a declaratory decree and it appears to us that in these

circumstances, while in cases where a declaration alone is sought a stamp of Rs. 10 is sufficient, in a case under S. 39, Act 1 of 1877, in which not only is a declaration sought but it is further asked that the document shall be delivered up, cancelled, and its registration set aside, an ad valorem fee must be paid under the provisions of S 7 (iv) (c), Court-fees Act 7 of 1870. This conclusion appears to us to follow from the words of the section itself. The point has not so far been decided by the authority of this Court. There was a Full Bench decision of the Allahabad High Court in 1883 *Karam Khan* v. *Daryai Singh* (1) where it was decided that a suit for cancellation of mortgage was a simple declaratory suit Unfortunately the terms of S. 39 are not discussed in that case All that Straight, J. said in his reference to the Full Bench is as follows·

" Upon careful consideration the case now referred appears to me to be one exactly of the kind mentioned in S. 39 of that Act and to be in the nature of a simple declaratory suit. "

The Act in question is the Specific Relief Act. The order of the Full Bench is in two lines.

" We concur in the opinion expressed in this reference that the case is in the nature of a simple declaratory suit. "

Our view is that certain cases falling under S. 39, Specific Relief Act, are simple declaratory suits and others are declaratory suits in which consequential relief is desired. The Judicial Commissioner's Court of Oudh in a Bench case : *Durga Baksh Singh* v. *Mirza Mohammad Ali Beg* (2) followed the Allahabad view. The question again was not discussed. The point came up before a Bench of the Bombay High Court in *Parvati Bai* v. *Vishvanath Ganesh* (3). In this case a Bench of the Bombay High Court decided against the Allahabad view. The suit in question was a suit under S. 39 for a declaration that a sale deed was fraudulent and for an order to have it cancelled and a copy sent to the Sub-Registrar as provided by S. 39, Specific Relief Act. Sir Lawrence Jenkins said at page 210 ·

" The first question is whether this is a suit to obtain a declaratory decree without a prayer for consequential relief or whether consequential relief is prayed. On this point we are in complete agreement with the District Court. We think there can be no doubt that the suit is one in which there is distinct prayer for consequential relief, and we come to that conclusion notwithstanding the ruling in *Karam Khan* v. *Daryai Singh* (1) of the Allahabad High Court to the contrary. "

Here the question was not discussed but the opinion is emphatic. In deciding this point we have looked more to the wording of S 39 than to the weight to be given to the conflicting authorities. Our opinion is that where a person, as here asks for a declaration that certain deeds are voidable against him because his consent to their execution has been caused by fraud or misrepresentation and not only ask for a declaration that those deeds are voidable but also asks that the deeds should be cancelled and delivered up, the suit is distinctly a suit for declaration with a prayer for consequential relief. We have not thought it necessary to issue notice on the other side. To do so would only have added to the costs. The point appears to us sufficiently clear to be determined after hearing the argument of the learned counsel for the appellant Further in his own interests it is better to decide the matter as quickly as possible in order to enable him to decide whether he will choose to institute further proceedings We dismiss this appeal under O 41, R. 11, Civil, P. C.

R.M./R K. *Appeal dismissed*

(1) [1883] 5 All. 331=(1883) A. W. N. 55 (F.B.).
(2) [1898] 1 O. C. 123.
(3) [1905] 29 Bom. 207=6 Bom. L. R. 1125.

A. I. R 1929 Oudh 493

STUART, C. J. AND SRIVASTAVA, J.

Ganga Pershad—Plaintiff—Applicant.

v.

Ram Narain and *others*—Defendants—Opposite Parties

Civil Revn. Appln. No. 29 of 1929, Decided on 2nd September 1929, from order of Addl. Sub-Judge, Lucknow, D/- 6th April 1929.

Civil P. C., S. 115—No revision lies in respect of order setting aside arbitration award.

Where the Court passes an order setting aside an arbitrator's award and resumes hearing of the suit for decision no application for revision can lie in respect of such order as there has been no decision of a case and the order is clearly an interlocutory order: *A. I. R* 1923 *Bom.* 402, *Foll.*; 5 *All.* 293 and 26 *Bom.* 551, *Ref.*; *A. I. R.* 1926 *Oudh.* 307 and *A. I. R.* 1926 *Oudh* 383, *Dist.* [P 494 C 1, 2]

Mahesh Prasad—for Applicant.

A. P. Sen and *Hakimuddin*—for Opposite Parties.

Judgment.—This is an application under S. 115, Civil P C, to set aside an order of the Additional Subordinate Judge of Lucknow passed in the following circumstances. A suit for partition was pending before the learned trial Judge. An application was made to refer the matter to arbitration. The matter was referred to arbitration. The arbitrator finally made an award The learned Judge set aside the award on the ground of technical misconduct by the arbitrator and has resumed cognizance over the suit which is now proceeding towards decision. The plaintiff who is the applicant asks us to set aside under the provisions of S. 115 the decision of the learned Subordinate Judge and to pass a decree in terms of the award. Mr. Sen on behalf the opposite party took a preliminary objection that no application for revision lay as there has been no decision of a case. He based his objection on a decision of a Bench of the Allahabad High Court in *Chatter Singh* v. *Lekhraj Singh* (1). The Bench there laid down that under the provisions of S. 622 of the old Code, which corresponds to S. 115 of the present Code, no action could be taken in respect of an order setting aside an arbitrator's award and resuming the hearing of the suit for decision. He futher quoted the decision in *Damodar Trimbak* v. *Raghunath Hari* (2) in which a Bench of the Bombay High Court arrived at a similar conclusion. He referred finally to a rent decision of the Bombay High Court in *Chiman Bhai* v *Keshav Lal* (3), in which the same view was affirmed in respect of S. 115 of the present Code. Sir Norman Macleod, C. J., at p. 723 (*of* 47 *Bom.*) said:

"It cannot be said in this case that there has been a decision of the suit by the Subordinate Judge. He only decided not to pass a decree in terms of the award but to continue the hearing of the suit by the Court. There is no appeal from that decision and as it is clearly an interlocutory order, an application to revise it is not competent."

The learned counsel on the other side has referred us to two decisions of this Court as authority for the proposition that a revision lies The first is a decision in *Usuf Khan* v. *Riasat Ali* (4) This is a decision of a Bench of this Court. There the Bench was asked to interfere under the provisions of S. 115, Civil P. C. with an order of an Assistant Collector setting aside an arbitrator's award. It is true that no objection was taken before that Bench that no application lay against that order inasmuch as it was not an order deciding a case. But the decision of the Bench is no authority for the proposition that a revision lay, for we find that the Bench refused to interfere. The next decision is a decision of a single Judge of this Court in *Chandrika Dat Ram* v. *Shyam Lal* (5) Apart from the fact that this is a decision of a single Judge the point now in dispute was not before him. It is true that he reversed an order setting aside an award but he reversed that order under the provisions of S 25, Provl Sm. C Courts Act and did not have to consider the provisions of S. 115 We consider that the preliminary objection must succeed. The view which we take of the matter is the view taken by Sir Norman Macleod in *Chiman Bhai* v *Keshav Lal* (3). We accordingly dismiss this application with costs

R.M./R.K. *Application dismissed.*

(1) [1883] 5 All. 293=(1883) A. W. N. 39.
(2) [1902] 26 Bom. 551=4 Bom. L. R. 267.
(3) A. I. R. 1923 Bom. 402=47 Bom. 721.
(4) A. I. R. 1926 Oudh 307=1 Luck. 139.
(5) A. I. R. 1926 Oudh 383=29 O. C. 258.

A. I. R. 1929 Oudh 494

STUART, C. J. AND RAZA, J

Nisar Ali Khan — Defendant — Appellant.

v.

Muhammad Ali Khan — Plaintiff — Respondent.

First Appeal No. 116 of 1927, Decided on 22nd April 1929, from judgment of Pullan, J., reported as *A I R.* 1928 *Oudh* 67

(a) Will—Construction— Actual intention should be sought from words of document keeping in mind circumstances and not by searching case law whether English or Indian.

It is not permissible to attempt to discover the correct construction of a particular testamentary disposition by a lengthy search through a variety of decided cases, English and Indian. The actual intention of the testator should be sought from the words of the document keeping in mind the circumstances on which it has been prepared : 23 *Cal.* 563 (*P. C.*); *A. I. R.* 1922 *P. C.* 311 and *A. I. R.* 1928 *Oudh* 49, (*F.B.*), *Foll.*

[P 502 C 2; P 503 C 1]

(b) Oudh Estates Act (1 of 1869), S. 11—Will executed by taluqdar conferring upon his nephew some powers as testator—Sub-

sequently it provided three consecutive life estates—Creation of fourth on termination of first three—Authority for appointment of nominee to last holder of three life estates or choice of election to descendants of three life-holders—Failing that Government empowered to appoint successor—Will was held invalid as not conferring absolute interest and creating interest in persons unborn—Succession Act (39 of 1925), Ss. 112 and 114.

A will was executed by a proprietor of a taluqdari estate under S. 11, Act 1 of 1869, by means of which the testator appointed his nephew, his executor and successor of all the taluqdari estate with all the very same powers of possession and enjoyment as the testator himself. The will further provided for three consecutive legatees after lifetime of the first legatee. It further provided for the creation of a fourth estate by the last legatee and if he died without nominating his successor authorising the male descendants of each of the three legatees to appoint as successor whomsoever they considered fit and superior amongst themselves. It was further provided that in the event of disagreement the Government would have power to appoint as successor anyone amongst the descendants of each of the three legatees whom it considered the fittest. It was also provided that the line of successors was to continue according to the above rules.

Held, that the line of succession could not be given effect to as the estates created fell far short of absolute estates and it offended against the law forbidding perpetuities. Further it created interest in persons unborn and was in every way objectionable. [P 506 C 1]

(c) Succession Act (1865), S. 54—Legatee signing will as attesting witness does not make will invalid—Oudh Estates Act (1 of 1869), S 19.

A legatee signing the will as an attesting witness does not forfeit all the benefits under the will under S. 54, Act 10 of 1865 read with S. 19, Act 1 of 1869: *A. I. R.* 1927 *P. C.* 248, *Foll.* [P 507 C 1]

(d) Evidence — Appreciation— When witnesses are partisans, to arrive at correct conclusion best method is to look at inherent probability of case.

Where the witnesses are partisans there is always a tendency to strain a point in favour of a friend. It is doubtful if such can conceive that he was thereby doing something improper. The attitude of mind is often a self deception produced subconsciously by an outside cause. In these circumstances best method to arrive at a correct conclusion is to look at inherent probabilities of the case. [P 509 C 1]

(e) Evidence Act, Ss. 145 and 157—Extract from newspaper by itself is not admissible though can be used to contradict or corroborate writer.

A particular extract from a newspaper by itself is inadmissible in evidence. If the writer is called as witness, it can be used to corroborate or contradict his statement. Standing by itself it is inadmissible in evidence. [P 510 C 1]

(f) Practice—Burden of proof—Pleadings —Success of plaintiff's case depends on strength of his case and not weakness of opposite party.

A plaintiff must always succeed on the strength of his own title and not on the weakness of the defendant's title. [P 513 C 1]

(g) Evidence Act, S. 115—Claimant must have acted to his detriment.

Before an estoppel can take place it is necessary for the party to establish that he had been led to do something detrimental to the interest owing to the action of the other party. [P 513 C 2]

(h) Adverse possession — Holder of life estate cannot assert adverse possession against remainderman.

Holder of a life-estate and the remainderman must be considered as one and the holder of the life-estate who has entered under the will cannot against the will assert an adverse title derived independently against the remainder man. [P 513 C 1]

Tej Bahadur Sapru, Bisheshwar Nath Srivastava, Ali Zaheer and *Barkat Ali*—for Appellant.

Hasan Imam, Ghulam Hasan and *Jagannath Prasad*—for Respondent.

Stuart, C J. — Appeals Nos. 116 and 147 of 1927 are against the judgment and decree of a single Judge of this Court presiding over a Court of original jurisdiction in original suit No. 6 of 1925. The main appeal is No. 116 preferred by the defendant Sardar Nisar Ali Khan against the plaintiff Khan Bahadur Muhammad Ali Khan C. S. I. The minor appeal No. 147 is preferred by the plaintiff against the defendant. It is necessary to state in detail the uncontested facts relating to events which preceded the institution of the suit. In nearly all instances there is evidence on the record supporting these facts. Where the evidence is deficient, the deficiency is supplied by the agreement of the learned counsel for the parties. We have had the advantage of having the arguments presented to us by learned counsel who could not have done, in my opinion (which is shared by my learned brother) more to assist the Court in bringing out the questions of law and fact which required determination.

I here give a pedigree of the family to which I shall refer again in the course of this judgment.

(For pedigree see p. 496):

The history of this family is accepted by the learned counsel as having been detailed with reasonable accuracy in a

volume prepared with the approval of the Government of the Punjab called "Chiefs and Families of Note." The first name upon the pedigree which I have given is that of Nawab Ali Raza Khan. He was the son of Sardar Hidayat Khan, who was the son of Sardar Ali Khan. Sardar Ali Khan was a nobleman who resided in the province of Sherwan on the West Coast of the Caspian Sea. He was a Turk belonging to the Qizilbash tribe. Qizilbash means "Red Cap." The tribe was apparently so called because the male members wore as a distinctive part of their head gear a red "lungi" or cap round which the turban was tied. Sardar Ali Khan accompanied Nadir Shah in the expedition to India, which resulted in the capture of Delhi. After the Indian campaign was over, he was appointed by Nadir Shah, Governor of Kandahar. He was murdered in 1770. He left three sons of tender years. Gul Muhammad Khan was the eldest, Hidayat Khan was the second and Ali Muhammad Khan was the youngest. Hidayat Khan had many sons. Nawab Ali Raza Khan had at least three elder brothers. When Hidayat Khan died in 1836, Sardar Ali Raza Khan resided in Afganistan where he posessed considerable estates. In 1839 when the British forces invaded Afghanistan in order to place Shah Shuja on the throne, Ali Raza Khan was appointed their chief agent in the commissariat department, and became attached to the British authorities. When the subsequent insurrection deprived Shah Shuja of his throne and disasters which are well-known overtook the British forces, Ali Raza Khan remained faithful to his allegiance. He made every effort to assist the British captives and enabled some to effect their escape. When the British forces retired to India, Ali Raza Khan accompanied them. His allegiance to the British resulted in the confiscation of the whole of his property in Afghanistan. After his arrival in India he performed signal services for the British Government. He

NAWAB ALI RAZA KHAN
died 24th June 1865.

- Sir Nawazish Ali Khan, K. C. I. E. died 1930.
  - †Hidayat Ali Khan born about 1878, died 25th Oct. 1924.
    - Nawazish Ali Khan born 1901
    - Muhammad Husain Khan born 1902.
      - Ali Raza Khan born 1892.
      - Ali Khan born 1894.
- Nawab Nasir Ali Khan* died 19th Nov. 1906.
  - Khan Bahadur Sardar Muhammad Ali Khan, Plaintiff born about 1870.
    - Mansur Ali Khan born 1894.
    - And others born after 1894.
- Nisar Ali Khan died 1878.
  - Sir Fateh Ali Khan, K. C. I. E. born about 1863, died 28th October 1927.
    - Nisar Ali Khan, born 1901, and Defendant, three other sons younger.
- Barkat Ali Khan, born 1856, died 11th April 1902.
  - Ali Muhammad Khan, born 1879, died 14th October 1926.

*He had also a daughter Zohra Begam who was the second wife of Fateh Ali Khan. She died in 1912. Fateh Ali Khan's sons were born from another wife. Nasir Ali Khan's widow Fatima Begam who was not the mother of Muhammad Ali Khan and Zohra and was childless at the time of the death of her husband died at Karbala in 1916.

†Hidayat Ali Khan married Fateh Ali Khan's daughter.

raised armed forces for them, and himself commanded them. He fought on the side of the British at Mudki, Ferozeshah, and Sobraon and in 1857 he raised at his own expense a troop of cavalry which became embodied in "Hodson's Horse." His youngest brother Muhammad Taki Khan was killed in 1858 fighting for the British. Another brother Muhammad Raza Khan was distinguished by his exceptional gallantry. As a reward for his eminent services Sardar Ali Raza Khan was granted a pension of Rs 800 a month, and was awarded a confiscated estate in Oudh. This estate is described in the Lists attached to Act 1 of 1869 as the estate of Nawabganj in the Bahraich District. Sardar Ali Raza Khan was created a Nawab. He died in 1865. By an oversight—not unusual to those who are acquainted with the proceedings of the period—his name was entered after his death in the Lists prepared in accordance with the provisions of Act 1 of 1869. It is entered at No. 161 in List 1 and No. 39 in List 5. The grant of Nawabganj was thus according to S. 8, Act 1 of 1869, a grant to a grantee, declaring that the intestate succession to the estate should thereafter be regulated by the rule of primogeniture On the death of Nawab Ali Raza Khan on 24th June 1865, he was succeeded by his eldest son Nawazish Ali Khan Nawab Nawazish Ali Khan attained great distinction. He was created a Nawab. Like his father he resided continuously in the Punjab. He became an Honorary Assistant Commissioner and President of the Lahore Municipal Committee. In 1835 he was created a Companion of the Indian Empire and in 1888 he was created a Knight of the same order. He became also an additional member of the Legislative Council.

Here the history may be continued in greater detail. It has already been stated that a pension of Rs. 800 a month had been conferred by Government on Nawab Ali Raza Khan. On the death of the latter the authorities gave in lieu a pension of Rs. 200 a month for life to each of the widows of Nawab Ali Raza Khan. Before 1866 one of the widows had died. Ex. CA-35 shows that the Government of India in that year had considered the advisability of giving in lieu (provided the surviving widow Mt. Khadija Begam consented to forego her pension) a grant of the land in the Lahore District, not to be held by the lady but to be held by the members of the family, from the income of which grant the lady could be supported. Ex. CA-35 is a translation of the vernacular order from the Deputy Commissioner of Lahore dated 10th August 1866, asking that the lady should be approached and her consent obtained, if possible, to such an arrangement and that the senior male members of the family should be asked to state their views as to the form which the grant should take. Ex. CA-36 is a report of the Tahsildar dated 27th August 1866 in which it is stated that the lady had consented, and that the family had put up proposals as to the form which the grant should take.

It appears from a decision of the Deputy Commissioner of Lahore in mutation proceedings (Ex. 7 dated 9th March 1925) that on 23rd August 1866, the three senior members of the family Nawazish Ali Khan, Nasir Ali Khan and Nisar Ali Khan signed a joint vernacular document, in which they asked that the grant in question should be made in the following form. Three successive estates for life were to be created ; the first in favour of Nawazish Ali Khan, the second in favour of the second brother Nasir Ali Khan and the third in favour of the third brother Nisar Ali Khan. On the termination of the life estates the three brothers desired that a series of life estates should continue to be given to a person appointed by the surviving members of the family themselves. This document is quoted in the decision in question. It has not been brought on the record of this case but the learned counsel agreed to its acceptance in this Court for the purpose of explaining how the grant came into being.

After certain other preliminaries with which I am not concerned the actual grant was made. The terms were not in exact accord with the desires of the members of the family. This grant (which is in English) is Ex A-13 dated 9th May 1868. The property — the subject of the grant—was 2753 acres (more or less) in what was known as "Rakh Khamba" in the Lahore District. A "Rakh Khamba" in the Punjab in a tract for

the most part of reclaimable forest and jungle land. At the time that the grant was given the property granted was of value sufficient to provide for the maintenance of Khadija Begam with some surplus. In the last forty years this grant has become of considerable value, and the present income is stated to us to be as much as Rs. 1,00,000. The deed is on the record. It may be described shortly as follows· Nawab Nawazish Ali Khan was to hold the estate for life. On his death it was to devolve on his brother Nasir Ali Khan, and on Nasir Ali Khan's death it was to develve on Nisar Ali Khan. If one brother predeceased the other the survivor would take the grant. There can be no doubt that it commenced thus with three life estates. The Crown disposed of the remainder in the following manner. On the death of the last survivor it was directed that :

"the said estate shall go and belong to whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate, his heirs and successors. It is thus clear that on the termination of the life estates a heritable estate was to be created."

The deed continued :

"In the event of the said male heirs being unable to agree within a reasonable time then to such one of the lawful heirs of the said Nawab Ali Raza Khan as His Honour the Lieutenant-Governor may consider fittest to succeed to the said estate, his heirs and successors."

There is little room for controversy here. On the termination of the life-estates, the surviving heirs were directed to choose out of their own body the heir whom they considered the fittest person to succeed, and to such person was granted a heritable estate If the heirs did not choose such a person within a reasonable time, the Lieutenant-Governor of the Punjab was directed himself to appoint such a person and such person would obtain a heritable estate. The estate thus created was not, however, an absolute estate for the deed laid down afterwards:

"No transfer of proprietary rights in the said estate will be valid until it shall have received the sanction of His Honour, the Lieutenant-Governor and shall have been duly registered."

There were other conditions. The holder was at all time required to make due provision for the maintenance of the family of Nawab Ali Raza Khan. It was explicitly laid down, that provision should be made for the maintenance of Mt. Khadija Begam and the Local Government reserved to itself the right to fix the amount of maintenance and to require the holder to set aside a specific sum from the income to provide the requisite amount. Further it was laid down that the holder should, if required, be bound to furnish twenty-five troopers for the service of the Government. There are other conditions which are immaterial. The property described in this grant was afterwards called the Ali Razabad property and I shall in future refer to it under the latter name. The legality of the disposition in the Ali Razabad property cannot be called in question in view of the provisions of the Crown Grants Act (Act 15 of 1895). We have here to give effect to the grant.

There are two more grants to be considered. The first of these is what is referred to in the judgment as the second Rakh Khamba grant. The deed will be found in Ex. 11, dated 23rd September 1871. This is a grant of 207 acres also in Rakh Khamba in the Lahore District. This is a grant giving full proprietary title to Nawab Nawazish Ali Khan alone. This property is known as the Khalikabad property, and I shall refer to it under that name in future On 17th June 1892 Nawab Nasir Ali Khan made this grant the subject of a wakf under Ex. 4. The remaining grant was a grant of what was known at first as the Juliana property, but what is now known as the Musalla property. I shall call it in future the Musalla property. This grant was made by the Crown on 25th June 1886. The deed is Ex. 12. It is a grant of 1126 acres in the Lahore District and confers full proprietary right on Nawazish Ali Khan. This suit relates in the main to the four properties already enumerated:

(1) The Nawabganj property in Oudh now called Nawabganj-Aliabad.

(2) The Ali Razabad property in Lahore

(3) The Kalikabad property in Lahore.

(4) The Musalla property in Lahore.

After this digression I return to the history of the family. It has already been mentioned that Nawazish Ali Khan had two brothers This second brother Nasir Ali Khan entered Government

service in the Punjab as an Extra Assistant Commissioner. He retired in 1888, being then about the age of fifty-five, having attained the position of what was then known as a District Judge. The duties of a District Judge, as he then was, in the Punjab corresponded in the main with the duties of what is known as a Subordinate Judge in the United Provinces. The next brother Nisar Ali Khan resided in Oudh and looked after the Nawabganj-Aliabad estate. He died in 1878. Sir Nawazish Ali Khan left India in 1889. He went to Europe, where he resided for some time, and on his return from Europe did not come back to India He proceeded from Europe to Karbala where he died in 1890. He had executed on 14th February 1882 a registered will (Ex. 1) under the terms of which he appointed his brother Nasir Ali Khan his successor in respect of the Nawabganj-Aliabad property in Oudh. We are not concerned with the construction of this will, as both parties are agreed for the purposes of this case that it conferred an absolute estate on Nasir Ali Khan.

It is to be noted that at the time this will was executed Hidayat Ali Khan who was born in 1878, was a boy of four years old. No provision is made in this will by the testator for his only son. It was further set up that before Sir Nawazish Ali Khan proceeded to Europe, he made an oral gift of all his properties other than the Nawabganj-Aliabad property to Nasir Ali Khan. The learned trial Judge has found against this oral gift, but on the evidence I am unable to agree with his conclusion I find on the evidence that the oral gift was made. On the death of Sir Nawazish Ali Khan, Nasir Ali Khan succeeded to all the four properties mentioned. I have referred to Sardar Ali Raza Khan and Sir Nawazish Ali Khan as Nawabs. Apparently they had obtained the title of Nawab but it is not clear how they had obtained it. On 1st January 1892 Nasir Ali Khan was created a hereditary Nawab by the Viceroy Lord Lansdowne. Under the provisions of Ex. A-39 a sanad was granted to him. As this creation has a bearing upon the subsequent history of the case I give it in full:

"Having regard to the memory of Nawab Ali Raza Khan, your father, and of Nawab Sir Nawazish Ali Khan, K. C. I. E. your brother, and their loyal services, I confer upon you by this sanad the title of Nawab."

"This title will henceforth be hereditary in your family, and will descend to the fittest member of the family by the same rule as that by which the estates devolve according to your family custom, provided that such member shall on each devolution of the title be formally approved of by the Viceroy and Governor-General of India as a deserving representative of the family, and the said title shall not descend to him until such approval has been accorded."

On 15th July 1896 Nawab Nasir Ali Khan while residing in Lahore at a house in the Empress Road executed two wills Ex. 2 and Ex. 3. Both these wills were registered. On 19th November 1896 Nawab Nasir Ali Khan died in Lahore. He was buried the same day His death was reported for the purpose of mutation proceedings in one instance on the following day. On 21st November 1896 two ceremonies took place in the family residence, the Mubarak Haveli-at Lahore. In the morning there was held what is known as the Soem ceremony. The family are Shia Muhammadans governed by the Imamia law Amongst Shia Muhammadans it is customary to hold a ceremony in commemoration of the death of one of their number on the Soem, that is to say, the third day after the death. The Soem ceremony was held in the morning. In the afternoon was held a ceremony known as the Dastarbandi, which means the tying of the turban ceremony, the nature of this ceremony its significance, and its legal effect are amongst the most controversial questions in these appeals. I here note that it is accepted by both sides that such a ceremony was held. Nawab Fateh Ali Khan succeeded to the whole of the property owned and possessed by his uncle Nawab Nasir Ali Khan to the exclusion of Nasir Ali Khan's own son, the present plaintiff, and to the exclusion of Nawab Fateh Ali Khan's elder brother Barkat Ali Khan. These facts are admitted The nature of his title is in question but the fact that he succeeded to possession and enjoyment is accepted on both sides. It has already been mentioned in the pedigree that Nawab Fateh Ali Khan had married Zohra Begam the daughter of Nawab Nasir Ali Khan. At the time of Nawab Nasir Ali Khan's death he had no son by Zohra Begam. He never

obtained a son from Zohra Begam. This point, as will be seen later, is of importance. On 6th July 1897 the Assistant Secretary to the Government of India, Foreign Department, addressed the Chief Secretary of the Punjab Government in a communication a copy of which is Ex. A-22. I quote this in full:

"I am directed to acknowledge the receipt of your letter No. 238, dated 29th April 1897 reporting that Fateh Ali Khan has succeeded to the estate of his uncle, the late Nawab Nasir Ali Khan and has been recognized by the Lieutenant Governor of the Punjab as head of the family.

2. His Excellency the Viceroy and Governor-General formally approves of Fateh Ali Khan, as a deserving representative of the family. The title of Nawab consequently descends to him in accordance with the terms of the sanad granted to the late Nawab on 1st January 1892."

Fateh Ali Khan was thus recognized by the Punjab Government as head of the family. Although he was not the eldest member, and although he was not the son of the last holder, the hereditary title of Nawab which had been conferred on Nasir Ali Khan and his successors was conferred on him. After certain attempts on the part of Barkat Ali Khan, Fateh Ali Khan's elder brother, to obtain more favourable treatment these attempts will be referred to again : Nawab Fateh Ali Khan was accepted as in possession and enjoyment of Nawabganj-Aliabad, Ali Razabad and Musalla properties and as mutawalli of the Khalikabad property. It is admitted that up till at any rate 1898 or 1899 his relations with the present plaintiff were cordial. He does not appear to have granted the plaintiff any fixed allowance but in its place it appears that he allowed the plaintiff to draw such sums as he required from the family treasury. On 7th March 1898, Nawab Fateh Ali Khan then intending to leave India, executed Ex. 116 a general power-of-attorney in favour of the plaintiff It was under this general power-of attorney that the plaintiff made the statements Ex. 117 dated 17th August 1898 and Ex. 118 dated 1st September 1898 before the revenue authorities.

In 1898 or 1899 occurred an event which has been largely responsible for the unfortunate acerbity of feeling which has tinged the subsequent conduct of the parties. Nawab Fateh Ali Khan married again. It appears that subsequently he contracted a fourth marriage. The details of the marriages are unimportant. The important facts are that in 1901 a son was born to him, Zohra Begam still remaining childless, and since then three other sons have been born to him. It is common to the parties that after the birth of these sons Nawab Fateh Ali Khan curtailed the plaintiff's expenditure and also that he commenced to make dispositions out of the income of his property in favour of his children. The plaintiff and he became estranged, and the plaintiff admittedly commenced to borrow money and incur debts We find that on 8th October 1905 Nawab Fateh Ali Khan issued a notice (Ex. A-30) warning the public that he would not be responsible for any debts contracted without his written authority. Nawab Fateh Ali Khan did not reside in the family house—the Mubarak Haveli. In 1906 he was living in a house known as the Sabz Kothi (Green House) The plaintiff resided there with him. That year the plaintiff left the Nawab's house, and took up his residence in another house in the Empress Road, Lahore. They never resided together again The plaintiff continued to incur debts. In Christmas 1910 three leading gentlemen of the Punjab, Nawab Sir Khuda Bakhsh Khan, Raja Hari Kishan Kaul and Iftikhar Uddin waited on Nawab Fateh Ali Khan and asked permission to lay before him the hardships of the plaintiff.

The fact is clear from a portion of the Nawab's letter to Mr. Humphreys, the Deputy Commissioner of Lahore (Ex. A-37), dated 30th January 1913. Nawab Fateh Ali Khan refused to discuss the question with these gentlemen, but later on called on Mr. Butler (now Sir Montague Butler) who was then Deputy Commissioner of Lahore and stated the case to him. On 10th January 1911 Nawab Fateh Ali Khan appears to have communicated with Sir Louis Dane, the Lieutenant Governor of the Punjab, and asked Sir Louis Dane to arrange certain differences. Unfortunately a copy of the letter is not on the record, but the fact is admitted by the learned counsel for the parties and is clear from Ex. CA-161 a letter of 24th January 1911 written by Nawab Fateh Ali Khan to Col. Parsons, the then Commissioner of Lahore. This gentleman is now dead. There is on the record an official note of Sir Louis Dane,

dated 9th April 1911 (Ex. A-35). On 30th August 1911 a precis of facts was submitted on behalf of Nawab Fateh Ali Khan to Sir Louis Dane. This is Ex. 152. On 18th August 1912 Sir Louis Dane issued an award (Ex. A-78). This award fixed an allowance for the plaintiff to be paid by Nawab Fateh Ali Khan and provided for the payment of the plaintiff's debts by Nawab Fateh Ali Khan. Nawab Fateh Ali Khan clearly did not agree to accept this award. This is shown by his letter Ex. A-36 dated 9th November 1912 sent to Sir Louis Dane.

On 8th January 1913 Mr. Humphreys, the then Deputy Commissioner of Lahore (this gentleman is now dead) wrote to Nawab Fateh Ali Khan. The letter is not on the record but is referred to in Nawab Fateh Ali Khan's reply to which we have already referred (Ex. A-37) dated 30th January 1913. What happened afterwards can be discovered from a letter (Ex. A 38) written by Nawab Fateh Ali Khan to Mr. Humphreys. This is dated 14th March 1913 From this it appears that Sir Louis Dane took strong exception to Nawab Fateh Ali Khan refusing to accept his decision, and that he directed Mr. Humphreys to inform Nawab Fateh Ali Khan that in consequence of his attitude, Sir Louis Dane refused to see Nawab Fateh Ali Khan, and that Sir Louis Dane ordered that neither the Commissioner of Lahore nor the Deputy Commissioner of Lahore were to receive him in their houses. Nawab Fateh Ali Khan then wrote Ex. A-38, in which, while still refusing to accept any determination as to the succession to his property, he agreed to pay off the plaintiff's debts to the extent of Rs. 36,000 and to pay him in future an allowance of Rs. 1,600 a month. From this date to the date of Sir Fateh Ali Khan's death 28th October 1923 the relations between him and the plaintiff were clearly never cordial, although they appeared in public together on certain occasions The history of the intervening year is more or less controversial. But certain facts stand out clearly which may be mentioned now. Nawab Sir Fateh Ali Khan followed his predecessors in a career of public activities. In 1897 he was nominated a member of the Legislative Council. In 1902 he proceeded to England as one of the representatives of the Punjab at the time of the Coronation of his Majesty King Edward VII.

In 1903 he was an official guest at the Delhi Darbar, and was created a Companion of the Indian Empire. In 1904 he became an additional member of the Governor-General's Legislative Council. In 1921 he was advanced to the dignity of a Knight of the Order of the Indian Empire. It is admitted that he took a leading part in public and religious matters and was a strong adherent to his own side. Such men make many friends and many enemies. In a variety of public matters such as elections he was an adherent of one candidate. It is noticeable that the plaintiff, who also is a man who has taken part in public life, was frequently on the other side to that taken by Sir Fateh Ali Khan The plaintiff has also attained a considerable position. He is an Honorary Magistrate. In 1910 he became a Khan Bahadur. He was Vice-President of the Chiefs Association of the Punjab and President of the Anjuman Islamia of the Punjab. For many years he had been a member of the Municipal Board, Lahore, and has been its Vice-President for 18 years. In 1921 the same year when Nawab Fateh Ali Khan obtained this Knight Companionship of the Indian Empire, the plaintiff was created a Companion of the order of Star of India. It is necessary to state these facts here to prepare the way for the subsequent discussions of the evidence in the case. The statement of the facts is now nearing conclusion. Sir Fateh Ali Khan died on 28th October 1923.

After the death of Sir Fateh Ali Khan the plaintiff at once claimed succession to the properties. Sir Fateh Ali Khan's eldest son Sardar Nisar Ali Khan opposed this claim. The first contest was (as is usual) in the revenue Courts to obtain recognition as a person entitled to engage for the land revenue or as a person entitled as a grantee. In the Punjab revenue Courts the plaintiff was successful. In the Bahraich revenue Court the defendant was successful. As the revenue Courts refused to give the plaintiff possession the plaintiff has been obliged to file the suit out of which the present appeals proceed. The possession in no circumstances has been actual possession. It has only been constructive possession. The plaintiff's suit has been

decreed by the learned trial Judge almost in entirety.

I now proceed to the questions involved in these appeals. As has already been stated, on the death of Sir Nawazish Ali Khan in 1890 his brother Nawab Nasir Ali Khan, the father of the present plaintiff, succeeded to all the properties owned and possessed by his elder brother. He succeeded to the Nawabganj-Aliabad estate in this province according to the terms of the will Ex. 1. It is agreed between the parties that under the terms of this deed he obtained a full estate. He succeeded to the Ali Razabad property as the holder of the second life-estate under the terms of Ex. A-13 He succeeded as mutwalli to the Khalikabad property under the terms of the deed of wakf Ex. 4. With regard to the Musalla property and the remaining property the plaintiff's case was that Nasir Ali Khan succeeded under an oral gift. The learned trial Judge has found against the oral gift I am, however, of opinion that the oral gift is established and I find accordingly. I base my finding upon the following facts. There is admittedly no written transfer from Sir Nawazish Ali Khan to Nawab Nasir Ali Khan in respect of the Punjab property. This property is not covered by the will Ex. 1. But we have it as a fact that Nawab Nasir Ali Khan did succeed to that property. It appears that in 1884 the Deputy Commissioner of Bahraich wrote to the Deputy Commissioner of Lahore, asking the Deputy Commissioner of Lahore to ascertain from Nawab Nawazish Ali Khan who was his heir and successor to the Ali Razabad Taluqa. It was in accordance with the practice of the period that the inquiry was made. The Deputy Commissioner of Lahore wrote to Nawab Nawazish Ali Khan asking him for the necessary information. There is on the record Nawab Nawazish Ali Khan's reply Ex A-16 dated 15th April 1884. He replied that he had made a will in 1882, declaring his brother Nasir Ali Khan to be his heir and successor. The letter concludes with the following words according to the translation :

"Let it also be mentioned that with the sanction of the Government Nasir Ali Khan has further been appointed to be the owner and heir after me of the Jagir Muafi held in perpetuity as well as of other properties of mine in the Punjab."

This letter is sufficient proof of a gift and as the gift is not in writing it can be taken to be an oral gift. Under the Imamia Law to which the parties are subject a gift cannot be effected without possession; but Ex 14 shows that possession was granted in Sir Nawazish Ali Khan's lifetime This is a letter to the Tahsildar of Lahore written by Sir Nawazish Ali Khan on 5th April 1889, before he started on his voyage to Europe. In this he states again, that all his Punjab property has been transferred to Nasir Ali Khan and directs the Tahsildar to record Nasir Ali Khan's name and to put him in possession. Nasir Ali Khan was put in possession accordingly.

I now come to the construction of the wills Exs. 2 and 3. The rules of construction of wills in India have been laid down on several occasions by their Lordships of the Judicial Committee. An attempt to discover the correct construction of a particular testamentary disposition by a lengthy search through a variety of decided cases English and Indian was not approved by Lord Macnaughten in *Norendra Nath Sircar* v. *Kamal Basini Dasi* (1):

"To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd."

He again said in *Bhagabati Barmanya* v. *Kali Charan Singh* (2):

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact

(1) [1896] 23 Cal. 563=23 I. A. 18=6 M.L J. 71=6 Sar. 663 (P.C.).
(2) [1911] 38 Cal. 468=10 I. C. 641=38 I. A. 54 (P.C.).

that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently, from Englishmen, and who have never heard of the rules in question."

The same remarks were quoted with approval by Lord Parmoor in a comparatively recent case *Dinbai* v. *Nusserwanji Rustomji* (3) in reference to a will made by a Parsi and they are applicable equally to a will made by a Shia Muhammadan governed by the Imamia Law. In a previous decision of mine which is quoted in *Jagmohan Singh* v. *Sheoraj Kuar* (4). I stated that the actual intention of the testator should be sought from the words of the document keeping in mind the circumstances in which it has been prepared, and I shall endeavour to apply those principles of construction to Ex. 2 and Ex. 3. The testator Nawab Nasir Ali Khan was a gentleman of position and of culture. He belonged to an aristocratic family. He had clearly a good knowledge of Urdu. He had also some claims to understand the law as he had been an Extra Assistant Commissioner in the Punjab and had retired holding the office of the District Judge. But both the learned counsel have informed us (although there is no evidence on the record in this respect) that he did not know English and his knowledge of testamentary law can be best illustrated by the fact that, as will be seen later, he assumed a disposing capacity over certain property which he ought to have known he did not possess. The evidence as to how he came to make these wills is unsatisfactory. The main evidence on this point is that of the plaintiff himself and that of the scribe of the wills. The plaintiff was P. W. 29 and the scribe was Abdul Karim P. W. 31. Some points are clear enough from their evidence. Nawab Nasir Ali Khan was living in the house in Empress Road in which the plaintiff now lives, and it was in that house that the wills were written. On 14th July 1896, according to this evidence, Nawab Nasir Ali Khan who had previously contemplated making these wills sent for Abdul Karim and dictated to him what he calls a draft and what presumably were two drafts as there are two wills which varied in terms. It is agreed that Abdul Karim did not suggest the drafts. The drafts were the unaided composition of Nawab Nasir Ali Khan. He does not appear to have taken any legal advice and he does not consult Abdul Karim in respect to the wording of the dispositions Abdul Karim is now dead. He gave evidence in 1927 when he was a man who, according to himself, was nearly a hundred years of age. His evidence and that of the plaintiff can be accepted as to the fact that Nawab Nasir Ali Khan dictated the wills. He was not likely in any circumstances to have consulted Abdul Karim who was a Mukhtar in small practice in Lahore. Abdul Karim was called in to write to the testator's dictation, because he was one of the numerous persons who call regularly at the house of an important man. Another reason may have been that he wrote a very good hand. The evidence of these witnesses as to how these drafts were prepared conflicts with the internal evidence afforded by the contents of the wills themselves. The witnesses would have it that Nawab Nasir Ali Khan dictated the contents of the wills without preparation and with no hesitation. From their evidence it would appear that he dictated them as a man would dictate a business letter. Abdul Karim stated that the Nawab had no written documents in front of him. He added that perhaps he had some sanads in front of him while he was dictating. Perhaps he had one or two books. The books were about the Oudh property and Rakh Khama property.

It is clear to me (and my learned brother agrees with me upon this point) that the drafts could not possibly have been prepared in this way. I have studied the wills closely and have read them many times It is apparent to me that the drafts from which these wills were prepared were based upon a draft not mentioned in which the testator had copied words from the will of Nawazish Ali Khan Ex. 1. He altered those words, but he was using those words as a structure upon which he based his own wills and it would be practically an impossibility that any

(3) A. I. R. 1922 P. C. 311=49 Cal. 1005=49 I. A. 322 (P.C.).

(4) A. I. R. 1928 Oudh 49=3 Luck. 19 (F.B.).

man could have produced such an excellent piece of Urdu composition if he had not previously worked it out in the rough. This is, I believe, what happened. He had already worked out in the rough what he intended to say in the two wills and then proceeded to dictate them to Abdul Karim. Abdul Karim then took away the drafts, went through them and brought them back the next day. The Nawab examined them and finding them correct (or perhaps after making verbal corrections in them) gave them back to Abdul Karim to copy fair. The final copies are Ex. 2 and Ex. 3 These witnesses have shown that their evidence is not reliable in itself by the fact that they have given an account as to how these wills came into being which cannot be correct on the face of the wills themselves. This is not to their discredit. They were deposing to events that had taken place more than thirty years before and their memories could hardly have been trusted on details This, however, is a reason for not accepting their evidence when they speak as to conversations and undertakings given by Fateh Ali Khan, and the like. My finding as to this portion of the case is that it is proved that Nawab Nasir Ali Khan, a man of over sixty, of considerable ability, with a slight knowledge of law which was more likely to prove an obstacle than an assistance to him, prepared himself the wills which he executed. He was in full possession of his faculties, and was clearly doing what he desired to do. I find that he had before him and was using as a model the will Ex. 1 made by Nawazish Ali Khan in his favour and that he had before him the disposition of the Ali Razabad property which had been made after he had been consulted, and which embodied, (it is true with important variations) a scheme of inheritance which he favoured. The similarity in the two wills Ex. 2 and Ex 3 and the will in Ex. 1 can best be appreciated by a comparison of the originals and not the translations. Whole sentences are reproduced. There are, it is true, variations. I have directed the office to prepare transliterations in Urdu of the three wills Exs. 1, 2 and 3 and a comparison of the transliterations will assist. I now come to the wills themselves.

Exhibit 3 affects the Nawabganj-Aliabad property in Oudh. I give the essential particulars eliminating superfluous words:

"I am..... Nasir Ali Khan..... owner and taluqdar of Nawabganj Aliabad, Bahraich district in the province of Oudh. Whereas this borrowed life is transitory, therefore considering the appointment of an executor (the word "wasi" means "executor" and does not mean "legatee" as given in the official translation) and my successor a matter of necessity and duty I do hereby affirm in writing that whereas the estate comprising Taluqdari Nawabganj-Aliabad .... with all property and articles moveable and immovable and all external rights and rights of user which were given to me by my older brother the late Sir Nawab Haji Nawazish Ali Khan .... by means of a registered will dated 14th February 1882 made under-S. 11, Act 1 of 1869, and in 1889 the said Nawab Sahib in his lifetime having got this above-mentioned Taluqdari estate, with all rights and interests entered in my name made me like himself owner without any one else's partnership. Accordingly I have been continuously and am still in possession and owner of this very Taluqdari estate from the date of mutation till today."

"Now, under S.11, Act 1 of 1869, A. D., I by means of this will do hereby appoint Nawab Fateh Ali Khan son of my late brother Nawab Nisar Ali Khan my executor and successor of all this Taluqdari estate with all the rights and interests aforesaid and do hereby authorize the legatee that whatever Taluqdari powers over the above mentioned Ilaka and over all the properties moveable and immovable, I the said declarant have, my legatee, to wit Nawab Fateh Ali Khan, after my life shall have like myself the very same powers with powers of possession and enjoyment as owner provided he be alive."

Up to this point the effective portion of the will is strikingly similar to the effective portion of Ex 1. We have the same words *wohi ikhtiarat ba kabzi-tasarrufe malikana*. If the will stopped here it would be difficult to arrive at a finding that it did not give an absolute estate to Nasir Ali Khan. It is true that nowhere does the testator call him his heir. He does not use the word waris in describing him. It is true that there are no words such as naslan bad naslan, generation after generation. There is no express devise of a heritable estate. There is nothing to indicate explicitly that there is a power of transfer. But the statement that whatever Taluqdari powers the testator possesses shall be possessed like himself by Nasir Ali Khan would go far to indicate that the estate was absolute. Though the word malik is never used, there is a re-

ference to powers of possession and enjoyment as owner. But when it is remembered that the testator was taking large portions of his wording from Ex. 1 the use of particular words has not the same significance and further the testator might well have been misled as to the use of words denoting ownership if he possessed a translation of the Government grant Ex. A-13. Although the deed of 1868 (Ex. A-13) was presumably prepared by a Legal Adviser to the Government of India it grants what on the face of it is a life estate as an estate

"for the term of his life in full proprietary right."

The difficulties in construing Ex. 3 are rendered the less by the subsequent contents of that document. Although Nawab Nasir Ali Khan cannot be considered to have had any clear ideas as to the rules of testamentary disposition it is not an unfair presumption that he would have appreciated the impossibility of devising full proprietary title to more than one devisee. The will continues :

"Similarly after the lifetime of the legatee Nawab Fateh Ali Khan, my son Nawab Muhammad Ali Khan shall, if alive, be his successor. He shall also have the very same powers as have been bestowed upon Nawab Fateh Ali Khan by means of this deed of will."

Then follows the third provision :

"After the lifetime of my son Nawab Muhammad Ali Khan Nawab Hidayat Ali Khan, son of the late Sir Nawab Haji Nawazish Ali Khan, shall be his successor provided he be alive."

We now come to the fourth provision. After the termination of these three estates the testator then provides for the creation of a fourth estate and here he was clearly considering the arrangements which he and his two brothers had proposed to Government in 1868. On the termination of the third estate he laid down :

"After all these three successors the fit amongst the descendants of the successors shall succeed."

But here he added something that had never been suggested before.

"The last legatee shall have power to nominate as his successor any one whom he considers fit from amongst the descendants of each of the three successors."

Thus there was not to be selection by the heirs but an appointment by the last holder of the first three estates. This is how he provides for the devolution in event of the last legatee failing to make an appointment. He here goes back to the original plan :

"If the last legatee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsoever they consider fit and superior amongst themselves."

Next comes a very obscure condition :

"The line of successors shall continue according to this very rule."

Whether this means that the next successor should have power to appoint and on failure there should be a selection by the heirs, or whether it means that after the fourth successor there should invariably be selection by the remaining heirs, I have not to determine so need not discuss the question. Next comes a clause to provide for failure to select which makes the same provision as in the Ali Razabad grant :

"In the event of disagreement the Government shall have power to appoint a successor any one amongst the descendants of each of the three successors whom he considers the fittest."

This is the will. It is made under the provisions of S. 11, Act 1 of 1869. It is urged by Sir Tej Bahadur Sapru on behalf of the defendant that on the proper construction this will gives an absolute estate to Fateh Ali Khan with an attempt to determine succession after his death which is void on the ground of repugnancy. He argues that the words at the commencement show that an absolute estate was created, and that anything following is an attempt to restrict the owner of the absolute estate and divert the succession in a manner unauthorized by law. I think it is permissible in the circumstances of the case first to read the will without paying any attention to legal rules for the purpose only of seeking the testator's intention. To my mind the intention is very clear. Nawab Nasir Ali Khan had in his mind as his main intention the intention of preserving the estate intact. Although on the words he used it is possible to arrive at a finding that the holder had a power of transfer, it is clear to me that he did not intend any holder to touch the corpus of the property. The whole of the will read together convinces me that his one intention was to preserve the property intact. The estate was to be considered sacred. It was never to diminish. It was to continue from holder to holder and never to be less than the estate that came into his hands. I can-

not reconcile the creation of three exactly similar estates to be held in turn by Fateh Ali Khan, Muhammad Ali Khan and Hidayat Ali Khan as compatible with an intention to grant to Fateh Ali Khan a full proprietary estate and then divert the succession firstly to Muhammad Ali Khan and secondly to Hidayat Ali Khan

Thus it appears to me that Fateh Ali Khan obtained nothing more than a limited estate which terminated with his death How far he had powers of transfer it is not necessary for me to decide. It is not suggested that he ever made any transfers. But the estate devised to him in my opinion fell far short of an absolute estate It was a limited estate It seems academic to discuss the limitations beyond the main limitation that it terminated with his life. This being the case, the decision of this portion of the appeal can proceed in the following manner. Either the disposition was only effective to convey a limited estate to Fateh Ali Khan, and the disposition then ceased to be effective or the disposition was sufficiently effective to convey a similar limited estate to the plaintiff It is of no consequence which view is taken for the decision of this portion of the appeal, for in either case, the plaintiff has become absolute owner of Nawabganj-Allahabad on the death of Sir Fateh Ali Khan. Hidayat Ali Khan having died in 1925 and thus having predeceased the plaintiff, his limited estate (if it ever existed), has disappeared. In whom would the remainder vest ? According to the terms of the will the remainder never vests The line of succession laid down by the testator is obviously one to which Act 1 of 1869 cannot give effect. It offends against the law forbidding perpetuities. It creates interests in person unborn and is in every way objectionable The remainder must clearly vest in Nasir Ali Khan's heir-at-law Muhammad Ali Khan is now his sole heir-at-law There were at the time of Nasir Ali Khan's death three heirs, his widow Fatima Begam, his daughter Zohra Begam the wife of Sir Fateh Ali Khan, and the plaintiff. The widow being a childless widow was under the Imamia law entitled to no share in the immovable property. But apart from that, she died in 1916. Zohra Begam died in 1912. Thus Muhammad Ali Khan is the sole heir-at-law. It is unnecessary to discuss whether in addition to being sole heir under the Imamia law he is also sole heir under the rule of primogeniture by virtue of the retrospective effect of Local Act 3 of 1910 If he obtained a limited estate on Sir Fateh Ali Khan's death he also obtained the remainder, and thus became full proprietor. If the disposition became inoperative on Sir Fateh Ali Khan's death he succeeds as heir-at-law. In either case he becomes full proprietor.

I now come to the will Ex. 2 It affects the Punjab property. The dispositions are so similar to the dispositions in Ex. 3 as not to require a detailed examination It is sufficient to say that there are again the three successive estates in favour of Fateh Ali Khan, Muhamad Ali Khan and Hidayat Ali Khan with the power given to the last holder to nominate a successor and the power of selection in certain circumstances. But this is not a will which the testator was competent to make under the provisions of S. 11 Act 1 of 1869, but the will of a Shia Muhamadan governed by the Imamia law. It is thus only effective to the extent of one-third of the dispositions unless the heirs-at-law consented to its provisions I shall come to that point later.

For the same reasons on which I have based my finding in respect of the will Ex 3, the plaintiff must succeed to the full estate in all the property covered by it over which the testator had a power of disposition after the death of Sir Fateh Ali Khan. As I shall proceed to show later the testator had not the power of disposition over the Ali Razabad property and as I shall show later the appeal must succeed in respect of that property. But in respect of the Musalla property the disposition was a good disposition in so far as it gave a limited estate to Fateh Ali Khan. It might be argued (although it was not argued at the Bar) that under the Imamia law a series of limited estate can be created "ad infinitum" see Tyabji's Principles of Mahomedan Law, Ed 2, p 516, para 449. But even if this be so, the rule of succession on the termination of the limited estates cannot be effective. The limited estate in favour of the plaintiff may be a good estate. What then ? Hidayat Ali is dead The limited estate

in his favour fails and the plaintiff is left again as holding both the limited estate and the remainder On the facts there was consent of the heirs I need not go into this matter in detail. It is sufficient that I accept the findings of the learned trial Judge to the effect that the plaintiff and Zohra Begam consented explicitly to the will Ex. 2 and that Fatima Begam consented impliedly. She received maintenance from Sir Fateh Ali Khan and clearly took no objection to the disposition.

Before I proceed to the contentious questions as to the rights to the Ali Razabad property I note certain objections taken by Sir Tej Bahadur Sapru in respect of the property as a whole. He has taken a general objection that in any circumstances Sir Fateh Ali Khan had obtained full title by adverse possession. He did not press this plea strongly but he put it forward. The learned trial Judge has discussed the question of adverse possession under issue 16. The case put up here was that at a certain period about 1910 Sir Fateh Ali Khan asserted adverse possession He certainly did not assert it in respect of the Nawabganj Aliabad and the Musalla properties for we find that in the precis of facts (Ex. 152) prepared on 30th August 1911 which was submitted to Sir Louis Dane on his behalf it was stated that Sir Fateh Ali Khan had only a life interest in these properties. I consider that the defendant's appeal must succeed in regard to the Ali Razabad so it is not of importance to consider the question of adverse possession there. Another point was taken that the plaintiff by signing Ex. 3 as an attesting witness has forfeited all benefits under the will in accordance with the provisions of S. 54, Act 10 of 1865 read with S. 19, Act 1 of 1869 I am in agreement with the learned trial Judge that the acceptance of the will shown by the plaintiff's signature to Ex. 3 did not involve the voidness of the bequest. I note here that the decision of the Judicial Commissioner's Court on which he relies has since been approved by their Lordships of the Judicial Committee in *Shiam Sundar* v. *Jagannath* (5). But the plea fails for another reason. It cannot affect the title of the plaintiff. If he had a life estate under Ex. 3 and forfeited it he succeeds as heir-at-law.

(5) A. I. R. 1927 P. C. 248.

I now come to the question of the Ali Razabad property. Here the disposition in Ex. 2 made by Nasir Ali Khan stands out as extraordinary. There can be no doubt as to the fact that he had before him the exact conditions of the grant Ex. A-13. As I have already noted he had been consulted before that grant was made. He had put in writing the terms that he desired. It is true that the Government had not made the grant exactly in the terms that he desired, but in so far as three life estates were created the Government had complied with his own wishes and the wishes of his brothers. He and his brothers had asked that a life-estate should be created first in favour of Nawazish Ali Khan, next in favour of Nasir Ali Khan and after that in favour of Nisar Ali Khan.

Whether the next estate was to be a heritable estate the holder of which was to have a right of transfer subject to the permission of the Lieutenant Governor and subject to the execution of a registered deed as laid down by Government, or whether the estate was to be a life estate as desired by the three brothers, Nawab Nasir Ali Khan had no power to dispose of the Ali Razabad property. He had no power to appoint a successor to it It could not have been the case that he had forgotten the conditions for in Ex. 2 he refers to the grant Ex. A-13 in explicit terms. He does not quote the grant but he quotes something showing special knowledge of its conditions. He refers to the letter of the Secretary to the Government of India, Foreign Department, to the Secretary of the Punjab Government on which the grant was based. He gives the number of the letter correctly, and he gives the date of the letter correctly, and he gives in Ex. 2 the exact terms of the grant. He did not know English So he must have had a correct translation of the grant before him. Knowing, as he did that he had no title to dispose of these properties stating, as he did, the fact that he had no title to dispose of the property, he nevertheless disposed of it and proceeded to grant in property over which he had no power of disposal three successive life-estates followed by a line of succession. Whether he was or was not ignorant of the terms he clearly had no disposing capacity. The remarkable fact is that he was not ignorant of

the terms. It is clear that Ex. 2 gave no good title in Ali Razabad to any one and that in so far as it purported to give title not only had it no effect but the fact that it had no effect was palpable to any person who read Ex. 2 intelligently. The consequences of the death of Nawab Nasir Ali Khan were in no way affected by the execution of Ex. 2. Nawab Nisar Ali Khan having predeceased him, the last life estate terminated, and the male heirs were called upon under the terms of Ex. A-13 to choose as the holder of the estate male heir whom they considered the fittest person. If they did not agree to the appointment within a reasonable time, it was the duty of the Lieutenant-Governor to appoint. The learned trial Judge has stated that the Lieutenant-Governor could only exercise this power when the heirs disagreed. I do not read Ex. A-13 in that manner. An inability to agree is not the same as a disagreement. An omission to exercise their powers without expressing agreement or disagreement can only be construed as an inability to agree. The distinction is real. As I read the terms unless the heirs arrived within a reasonable time at an unanimous decision to appoint one of their number it was the duty of the Lieutenant-Governor himself to make the appointment The point as will be seen later is of importance.

At the time of the death of Nasir Ali Khan there were five male heirs in existence whose opinions could be taken. They were in order of age Barkat Ali Khan, who was then a man of forty, Fateh Ali Khan who was then a man of about thirty six, the plaintiff who was then a man of 26, Hidayat Ali Khan, who was a young man of eighteen, and Ali Muhammad Khan son of Barkat Ali Khan, who was a young man of seventeen. The only other male descendants of Nawab Ali Raza Khan were Ali Raza Khan aged four and Ali Khan and Mansur Ali Khan each aged two years old Every one of the adults if he had seen the will was in a position to know the necessity of making the appointment. It is the case for the defendant appellant that they did make such an appointment and that they selected Fateh Ali Khan under the terms of Ex. A-13 as the holder of the estate. It is on this question that there has been controversy and a conflict of evidence.

The events of 21st November 1896, were events not uncommon in the families of noblemen in the Punjab. There are always gatherings in such families at times of birth, marriage, and death and the ceremonies of condolence are as important as the ceremonies of rejoicing. When a man of the position of Nawab Nasir Ali Khan dies, there would ordinarily assemble a concourse at the house on the occasion of the third day ceremony, and amongst those assembled would ordinarily be relatives and highly placed friends of the family, and those of humbler position who were on visiting terms with the family. There would also be present many attracted by a desire to see and hear what was happening In such a gathering in a Shia family there would ordinarily be not only Shias. There would be Sunnis and there would be Hindus.

Thus the field from which witnesses could be drawn in this suit was a large field Several hundred people would ordinarily be present on such an occasion Against this it is to be remembered that the events occurred in 1896 and that the suit came on for hearing thirty years afterwards As I have already stated in an earlier part of this judgment at the time that the suit came on for hearing there were in existence partisans on both sides. The differences between the late Sir Fateh Ali Khan and the plaintiff were well known in Lahore. There were in existence two parties, a party which supported Sir Fateh Ali Khan and a party which supported the plaintiff. Sir Fateh Ali Khan's public life had made him friends and had made him enemies. It is clear that even in public matters Sir Fateh Ali Khan and the plaintiff were frequently on the opposite sides When evidence is conflicting, as this evidence is, the difficulties in arriving at a correct appreciation of its value are considerably enhanced by the fact that the events described occurred thirty years before. It is difficult to cross-examine effectively in regard to events so distant. The difficulty is greatly enhanced when the details in themselves are comparatively simple. In this case there has been a further difficulty A small portion of the evidence in the case was recorded by King, J. before whom the suit was. When he left this Court for the High

Court of Allahabad the hearing continued before the learned trial Judge who has decided the suit. The great mass of the evidence was recorded on commission in the Punjab. Thus it has happened that the learned trial Judge did not actually hear any of the witnesses himself. He has referred to the loose manner in which evidence on commission was recorded. He has referred to the unsatisfactory methods adopted before the commissioner—methods for which the commissioner is in no way to blame. The learned trial Judge has felt the difficulty. He has arrived at the conclusion that the evidence is strongly partisan, and has preferred to select amongst witnesses those who are not Mahomedans and those of high ancestry and position as being most reliable. I am unable myself to rely upon the evidence of any particular witness for such reasons. I agree with the learned trial Judge that the evidence is usually the evidence of partisans, and when it is not the evidence of partisans it is the evidence of persons easily procurable who are ready to state anything. Any witness in this case who was endeavouring to give an accurate account of what happened on 21st November 1896 would, unless he were a man of remarkable memory, have had to admit that he had no more than a somewhat vague recollection. It is to be observed that very few of the witnesses took that position. Where the witnesses are partisans there is always a tendency to strain a point in favour of a friend. It is doubtful whether such a witness would conceive that he was thereby doing anything improper. The attitude of mind is often a self deception produced subconsciously by an outside cause. In these circumstances it appears to me that the best method of arriving at a correct conclusion is to look at the inherent probabilities of the case.

I need not dwell on what the witnesses assert occurred at the Soem ceremony. The Soem ceremony would ordinarily take place in the morning. We are told that it did take place in the morning. It would consist of readings from the Quran, of what is known as the Majlis observed invariably by Shias and what is known as the Fatiha. There would be prayers for the deceased and there would be eulogies on his virtues after the ceremony food is distributed. It may be taken that this is what occurred at the Soem ceremony. It is agreed that there was present at the Soem ceremony a retired Extra Assistant Commissioner by name Barkat Ali Khan. This gentleman is now deceased. He is to be distinguished from Barkat Ali Khan the brother of Sir Fateh Ali Khan. I see no reason to refuse to accept the evidence that he took a prominent part in the proceedings but as far as I can see that part was confined to eulogia, and to an announcement of the ceremony with which I am mainly concerned—the Dastarbandi or the tying of the turban ceremony. It may be taken that after the food at the Soem ceremony had been distributed some one announced, there is no reason why the announcer should not have been the retired Extra Assistant Commissioner Barkat Ali Khan, that the Dastarbandi ceremony would be held in the afternoon. The following are the two conflicting versions as to what occurred at the Dastarbandi ceremony.

According to the defendant's version the retired Extra Assistant Commissioner took very little part in the afternoon ceremony. Sir Fateh Ali Khan's brother Barkat Ali Khan according to him presided over that ceremony. Put shortly, his version is that Sir Fateh Ali Khan's elder brother called on the heirs to select a successor according to the provisions of Ex. A-13, that the heirs selected Sir Fateh Ali Khan and that his elder brother then tied the turban round his head to signify his selection as head of the family. After an acclamation the other members of the family kissed Sir Fateh Ali Khan's hand. Then there were refreshments and the gathering dispersed. This is the defendant's version. The plaintiff's version is that the retired Extra Assistant Commissioner took charge of the proceedings, that he informed the audience what were the contents of Nawab Nasir Ali Khan's wills, and that he informed them that the family had accepted those wills. Then Fateh Ali Khan's elder brother brought three shawls and the retired Extra Assistant Commissioner tied one shawl round the head of Fateh Ali Khan, one shawl round the head of the plaintiff and either placed the third shawl on the shoulders of Hidayat Ali Khan or presented it to him. I digress to refer to a document

to which the learned trial Judge has made reference. This is Ex. 60 which purports to be an extract from an issue of the Civil and Military Gazette dated 23rd November 1896 The Civil and Military Gazette is a newspaper published in English in Lahore. The learned trial Judge was of opinion that both sides wished this extract to be placed on the record in evidence. We have, however, been informed by Mr Bisheshar Nath who appeared for the defendant in the lower Court and who appeared again before this Court that he never agreed to the reception of this document in evidence. We asked Mr. Hasan Imam who propounded this document on behalf of the plaintiff how an extract from a newspaper could be admissible in evidence. He could not put it higher than that it was part of the res gestae. I am of opinion that this document is inadmissible. If the writer had been called he could have produced it to corroborate his statement or it could have been produced by the other side to contradict his statement Standing by itself it appears to me inadmissible in evidence. Even if it were admissible it would not afford any evidence of a satisfactory nature as to the correctness of its contents.

To return to the conflicting stories given on behalf of the defendant and the plaintiff. It appears to me that they should be examined in the light of the facts which are established. The Dastarbandi ceremony is not a ceremony of a religious nature. Its meaning is clear from its name The head of a family or a tribe has on his succession a turban tied round his head to signify his accession to the position. Such a ceremony is not uncommon in certain families in this province Here it is usually known as pagribandhan which has the same meaning in Urdu as Dastarbandi in Persian. The first thing to be noted is that such a ceremony is a ceremony of installation. The selection or the recognition would ordinarily take place before. It is difficult to conceive how an election which might be contested could be combined with the Dastarbandi ceremony. The parties would have surely settled before, who the successor was to be The successor would then be installed as being recognized by them. It would not be in accordance with the dignity of such a family as this Qazilbash family to proceed to elect, and to risk the possibility of a dispute in the presence of a mixed gathering amongst whom the majority would be persons not of their own social status. The second point is this. I do not understand how the recognition of the successor could be accompanied by the recognition of the persons who were to succeed him. According to the plaintiff's story the retired Extra Assistant Commissioner Barkat Ali Khan not only tied a shawl on the head of Fateh Ali Khan to denote his immediate succession, but tied a shawl on the head of the plaintiff to denote that he would be the successor of Fateh Ali Khan, and then put a shawl round the shoulders of or presented a shawl to Hidayat Ali Khan to show that he would be the successor of the plaintiff. The delicate distinction in not tying the shawl round the head of Hidayat Ali Khan, because he was the successor only to the third estate, is noticeable The next point which is difficult to understand is why the retired Extra Assistant Commissioner should be deputed to perform the ceremony of installation He was not a member of the family. The defendant's story is better here. Barkat Ali Khan, the elder brother of Fateh Ali Khan, as the senior in age might well perform the installation. The introduction of a reference to wills and the title deeds appears to me to have been singularly out of place in such a ceremony. The learned trial Judge has criticized the defendant's story where it is said that reference was made to the terms of Ex A-13 The criticism is just. An equally strong criticism may be directed to the reference to the terms of the wills.

It is also noticeable that the reference to the terms of Ex. 2 involves a reference to the terms of Ex. A-13, as Ex A-13 is discussed explicitly in Ex. 2. But my finding is that there was no necessity to refer to any of these documents at such a ceremony as the Dastarbandi If it had been considered necessary to obtain the assent of the heirs of Nasir Ali Khan to the terms of the will (Ex. 2) this occasion would hardly have been selected, and the method in which the assent is stated to have been obtained is unconvincing. In respect of Ex. 3 the assent of the heirs was immaterial The provisions of Act 1 of 1869 did not require the assent of

the heirs of Nasir Ali Khan. Ex. 2 which was a will made by a Shia bound by the Imamia law did require the assent of Nasir Ali Khan's heirs but of no one else. Fateh Ali Khan, his elder brother Barkat Ali Khan, Barkat Ali Khan's son Ali Muhammad Khan, and Hidayat Ali Khan were not the heirs of Nasir Ali Khan. The heirs of Nasir Ali Khan were his widow Fatima Begam who was in Karbala, the plaintiff, and the plaintiff's sister Zohra Begam. The two latter had already assented to the will. My finding on the probabilities of the case is that this Dastarbandi ceremony was performed by Fateh Ali Khah's brother and not by the retired Exra Assistant Commissioner of the same name. As the eldest member of the family he obviously would perform the ceremony. The suggestion in the plaintiff's story that the retired Extra Assistant Commissioner performed the ceremony and that Fateh Ali Khan's brother fetched the shawls does not commend itself to me The suggestion that Fateh Ali Khan's brother who was excluded from all benefit under the wills should in the circumstance have gone to fetch the shawls for the retired Extra Assistant Commissioner seems impossible of acceptance. Any servant could have fetched the shawls I further find that the turban was tied on the head of Fateh Ali Khan and that no other member of the family was recognized in any way as successor. Shawls may have been presented by Fateh Ali Khan as khilats to other members of the family. I do not believe that there was any reference (except perhaps in the most general way) to the wills or to Ex. A-13. There was no place for such reference. I thus accept neither story as it stands.

What then was the legal import of what happened? I can give this best in a quotation from the evidence elicited under cross-examination from the plaintiff himself. The reference is to o-p. 396 at p. 61 of Part 1 of the Printed Book :

"No one raised any objection to Fateh Ali Khan being owner and successor of the estate. At that time I approved the arrangement that Fateh Ali Khan should succeed to the property in place of my father. Barkat Ali Khan, the elder brother of Fateh Ali Khan, also approved of Fateh Ali Khan's succession. Hidayat Ali Khan also approved. I considered Fateh Ali Khan to be the most suitable successor in preference to Hidayat Ali Khan, who was young, and Barkat Ali Khan, who had left the world. I consented to the succession of Fateh Ali Khan, who was older than I, and who had been appointed by my father."

There is reason to suppose that Barkat Ali Khan, the elder brother of Fateh Ali Khan had not abandoned the world. But that point is of no importance. Nor can anything useful be derived from a discussion as to the relative characters or relative suitability of the various male heirs who had then attained maturity. It is unfortunate that as a result of the acerbity which the parties have introduced into the contest of the case many unpleasant remarks and many unpleasant suggestions have been made I find that there is no foundation for many of these suggestions and even if there had been foundation the suggestions should not have been made, as they are painful and in no way assist the determination of the case. Whether Barkat Ali Khan had abandoned the world as the plaintiff would have it, or whether he was a man of dissolute character as the defendant would have it, whether Hidayat Ali Khan's mental condition approached imbecility or whether he was a comparatively normal man do not affect the questions. It is sufficient that on the plaintiff's own statement Fateh Ali Khan was accepted as the head of the family. It is true that Barkat Ali Khan, as is clear from the evidence of Mr. Hallifax (D.W. 38), quarrelled with the head of the family shortly afterwards, but he accepted him as head. Barkat Ali Khan's son Ali Muhammad Khan clearly accepted him. He gave evidence in the mutation proceedings in Lahore which will be found in Ex. A-113. He died before he could be called as a witness in the present case. I do not rely upon his evidence as it stands, as the officer who heard it did not consider him reliable, but it is clear that he accepted Fateh Ali Khan as the head of the family.

I do not find that there was any formal selection with direct reference to Ex. A-13. If there had been such a formal selection I should have accepted intimation to have been given in writing to the Lieutenant Governor of the Punjab. There is no evidence that such intimation was given. I am, however, of opinion that the recognition of Fateh Ali Khan as the head of the family in preference to his elder brother, Muhammad

Ali, Khan and Hidayat Ali Khan was a sufficient choice within the meaning of Ex A-13. This directed the male heirs to make a choice from among themselves when the last life estate terminated The words are :

" Upon the death of whichever of the three persons aforesaid shall longest survive the said estate shall go and belong to whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate. "

Fateh Ali Khan was distinctly chosen as the fittest person and from this it can only be implied that he was the fittest person to succeed to the said estate. The circumstance that Nasir Ali Khan had assumed a power of devise over the Ali Razabad property which he did not possess does not affect the selection of Fateh Ali Khan as the fittest person.

If, however, it be considered that the said male heirs were unable to agree within a reasonable time another point arises. Reference has already been made to the confirmation of the title of Nawab upon Nasir Ali Khan Under the provisions of Ex. A-39 the title of Nawab was to be conferred in future in the following manner :

" This title will henceforth be hereditary in your family, and will descend to the fittest member of the family by the same rule as that by which the estates devolve according to your family custom provided that such member shall on each devolution of the title be formally approved of by the Viceroy and Governor-General of India as a deserving representative of the family. "

Before the title could descend it then had to be determined that the new holder should be the " fittest member " of the family and he had to be recognised by the Viceroy and Governor-General as a deserving representative of the family. There was unfortunately superadded a qualification which is meaningless that the estates would devolve " according to the family custom " to the fittest member There was no much family custom and the estates held by Nasir Ali Khan were held under a variety of titles In Nawabganj-Aliabad he held as a devisee in an estate governed by Act 1 of 1869. In Musalla he held as the devisee of a full proprietary estate granted to Sir Nawazish Ali Khan. In Khalikabad he held as mutwalli and in Ali Razabad he held a life estate under a special grant. But rejecting this qualification this much is clear. Before the title could descend it had to be shown that the new title holder was the fittest member of the family and a deserving representative of the family. On 6th July 1897 more than seven months after Nawab Nasir Ali Khan's death the Assistant Secretary to the Government of India, Foreign Department, wrote Ex. A-22 and in Ex -22 it is noted that the Government of India accepts the Punjab Government's recognition of Fateh Ali Khan as head of the family (in other words according to Ex. A-39 " the fittest member of the family ") and further accepts him as a deserving representative of the family. The title of Nawab in consequence was declared to descend to him in accordance with the terms of Ex. A-39. This recognition can only be looked at in two ways. It is either a ratification of the choice of the heirs or, assuming that the choice of the heirs had not been made, it is an appointment by the Lieutenant Governor under the terms of Ex. A-13

I cannot agree with the learned trial Judge that the Lieutenant Governor merely accepted the position under the belief that he was carrying out the wishes of the family. This would imply that the Lieutenant Governor of the Punjab, who in April 1897 was Sir Mackworth Young, was ignorant of the terms of the grant Ex. A-13. Nor do I understand the force of the argument advanced by the learned trial Judge that the Lieutenant Governor took a different view in 1911. It was for Sir Mackworth Young to decide the matter finally. Sir Louis Dane could not reopen the matter in 1911. It is not proved that either Sir Mackworth Young or his predecessor Sir Dannis Fitzpatrick (Sir Mackworth Young succeeded Sir Dannis Fitzpatrick on the 6th March 1897) made a formal selection of Fateh Ali under the provisions of Ex. A-13 There was no necessity for this to be done if the heirs had already made the choice, and the circumstance that no formal selection was made would indicate that the heirs had made a choice. But if the heirs had not made the choice I consider that Ex. A-22 was a sufficient selection by the Lieutenant Governor of the Punjab.

These findings dispose in effect of the appeal in so far as it relates to the Ali Razabad property. It was, however, urged on this Court by Sir Tej Bahadur Sapru that even if his case fails on the question of choice by the heirs of selection by the Lieutenant Governor the appeal must succeed on the ground that the plaintiff had not made out any title in the Ali Razabad property. The plaintiff had of course to succeed on the strength of his own title not on the weakness of the defendant's title and if the heirs have not made a choice and the Lieutenant Governor has not made a selection the question as to who should succeed to the Ali Razabad property has still to be determined. The heirs not having made the choice within a reasonable time it would be for the Lieutenant Governor to make the selection now. The plaintiff has no title and so the appeal should succeed on this point. This was the argument of Sir Tej Bahadur Sapru. I think it desirable to arrive at a decision on this plea although on my previous findings the plea does not arise The learned trial Judge decided against this plea on the ground that the defendant was estopped from setting it up. He relied on the decision in *Board* v. *Board* (6). This was a decision of a Bench in 1873. A certain Robert Ameshbury was "tenant by the Court" of certain property. When he died he had nothing to devise therein. His son Joseph Amesbury was heir-at-law. Robert Amesbury, however, made a will leaving the property to Rebecca Amesbury for life and to a certain William Board in fee Joseph Amesbury did not claim the property within twenty years. On Rebecca's death William Board claimed as Rebecca's representative. Rebecca's representative asserted that Rebecca had acquired independently of the will a prescriptive title to the property. It was held that he was estopped from taking this plea.

The view taken was that the holder of the life estate and the remainder man must be considered as one and that the holder of the life estate who had entered under the will could not against the will assert an adverse title derived independently against the remainder man. If the facts in this case were as the facts in *Board* v. *Board* (6), the decision of the learned Judges therein would be of great importance. But here the facts are different. If there is a finding that there has been no choice by the heirs and that there has been no selection by the Lieutenant Governor the Ali Razabad estate will have vested in no one. There can be no assertion of adverse possession by Fateh Ali Khan or his heirs for we find from the precis of facts to which reference has already been made (Ex. A-152) that Fateh Ali Khan asserted in 1911 that he had been duly elected by the family. He accepted the terms of the grant without demur. I agree that it is not open to the defendant to assert a title by adverse possession as against the plaintiff. But he is certainly not estopped from pointing out that neither he nor the plaintiff has any title except under the provisions of Ex. A-13. That is all which he says. Before an estoppel can take place it would be necessary for the plaintiff to establish that he had been led to do something detrimental to his own interests owing to the action of Sir Fateh Ali Khan. It has not been established that he did anything detrimental to his interests and he has to meet the position that Sir Fateh Ali Khan all along claimed under Ex. A-13. It has further been urged that it was not competent for Sir Fateh Ali Khan while taking advantage of the terms of the will Ex. 2 to repudiate any portion of it I do not find, however, that there has been any attempt to repudiate the will. I thus find that that the Ali Razabad property was acquired by Fateh Ali Khan under the terms of Ex. A-13. Mr. Hasan Imam suggested that in any circumstances the plaintiff should succeed here under a family arrangement, apart from the absence of registered deeds. How could the family make an arrangement except according to the provisions of Ex. A-13 ? I decide against this plea. The appeal should therefore succeed in respect of the property in Sch. 3.

I now come to the portion of the appeal which has reference to the Khalikabad property. This property formed the subject of an admittedly valid wakf created by Nawab Nasir Ali Khan on 17th June 1892 The defendant had from the commencement asserted that this Court had no jurisdiction to decide

(6) [1874] 9 Q. B. 48=43 L. J. Q. B. 4=22 W. R. 206=29 L. T. 459.

the plaintiff's claim in respect of the wakf property. He repeats the plea here. Sir Tej Bahadur Sapru on his behalf, while recognizing that the plaintiff had a right under the provisions of S. 17, Civil P. C. to ask for possession of the Punjab property other than the Khalikabad property argued that the Court has no jurisdiction to declare the plaintiff mutwalli of the Khalikabad property as the Punjab Courts alone would have jurisdiction to decide that point. His case was that is so far as the Khalikabad property was concerned the suit was not to obtain relief in respect of property but to obtain a declaration of title as mutwalli under the terms of Ex. 4 which this Court has no jurisdiction to grant. In order to determine whether this Court has or has not jurisdiction to grant that relief it is necessary to look closely at the conditions of appointment of mutwalli under the terms of the deed of wakf Ex. 4. The translation gives the conditions as follows :

"I have for my life time fixed the trusteeship to my own person without any partner. And after me the question of trusteeship will devolve upon the person who will succeed after me."

The question which I have to consider is whether this Court can determine this question. Nawab Nasir Ali Khan was certainly succeeded by Nawab Sir Fateh Ali Khan in every respect and as such a successor (janashin) Sir Fateh Ali Khan became mutwalli. But the question is, is the successor to Sir Fateh Ali Khan in this sense of the word who will become mutwalli? What this Court has decided so far is that the plaintiff must succeed in respect of the Nawabganj Aliabad property—if in no other manner—by intestate succession as the heir of Nawab Nasir Ali Khan and that he must succeed in respect of the Musalla property if in no other manner by intestate succession as heir of Nawab Nasir Ali Khan. His suit fails in respect of the Ali Razabad property as the estate, according to the terms of the grant Ex. A-13 vested as heritable estate in Sir Fateh Ali Khan But it has not decided and cannot decide the question of succession as mutwalli for the question of succession to the office of mutwalli is inseparably connected with the question of succession to the title of Nawab. Ex. A 39 was executed on 1st January 1892. Ex 4 wasexecuted on 17th June 1892.

The Viceroy and Governor-General has not yet determined who is to be hereditary Nawab and in accordance with the terms of the sanad (Ex. A-39) the successor must be the fittest member of the family who is also a deserving representative of the family. According to my view it is that successor who is entitled to obtain the post of mutwalli. If the view be taken that the future holder of the Nawabganj-Aliabad and the Musalla estates is to be considered the successor of Nasir Ali Khan it would be possible for a transferee of those estates unconnected with the family to obtain the appointment of mutwalli. We have here a clear line of guidance. It is for the Viceroy to determine who is to be head of the family provided he be a deserving representative ; and so long as a deserving representative can be found, the head of the family will be created a hereditary Nawab, and it is that hereditary Nawab who will be the mutwalli in respect of the Khalikabad property. I therefore consider that apart from the question of jurisdiction the appeal must succeed in respect of the property in Sch 5.

The next question for determination is in respect of a portion of the under-proprietary rights in a village called Ramnagar Simra No 23, Sch. 1. This is a village in the Bahraich District the superior rights of which appertain to the Nawabganj-Aliabad property. On 21st August 1906, Nawab Fateh Ali Khan purchased a portion of the under-proprietary rights in that village. The sale certificate is Ex. A-7. The learned trial Judge decided at o. p. 54 that under the rule of merger stated in S. 101, Act 4 of 1882, these under-proprietary rights merged in the estate of Nawabganj-Aliabad It appears to me that they did not do so. On the construction which I have placed on Ex. 3 Sir Fateh Ali Khan obtained only a life-estate in Nawabganj-Aliabad. He never became absolutely entitled to the property. Thus it must be held that there is no merger The appeal must succeed on this point.

There is another point. Nasir Ali Khan during his lifetime acquired a house adjoining the Mubarak Haveli. It is the case for the defendant that this house was absorbed in the Mubarak Haveli and in the division of the Mubarak Haveli this house should be included. But on the facts I find that although this

house adjoins the Mubarak Haveli it has never become amalgamated with the Mubarak Haveli It remained the property of Nasir Ali Khan and has rightly been held to devolve upon the plaintiff as his heir by intestate successions The appeal therefore fails upon this point. Sir Tej Bahadur Sapru did not argue on ground 24 of appeal in reference to mesne profits. I find the decree correct on this point. But the amount will be varied according to the variation in the appellate decree. As a result I should allow the defendant's appeal No. 116 to this extent. I should exclude from the relief awarded to the plaintiff all the properties in Schs. 3 and 5 and the under-proprietary rights in Ramnagar Simra No. 23 in Sch. 1. The costs should be borne according to success and failure.

I now come to the plaintiff's appeal. This can shortly be disposed of The plaintiff objects to having received only a declaration in respect of one-third of the Mubarak Haveli. He asks for possession Sir Tej Bahadur Sapru on behalf of the defendant did not oppose this prayer. He agreed that possession should be given to the plaintiff over one-third of the Mubarak Haveli. The plea is a good plea and the appeal is accepted to this extent. The remaining plea relates to relief in respect of certain land covered by the deed of wakf Ex 4. As I have previously found that this Court is not competent to determine who should be the mutwalli the appeal must fail on this ground On my finding the plaintiff is not the mutwalli at present. He may subsequently be held to be the mutwalli. When he has obtained that position it will then be open to him to seek for relief under this head The failure of this plea will not operate as res judicata. As the plaintiff has succeeded in respect to about half the relief sought in his appeal and has failed in respect to about half of his relief I consider that the plaintiff and the defendant should pay their own costs in respect of the Appeal No. 147 of 1927.

Raza, J.—I entirely agree, I have nothing to add to the judgment which has been delivered by the Hon'ble the Chief Judge. I adopt the judgment

V B./R.K. *Order accordingly*

A. I. R. 1929 Oudh 515

WAZIR HASAN, J.

Panchu—Applicant.

v.

Jumman—Opposite Party.

Civil Revn. Appln. No. 16 of 1929, Decided on 18th July 1929, from order of Dist. and Sess. Judge, Gonda, D/- 21st November 1928.

(a) Criminal P. C., S. 195 (3)—Court of Subordinate Judge exercising power of Judge of Small Cause Court is subordinate to District Judge.

Under sub-S (3) the Court of the District Judge is the principal Court having original jurisdiction within the local limits in which a Court of Subordinate Judge exercising powers of a Judge of Small Cause Court is situate and the Court of Subordinate Judge is subordinate to it. Therefore, the District Judge has jurisdiction to entertain an appeal from the order of the Subordinate Judge passed under S 476-B 20 *O. C.* 223, *Ref.*, 1 *Pat. L. J.* 203; 2 *Pat. L. J.* 1, *Dist.* [P 516 C 1]

(b) Oudh Courts Act (1925), S. 7—Jurisdiction conferred on Chief Court is not "ordinary" original civil jurisdiction.

Though it may be conceded that according to S. 7 the Chief Court of Oudh has original jurisdiction in civil matters over certain classes, yet it cannot be considered to be Court of "ordinary" original civil jurisdiction as required by S. 195 (3), Criminal P. C., because jurisdiction conferred by S. 7 is not an "ordinary" original civil jurisdiction. [P 516 C 2]

Motilal Saksena—for Applicant.

Ali Zaheer—for Opposite Party.

Judgment.—This is an application under S. 115, Civil P. C The circumstances are as follows:

The respondent held a decree against the applicant passed by the Court of the Munsif of Qaiserganj. On an application being made by the applicant to the said Court for recording full satisfaction of the decree notice was issued to and effected on the respondent in respect of the certification proceedings but the respondent did not appear and an ex parte order recording the full satisfaction of the decree was made on 5th Augnst 1926 In February 1928 the respondent made an application for execution of the decree in the Court of the Subordinate Judge of Bahraich exercising powers of a Judge of Small Cause Court. The execution proceeded to certain stage but finally the case was consigned to records. The applicant then presented a petition to the Subordinate Judge, praying that the respondent be prosecuted under S 210,

I P. C. The learned Subordinate Judge accepted the prayer of the petitioner and took proceedings under S. 476-B, Criminal P. C. From the order of the learned Subordinate Judge the respondent preferred an appeal to the Court of the District Judge of Gonda. The learned Judge considered the appeal on its merits and held that no good purpose would be served by instituting a prosecution. He accordingly allowed the appeal and ordered the withdrawal of the complaint made by the Subordinate Judge. Against this order of the learned District Judge the present application in revision is made

On the merits of the case I am not prepared to interfere with the order of the learned District Judge but a point of law was raised to the effect that the learned District Judge had no jurisdiction to entertain the appeal from the order of the Subordinate Judge passed under S 476-B, Criminal P. C In support of this contention two cases decided by the High Court at Patna were cited: *Ambika* v *Emperor* (1) and *Sukhdeo* v *Dist. Mag., Muzzafferpur* (2) The first mentioned case purports to follow a decision of the Allahabad High Court in *Ajodhia Prasad* v *Ram Lal* (3). I do not propose to consider these cases on two grounds. Ground 1 is that since the decision of those cases the law has been materially altered and ground 2 is that the decision in those cases was not accepted as applicable to Oudh in the case of *Ram Dayal* v *Dwarka* (4).

In my opinion according to S. 195, sub-S, (3), Criminal P. C., there can be no question that the Court of the District Judge is the principal Court having original civil jurisdiction within the local limits of whose jurisdiction the Court of the Subordinate Judge exercising powers of a Judge of Small Cause Court is situate and this is so under the second portion of sub-S (3) mentioned above. I further hold that even according to the first part of sub-S (3) the Court which originally initiated proceedings under S. 476-B, Criminal P. C., is the Court subordinate to the Court of the District Judge because though a decree passed by the Subordinate Judge in the exercise of his powers of a Judge of Small Cause Court is not an appealable decree yet an appeal from such of his decrees as are appealable in law would ordinarily lie to the Court of District Judge. Again if certain appeals were to lie to the Chief Court, according to proviso (a), sub-S. (3), the Court of the District Judge would be competent to entertain an appeal from proceedings initiated under S 476-B, Criminal P C In this connexion the definition of the expression " District Judge " in the General Clauses Act, 1897, and of " District " in S. 2 (4), Civil P C., is helpful and leads to the same conclusion at which I have reached.

It was argued that after the passing of the Oudh Courts Act 1925, the Chief Court of Oudh is a Court possessed of original civil jurisdiction and, therefore, the decision in *Ram Dayal* v *Dwarka* (4), is no longer relevant. Now the original jurisdiction of the Chief Court of Oudh is conferred by S. 7, Oudh Courts Act 1925, and it may be conceded that according to that section the Chief Court of Oudh has original jurisdiction in civil matters over a certain class of cases but sub-S. (3), S 195, Criminal P. C., speaks of " ordinary " original civil jurisdiction and to my mind the jurisdiction conferred by S. 7, Oudh Courts Act 1925, is not an " ordinary " original civil jurisdiction.

The application is dismissed with costs

R.M /R.K. *Application dismissed*

(1) [1916] 1 Pat. L. J. 206=34 I. C 320=17 Cr. L. J. 209.
(2) [1917] 2 Pat. L. J. 1 =38 I. C. 754=18 Cr. L. J. 370.
(3) [1912] 34 All. 197.
(4) [1917] 20 O. C. 223=42 I. C. 131= 4 O. L. J. 529.

A. I. R. 1929 Oudh 516

STUART, C. J., AND RAZA, J.

Umrao—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 363 of 1929, Decided on 26th July 1929, from order of Addl. Sess Judge, Bahraich, D/- 6-7-1929.

Penal Code, S 302—Death under circumstances compatible with little else than irritant poisoning— Medical evidence also testifying to same effect—Conclusion that death was due to poisoning by accused held to be good conclusion

The accused who was greatly displeased with the wife of his brother, came to get her child from her. He took away the child

without her consent. Later on he was overpersuaded by other men to let the child remain. He then proceeded to give the child some sweets. Directly afterwards the child was taken ill and died. The child's viscera was sent to Chemical Examiner who deposed that an extract from viscera produced tingling sensation when rubbed on the tongue and killed frog on injection. He gave as his opinion that death was due to aconite poisoning. The Civil Surgeon was of opinion from the condition of the mucous membrane of the stomach and the points of haemorrhage that death was due possibly to irritant poisoning. There were other symptoms which pointed to aconite poisoning.

Held : that child died under circumstances which would be compatible with little else than aconite poisoning and that the child was poisoned by the accused was a good conclusion [P 519 C 1,2]

R. F. Bahadurji—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—Umrao Dafali, a man of thirty years of age, a resident of Bhitya in the Bahraich District, has been convicted by the learned Additional Sessions Judge of Bahraich of an offence of murder under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. He appeals The reference in confirmation is also before us The facts are these : Hafizan, the daughter of Raddu Dafali and Mangala, residents of a hamlet called Ghuraupura or Jignia Mahpal Singh in the village of Bhabharpur, Bahraich District, married about 1919, Abdulla the brother of the appellant and went to reside in the house in which he and the appellant lived in the village of Bhitya. At first her marriage with Abdulla was successful Subsequently Abdulla became incapacitated by lameness and was unable to work Umrao then apparently had to keep them While ready to keep his brother he was not ready to pay for the support of his brother's wife. In 1926 Hafizan was turned by Umrao out of the house. She went back to her father's house. She was then pregnant Her son Mohammad Husain known by the pet name of Chummun is the deceased child with whose murder Umrao has been charged. This child was born about July or August 1926 After his birth Hafizan returned to Abdulla. After a short time she was divorced and turned out of the house once more, Abdulla retaining the custody of the child. She went back to her father On 5th February 1929, she returned to Bhitya which is eighteen or nineteen miles from Bhabharpur. She clandestinely removed the child and brought him back to her father's house on 6th February 1929. On 7th February Umrao and a man called Ghafoor arrived at Jignia Mahpal Singh They went to the house of Rahmat Ruddu's brother. Ghafoor came to Ruddu's house where he found Mangala. He asked Mangala to give back the child The child was at that time with Hafizan who was in the fields When Hafizan returned, Mangala took the child to Rahmat's house where the appellant was The appellant took the child upon his knee and apparently fondled it After a time he returned the child to Mangala, who took him home. On 8th February 1929, Umrao and Ghafoor went away to another hamlet whence they returned with Rahim Bakhsh the brother of Umrao's mother. At that time Mangala and Hafizan were away but the child was in the house. Umrao and Ghafoor took the child up and were taking him away when Mangala and Hafizan returned. We continue in the words of the witnesses themselves. Mangala has deposed as to what happened subsequently.

"Then I requested Umrao to let the boy remain with us till the Id. Umrao said he would by no means give the boy, and carried him away. I then asked Umrao to let my daughter suckle the child. He gave the child to me. I gave the child to my daughter. On account of shame from the presence of her husband's elder brother Umrao, my daughter turned round to suckle the boy. Umrao rushed and snatched away the boy. Then my daughter began to weep and cry Then I began to cry too. My daughter then said that he would be no better than a man who had connexion with his sister and his mother if he took away the boy. Umrao started off with the boy saying that he would be no son of his father if he did not get us all sitting in the police station at Sonwan. Then he went away with the boy up to a grove called the Hidia grove. Behind him went I and my younger daughter Nissa, beseeching him to leave the boy. Fakiroy tailor who was coming in the noon from his fields to his house and Ratan who was splitting wood in the grove met there. I told them that they had the previous night made Umrao give the boy to me and now he was taking away the boy. Fakiroy and Ratan entreated Umrao to give the boy till the Id. Then we all sat down in the grove."

"Umrao made the boy sit on his legs and gave him sweets which he untied from the corner of an angaucha. The sweets were two peaces of gur, half a chattak in weight. While the boy was eating gur Umrao kept him seated on his legs. When he had finished, Rahim Bakhsh and Gappu said that the boy should be given to me to be taken away.

Umrao said that day he was giving me the boy and if anything untoward happened he would take another boy in return for the boy given me."

Note :—Gappu is Ghafoor.

"I said I had nourished the boy for two years with care and nothing untoward had happened and that now if any such thing should happen I would give a boy to Umrao in return for that boy. Then the three started off. Myself, my daughter, the boy, Fakirey and Ratan Lodh started for our village. As we had gone a little distance the boy's head hung down. When we went a little further the boy lost consciousness. I made my daughter Nissa run to call back Umrao and his companions. My daughter followed them to Hariharpur but they took rapid strides and disappeared By the time my daughter came back the boy expired. When I reached home the boy vomitted. I thought he was possessed and I went to a wizard. I told my daughter Hafizan to lay the boy on the square of Imam Sahib, while I was going to call the magician. When I came back I found the boy stark dead. I saw the boy. His teeth, lips and nails were all black."

Hafizan's account of the affair is this. She says she did not accompany her mother to the grove She says :

"The three men went away with the child and my mother and my sister Nissa went behind them beseeching. My mother then came back with the child. The boy was unconscious and hung his head down. He was perspiring. I put the boy on the chabutra of Fakirey tailor. The boy vomitted six or seven times and expired there before my mother came back from the magician's house to which she had gone His nails and teeth became black and his lips blue and his stomach got bulged out."

Nissa a little girl of nine corroborated. Fakirey the tailor said

"The next day when Umrao was going with the baby I met him at Hiddabagh. Ghafoor was with him. Mangala was behind them. She was entreating Umrao to leave the boy behind. I interceded and Umrao agreed. All of us sat there on the ground. Umrao gave the boy two lumps of gur about half a chhatak in weight. The boy ate up the gur. The three men started towards their village and we started towards our village. I did not hear any condition imposed by Umrao as to the boy when giving him to Mangala. I did not hear him saying that if the child did not fare well Umrao would take another boy from her. In the way the child became unwell. Mangala asked me and I said the boy was either possessed by something or there was poison in gur.

Ratan said :-

"Umrao with the child, Ghafoor and Rahim Baksh came to Hidda grove followed by Nissa and Mangala entreating them to leave the boy till Id. I was splitting wood in that Hidda grove. Fakirey came there. I and Fakirey admonished Umrao and he acceded to our request. We all sat down on the ground. Umrao from his dhoti's corner took out two lumps of gur and gave them to the boy who ate it up. Then Umrao gave the boy to Mangala. Umrao said if the boy should be unwell or die he would take back a boy in return. Mangala said she had nourished the boy 2½ years and he had not come to grief."

We have in places altered the translation in the printed book. We have corrected the translation from the Vernacular. Thus according to this story the boy who was apparently in good health was given some sugar by the appellant. Almost directly after he had eaten it he was taken violently ill and he died in a very short time afterwards Before we go any further we should dispose of a plea in defence which, while recognizing that the child was poisoned, suggests that he was poisoned not by the appellant but by his own grandmother Mt. Mangala. We have already referred to Ghafoor and Rahim Bakhsh. Ghafoor was arrested in connexion with the murder but as there was not sufficient evidence against him he was discharged. He has given evidence for the defence So has Rahim Bakhsh. According to these witnesses Mangala at first agreed that the appellant and Ghafoor should take the boy away. Ghafoor says .

"When Umrao started with the boy Mangala said that ten koses had to be travelled and the boy might cry in the way and so Umrao should take with him sweets to give the boy. So saying she tied a piece of gur to the corner of Umrao's angaucha. The gur was about a chhatak. Umrao started with the boy Mangala and Nissa came along with us entreating Umrao to let the boy remain till the Id. Umrao did not heed So the two followed us to the Hidda grove. There Ratan and Fakirey tailor were cooling themselves in the grove."

"Mangala said to Fakirey that Umrao had brought her daughter's son and was not listening to entreaties Fakirey and Ratan recommended to Umrao that he should let the boy remain till the Id. Umrao said that it was wrong for Hafizan to steal away the boy. Then at the request of myself, Rahim Bakhsh, Fakirey and Ratan, Umrao gave the boy to Mangala and made the boy eat the gur (mithai) which was tied at the corner of his angaucha."

Rahim Bakhsh said

"Mangala took the boy from Hafizan and gave him to Umrao. Mangala tied gur in Umrao's angaucha while Hafizan was suckling the boy and said that " whenever the boy should cry Umrao should give him the gur as a distance of ten koses had to be covered. Umrao started homeward with the boy. I and Ghafoor were with him. Mt. Mangala and Hafizan came

along with us in the way making entreaties. After a short distance we came to a grove called the Hidda grove. Then Ratan Lodh and Fakirey tailor met us. Mt. Mangala said to them that she was entreating Umrao to let the boy remain with her for a month but Umrao did not heed. Fakirey and Ratan Lodh also asked Umrao to leave the boy for a month which was not a long time. We too said that the boy might be allowed to remain. Umrao gave back the boy to Mt. Mangala. Umrao then untied the sweets (mithai) that is the same gur and gave it to the boy. The boy began to eat gur."

Here is a sharp conflict of evidence. If Mangala, Nissa, Fakirey and Ratan are telling the truth the gur was with the appellant and the appellant gave it to the boy to eat. If Ghafoor and Rahim Bakhsh are telling the truth it was Mangala who was responsible for giving the gur to the boy. It is noticeable that Fakirey and Ratan appear to be independent witnesses. It is also noticeable that neither of them was cross-examined on this point Ghafoor was the appellant's associate all through the matter. Rahim Bakhsh is his mother's brother. It is true that the families are inter-related. There is further this fact. Hafizan has deposed that while she was at Bhitya the son of Sarfaraz, another brother of Umrao was drowned and that she was charged by Umrao and the family with having drowned the boy. She says that Umrao told her (here we are correcting the English of the record) that he would deal with her in such a manner that she would not be able to let her liver go because she would be gripping it in agony. Both Ghafoor and Rahim Bakhsh deposed to the drowning of Sarfaraz's son but both deposed a complete ignorance of Hafizan having been charged with complicity in the child's death. We do not wish to strain the point but there may be some connexion between the death of the son of Sarfaraz and the present affair. The learned Sessions Judge and the assessors all found the appellant guilty and they thus found that Mangala, Nissa, Fakirey and Ratan were telling the truth and that Ghafoor and Rahim were not telling the truth We are of the same opinion. The case then stands as follows: The appellant was greatly displeased with Hafizan. He came to get the child back. He took away the child without the consent of the mother. Later on he was over-persuaded by other men to let the child remain. He then proceeded to give the child some sweets. Directly afterwards the child was taken ill and died The child's viscera was sent to the Chemical Examiner who deposed that an extract from the viscera produced a tingling and numbing sensation when rubbed on the tongue and killed a frog on injection He gave it as his opinion that the death of the child was due to aconite poisoning. In Taylor's well known work on Medical Jurisprudence, 8th Edn. Vol. 2, p. 718 it is stated

"Aconite may be extracted from organic liquids by means of Stas's process for the separation of the alkaloids. In this way and by applying the test of taste and that of physiological action on animals (mice or frogs) a very minute trace of aconitine may be detected."

We hold that the child died in circumstances which would be compatible with little else than irritant poisoning. The Civil Surgeon was of opinion from the condition of the mucous membrane of the stomach and the points of haemorrhage that death was due possibly to an irritant poison. There were other symptoms which pointed to poisoning with aconite. We have been unable to ascertain that the discolouration of the nails or teeth after death is a necessary symptom of poisoning by aconite but this discolouration might well follow intense irritation. Even in the absence of the medical evidence a conclusion that the child was poisoned could be a good conclusion, but when the other evidence is read with the medical evidence it appears to us that we are not justified at arriving at any conclusion other than the conclusion on which the Court arrived. The question of motive is difficult. In the first place it was not easy for the Court to ascertain every aspect of the case from the witnesses. The people who had the most intimate knowledge of the facts were all Dafalis. Dafalis anywhere are not an intelligent class and in the particular part where they reside would probably be most unintelligent This much, however, is clear. Umrao hated Hafizan and was apparently ready to do anything to injure Hafizan. We believe her evidence when she says that Umrao attributed the death of the son of his brother Sarfaraz to her. It may have been that he wished to deprive her of her son. It may have been that he had hoped being

an ignorant man that if he poisoned the deceased child Hafizan might be suspected of murder It is noticeable that his witnesses have endeavoured to implicate Hafizan's mother. The learned counsel who appeared for the appellant put up as good a case for him as was possible. The gentleman in question is a very experienced counsel in criminal cases. He was, however, unable to put the case any higher than this He said that even if the Court took the view on the evidence that the appellant gave the sugar to the child it appears to us impossible to take any other view—there was a possibility that the appellant was unaware of the fact that the sugar contained poison. He did not endeavour to contest the finding of the Sessions Judge that the boy had been poisoned This plea is altogether insufficient. We accordingly find that the appellant has been rightly convicted The offence was particularly cruel and there can be no question of mitigation. We accordingly dismiss the appeal, uphold the conviction, confirm the sentence and direct that Umrao be hanged by the neck till he be dead.

V B /R.K. *Appeal dismissed.*

A I. R. 1929 Oudh 520

WAZIR HASAN, Ag. C. J., AND PULLAN, J.

Mt Amina Bibi— Plaintiff — Appellant.

v.

Mohammad Ibrahim and *another*— Defendants—Respondents

Second Appeal No 201 of 1928, Decided on 20th November 1928, from decree of Sub-Judge, Rai Bareily, D/- 17th February 1928.

(a) Mahomedan Law—Dower can be fixed after marrige.

A dower can be fixed at a period later than the celebration of the marriage. *A. I. R.* 1926 *Oudh* 186 and 3 *All.* 266 (*P. C.*), *Foll.*

[P 521 C 1]

(b) Transfer of Property Act, S. 53—Gift to wife—Husband indebted but having sufficient property—Gift cannot be avoided.

Paying one creditor in full and leaving others unpaid is not regarded in law to be voidable at the instance of a creditor.

Where a husband discharges his liability for his dower debt by a gift of a portion of his property in favour of his wife, the mere fact that he was heavily indebted at the time of the gift is no ground for refusing to give effect to the gift, particularly when he is still possessed of large immovable property to satisfy other creditors. *A. I. R.* 1915 *P. C.* 115, *Foll.*

[P 521 C 2]

Akhlak Husain—for Appellant.

Akhtar Husain—for Respondent 1.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Rai Bareli dated 17th February 1928 affirming the decree of the Munsif of Dalmau dated 12th November 1927. The plaintiff is the wife of one Abdul Wahab, who was arrayed as defendant 2 in the suit out of which this appeal arises Shaikh Muhammad Ibrahim defendant 1 holds a decree for simple money debt against Abdul Wahab In execution of that decree he desires to attach and bring to sale the property which is the subject matter of the present suit. The plaintiff intervenes in execution proceedings with a claim that the property in question had been gifted to her by her husband, Abdul Wahab, in lieu of a portion of her dower debt by a registered deed executed on 23rd December 1926. This claim was rejected by the Court seized of the execution proceedings. In consequence of this the present suit was brought. The relief claimed is a declaration that the property in question is not liable to be sold in execution of the decree held by defendant 1 as against Abdul Wahab defendant 2 The ground on which the relief is claimed is the same which was urged by her in the execution proceedings to which reference has already been made. The only defence to the suit with which we are concerned was that the deed of gift is a fictitious transaction in the sense that there was no dower debt subsisting on the date of its execution in favour of the plaintiff and if that was true the deed was clearly voidable at the option of the creditor in virtue of the provisions of S. 53, T. P. Act, 1882. The Courts below have given effect to this defence both in the premises and in conclusion.

The judgment of the lower appellate Court is primarily founded on conjectures and suspicions and with the aid of counsel on both sides we endeavoured to extract any definite finding on the question as to whether the dower debt had been paid up before the execution of the deed of gift in question. The judgment at best can be interpreted to mean that it has not been proved that the wife's dower

subsisted as a debt on the date of the execution of the deed of gift. But if there is no finding and indeed there is no evidence, which could have supported such a finding, had it been given that the dower debt had been satisfied the learned Subordinate Judge's surmises that it might have been paid up before because it was not shown to have been subsisting on the date of the gift is of no consequence whatsoever. The facts which are not disputed are that the plaintiff is the married wife of Abdul Wahab and that a dower of at least Rs. 10,000 was fixed either at the marriage or at a subsequent period by the husband. The evidence furnished by the recitals in the deed of gift, which deed was proved by formal evidence as against the respondent, though not conclusive in its nature is certainly admissible It recites the fact of marriage, the fixing of dower at the figure of Rs 10,000 and it recites the further fact of the husband discharging his obligation in respect of the dower debt to the extent of Rs. 1,000 by making transfer of a portion of his immovable property. That the dower could be fixed at a period later than the celebration of the marriage is a proposition which cannot be disputed A Bench of this Court to which one of us was a party had occasion to consider this matter in case of *Bashir Ahmad* v *Zobaida Khatun* (1). On the authority of a decision of their Lordships of the Judicial Committee in the case of *Kamarunissa Bibi* v. *Hussaini Bibi* (2), it was held in that case that if no dower is fixed at the marriage it may be fixed later.

We must, therefore start with the initial fact that at least a sum of Rs 1,000 was the amount of dower fixed in favour of the wife by the husband. The liability to discharge this dower debt rests on the husband and will continue to rest till he satisfies it. There is no evidence on the record, indeed there was no positive case to that effect, that he had ever satisfied it at a date earlier than the date of the execution of the deed of gift. It follows that the dower debt to that extent was subsisting on the said date . By means of the transfer of a portion of his immovable property under the deed of gift in question, the husband discharges his liability for his dower debt. If there were nothing else the transaction of gift must be upheld in favour of the wife but it is said that it cannot be so upheld because Abdul Wahab was heavily indebted on the date of execution of the deed of gift It is true and that is the finding of the learned Subordinate Judge that Abdul Wahab was so indebted. That however, is no ground for refusing to give effect to the gift In those circumstances the provisions of S. 53, T. P. Act, 1882, are also not applicable. It is admitted that Abdul Wahab is still possessed of large immovable property The share of his annual profits from zemindari, according to the finding of the learned Subordinate Judge, is about Rs. 2,000. Abdul Wahab's act of transferring a small portion of his immovable property to his wife in lieu of a portion of her dower debt in the circumstances of this case amounts to no more than paying one creditor in full and leaving others unpaid Such an act is not regard in law to be voidable at the instance of a creditor. We may here with advantage quote a passage from a decision of their Lordships of the Judicial Committee in the case of *Musahar Sahu* v *Hakim Lal* (3):

"As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

The result is that the appeal is allowed the decree of the Courts below are discharged and the plaintiff's claim is decreed with costs in all the three Courts.

W.S./R.K. *Appeal allowed.*

(1) A. I. R. 1926 Oudh 186=1 Luck. 83=29 O. C. 108.

(2) [1881] 3 All. 266 (P. C.).

(3) A. I. R. 1915 P C. 115=43 Cal. 521=43 I A. 104 (P. C.)

A I. R. 1929 Oudh 521

MISRA, J.

Mohammad Ali—Plaintiff-Appellant.

v

Mumtaz Ali — Defendant — Respondent.

Second Appeal No. 298 of 1928, Decided on 9th November 1928, from decree of Sub-Judge, Sultanpur. D/- 23rd May 1928.

Trusts Act, S. 90 —Partition—Suit for—Person acquiring certain right by virtue of being in possession of entire property cannot resist coheirs' claim for partition.

Persons inheriting property as heirs from a common ancestor are deemed as cosharers and possession of one is deemed to be the possession of the other. If one of them while in possession of the entire property derives an advantage, namely, tenancy and under-proprietary rights in respect of some plots by virtue of being in such possession, he cannot appropriate that advantage exclusively for himself but must be deemed to have derived it both for himself and his cosharer. He, therefore, cannot resist a coheir's claim for partition in respect of the plots.

[P 523 C 1]

M. Wasim—for Appellant.

Naimullah—for Respondent.

Judgment.—This is a plaintiff's appeal out of a suit for partition. The parties to the suit are brothers, sons of one Sheikh Amjad Ali, resident of village Nandaura, district Sultanpur. The plaintiff-appellant filed a suit for partition in respect of the property which had been inherited by them either from their father Amjad Ali or from their grand-uncle Ramzan Ali. The dispute in this appeal relates to certain plots of land situate in village Nandaura which have been proved to have been in possession of the aforesaid Ramzan Ali, who died in 1890 and after whose death the parties to the suit inherited it These plots of land are Nos 161 old 196 new, old 187/1/new 219, old 187/2/new 221, old 188/new 222, old 265/new 318, old 315/new 390, old 316/new 391, old 334/new 408 old 466/new 555, and old 541/new 657, which were recorded at the time of the regular settlement in the possession of Ramzan Ali himself free of rent and certain other numbers, which were old 163/new 198, old 183/new 216 and old 510/1/new 618, which were recorded in the cultivation of tenants but had subsequently come into the possession of Ramzan Ali. There were certain other numbers, namely, old 325/new 350, old 318/new 393, old 321/2/new, 396, old 322/new 396, old 324/new 399 and old 321/1/new 401 which were recorded as parti. In 1915 the taluqdar of Kurwar, who is the owner of the village in which these plots of land are situate, instituted in the rent Court a suit for resumption in respect of these plots. The suit was filed against the defendant-respondent Mumtaz Ali who then happened to be in possession of all these plots of land. On 17th September 1915 a compromise was arrived at between the parties to this case under which tenancy rights were decreed in respect of three plots of land namely 198 (recent) 216 (recent) and 618 (recent) subject to the payment of an annual rent of Re. 1-4-0 and under-proprietary rights in respect of 196, 219, 221, 222, 318, 350, 390, 391, 393, 396, 397, 399, 400, 408, 555 and 657 on the payment of under-proprietary rent of Rs. 17-0-3. All the plots of land are now admittedly in possession of the defendant-respondent, and the plaintiff-appellant claimed a half share in them.

The learned Munsif of Musafirkhana at Sultanpur who tried the suit held that the property was joint property of the parties and by his decree dated 6th February 1928 decreed the plaintiff's suit for partition of a half share in respect of these plots

On appeal, however, a different view was taken by the learned Subordinate Judge of Sultanpur, who by his decree dated 23rd May 1928, had dismissed the plaintiff's suit

On appeal it is contended before me that the decision of the learned Subordinate Judge is wrong and that the plaintiff is entitled to a half share in the plots in suit. After hearing the parties I have come to the conclusion that the judgment of the learned Subordinate Judge is erroneous and cannot be upheld. I will now proceed to give my reasons for arriving at this conclusion

It has not been contested before me that all these plots of land were in the possession of Ramzan Ali. Indeed this was admitted by the defendant-appellant in the resumption case (vide Ex. 2). It is also admitted before me that these plots of land came into the possession of the defendant-respondent as heir of Ramzan Ali It, therefore, appears to me that if any right had been obtained by the defendant-respondent in respect of these plots of land by virtue of a compromise with the taluqdar, such rights must be ascribed to the rights of Ramzan Ali whose heir he happens to be If such be the position, as it must be, the benefit derived by Mumtaz Ali must be considered as benefit derived by him not for his exclusive advantage but for all the heirs of Ramzan Ali. When after his death the de-

fendant-respondent came into possession of these plots of land, his possession must be considered not only on his own behalf but on behalf of all the heirs of Ramzan Ali. It is not necessary to cite authorities in support of the proposition since it has not been contested before me that both the plaintiff and the defendant being the heirs of Ramzan Ali will be deemed as cosharers and the possession of one will be deemed to be the possession of the other Under these circumstances if the defendant-respondent while in possession of the entire property derived any advantage by virtue of being in such possession, he could not appropriate that advantage exclusively for himself, but must be deemed in law to have derived it both for himself and his cosharer. In this view of the case the defendant cannot now resist the plaintiffs' claim for partition in respect of these plots.

I, therefore, set aside the decree of the learned Subordinate Judge and restore the decree of the learned Munsif. The plaintiff's suit will stand decreed with costs in all the three Courts.

R.M./R.K. *Decree set aside.*

A. I. R 1929 Oudh 523

PULLAN, J.

Bhagirathi and others—Defendants—Appellants.

v.

Udesh Singh—Plaintiff—Respondent.

Second Rent Appeal No. 65 of 1928, Decided on 13th February 1929, from decree of Dist. Judge, Rae Bareli, D/- 2nd August 1928.

(a) Oudh Rent Act (1886), Ss. 108 and 127—Transfer of occupancy rights—Only right to trees planted passes—Transferee does not acquire grove right and is liable to be ejected when trees cease to exist.

An occupancy tenant who had planted trees conveyed his rights. The trees ceased to exist but the transferee raised the plea in a suit under S. 127 that he was a grove holder.

Held: that the sale conveyed only the right to trees and did not convey grove rights to the transferee. When the trees ceased to exist the landlord was entitled to treat the purchaser as trespasser and could sue him under S. 127. [P 524 C 1]

(b) Landlord and Tenant — Under-proprietary right.

Under-Proprietary rights cannot be obtained by prescription unless they have been asserted against a landlord. [P 523 C 2]

Moti Lal Saxena—for Appellant.

H. D. Chandra—for Respondent

Judgment.—These two cases have been decided in Court below by a single judgment and the same procedure may be adopted in diposing of the second appeals. The plaintiff sued each of the defendants who are appellants for arrears of rent under S. 108, Cl. (2), Oudh Rent Act, and as a consequential relief prayed for ejectment under S. 127 of the same Act. The finding of the Courts below was that these persons were holding the land without any title and that they were liable to be treated as tenants under the terms of S. 127, Cl. (1), Oudh Rent Act. The finding was based on the evidence of the patwari and also a decision in each case by the Assistant Record Officer of the year 1925 from which it appears that the land is tenant's land and is held by the respective appellants without any assessment of rent In the first Court the defence set up was that each of these persons had obtained a title as an under-proprietor either by sale or by prescription. The sale was in the case of Altaf Ali of the year 1897 and in the case of Bhagirathi of 1908. It appears that in each case the sale was by an occupancy tenant and the rights which were transferred were qubzedari of occupancy rights. They were not under proprietary rights and under proprietary rights cannot be obtained by prescription unless they have been asserted against a landlord. Neither of these parties ever asserted under-proprietary rights against the landlord. After the evidence had been finished in the first Court one of these appellants Altaf Ali raised the plea that he was a grove-holder. The Court refused to entertain the plea, but it was argued in the Court of the learned District Judge in appeal. That being so I have heard the argument on behalf of Altaf Ali but I can see no ground whatever for hearing any such argument on behalf of Bhagirathi who never raised the plea at all until he came up in appeal

As far as Altaf Ali is concerned I am satsified with the decision of the Court below. The land is occupancy land and under the old law a tenant could plant trees without permission on his occupancy land and could sell those trees. He could not sell the land and he could not sell the occupancy rights. Consequently the sale deeds on which the appellants rely were sales of the trees

only and these sales did not carry with them the rights of grove-holders. The trees no longer exist and the position of the appellants now is as found by the Court below, that of trespassers on agricultural land and as such they may be dealt with under S. 127, Oudh Rent Act In my opinion there is no force in these appeals and they are both dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I R. 1929 Oudh 524

WAZIR HASAN AND SRIVASTAVA, JJ.

(*Raza*) *Mohammad Khan* and *others* —Defendants—Appellants.

v.

Abdul Rahman Khan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 112 of 1929, Decided on 23rd September 1929, from decree of Addl Sub-Judge, Fyzabad, D/- 18th December 1928.

(a) Civil P. C., S. 100—Finding of fact not vitiated by error of law or procedure is conclusive.

A finding of fact which is not vitiated by any error of law or procedure is conclusive in second appeal. [P 524 C 2]

(b) Landlord and Tenant — Proprietary right—Proprietor has no right of re-entry on under-proprietary land even though it is in possession of trespasser—He is entitled to rent only.

To entitle a superior proprietor to bring an action for recovery of possession of land he must have a right of entry either legal or equitable. A superior proprietor has no right of re-entry on the under-proprietary tenure. He cannot bring a suit for ejectment even though persons in possession are trespassers. The fact that the under-proprietors have no title is no ground for holding that the proprietor has a right of re-entry. He must succeed on his own title and not on the weakness of the defendants. The proprietor's only right is to receive rent and no more. This right of his is not in any way affected by the change in possession. But because trespassers have come into possession, the original under-proprietary tenure is not affected in any manner in relation to the proprietor. That tenure carries with it both transferability and hereditability, the two essential elements of ownership which vests in original under-proprietors . 35 *All.* 273 (*P.C.*), *Rel. on*; 10 *Cal.* 1076, *Dist.* [P 525 C 1, 2]

Ali Zaheer and *Mohd. Ayub* — for Appellants.

A. P. Sen and *Hyder Husain* — for Respondent 1.

Judgment.—This is the defendant's appeal from the decree of the Additional Subordinate Judge of Fyzabad dated 18th December 1928 substantially affirming in its entirety the decree of the Munsif of Akbarpur, dated 31st March 1928.

In the suit out of which this appeal arises the plaintiff asked for the relief of possession in respect of a large number of plots of land situate in the village of Ajmeri Badshahpur in the district of Fyzabad. The plaintiff's case is that the lands in suit fall within the boundary of his village mentioned above and that he is the proprietor of the village and therefore also of those lands. The defendants are under-proprietors of an adjoining village of Rampur Benipur and their case is that the lands in suit form part of their under-proprietary tenure in the village of Rampur Benipur. On those pleadings the issue which arose for decision was as to whether the lands in suit form part of the plaintiff's village or they are included in the defendants' village The Courts below have decided, with reference to the documentary evidence on the record, that the lands in suit appertain to the plaintiff's village of Ajmeri Badshahpur

At the hearing of the appeal before us some attempt was made to reopen the finding arrived at by the Courts below in favour of the plaintiff's case as stated above but it was soon discovered that the attempt must prove futile. We hold that the finding is conclusive in second appeal as not being vitiated by any error of law or procedure.

The second point taken in support of the appeal is that the plaintiff being the proprietor of the village and not entitled to actual possession of some of the lands in suit which were held by third parties in the right of under-proprietary tenure, was not entitled to a decree in ejectment against the defendants though they were trespassers without any title. Before deciding this question of law it is necessary to clear the ground in relation to the facts. The total area of the lands in suit as given in the plaint is 29 bighas 9 biswas 4 biswansis. This area is covered by a large number of plots the details of which are given in the list attached to the plaint In this list each plot is described by its number and area. There are twenty plots. The first ten are as follows: 1167, 1168, 1169, 1206/1, 1370, 1377, 1378, 1379, 1380, 1382.

It has been found by the Court of first instance, and the finding was not reversed

in the lower appellate Court that these plots are held by persons, who are not parties to this suit, in under-proprietary right and it has further been held that the defendants are in actual possession of these plots of land without any title. This finding has been accepted before us in so far as the question now being decided is concerned.

On the facts stated above we are of opinion that the argument advanced on behalf of the plaintiff in respect of the ten plots above mentioned must be accepted The relief which the plaintiff prayed for and which the Courts below have granted to him in respect of these plots is the same as the relief prayed for in the matter of the other plots. Indeed there is no distinction made in the relief in respect of any plot of land The relief is for a decree for possession in favour of the plaintiff against the defendants. The purpose of the relief is quite clear and it is this, that the plaintiff wants the aid of the Court for ejecting the defendants from the possession of the ten plots of land mentioned above, and also for the plaintiff being put into possession thereof in place of the defendants. This obviously is a relief of re-entry on the under-proprietary lands. It is unquestionably true that the plaintiff in the character of a superior proprietor has no right of re-entry on the under-proprietary tenure, It follows that he cannot bring a suit against the defendant for ejectment. The defendants are trespassers according to the finding of the lower Court but the fact that they have no title is no ground for holding that the plaintiff has a title of re-entry. The plaintiff must succeed on the strength of his own title and not on the weakness of the defendants. This principle of law is as old as the hills. If it is necessary to refer to any authority in this connexion we may point to a recent decision of their Lordships of the Judicial Committee in the case of *Basant Singh* v. *Mahabir Prasad* (1):

"To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands tenements, or hereditaments, as incident to some estate or interest therein". (The Law of Ejectment by H. J. Witliams and W. B. Yates. second edition page 1).

(1) [1913] 35 All. 273=19 I. C. 310=40 I. A. 86 (P.C.)

The proprietor, as the plaintiff is, has the right to claim rent in respect of these under-proprietary plots of land. That right of his is not in any manner affected by the change in possession. But because trespassers have come into possession, the original under-proprietary tenure is not in any manner affected in relation to the plaintiff. That tenure carries with it both transferability and hereditability the two essential elements of ownership. The ownership of these plots therefore also vests in the original under-proprietors and not in the plaintiff whose only right is to receive rent and no more. The learned counsel for the plaintiff placed before us a decision of the High Court of Calcutta in *Bissessuri Dabeea* v. *Baroda Kanta* (2). and asked us to interpret it to mean that in a case of this nature a decree in ejectment could be passed in favour of the superior proprietor. We are unable to interpret the judgment in that case in the sense contended for. In the first place we are not informed of the nature of the tenure in respect of which the plaintiff was decreed possession "as before" and in the second place the relief for actual possession was distinctly held in that case not to be open to the plaintiff. The decree for possession "as before" was therefore merely a declaration of plaintiff's title in respect of the lands in dispute in that case. We would have been prepared to grant this relief to the plaintiff in the present case as well but we refrain from doing so for two reasons. firstly, such a decree may have the effect of creating a relationship of proprietor and under-proprietor between the parties to this suit which is not certainly desirable to do in the absence of the original under-proprietors and in face of the finding that the defendants are trespassers and, secondly, at no stage of the proceedings has the plaintiff's title as proprietor been disputed. Even in the issue relating to the boundary, the defendants did not claim more than the status of under-proprietors.

We accordingly allow the appeal and modify the decree of the Court below in respect of the ten plots previously mentioned in this judgment and dismiss the plaintiff's suit as regards those plots The rest of the decree of the lower appel-

(2) [1884] 10 Cal. 1076.

late Court is maintained As the result of our judgment is half in favour of the plaintiffs and half in favour of the defendants, we think that the proper order as to costs whould be that the parties should bear their own costs throughout and we accordingly make that order.

R M./R.K. *Appeal allowed.*

A I. R. 1929 Oudh 526

STUART, C. J.

Emperor

v.

Baijnath—Complainant—Respondent.

Criminal Ref. No. 46 of 1929, Decided on 3rd October 1929, reported by Deputy Commissioner, Partabgarh.

(a) Criminal P. C., S. 145 (4)—Object of S. 145 is retention of possession to avoid breach of peace—It has no reference to title.

The provisions of S 145 are directed to enable a Magistrate to pass orders as to retention of possession with the object of preventing a breach of the peace. These orders have no effect as to title, but a special exception is made in favour of persons who have been very recently dispossessed. [P 526 C 2]

(b) Criminal P. C, S. 145 (4) — "Two months" are to be calculated from date of order.

"Two months" from the date of the order mean two months from the date of the order and not two months from the date of the complaint : *A. I. R.* 1929 *Mad.* 198, *Diss. from.* [P 526 C 2]

M Il. Kidwai—for the Crown

Radha Krishna—for Respondent.

Judgment.—The question which has been referred to this Court is this :

Baijnath was on the facts dispossessed from possession of a house on 28th March 1929 The Sub-Divisional Magistrate passed his preliminary order under S. 145 (1), Criminal P. C., on 10th June 1929. At that time Baijnath had been out of possession for more than two months. It is accordingly suggested by the District Magistrate of Partabgarh, who has referred the case, that the order restoring Baijnath to possession is not justified by law The normal procedure is to declare in possession and to retain in possession the person who is in actual possession on the date of the preliminary order. But this rule is relaxed to the following extent. Where it is found that a man has been dispossessed within two months or less of the date of the preliminary order he is treated, as though he were in possession on the date of the preliminary order. But the period is two months and no more. The learned counsel who appears against the reference relies upon a judgment of Devadoss, J., sitting singly reported in *R. Srinivasa Reddy* v. *M. Dasaratha Rama Reddy* (1), where the learned Judge decided that the period of two months should be taken from the date of the application made to the Magistrate and not from the date of the Magistrate's order. The learned Judgs says that :

"Though the words of the proviso are capable of the interpretation, that the dispossession must be within two months of the preliminary order, yet the intent and object of the section must be taken into consideration before such an interpretation is put upon it."

With all due respect to the learned Judge I am unable to agree with him. Where the section says "two months" I am unable to find that the period can be extended, whatever view may be taken of the intent and object of the section. As far as I understand, the provisions of S 145 are directed in the first place to enable a Magistrate to pass orders as to retention of possession with the object of preventing a breach of the peace. These orders have no effect as to title The law considers that it is desirable in order to prevent a breach of the peace to retain in possession the person who is in possession whatever his title may be but a special exception is made in favour of persons who have been very recently dispossessed. This exception may have been made on the view that person recently ejected might endeavour to take forcible possession again. But whatever the reason may have been the law lays down as the period, the period of two months from the order. If the law meant to lay down a period of two months from the complaint it should have said so. It does not say so. I cannot see that any case arises of balancing the advantages of liberal interpretation against the advantages of a literal interpretation. To my mind the words two months from the date of the order mean two months from the date of the order and not two months from the date of the complaint In these circumstances agreeing with the learned District Magistrate I set aside the order.

V S./R.K. *Order set aside.*

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(1) A. I. R. 1929 Mad. 198=52 Mad. 66.

A. I. R. 1929 Oudh 527 (1)

STUART, C. J.

Mt. Mariam — Complainant — Applicant.

v.

Kadir Bakhsh—Opposite Party.

Criminal Ref. No. 37 of 1929, Decided on 3rd October 1929, made by Sess. Judge, Gonda.

Mahomedan Law—Divorced wife is entitled to maintenance during period of Iddat.

A who was married to *B* applied under S. 488, Criminal P. C, for maintenance. *B* proceeded to divorce her before Court. The question arose as to whether *A* could be granted maintenance and for what period.

Held that *A* could obtain maintenance against *B* during the period of Iddat and was entitled to it for three months. 5 *All.* 226 and 19 *All.* 50, *Rel. on.*, 17 *O.C.* 260, *Dist.* [P 527 C 1]

Judgment — The question for decision in this case is as follows :

The applicant Mt Mariam was married to Kadir Bakhsh She applied under S. 488, Criminal P. C. for maintenance. Kadir Bakhsh proceeded to divorce her before the Court The question is whether she can in these circumstances be granted maintenance against him, and if so for what period and at what rate ? I have no doubt as to the fact that she can obtain maintenance against him during the period of Iddat. The question was discussed at length by the late Mahmood, J. in *the matter of the petition of Din Muhammad* (1) and again before a Full Bench of the High Court of Allahabad in *Shah Abu Ilyas* v *Ulfat Bibi* (2) The decision in *Emperor* v. *Jadu* (3) does not determine the question as to whether maintenance is payable for a period of Iddat. In any circumstances it is not a decision which is binding on me I consider the Allahabad view correct. Thus Mt. Mariam is entitled to maintenance during the period of Iddat and not after that period has expired She is thus entitled to a maintenance for three months. I fix the rate of maintenance at Rs. 10 per month.

R M./R.K. *Order accordingly.*

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(1) [1882] 5 All. 226=(1882) A. W. N. 237.
(2) [1897] 19 All. 50=(1897) A. W. N. 179.
(3) [1914] 17 O. C. 260=25 I. C. 846=15 Cr. L. J. 646.

A. I. R. 1929 Oudh 527 (2)

STUART, C J.

Emperor

v.

Ghasitey and *others*—Complainants—Respondents

Criminal Ref. No 3. of 1929, Decided on 17th October 1929, made by Sess. Judge, Bahraich.

Criminal P. C., S. 339 (3) — No sanction can be given in absence of certificate by Public Prosecutor that condition of tender has not been complied with.

No sanction under S. 339 (3), can be given unless the Public Prosecutor certifies that in his opinion the person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made. In absence of such certificate no sanction can be granted. [P 527 C 2]

H. K. Ghose—for the Crown.

Judgment — The learned Sessions Judge has found that Ghasitey a person to whom a pardon was tendered under the provisions of S 337, Criminal P C., had given a false account of the dacoity, participation in which he had admitted, and had given false evidence. He has accordingly forwarded the record to this Court with an application that this Court should give sanction under the provisions of S. 339 (3) for the prosecution of Ghasitey on a charge of having given false evidence. The learned counsel for the Crown has represented that no such sanction can be given unless the Public Prosecutor certifies that in his opinion the person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made and that there is no certificate from the Public Prosecutor This objection must prevail In the absence of this certificate no prosecution can be sanctioned. I accordingly reject the application and direct that the record be returned.

R M./R K *Application rejected.*

A. I. R. 1929 Oudh 528

RAZA AND WAZIR HASAN, JJ.

Shujaat Haider — Defendant—Appellant.

v.

Mt Habibunnissa and *others*—Plaintiffs—Respondents.

Second Appeal No 396 of 1928, Decided on 2nd August 1929, from decree of Dist. Judge, Rai Bareli, D/- 9th August 1928.

Decree — Construction — Construction of decree in suit relating to portion of same land should be followed in suit relating to other.

A's (defendant's) predecessor-in-interest obtained a settlement decree against the predecessors-in-interest of *B* (plaintiff). The lands which were subject matter of the decree were subsequently divided into two portions in a village partition. In a suit against *A* with regard to one portion of the land which was not in the possession of the plaintiff, the construction of the settlement decree was the matter in dispute and the decree was interpreted in a certain manner.

Held: that in another suit against *A* with regard to the other portion, the settlement decree should be construed in the same way as it was construed in the previous litigation. The fact that the plaintiffs in the latter suit were different from plaintiffs in the previous suit could make no difference when the points in issue are common to both the cases. The judgment deciding that previous suit should be followed where the Court does not think it necessary to reconsider it. [P 529 C 1]

Akhtar Husain—for Appellant.

Hyder Hussain—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Rae Bareli, dated 9th August 1929, affirming the decree of the Subordinate Judge of the same place dated 4th February 1927.

The necessary facts of the case are these The defendant-appellant's predecessor-in-interest, Wajid Hussain, obtained a decree from the settlement Court of the District of Rae Bareli, on 3rd April 1869 in respect of 19 bighas odd lands situate in village Zer Masjid in that town of Jais as against the predecessor-in-interest of the plaintiffs-respondents. The nature of the rights conferred by the decree is a question in the case On behalf of the plaintiffs it is contended that Wajid Husain under the terms of that decree did not obtain any title of an under-proprietor in the lands mentioned above and the object of the suit, out of which the appeal arises is to obtain a declaration to that effect in respect of a portion of those lands. The defendant's contention, on the other hand is that the decree of 3rd April 1869 conferred an under-proprietary tenure on Wajid Husain in the lands to which the decree relates.

In recent years the lands which were the subject matter of the settlement Court decree came to be divided into two portions on account of a partition of the village A portion fell into mahal Manjha Bibi and the rest in mahal Sayra Bibi.

The portion which fell in the former mahal is the subject matter of the present litigation While in respect of the portion which fell in the second mahal a previous litigation between the present defendant and the owners of that mahal was concluded by a decision of a Bench of this Court in *Shujaat Haider* v. *Ali Akhar* (1).

We have already stated the nature of the controversy between the parties in respect of the title which Wajid Husain obtained under the decree of the settlement Court as regards the lands in suit. On the side of the defendant a further plea is raised as it was raised in the previous litigation that whatever might be the construction of the decree of 3rd April 1869 he and his predecessors have held the lands in suit continuously for a period of over 12 years in the assertion of an under-proprietary title recognized by the plaintiffs and their predecessors and in judicial proceedings by the revenue Courts and thus they have acquired that title by prescription.

The Courts below have rejected the defence both as to the interpretation of the decree and the acquisition of title by prescription and have granted a declaration in favour of the plaintiffs that the land in suit is not held by the defendant in the right of a proprietor or an under-proprietor Against this decree of the Courts below the present appeal is preferred.

We have heard arguments at great length in this case. The judgment of this Court dated 22nd December 1926 delivered in the previous litigation, to which reference has already been made, covers both the points urged on behalf of the defendant in support of the present appeal As already stated, those two points are: (1) the construction of the

(1) A. I. R. 1929 Oudh 239.

settlement Court decree of 3rd April 1869 and (2) the plea of prescriptive title.

It will be realized from what we have stated above that the land now in suit is only a portion of the lands to which the settlement Court decree related and that the other portion was the subject matter of the previous litigation. This being so, the same decree was under construction in that case but the portion now in dispute having been allotted under the village partition to a different mahal the plaintiffs in the present case are nominally different from the plaintiffs of the previous case. This, however, can make no difference in the substance as the points in issue are common to both the cases. In the circumstances we are of opinion that the judgment of this Court dated 22nd December 1926 should be followed in the present case and this appeal should be decided in accordance with the same judgment.

It was strenuously argued and we desire to add, ably argued, by Mr. Akhtar Husain, advocate for the defendants-appellants, that the evidence adduced in this case in support of the plea of the prescriptive title is more in volume and stronger in nature than the evidence adduced in the previous case and that in the previous judgment the proper import of the decision of their Lordships of the Judicial Committee in the case of *Pirthipal Singh* v. *Ganesh Din Singh* (1) and *Mohammad Mumtaz Ali Khan* v *Mohan Singh* (2) was not fully appreciated by the learned Judges who decided the previous case. We do not, however, think that this is a fit case in which we should reconsider the previous judgment and accordingly we direct that a copy of that judgment shall be incorporated in our judgment in the present appeal.

We dismiss this appeal with costs.

R M /R.K. *Appeal dismissed.*

(1) A. I. R. 1922 P. C. 383=25 O. C. 396=50 I. A. 210*n*. (P.C.).

(2) A. I. R. 1923 P. C. 118=45 All. 419=26 O. C. 231=50 I. A. 202 (P.C.).

A. I. R. 1929 Oudh 529 (1)

STUART, C. J., AND RAZA, J.

Deo Dutt—Defendant—Appellant

v.

Mahraj Lal Behari—Plaintiff — Respondent.

Second Appeal No. 164 of 1929, Decided on 18th September 1929.

Limitation Act, S. 19— Suit cannot succeed when no new contract is created by acknowledgment—Contract Act, Ss. 25(3) & 62,

When from the plaint it is clear that the creditor sues on mere acknowledgment and not on basis of the old debts, and no new contract or no new obligation is created by the acknowledgment the suit cannot succeed. 23 *All.* 502, *Rel. on.* [P 529 C 2]

L. S. Misra and *Kashi Prasad* — for Appellant.

Judgment.—The question in this appeal is whether the plaintiff can be allowed to go back to the debts which were incurred in the year 1923 and extend the period of limitation by using an acknowledgment in writing made in 1925 or whether he must be held to have sued on a mere acknowledgment which was made on 8th January 1925. As we read the plaint he distinctly sued on the acknowlegment of 8th January 1925 and did not sue on the basis of older debts In these circumstances the suit appears to us to be a suit on a mere acknowledgment. There was no new contract, no new obligation was created and in these circumstances the suit could not succeed. The view which we take is similar to the view taken by a Bench of the Allahabad High Court in *Ganga Prasad* v *Ram Dayal* (1). In consequence this appeal must succeed and the suit must be dismissed We order accordingly. The plaintiff will pay his own costs and those of the appellant in all Courts.

R.M./R.K. *Appeal allowed.*

(1) [1901] 23 All. 502=(1901) A. W. N. 150

A. I. R. 1929 Oudh 529 (2)

MISRA AND PULLAN, JJ.

Ambika Prasad—Plaintiff—Appellant.

v

Beni Madho—Defendant—Respondent.

Second Appeal No 360 of 1928, Decided on 4th February 1929, from order of Dist. Judge, Gonda, D/- 1st August 1928.

(a) Transfer of Property Act, S. 111—Contract of tenancy—Non-compliance of any term does not ipso facto operate as cancellation of contract unless right of re-entry or power to cancel lease is reserved

Where the order passed by the manager of an estate amounts to a contract of tenancy, the non-compliance of certain conditions of the contract would not amount to cancellation of the contract ipso facto. The party suffering from the non-compliance of any term of the contract will have a right to seek remedy in law but that cannot operate as cancella-

tion of the contract. It would not be open to the estate to exercise the right of re-entry unless condition as to right of re-entry or power to cancel the lease is embodied in the order passed *S. C. No.* 240, 15 *O. C.* 91 and 1 *O. L. J.* 273, *Ref.* [P 532 C 2, P 533 C 1]

(b) Landlord and Tenant—Tenancy—Fact that person in possession pays rent and it is accepted supports creation of tenancy.

Where the tenant admittedly remains in possession of the land in dispute in a certain year and pays rent for that year which is accepted by the landlord, it is clear that the tenant was admitted into tenancy with regard to the land in possession [P 533 C 2]

(c) Transfer of Property Act, S. 117 — Lease of land used for growing grass is for agricultural purposes and need not be in writing, nor does it require registration—Oudh Rent Act, S. 156.

When the land let is used for growing grass which is subsequently sold, the lease of such land is for agricultural purposes and so is not required to be in writing. Nor is such lease required to be registered by reason of S. 156, Oudh Rent Act: 10 *O. C* 188 and 2 *U. D.* 510, *Ref.* [P 533 C 2]

(d) Landlord and Tenant — Ejectment — Landlord in Oudh must have recourse to ordinary process of law to eject tenant.

It is settled rule of law in Oudh that a landlord must have recourse to the ordinary process of law if he wishes to eject a tenant or thekadar and if he does so forcibly the tenant or thekadar is entitled to recover possession of his holding on the ground of illegal ejectment. So another lessee of the same land cannot also recover possession of the land by treating the tenant as trespasser *S. D. No.* 9 *of* 1925, *S. D. No.* 33 *of* 1891 and 3 *U. D.* 149, *Ref.* [P 534 C 1]

(e) Oudh Rent Act (1921), S. A-52 — Omission to make S. A-52 expressly applicable to thekadars does not establish intention of legislature to justify ejectment of thekadar without having recourse to law.

Though S. A-52 has not been made expressly applicable to the case of a thekadar by reason of its not being mentioned in S. 3 (10) as one of the sections in which the expression "tenant" is to be held to include a thekadar, the omission does not establish that the intention of the legislature was to justify the ejectment of a thekadar without having recourse to law. A thekadar holding on after expiry of his term is entitled to a notice of ejectment as any other tenant included in S. 53 (1): *S. D. No.* 33 *of* 1891 and 3 *U. D.* 149, *Rel. on.* [P 534 C 2]

(f) Jurisdiction—Civil and revenue Courts — Dispute between two rival tenants is cognizable by civil Court.

Where the case relates to a dispute between two rival tenants, it is cognizable by a civil Court. *A. I. R.* 1927 *Oudh* 103, 10 *O. C* 23, 16 *O. C.* 105 and 18 *O. C.* 48, *Rel. on.* [P 534 C 2]

M. Wasim, K. P. Misra and *Gaya Prasad*—for Appellant.

Ali Zaheer and *Radha Krishna*—for Respondent.

Misra, J.—This is an appeal arising out of a suit for possession and damages brought by a thekadar in respect of a plot of land situate in village Munimpur, District Bahraich, which is owned by the Nanpara Estate. The suit was decreed by the learned Subordinate Judge of Bahraich by his decree, dated 24th April 1928, but has been dismissed in appeal by the decree of the learned District Judge of Gonda, dated 1st August 1928.

The facts of the case are that village Munimpur had been leased out by Nanpara Estate to one Abdul Aziz Khan for the years 1330 to 1332 Fasli. The said thekadar gave a sub-lease (kitkina) of plot 180 situate in the same village to the defendant-respondent Beni Madho. It is a large plot measuring 88 30 acres, and is called "rakhauna" which means that grass grows on the said land and is preserved and subsequently sold. The sub-lease was on payment of an annual rent of Rs. 400. On expiry of the theka of Abdul Aziz Khan the defendant-respondent applied for a lease of this plot of land directly to the Nanpara Estate and succeeded in obtaining a lease for five years in respect of the said land on payment of the same sum of Rs. 400 The period for which he obtained the lease was 1333 to 1337 Fasli. The Nanpara Estate imposed two conditions: they being to the effect that the respondent was to pay one year's rent in advance as security which was to be set off against the rent of the last year, i.e., 1337 Fasli, and that he should also pay the rent for 1333 Fasli in advance. The defendant-respondent was also ordered to execute an agreement to that effect.

It appears that the defendant-respondent did not deposit a year's rent in advance as security, but only offered his immovable property consisting of groves, etc., as security for the said payment. It, however, appears that he continued to remain in possession and also rent was paid by him for the year 1333 Fasli on 22nd April 1926. The plaintiff-appellant Ambika Prasad applied to the Nanpara Estate for a lease of the village Munimpur and his application was accepted, a lease having been given to him for the years 1334 to 1338 Fasli. The order granting the lease was passed on 13th September 1926, and on the same

date a registered lease was executed in his favour. It appears that the lease granted to the plaintiff-appellant makes certain exemptions, but it is admitted by the parties now that the lease in his favour includes the land in suit. After the lease had been executed by the Nanpara Estate in favour of the plaintiff-appellant, he did not succeed in getting possession of the land in suit. The matter went to the criminal Court under S. 145, Criminal P. C., and the possession of the defendant-respondent was maintained from the said Court by an order dated 1st March 1927 The plaintiff-appellant has now brought the present suit for possession of the land together with damages. His case is to the effect that his lease covers the land in suit and the defendant is not entitled to remain in possession of the said land since his lease has been cancelled by an order of the Nanpara Estate passed on 11th September 1926.

The defendant-respondent denied the lease in favour of the plaintiff and also that it included the land in suit. He contended that he was a tenant of the plot in suit having been admitted to the tenancy by an order of the Nanpara Estate, dated 17th March 1926, and that rent for the year 1333 Fasli had been paid by him and accepted by the Estate. He urged that his lease could not be legally cancelled by the Nanpara Estate and it was not open to that Estate to grant to the plaintiff-appellant a lease in respect of the same land, without his being duly ejected from the land through the revenue Courts. He also alleged that it was not open to the plaintiff-appellant to claim possession of the land in suit from the civil Courts Lastly he denied the plaintiff's claim for damages.

In replication it was urged on behalf of the plaintiff-appellant that no lease having been executed in favour of the respondent by the Nanpara Estate, he could not be deemed to be either a tenant or a lessee of the land in suit, and could not, therefore, resist the claim of the plaintiff appellant, who was a thekadar holding under a registered lease It was also urged that the defendant's lease had been validly cancelled by the Nanpara Estate by an order dated 11th September 1926, and in the face of that order the defendant could not resist the plaintiff's claim. The plea with regard to the jurisdiction was also denied.

It would thus appear that the main points for trial in the case were :

(1) Whether any lease had been executed in favour of the plaintiff-appellant, and, if so, whether it included the land in suit ?

(2) Whether the defendant was a tenant of the plot in suit and could the alleged tenancy be created in his favour without a registered lease ?

(3) Whether the defendants' lease had been validly cancelled by the Nanpara Estate ?

(4) Whether the suit was cognizable by the civil Court ?

(5) Whether the plaintiff was entitled to any damages and, if so, to what extent?

The learned Subordinate Judge of Bahraich who tried the suit came to the finding that the lease in favour of the plaintiff had been proved and that it was also established that it included the land in suit. Regarding defendant's tenancy he was of opinion that it could not be recognized in the eyes of law since a registered deed was necessary for the creation of it. He further found that the defendant's lease had been cancelled owing to his own default in not having paid the security money as mentioned in the order granting the lease to him and that the action of the Nanpara Estate in doing so was perfectly valid. As to the question of jurisdiction he decided that the suit was maintainable in the civil Court, and on the question of damages he held that the plaintiff was entitled to Rs. 1,250 on this account. The result was that he decreed the plaintiff's suit for possession of the plot in suit and also awarded him damages to the extent of Rs. 1,250

The defendant took the matter further in appeal and the learned District Judge of Gonda decided the case in his favour. He held that the lease executed in favour of the plaintiff was fully established and that it included the plot in suit. Indeed the finding of the Subordinate Judge on this point was not challenged before him He, however, held that the defendant was a lessee on behalf of the Nanpara Estate by virtue of the order passed by the manager of that Estate on 17th March 1926 and it was not necessary in law that any registered lease should have been executed. He found that the defen-

dant had continued his possession ever since 1330 Fasli and had also remained in possession in the year 1333 Fasli on behalf of the Estate. He was also of opinion that the alleged cancellation of the lease in favour of the defendant was not valid and it was not open to the said Estate to grant a lease in respect of the land in suit to the plaintiff. He was also of opinion that if the plaintiff wanted to recover possession of the plot in suit it was open to him to do so by instituting a suit to that effect in the revenue Courts. In this view of the case he accepted the appeal and dismissed the plaintiff's suit.

The plaintiff has now come up to this Court in second appeal. It has been contended on his behalf that the tenancy in favour of the defendant-respondent has not been established, rather it cannot be recognized since no registered lease had been executed in his favour. It was argued that the tenancy, even if it could be recognized, had been cancelled by the order of the manager of the Nanpara Estate, dated 11th September 1926, and under the circumstances the plaintiff-appellant was entitled to the possession of the land in suit, since it was admitted that it was included in his theka As to the question of jurisdiction it was argued that the suit being between two rival tenants was properly brought in the civil Court. We have now, therefore, to decide three points in this appeal, firstly, whether the tenancy of the defendant-respondent is established and whether it can be recognized without any registered lease having been executed in his favour, secondly, whether the lease in favour of the defendant-respondent was validly cancelled by the Nanpara Estate and, even if it was, whether it was open to the Nanpara Estate to grant a lease of the same land to the plaintiff-appellant without having taken any steps to eject the defendant-respondent from the said land in due course of law ; and thirdly, whether the present suit is maintainable in the civil Court. The case was argued before us at great length and we have taken time to consider our judgment.

My opinion on each of these points is given below :

First point.—As to the question of the tenancy I am of opinion that the two facts on the record clearly establish that the defendant was admitted into tenancy. The first is the order passed by the manager of the Nanpara Estate dated 17th March 1926. It is Ex. 13. The order of the manager runs as follows :

"This case came up today. The theka is sanctioned for five years from 1333 Fasli to 1337 Fasli on an annual rent of Rs. 400. The purchaser shall have to deposit full one year's rent by way of advance money, which will be allowed as set-off against the rent of the last year 1337 Fasli. The amount for 1333 Fasli shall also be deposited at this very time. The rent for the remaining years shall be realized at the fixed time. It is, therefore, ordered that the officers concerned be informed and the deed of agreement be completed."

It was argued on behalf of the plaintiff-appellant that the theka must be deemed to have been cancelled, because the defendant respondent did not deposit a year's rent in advance, nor did he deposit the rent for the year 1333 Fasli in time. I am not prepared to accept this contention. It appears to me that this order amounts to a contract of tenancy, which was entered into between the Nanpara Estate and the defendant-respondent. If certain conditions of that contract were not carried out by a party to the contract, that would not amount to a cancellation of the contract ipso facto. The party suffering from the non-compliance of any term of the contract will have a right to seek remedy in law, but that cannot operate as cancellation of the contract. It was open to the Nanpara Estate to sue the defendant-respondent at once for the sum of Rs. 400 which he had been asked to deposit as security and also to claim the rent for 1333 Fasli, if it was not deposited in time. But if it did not do so it was not open to it to treat the contract as cancelled. As to the payment of the rent for 1333 Fasli it appears to me from the record that it was deposited by the defendant-respondent on 22nd April 1926, within the pear 1333 Fasli and was accepted by the estate. The effect of this was that the condition as to the payment of rent for 1333 Fasli in advance was waived by the Nanpara Estate. As to the deposit of Rs. 400 in advance as security it appears from the record that the defendant-respondent represented to the estate that he had no cash money to offer but could only give his immovable property consisting of groves, etc., in security. No definite order was passed by the estate in the presence of the defendant-respondent refusing to accept his offer. It appears

that in the meantime the plaintiff-appellant approached the estate for a theka of the village Munimpur including the land in dispute The estate appears to have entertained his proposal with favour On 11th September 1926, we find the zilladar of the estate sending a report to the manager to the effect that the defendant-respondent had not deposited the security amount in cash as he was required to do, nor had he executed the deed of agreement and that his theka ought to be cancelled (vide Ex. 7). The manager passed an order upon this report the same day. It is to the following effect

"This file came up to-day. A lease in respect of village Rikhauna in Munimpur for five years from 1333 to 1337 Fasli on an annual rent of Rs. 400 was given to Beni Madho on a condition that the lessee should deposit Rs. 400 as peshgi money which would be allowed as a set off against rent for the last year, and that he should execute a deed of agreement, but he did not deposit the advance money nor did he execute the deed of agreement upto this time. He only deposited Rs. 400 the rent due for 1333 Fasli. It was, therefore, ordered that the lease be cancelled and the file be consigned to the records."

This order shows distinctly that the manager himself understood that a lease for five years had been given to Beni Madho, the defendant-respondent, and that he was justified in cancelling the lease because he had failed to deposit the security and had not executed the deed of agreement. It is to my mind very doubtful, as stated above, whether in the absence of a condition to that effect embodied in the order dated 17th March 1926, which created the tenancy in favour of the defendant-respondent, it was open to the manager of the Nanpara Estate to cancel the lease. No condition as to right of re-entry or power to cancel the lease was embodied in the said order. Under those circumstances it would not be open to the estate to exercise the right of re-entry I am fortified in this opinion by several decisions of the late Court of the Judicial Commissioner of Oudh as well as of the Board of Revenue : vide *Lal Bahadur* v. *Mohammad Karim Khan* (1). I would also mention *Ali Muhammad Khan* v *Chheddan* (2) and *Bhikhari* v. *Manager, Court of Wards* (3) which deal with this point.

The second fact which supports the creation of the tenancy is that the defendant-respondent admittedly remained in possession of the land in dispute in the year 1333 Fasli, and paid rent for that year which was accepted by the estate. I am, therefore, clearly of opinion that the defendant-respondent was admitted into the tenancy in regard to the land in dispute

It was, however, contended on behalf of the plaintiff-appellant that the tenancy in favour of the defendant-respondent could not be recognized because no registered lease had been executed in his favour. Regarding this matter I am of opinion that the learned District Judge has taken the correct view. Under S. 117, T P. Act 4 of 1882, the leases for agricultural purposes are not required to be in writing and under S. 156, Oudh Rent Act, it is provided that notwithstanding anything contained in the Registration Act of 1908 pattas granted for any term not exceeding 10 years by landlords to statutory tenants shall be deemed good and valid without their being registered. There can be no doubt that the lease granted to the defendant-respondent was for an agricultural purpose within the meaning of S. 117, T. P. Act. The word "land" is defined in S. 3, Cl. (3), Oudh Rent Act, as follows : "Land" includes the ungathered produce of land whether spontaneous or not and whether growing in earth or in water. It is clear that "khar" which is grass or straw and grows spontaneously on the land in suit and it would, therefore, fall within the definition quoted above. This view is supported by a decision of the late Court of the Judicial Commissioner of Oudh reported as *Thakur Din* v. *Hulas* (4). The same view has been taken by the Board of Revenue in an unreported decision *Babu Jitan Singh* v. *Harbans Singh* (5). The lease given by Nanpara Estate to the defendant-respondent did not, therefore, require any deed nor did it require registration. The lease could be created orally and the order dated 17th March 1925, quoted above is, in my opinion, quite sufficient to create a valid tenancy in favour of the defendant-respondent.

Second point.—As to the second point, I may state that apart from the view that it was not open to the Nanpara Estate to re-enter upon the holding in case a

(1) S. C. No. 240.
(2) [1912] 15 O. C. 91=15 I. C 385.
(3) [1914] 1 O. L. J. 273=24 I. C. 780.
(4) [1907] 10 O. C. 188.
(5) 2 U. D. 510.

breach of the condition embodied in the lease happened it was also not open to the said estate to take the law in its own hands and to eject the defendant-respondent forcibly without having recourse to the proper method of ejectment prescribed under the rent law It is obvious that the plaintiff-appellant as a lessee of the land in the suit stands in the shoes of his lessor the Nanpara Estate and if it was not legally open it to take forcible possession of the land the plaintiff-appellant could not also recover possession of the land by treating the defendant-respondent as a trespasser. It is a settled rule of law in Oudh that a landlord must have recourse to the ordinary process of law if he wishes to eject a tenant or a thekadar and if he does so forcibly the tenant or the thekadar is entitled to recover possession of his holding on the ground of illegal ejectment ; vide *Nisar Hussain* v. *Secy. of State* (6) and *Prithi Nath* v. *Sheo Sahai Singh* (7) and *Sansardin* v. *Kalka Prasad* (8). The mere fact that the term of a thekadar expires or that there is a violation on his part of any term embodied in the lease would not entitle the landlord to resume possession without having recourse to the ordinary process of law. If that were not the rule many cases of hardship would result Indeed it would not be in the interest of public policy to countenance such an action on the part of the landlord.

It was contended on behalf of the plaintiff-appellant that a modification in this rule had been brought about by the Oudh Rent Act, Amendment Act (4 of 1921). The argument was to the effect that the said Amending Act had introduced a new section in the Oudh Rent Act 22 of 1886 which was marked as A-52 That section provides that no tenant shall be ejected otherwise than in accordance with the provisions of this Act. It was pointed out that this section was not applicable to the case of thekadars since in S. 3, Cl 10, Oudh Rent Act, where the definition of "tenant" was to be found, the new section A-52 was not mentioned as one of the sections in which the expression "tenant" was to be held to include a thekadar There is no doubt that S. A-52 has not been made expressly applicable to the case of a thekadar as would appear from the definition of the word "tenant" as indicated above. The omission does not, however, establish that the intention of the legislature was to justify the ejectment of a thekadar without having recourse to law. I am fortified in this view of the case by the two decisions of the Board of Revenue already quoted above, namely, *Prith Nath* v. *Sheo Sahai Singh* (7) and *Sansardin* v. *Kalka Prasad* (8) In the former case it was observed by the members of the Board of Revenue that the policy of the legislature in making sections embodied in the Oudh Rent Act relating to the ejectment of tenants applicable to the case of thekadars was obviously to provide that they were to be brought within the jurisdiction of the revenue Courts by making it compulsory upon the landlord to issue a notice to the thekadar before the landlord assumes possession. In their opinion any other construction would affect the interests of those classes of tenants for whose protection the sections respecting ejectment were specially designed. In the latter case *Sansardin* v. *Kalka Prasad* (8) the Board ruled that if the term of a thekadar had expired the relation between the parties still remained that of a landlord and tenant and the landlord or his mortgagee (in our present case the lessee) is not justified in summarily dispossessing the thekadar who was not ejected by the ordinary method of issuing a notice and that if this was done he (thekadar) would be entitled to sue for recovery of possession. I am, therefore, of opinion that it was not open to the Nanpara Estate to grant effectively a lease of the land in dispute to the plaintiff-appellant without having previously taken proper steps in law to eject the defendant respondent.

Third point.—As to the third point which relates to the question of jurisdiction I may state that, in my opinion, the present case relates to a dispute between the two rival tenants and as such it is cognizable by the civil Court This question has now been settled authoritatively by a decision of a Bench of this Court to which one of us was a party and which will be found to be reported as *Gayadin* v. *Lodhi* (9) In that case

(6) S. D. No. 9 of 1925.
(7) S. D. No. 33 of 1891.
(8) 3 U. D. 149.
(9) I A. I. R. 1927 Oudh 108=2 Luck. 137.

the rule laid down by the late Court of the Judicial Commissioner of Oudh in several cases decided by it was followed vide *Raghubar Dayal* v. *Chandan* (10); *Chandrika Bakhsh Singh* v. *Raghunath Kunwar* (11), *Kalap Nath* v. *Mata Din* (12).

The conclusion to which I have, therefore, arrived is that the tenancy in favour of the defendant-respondent having been created it was not open to the Nanpara Estate to cancel the lease on the ground of breach of one of the conditions provided in the lease. In any case even if it was open to cancel the lease it could only do so by taking proper steps to that effect in due course of law. No such steps having been taken it was not competent to the Nanpara Estate to grant a lease of the said land to the plaintiff-appellant and in case one was granted it is not open to the new lessee to treat the defendant-respondent as trespasser and to recover possession from him through the civil Court.

I would, therefore, dismiss this appeal with costs.

Pullan, J. — In my opinion this appeal must be decided on the finding in which I agree that the respondent was put in possession by the Nanpara Estate in virtue of a contract which was never legally cancelled. I must, however, add a few words in reply to the argument which was addressed to us on behalf of the appellant to the effect that a thekadar whose term has expired is not entitled to any notice under the Oudh Rent Act, and can be ejected without any legal procedure This view is based upon the fact that S. A-52, Oudh Rent Act, does not apply to a thekadar. It is significant that this section has been added to the Oudh Rent Act in order to bring it into conformity with the Agra Tenancy Act In the Agra Tenancy Act the section enacting that no tenant shall be ejected otherwise than in accordance with the provisions of the Act applies to thekadars. There is some meaning in the exclusion of thekadars from this section in Oudh and it is to be seen in the fact that S. 4, Cl. 1, also does not apply to thekadars. This section prohibits any contract being made between landlord and tenant to eject a tenant otherwise than in accordance with the provisions of the Act. It follows from the omission of thekadars from this section that a landlord can contract to eject a thekadar otherwise than in accordance with the Act It will be observed that S. 53, Cl. 2, does apply to a thekadar and, therefore, a landlord may eject him by notice and it is significant that the thekadar can only contest this notice on the ground that he holds the lease under the terms of which he is not liable to ejectment This defence must be open to a thekadar in any case where the landlord wishes to eject him at the end of his term and if so it cannot be intended that the landlord by failing to give him notice, can deprive him of this right. I am, therefore, of opinion that the only occasion on which a landlord can eject a thekadar otherwise than under the provisions of the Act is when he has entered into a contract with the thekadar by which the latter agrees to vacate the land at the end of his tenancy. Such a contract is not implicit in every tenancy; otherwise the provisions of S. 56, Cl. 2 read with S. 53, Cl. 2 would appear to be futile I would, therefore, hold that a thekadar holding on after the expiry of his term is as much entitled to a notice of ejectment as any other tenant included in S. 53, Cl. 2 of the Act. I agree in the order proposed.

R.M./R.K. *Appeal dismissed.*

(10) [1907] 10 O. C. 23.
(11) [1913] 16 O. C. 105=18 I. C. 284.
(12) [1915] 18 O. C. 49=28 I. C. 859.

A. I. R. 1929 Oudh 535

STUART, C. J., AND RAZA, J.

Raghubar—Plaintiff—Appellant.

v,

Radha Krishna—Defendant—Respondent.

Second Appeal No. 40 of 1929, Decided on 1st October 1929, from order of Addl. Sub-Judge, Lucknow, D/- 16th October 1928.

Civil P. C. S. 100—Finding of lower Court as regards right of privacy is finding of fact.

The finding of a lower Court that the right of privacy possessed by a householder in respect of the house which he occupies has not been interfered with by his neighbour, is a finding of fact and cannot be disturbed in second appeal : 29 *All.* 592, *not Foll.*

[P 536 C 1]

K. P. Misra and *P L Varma*—for Appellant

M. Wasim, *Ali Zaheer* and *Ghulam Imam*—for Respondent.

Judgment —The decision of the lower appellate Court is that the additional construction made by Radha Kishan defendant-respondent on his own house, so far from reducing the right of privacy enjoyed by the plaintiff-appellant, who is the tenant and occupier of the house opposite, has rather increased it Formerly the defendant-respondent's house had an open roof, and this open roof commanded a complete view of the courtyard of the plaintiff-appellant's house The defendant has now made constructions on that open roof which have restricted the view The lower appellate Court has decided that in these circumstances there has been no fresh or substantial interference with the plaintiff's former right of privacy. We consider that the qusetion is a question of fact and not of law. The question was treated as a question of law in a single Judge decision in *Abdul Rahman* v. *Bhagwan Das* (1) but it has been brought to our notice from a certified copy that this decision was revised in a Letters Patent Appeal on 17th January 1908, by a Bench consisting of the Hon. Sir John Stanley and Hon. Mr. Justice Burkitt. There is, however, no report of this reversal in any authorised law report. Be that as it may, in our opinion the question is a question of fact, whatever be the views of other Courts. As the question is a question of fact, we can only be bound by the finding, and the finding is that the right of privacy possessed by the plaintiff-appellant in respect of the house which he occupies has not been interfered with. In these circumstances the appeal fails and is dismissed with costs.

V S/R K. *Appeal dismissed.*

(1) [1907] 29 All. 532=4 A. L. J. 415=(1907) A. W. N. 193.

A. I. R. 1929 Oudh 536

WAZIR HASAN AND SRIVASTAVA, JJ.

Lasa Din—Plaintiff—Appellant.

v.

Mt Gulab Kunwar and *others*—Defendants—Respondents.

Second Appeal No. 118 of 1929, Decided on 23rd September 1929, from decree of Third Addl. Dist, Judge, Lucknow, D/- 21st December 1928.

(a) Deed— Construction — Stipulation entitling mortgagee to recover amount and interest as well as compound in case of default — Right to sue for whole mortgage money held accrued even before period fixed for payment of whole sum had expired.

A sued *B* on a mortgage-deed. The deed contained a clause to the effect that "in case of the breach of contract the above mentioned mortgagee shall be entitled within the fixed period of 6 years and also after it at any time to recover the entire mortgage money and the interest as well as the compound interest through the Court by attachment and sale of the mortgaged share and my other property." *A* contended that the stipulation contained in the given clause related to the mortgagees (*A*'s) right to obtain a simple money decree in respect of the unpaid interest and did not refer to his right to get a decree for sale for the entire mortgage money.

Held that the clause did not admit of this interpretation. The clause was intended to give the mortgagee the right to institute a suit for the whole of the mortgage money before the completion of the term of six years in case the mortgagor failed to pay interest regularly at the end of each year. [P 537 C 1]

(b) Limitation Act, Art. 132--Money sued for becomes due at earliest date when mortgagee can enforce payment of it.

The words "when the money sued for becomes due" refer to the earliest date on which it becomes due. Money sued for by a mortgagee must be considered to have become due at the earliest date when it is possible for the mortgagee to enforce payment of it. Where the interest is to be paid annually and there is a stipulation that in case of breach of contract the mortgagee would be entitled to recover the whole mortgage money the starting point for limitation is the date of the first default in payment of interest. 37 *All.* 400; *A. I. R.* 1923 *All.* 1; *A. I. R.* 1925 *Oudh* 502, *A. I. R.* 1927 *Oudh* 530 and *A. I. R.* 1928 *Oudh* 289, *Rel. on*, 39 *Mad.* 981, 11 *C. W. N.* 903, *A. I. R.* 1925 *Pat.* 557 and *A. I. R.* 1926 *P. C.* 85, *Dist.* [P 538 C 2, P 539 C 1]

A. P. Sen and *Daya Kishen Seth*—for Appellant.

Zahur Ahmad, *R B. Lal*, and *Makund Behari Lal*—for Respondents 2 to 6.

Srivastava, J.—This is a plaintiff's appeal. It arises out of a suit for sale brought by the plaintiff mortgagee on foot of a mortgage-deed dated 26th July

1912. The mortgage-deed was executed by Bikram Singh the husband of defendant 1 for Rs 900 and carried interest at twelve annas per cent per mensem. The deed provided for payment of interest annually and stipulated that in case of default the interest would be added to the principal. The entire amount of the mortgage money was to be repaid in six years. A further provision in the deed, on which the main controversy in the case is centred, was to the effect that

"in case of the breach of the contract, the above mentioned mortgagee shall be entitled, within the fixed period of six years and also after it, at any time, to recover the entire mortgage money and the interest as well as the compound interest through the Court by attachment and sale of the mortgaged share and my other property."

The other defendants in the suit, namely, defendants 2 to 6 are subsequent transferees of the mortgaged property.

The main defence with which we are concerned in this appeal was one of limitation. It has been accepted by both the Courts below and as a result of it they have agreed in dismissing the plaintiff's suit.

The first question raised on behalf of the plaintiff appellant is as regards the construction of the clause in the mortgage-deed which we have reproduced above. It has been argued that the stipulation contained in the above clause authorizing the mortgagee to recover his money before the expiration of the six years period, relates to the mortgagee's right to obtain a simple money decree in respect of the unpaid interest and does not refer to his right to get a decree for sale for the entire mortgage money. We do not think that the clause in question can admit of this interpretation. We have no doubt that the clause is intended to give the mortgagee the right to institute a suit for the whole of the mortgage money before the completion of the term of six years in case the mortgagor fails to pay the interest regularly at the end of each year.

The next question is as regards the rule of limitation applicable to the case Art. 132, Sch. 1, Limitation Act, provides a period of twelve years for suits to enforce payment of money charged upon immovable property and this period of twelve years is to commence from the date when the money sued for becomes due. There has been a sharp conflict of decisions in the various High Courts in this country as regards the meaning and application of the words "when the money sued for becomes due." It will be observed that the mortgage-deed in suit fixes a term of six years which would mean that the money sued for is to become due at the end of this period. Then there is the other clause which gives the mortgagee the right to sue within six years in case of default in the payment of interest

There is one class of authorities in which it has been held that the money sued for must be considered to become due at the earliest date when it was possible for the mortgagee to enforce payment of it. In other words that, in a case like the present, the starting point for limitation would be the date of the first default in the payment of interest: see *Gaya Din* v. *Jhumman Lal* (1) and *Shib Dayal* v. *Meharban* (2). The other class of cases support the view that the money should not be considered to become due within the meaning of those words as used in Art 132 until the expiration of the term fixed, when the mortgagee is, under the terms of the deed, given the right to sue for his mortgage money and the mortgagor is given the corresponding right to redeem: see *Narana* v *Ammani Amma* (3), *Rup Narain* v. *Gopi Nath* (4) and *Ramsekhar Prasad Singh* v. *Mathura Lal* (5) It is not necessary for me to make an exhaustive survey of the entire case law on the point or to discuss the matter in detail in view of the course of decisions which has prevailed in this Court and which is binding upon me. In *Pherai* v. *Pudai Ram* (6) a Bench of the late Court of the Judicial Commissioner of Oudh to which my learned brother Mr. Wazir Hasan, J., was a party, decided that in the case of a bond to which Art. 80 applied and which provided for payment of interest month by month and that in the event of failure to pay in any month, the plaintiff was to have a right

(1) [1915] 37 All. 400=28 I. C. 910=13 A. L. J. 510.
(2) A. I. R 1923 All. 1=45 All. 37
(3) [1916] 39 Mad 981=31 M. L. J. 865=4 M. L. W. 77=35 I. C. 419=(1916) 2 M. W. N. 125.
(4) [1907] 11 C. W. N. 903.
(5) A. I R. 1925 Pat. 557=4 Pat. 820.
(6) A. I. R 1925 Oudh 502=27 O. C. 313.

of suit at once, limitation began to run from the date of the first default in payment of the interest. The same view was taken by a Bench of this Court in *Gaura* v. *Ram Charan* (7). The same principle was adopted and held applicable to suits based on mortgages and governed by Art. 132, Lim. Act, by a Full Bench of this Court in *Ram Koer* v. *Patraj Koer* (8) Mr. Sen, J., the learned counsel for the plaintiff-appellant contended before us that the correctness of the view taken by the Full Bench of the Allahabad High Court in *Gaya Din* v. *Jhumman Lal* (1) and *Shib Dayal* v. *Meharban* (2) which view has been approved and adopted in this Court, has been questioned by their Lordships of the Judicial Committee in *Pancham* v *Ansar Husain* (9) No doubt there are observations in the judgment of their Lordships which seem to throw some doubt on the soundness of some of the observations in the Full Bench decisions above referred to but their Lordships expressly left the question open and refused to make any definite pronouncement on that point A similar argument was urged in this Court in *Gaura* v. *Ram Charan* (7) The learned Judges who constituted the Bench in that case referring to this argument observed that as their Lordships of the Judicial Committee did not decide the point, therefore :

"the decision in the Oudh case *Phera* v. *Pudai Ram* (6) should be followed so long as it is not expressly overruled by their Lordships of the Privy Council."

I feel bound by the authority of the Full Bench decision of our Court referred to above and think in accord with the opinion expressed in *Gaura* v. *Ram Charan* (7), that we must adhere to the decisions of one Court until their Lordships make a definite pronouncement to the contrary. For these reasons I must overrule the plaintiff's contention and hold that the present suit was barred by Art. 132, Lim. Act

Lastly it was argued that the Courts below were wrong in allowing separate costs to each of the three sets of defendants. The lower appellate Court has held that the awarding of separate costs in this case was justified because the defences of the three sets of defendants were different. It is admitted that they were represented by different counsel and the nature of the defences was such that they could hardly be represented by the same counsel. We do not think we would be justified in interfering with the discretion exercised by the Courts below in the matter of costs. We are satisfied that the reasons given by them for the exercise of their discretion in favour of allowing separate costs as quite reasonable.

The appeal therefore fails and I would dismiss it with costs

Wazir Hasan, J. — I agree. The ratio decidendi of the Oudh decisions to which reference has been made in the judgment of my learned brother seems to me to be quite clear. On a covenant like the one contained in the deed of mortgage on which this suit is founded the mortgagee acquires the right to recall the whole of his mortgage money on a default being made by the mortgagor in payment of the interest as it fell due at the end of one year of the date of the mortgage and before the expiry of the six years prescribed as a term certain for the mortgage. The covenant is in certain cases expressly coupled with a promise on the part of the mortgagor to pay the interest from year to year and further by an acknowledgment of liability to be sued for the entire mortgage money in case of default. But whether such a promise does exist amongst the terms of the mortgage or not is, to my mind, wholly immaterial I cannot conceive of the mortgagee's right to sue arising in the event of default without also the mortgagors' implied liability to pay the whole mortgage money in the event of such default. If that is the true construction of the covenants of this nature, it follows almost logically that the mortgagee's right to sue on default is simply a corollary of the mortgagor's liability to pay. This being so the terms of Art. 132, Sch. 1, Lim. Act (9 of 1908) as to the starting point of limitation, must be held to be fully applicable to a case like the present Those terms are: "When the money sued for becomes due." Column 3 of the schedule prescribes the point of "time from which period begins to run," and the

(7) A. I. R. 1927 Oudh 539.
(8) A. I. R. 1928 Oudh 289=3 Luck. 439 (F.B.).
(9) A. I. R. 1926 P. C. 85=48 All. 457=53 I. A. 187 (P.C.).

period is clearly referable to the suit mentioned in Col. 1 of the same schedule. In this column the description of the suit " to enforce payment of money charged upon immovable propert " must connote, it appears to me, the " right " to enforce which the suit may be brought Therefore, in a suit of the nature described in Col. 1, Sch 1, the existence of the right of the mortgagee to recall the mortgage money is a condition precedent to such a suit. That condition precedent necessarily involves the mortgagor's liability to make payment of the money charged upon his immovable property There is, therefore, the mortgagee's right to call for repayment and the mortgagor's liability to repay. Thus the requirements of Col. 1 as well as of Col. 3, Art. 132. are fully satisfied.

It has been contended that the money becomes due only on the expiration of the six years and not before it in spite of the covenant already referred to and the argument in support of the contention is that nothing can be held to have become due unless the mortgagor has the corresponding right to make the payment of the money for which the suit contemplated by Art 132 may be brought and that right only arises on the expiration of six years and not before. To my mind the argument is fallacious It ignores the mortgagor's statutory right to redeem as soon as the mortgage money becomes due. Under S. 60, T. P. Act (4 of 1882) at any time after the principal money has become payable the mortgagor has a right to redeem the mortgage. It is not necessary to make a contract for the purpose of creating this right. It is a right given by law, and is not controlled even by contract to the contrary as was pointed out by their Lordships of the Judicial Committee in the case of *Mohammad Sher Khan* v. *Swami Dayal* (10). In this connexion the only question to be considered is at what time the principal money becomes payable. Can it be doubted for a moment that it becomes payable as soon as the mortgagee acquires the right under the covenant to recall his mortgage money? The contrary view will lead to absurd results The mortgagee has the right to recall the whole of the mortgage money yet the mortgagor has no right to satisfy the mortgagee's claim until after a decree in a suit brought by the mortgagee is passed and the mortgagor could redeem the mortgage in terms of the decree. It appears to me that as soon as the mortgagee obtains the right to recall his mortgage money under the covenant, there arises both an implied covenant as to the mortgagor's right to redeem and the statutory right under S. 60 already referred to. In those circumstances the term of six years must be construed to have been intended to run its full course only in the absence of the default in the payment of interest as it falls due. Besides the language of the covenants, the aforementioned result must also flow from the decree in the mortgagee's suit.

I also would, therefore, dismiss this appeal with costs.

R.M./R K. *Appeal dismissed.*

(10) A. I. R. 1922 P. C. 17=44 All. 185=49 I. A. 60 (P. C.).

A. I. R. 1929 Oudh 539

SRIVASTAVA AND WAZIR HASAN, JJ.

Narain Dass and *another*—Plaintiffs—Appellants.

v.

Murli Dhar and *another*—Defendants—Respondents.

Second Appeal No. 109 of 1929, Decided on 24th September 1929, from decree of Sub-Judge, Lucknow, D'- 2nd March 1929.

(a) Transfer of Property Act, S. 100 — Stipulation that judgment-debtor shall not dispose of share in factory until satisfaction of decretal amount amounts to charge.

The law does not prescribe any particular form of words which may be necessary to create a charge. The determination of the question rests upon the intention to make a particular property, the security for payment of the debt and the intention has to be gathered from the language of the instrument.

A brought a suit against *B* on basis of pronote. The claim was settled by a compromise which was embodied in a decree. It was provided for payment of decretal money in easy instalments and stipulated "that the defendant will not dispose of in any way his share in the Premier Aerated Company at Hazratganj until the satisfaction of the decretal amount" Contrary to the agreement *B*, sold all his interest and on suit by *A* contended that the compromise decree did not create any charge against *B's* share in the factory as alleged by *A*.

Held : that the stipulation intended to preserve the property intact so as to be available

for payment of money payable under the decree. This being the object of the clause in question it had the effect of making the property security for the payment of the decretal amount. It therefore had a charge of *B*'s share 2 *All.* 449, 3 *Cal.* 336, and 24 *M. L. J.* 474, *Dist.* 36 *All.* 201, *Ref.* [P 540 C 2]

(b) Registration Act, S. 17 (2) (vi)—Where agreement is incorporated in decree it need not be registered

Where the decree incorporates the whole of the compromise and the agreement, which led to the compromise of the suit, the registration of the agreement is unnecessary and the decree is sufficient evidence of its terms *A I.R.* 1919 *P. C.* 79, *Rel. on.*, 22 *Mad* 503 (*P. C.*), *Ref* [P 541 C 2]

Ali Zaheer—for Appellants.

Lakshman Prasad Srivastava — for Respondent 1.

Judgment.—This is a second appeal by the defendants It arises under the following circumstances

The plaintiff-respondent Babu Murli Dhar brought a suit against Fateh Bahadur on the basis of a pro-note The claim was settled by means of a compromise which was embodied in a decree of Court dated 18th February 1925 It provided for the payment of the decretal money in easy instalments and stipulated

"that the defendant will not dispose of in any way his share in the Premier Aerated Company at Hazratganj until the satisfaction of the entire decretal amount."

It appears that contrary to the agreement embodied in the decree, the defendant Fateh Bahadur sold all his interest, which amounted to a moiety share, in the factory to two brothers Narain Das and Ram Kishen Das, defendants 1 and 2. The plaintiff thereupon instituted the present suit for recovery of the amount due to him under the above mentioned decree, by a sale of a half share in the Premier Aerated Water Factory on the ground that he had a charge for the amount of the decree against the share of Fateh Bahadur in the said factory Both the Courts below have upheld the plaintiff's contention and decreed the claim Narain Das and Ram Kishen Das the purchasers of Fateh Bahadur's half share in the factory have come to this Court in second appeal.

The first contention urged on their behalf is that the compromise decree dated 18th February 1925 does not create any charge against the judgment-debtor's share in the factory. S. 100, T. P. Act, provides that :

"where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

The question therefore is, whether the clause of the decree which we have reproduced above can either expressly or impliedly be considered to make the factory a security for satisfaction of the decretal amount The law does not prescribe any particular form of words which may be necessary to create a charge. The determination of the question in all such cases rests upon the intention to make a particular property the security for payment of a debt. Of course this intention has to be gathered from the language of the instrument. The stipulation that the defendant must not dispose of his share in the factory until the satisfaction of the decretal amount, was clearly intended to preserve the property intact so as to be available for payment of the money payable under the decree. Obviously this being the object of the clause in question it has the effect of making the property security for the payment of the decretal debt. The learned counsel for the defendants appellants has relied on *Bhupal* v. *Jag Ram* (1), *Gunno Singh* v. *Latafut Hossain* (2) and *P. Sivanna* v. *Venkatakrishna Murthi* (3). The first two cases are clearly distinguishable inasmuch as they contain only general stipulations not to alienate property. In the absence of any expressions making any specific property liable, the general covenant not to transfer any property could not establish the charge with regard to any particular property. In the last case cited the construction placed upon the compromise was that it did not contain any expression of intention to create an interest in the plaintiff's favour If their Lordships of the Madras High Court mean to lay down that in order to establish a charge it is necessary

"that an interest in the property should be created in favour of the creditor to secure due payment of the debt,"

then we must respectfully dissent from that view. The substantial distinction between a mortgage and a charge lies in the fact that while in the case of a mortgage there is the transfer of the interest

(1) [1879] 2 All. 449.
(2) [1877] 3 Cal. 336=1 C.L.R. 91.
(3) [1913] 24 M.L.J. 474=19 I.C. 478=(1913) M.W.N. 337.

in the immovable property, there is no such transfer of interest in the case of a charge which merely secures payment of the money against specific immovable property. The present case is very similar to the case reported in *Jawahir Mal* v. *Indomati* (4). In this case there was a clause in the deed by which the executant undertook that until the repayment of the amount he would not transfer the property by sale, mortgage, gift or any other way. It was held by Richards, C. J., that the intention of the parties was to make the property mentioned therein security for the loan and that the document created a charge within the meaning of S. 100, T. P. Act. We therefore agree with the Courts below that the clause under consideration is sufficient to create a charge under S. 100, T P. Act

The second contention urged on behalf of the appellants is that the above mentioned clause relates to a matter quite foreign to the scope of the suit in which the decree was passed and therefore such extraneous matter cannot be exempted from the necessity of registration by reason of its being included in a compromise which has been incorporated in a decree of Court. Sub-S. (2), S. 17, Registration Act provides that

"Nothing in Cl (b) and (c), sub-S. (1) applies to * * * * * * * * * * (iv) Any decree or, order of a Court and any award."

For a long time there had been controversy as regards the question whether the exemption above referred to extends to everything contained within the decree or must be limited to such matters as fall strictly within the scope of the suit which resulted in the decree. Dealing with this question their Lordships of the Judicial Committee in *Pranal Annee* v *Lakshmi Annee* (5) remarked as follows.

"The razinamah was not registered in accordance with the Act of 1877, but the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions, in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. . . . . If the parties after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the land involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were now the terms of the compromise, and had invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute."

The matter is, however, clinched now by the pronouncement of their Lordships of the Judicial Committee in *Hemanta Kumari Devi* v. *Midanpur Zamindari Co. Ltd.* (6). Their Lordships referring to their decision in *Pranal Annee* v. *Lakshmi Annee* (5) observed as follows:

"Though this judgment does not in terms refer to S. 17, sub-S. 2 (vi), Registration Act, it gives full effect to the opinion that their Lordships have formed as to its interpretation. The decree in the present case is a decree which makes no difference whatever in its language between one part and another part of the compromise, it incorporates the whole, and it is, in other words, a decree which, though affecting the lands in the suit as a decree, incorporates the whole of the agreement which led to the suit being compromised. For this reason their Lordships think that the registration of the agreement was unnecessary and that the decree is sufficient evidence of its terms.

We must therefore on the authority of this decision overrule this contention also.

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

R.M./R.K. *Appeal dismissed.*

(4) [1914] 36 All. 201=22 I. C. 973=12 A. L. J. 290.

(5) [1899] 22 Mad. 508=26 I. A. 101=7 Sar. 516 (P.C.).

(6) A. I. R. 1919 P. C. 79=47 Cal. 185=46 I. A. 240 (P.C.).

A. I. R. 1929 Oudh 541

PULLAN, J.

Gadadhar Prasad—Plaintiff—Appellant.

v.

Sumer Singh — Defendant — Respondent.

Second Appeal No. 186 of 1929, Decided on 4th October 1929, from decree of Addl. Sub-Judge, Sitapur, D/- 23rd March 1929.

(a) Landlord and Tenant — Transfer of grove—There is no custom allowing landlord to assert his right in case of transfer of grove.

There is no general custom which enables the landlord to step in, in the case of the transfer of a grove, although he may assert his right when the trees have been cut and the

land ceases to be a grove. Under these circumstances the land certainly reverts to the landlord but he acquires no right of entry from sale by a grove holder unless there is a special custom to that effect *A I.R.* 1927 *Oudh* 207 and *A.I.R.* 1927 *Oudh* 505, *Ref. A.I.R.* 1926 *Oudh* 139 and *A I R.* 1925 *Oudh* 319, *Dist.* [P 542 C 2]

(b) Custom — Wajib-ul arz — Custom laid down in, not uniform and acted upon should not be accepted.

A custom is one which is uniform and acted upon. When the custom laid down in the wajib-ul-arz is not uniform and acted upon and it is doubtful whether it is general, it should not be accepted. [P 542 C 1]

B. N. Roy—for Appellant.

Rajeshwari Prasad and *Raj Bahadur* —for Respondent.

Judgment—This is a second appeal by the plaintiff who is a zamindar. The cause of action for his suit was a sale by a grove holder of a grove situated in a mahal of which the plaintiff is admittedly the ground landlord. The lower Courts have agreed in dismissing the suit, and the plaintiff appeals on two main grounds. The first is that there is a general custom in Oudh by which grove holders are debarred from selling their groves, and the second is that there is a special custom in that village to that effect. The view that there is a general custom in Oudh by which grove holders are debarred from selling their groves, that is to say, their rights as grove holders, was recently discussed by a learned Judge of this Court in the case of *Mahomed Ali Mahomed Khan* v. *Madari Sah* (1) The view taken in that case was that there is no such general custom as distinguished from a village custom to be proved by the wajib-ul-arz or other evidence. Reference was made to previous cases, in particular a case which has been referred to me by the appellant, namely, that of *Mahabir Prasad* v *Uma Shankar* (2), decided by a Bench of the Judicial Commissioner's Court That ruling, however, referred only to the sale of a grove by a tenant and the Judges held that such a sale amounted to an abandonment, but this was not a decision as to grove holders, and I doubt the correctness of a subsequent decision by a single Judge of the Judicial Commissioner's Court, *Ganesh* v. *Suraj Baksh* (3), in which the learned Additional Judicial Commissioner applied the ruling in the case of *Mahabir Prasad* v *Uma Shanker* (2) to grove holders. That there is a distinction between the two has been decided more than once, but I would refer only to the case of *Mohammad Akhbar* v. *Lachman* (4). There is some confusion as to the rights possessed by landlords both in dealing with groves and in dealing with abandonment of holdings, but as far as I am aware, there is no general custom which enables the landlord to step in, in the case of the transfer of a grove, although he may assert his rights when the trees have been cut and the land ceases to be a grove. Under these circumstances the land certainly reverts to the landlord but, in my opinion, he acquires no right of entry from a sale by a grove holder, unless there is a special custom to that effect.

There are such customs in many villages, and in the village in question there is a wajib-ul-arz dealing with groves. This section of the wajib-ul-arz has been discussed by the Courts below and I am doubtful whether, as a Court of second appeal, I could in any case interfere with the findings of the lower appellate Court that there is no custom in the mahal or in the village such as is contended by the appellant. But I have myself considered these entries in the wajib-ul-arz, and I am satisfied that the view taken by the Courts below is correct A custom is one which is uniform and acted upon. The custom laid down in this wajib-ul-arz is certainly not uniform. It is doubtful whether it is general, and I have a finding of fact of the Courts below that it has not been acted upon. It appears that there was one custom applying to a certain number of groves by which a sale by the grove holder would amount to an abandonment and the landlord would be entitled to take possession of the grove, but there were two groves which were exempted from this custom and another custom was substituted namely, that, if the grove holder transferred his grove, the landlord would be entitled to what is known as haq chaharum or one-fourth of the sale consideration. Lastly there were two groves for which no custom was prescribed at all. It has been found by the Courts below that the grove in

(1) A. I. R 1927 Oudh 207.
(2) A. I. R. 1925 Oudh 319=28 O. C. 133.
(3) A. I. R. 1926 Oudh 139.
(4) A. I. R. 1927 Oudh 505.

suit now is in the very patti in which those two groves are situated for which no custom was prescribed. The grove itself was not in existence when the wajib-ul-arz was prepared. Thus, even if I were prepared to reconsider the findings of the Courts below on the evidence as to a special custom existing in this village, I would be unable to interfere on the merits of the case.

I, therefore, dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Oudh 543

STUART, C. J.

Emperor

v.

Bhagwati Prasad—Accused.

Criminal Ref. No. 41 of 1929, Decided on 5th September 1929, reported by Sess. Judge, Rae Bareli.

(a) Criminal P. C., S. 439—Interlocutory order is open to revision.

An application in revision lies over an interlocutory order passed by a criminal Court: *A. I. R.* 1926 *Oudh* 280, *Expl.* [P 543 C 2]

*** (b) Evidence Act, S. 124—Communications made by railway employees to Station Master as regards theft are not protected.**

B was charged of having committed theft of certain pieces of cloth in charge of the railway company from a goods truck at a railway station. The Station Master started an inquiry and recorded statements of four persons all of whom were railway employees; these statements were forwarded to the Divisional Superintendent who objected under S. 124 to their production before the trying Magistrate when the accused called for them in order that he might cross-examine the witnesses.

Held: that these communications were not protected. [P 541 C 2]

H. K. Ghose—for the Crown.

Ruknuddin—for Accused.

Daya Shankar—for Divl. Superintendent, E. I. Ry.

Judgment—This reference in revision raises a point of interest. Bhagwati Prasad is a transhipment clerk stationed at Partabgarh railway station. Sarfaraz, Ram Prasad and Pandohi are station coolies at the same station. Criminal proceedings have commenced against these four persons on a charge of having committed theft of certain pieces of cloth in charge of the E. I. Ry. Co. from a goods truck at Partabgarh railway station on 21st April 1929. The proceedings appear to have been started as the result of a report made by a certain Parja Singh a watchman employed on the Watch and Ward staff at the same railway station. Shortly after this report Mr. Mathews, Station Master, made an inquiry. I have been unable to discover from the record the date of this inquiry but it apparently took place within one to three days of the occurrence. In the course of this inquiry Mr. Mathews is said to have recorded statements of Manzur Ahmad, Parja Singh, Dal Bahadur and Bal Bahadur persons who have been called as witnesses for the prosecution and he is said to have transmitted these statements to the Divisional Superintendent at Lucknow.

In the course of the proceedings before the Magistrate the counsel for the accused called for these statements in order that he might cross-examine the witnesses, who were said to have made them, in reference to those statements, if he discovered that the statements disclosed any ground for such cross-examination. The Divisional Superintendent at the request of the Court sent these statements to the Court in a sealed cover but at the same time took objection to their production on the ground that they were privileged. The Magistrate upheld this contention. The matter was then taken in revision to the Sessions Judge who has forwarded it to this Court for decision. The learned Assistant Government Advocate has taken a preliminary objection that no such revision lies. I do not consider that his contention is correct. It is true that I decided in *Kashi Ram* v. *Ram Jiwan* (1) that there is ordinarily no justification for taking up in revision an interlocutory matter in a criminal Court but I never found that such an application in revision did not lie. I only found that ordinarily they should not be acceded to. In this case, however, I consider that the matter should be decided on the merits. Ordinarily these statements were capable of proof before the Court.

The Divisional Superintendent has, however, taken the position that they cannot be produced under the provisions of S. 124, Act 1 of 1872. This section

(1) A. I. R. 1926 Oudh 280=1 Luck. 48.

says that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure. But these statements were not made to the Divisional Superintendent. They were made to the Station Master. Granting for the sake of argument that the Station Master in the State Railway is a " public officer " within the meaning of S. 124 the question remains whether these communications were made to him in official confidence.

I do not determine whether the Station Master is or is not a public officer within the meaning of S. 124, Act 1 of 1872. He is certainly a public servant for the purposes of Chap. 9, I. P. C., under the provisions of S. 137, Act 9 of 1890, the Railways Act. But it would not follow from that that he is a public officer within the meaning of S. 124, Act 1 of 1872. But apart from that circumstance, is there anything to show that these communications were made to him in official confidence? There is nothing on the record to show that they were made to him in official confidence; and the learned counsel opposing the application has been unable to indicate any reason from which it can be concluded that these communications were made in official confidence. One of the persons who made the communication was Manzur Ahmad, another transhipment clerk, and the other three were watchmen employed under the Watch and Ward.

In these circumstances I find that these communications are not protected. If they had been communications made to a public officer in official confidence the Court would not have been in a position to decide whether the public interest would suffer by their disclosure. If the public officer considered that the public interest would suffer by their disclosure such communications could not be produced in evidence. But if it is not established that they are made in official confidence the opinion of the officer before whom they were made is not relevant. I, therefore, direct that the sealed cover be opened by the Magistrate and that both the prosecution and the defence be given an opportunity of utilizing these documents in the manner permitted by the provisions of the Evidence Act. The record will now be returned. I have to note that the record is very defective. It may be that we have not made a complete examination but I notice in the English record that the evidence of Mr. Mathews terminates at the end of the first page in the middle of a sentence and that we find a similar defect in the evidence of the witnesses under cross-examination. I note this point to safeguard our office. The record is exactly as we have received it and is returned in the condition in which we received it.

V.S./R.K. *Revision allowed.*

END

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1929

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Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

For **30 Criminal Law Journal, 113 to 120 Indian Cases and Indian Rulings, 1929 Rangoon=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

For **1929 Criminal Cases=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

Table No. III.

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Rangoon Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Rangoon. Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	6	*Rang*	598	17	116	*I C*	470	55	6	*Rang*	691	75	115	*I C*	664
FB	114	*I C*	296	20	6	*Rang*	594		117	*I C*	52		12	*A I Cr R*	307
5	6	*Rang*	411		114	*I C*	293	59	6	*Rang*	689	76	6	*Rang*	768
	112	*I C*	261	21	6	*Rang*	667		117	*I C*	51		115	*I C*	670
8	6	*Rang*	652		114	*I C*	543	60	6	*Rang*	676	77	6	*Rang*	783
	116	*I C*	479	22	6	*Rang*	623		115	*I C*	903		114	*I C*	540
9	6	*Rang*	590		114	*I C*	513	61	6	*Rang*	680	80	6	*Rang*	744
	114	*I C*	294	30	6	*Rang*	655		115	*I C*	898		115	*I C*	657
11 (1)	6	*Rang*	619		117	*I C*	60	62	7	*Rang*	104	86	6	*Rang*	741
	113	*I C*	79		30	*Cr L J*	70		117	*I C*	63		114	*I C*	676
	30	*Cr L J*	57	31	6	*Rang*	615	63	117	*I C*	62	87	6	*Rang*	672
11 (2)	6	*Rang*	612		114	*I C*	519	64	117	*I C*	64		115	*I C*	899
	114	*I C*	302	33 (1)	6	*Rang*	621	65	7	*Rang*	28		30	*Cr L J*	598
12	6	*Rang*	609		114	*I C*	538		116	*I C*	475		12	*A I Cr R*	327
	114	*I C*	522	33 (2)	117	*I C*	563	67	6	*Rang*	775	92	6	*Rang*	669
14 (1)	115	*I C*	900	34	117	*I C*	565		115	*I C*	665		112	*I C*	895
	30	*Cr L J*	589	35	117	*I C*	561	70	6	*Rang*	794	93	7	*Rang*	100
	12	*A I Cr R*	342	38	7	*Rang*	26		114	*I C*	687		116	*I C*	478
14 (2)	6	*Rang*	664	FB	117	*I C*	564	71	6	*Rang*	771	94	116	*I C*	478
	30	*Cr L J*	345	39	117	*I C*	566		115	*I C*	671	95	116	*I C*	474
	114	*I C*	681	41	6	*Rang*	703	73	6	*Rang*	766	96 (1)	6	*Rang*	748
15	6	*Rang*	657	FB	114	*I C*	524		115	*I C*	668		115	*I C*	667
	117	*I C*	60	54	6	*Rang*	682	75	6	*Rang*	791	96 (2)	117	*I C*	61
17	6	*Rang*	643		115	*I C*	909		30	*Cr L J*	509				

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
97	7	*Rang*	345	153	117	*I C*	591	216SB	119	*I C*	220	282	7	*Rang*	409
FB	115	*I C*	901	155	7	*Rang*	240	218	7	*Rang*	193		120	*I C*	670
	30	*Cr L J*	540		118	*I C*	630		118	*I C*	124	284		...	
	12	*AICrR*	350	157	7	*Rang*	107	221	7	*Rang*	561	285		...	
99	7	*Rang*	39		117	*I C*	252		121	*I C*	815	287	7	*Rang*	481
	115	*I C*	905	158	7	*Rang*	88	223		..			120	*I C*	226
102	7	*Rang*	281		117	*I C*	585	224		...		289	7	*Rang*	445
FB.	115	*I C*	897	161	7	*Rang*	110	225 (1)		...			120	*I C*	140
104	115	*I C*	912		117	*I C*	245	225 (2)	7	*Rang*	269	291	7	*Rang*	785
105	7	*Rang*	187	162	7	*Rang*	80		119	*I C*	212	293	7	*Rang*	414
	118	*I C*	120		117	*I C*	587	226	7	*Rang*	306		120	*I C*	292
107	118	*I C*	407	164	7	*Rang*	70		119	*I C*	737	297	7	*Rang*	466
109	118	*I C*	401		117	*I C*	255	228		...			120	*I C*	236
110	118	*I C*	401	166	7	*Rang*	136	229	7	*Rang*	201	298		...	
112	118	*I C*	127		117	*I C*	574		118	*I C*	615	300	7	*Rang*	487
113	118	*I C*	403	167	7	*Rang*	303	240	7	*Rang*	292		120	*I C*	658
115	7	*Rang*	20		119	*I C*	740		119	*I C*	738	304		...	
	117	*I C*	247	168	7	*Rang*	126	241	7	*Rang*	263	306	7	*Rang*	806
116	7	*Rang*	18		117	*I C*	582		119	*I C*	215		121	*I C*	807
	117	*I C*	251	170	120	*I C*	664	243				307	7	*Rang*	451
117	7	*Rang*	118	172	120	*I C*	661	244	7	*Rang*	300		120	*I C*	137
	117	*I C*	580	173	120	*I C*	663		119	*I C*	740	310	7	*Rang*	558
120	7	*Rang*	3	175	7	*Rang*	113	245	7	*Rang*	644		120	*I C*	910
	117	*I C*	254		117	*I C*	575	248	7	*Rang*	644	311	7	*Rang*	425
	30	*Cr L J*	752	177	7	*Rang*	319	FB					120	*I C*	142
121	7	*Rang*	11	FB	30	*Cr L J*	986	251	7	*Rang*	288	313	7	*Rang*	815
	117	*I C*	248		119	*I C*	209		119	*I C*	744		121	*I C*	812
	30	*Cr L J*	753		1929	*Cr C*	169	253	7	*Rang*	578	316		...	
122	7	*Rang*	23	179	7	*Rang*	140		121	*I C*	774	318	7	*Rang*	365
	117	*I C*	250		117	*I C*	577	254	7	*Rang*	266		120	*I C*	238
	30	*Cr L J*	754	181		..			30	*Cr L J*	990	320	7	*Rang*	556
123	118	*I C*	634	182	119	*I C*	223		119	*I C*	213		120	*I C*	911
126	118	*I C*	632	183	119	*I C*	222		1929	*Cr C*	450	321	7	*Rang*	538
	7	*Rang*	352	184	7	*Rang*	144	256	7	*Rang*	316		1929	*Cr C*	497
127	118	*I C*	416	187	119	*I C*	749		30	*Cr L J*	990		120	*I C*	912
128 (1)	119	*I C*	213	189	120	*I C*	129		119	*I C*	223		31	*Cr L J*	186
128 (2)	7	*Rang*	350	190	7	*Rang*	529		1929	*Cr C*	451	322	1929	*Cr C*	498
	118	*I C*	415		119	*I C*	751	257	7	*Rang*	751	331	1929	*Cr C*	507
129 (1)	118	*I C*	415	191	119	*I C*	751	259		..			7	*Rang*	470
129 (2)	7	*Rang*	374	192	120	*I C*	130	260	7	*Rang*	296		30	*Cr L J*	1164
FB	118	*I C*	409	193	7	*Rang*	608		119	*I C*	742		120	*I C*	230
134	7	*Rang*	245	SB	119	*I C*	746	262		...		333	7	*Rang*	276
FB	118	*I C*	609	196	7	*Rang*	98	263		...			119	*I C*	217
137	7	*Rang*	459		117	*I C*	253	265	7	*Rang*	398	335		...	
	118	*I C*	404	198	120	*I C*	693		120	*I C*	666	338		...	
139	7	*Rang*	34	200	7	*Rang*	706	269	7	*Rang*	310	339	7	*Rang*	537
	117	*I C*	568		120	*I C*	689		119	*I C*	742		120	*I C*	897
140	7	*Rang*	61	203	7	*Rang*	329	270		...		341	7	*Rang*	777
	118	*I C*	625	FB	118	*I C*	637	271		...			121	*I C*	718
145	7	*Rang*	339		30	*Cr L J*	961	272		..		343	7	*Rang*	526
	120	*I C*	899		1929	*Cr C*	177	273	7	*Rang*	361		120	*I C*	901
147	7	*Rang*	1	207	120	*I C*	695		120	*I C*	131	345	7	*Rang*	169
	117	*I C*	255	209 (1)	120	*I C*	897	274	7	*Rang*	423		118	*I C*	113
	30	*Cr L J*	755	209 (2)	7	*Rang*	96		120	*I C*	240		30	*Cr L J*	882
	1929	*Cr C*	60		117	*I C*	244	275 (1)		...			1929	*Cr C*	617
148 (1)	7	*Rang*	37		30	*Cr L J*	750	275 (2)		...		352 (1)	1929	*Cr C*	608
	117	*I C*	253		1929	*Cr C*	356	277		...		352 (2)		...	
148 (2)	7	*Rang*	75	210	120	*I C*	698	278	7	*Rang*	355	354	7	*Rang*	677
	117	*I C*	589	211	7	*Rang*	164		120	*I C*	692	FB	121	*I C*	705
150	7	*Rang*	14		118	*I C*	122		1929	*Cr C*	448	365	7	*Rang*	569
	117	*I C*	246	213		...			31	*Cr L J*	174		121	*I C*	778
	30	*Cr L J*	750	214	7	*Rang*	231	279	7	*Rang*	358	368	7	*Rang*	491
	1929	*Cr C*	58		118	*I C*	629		1929	*Cr C*	464		120	*I C*	132
152	7	*Rang*	132	215		...			120	*I C*	613	372	7	*Rang*	245
	117	*I C*	578	216SB	7	*Rang*	813		31	*Cr L J*	175		118	*I C*	609
153	7	*Rang*	85					280	7	*Rang*	271				
									119	*I C*	218				

Note.—*Cases not bearing parallel references against them are not reported elsewhere.*

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RANGOON HIGH COURT

** A. I. R. 1929 Rangoon 1
Full Bench

PRATT, Offg. C. J., CUNLIFFE AND ORMISTON, JJ.

Commissioner of Income-tax, Burma.

v.

Phra Phraison Salarak—Assessee.

Civil Reference No. 2 of 1928, Decided on 20th June 1928.

**** Income Tax Act, S. 4—Remuneration by Foreign Government paid to its servant for work done in British India is not income accruing or arising in British India.**

Remuneration, not in the nature of commission, paid in Siamese territory by the Siamese Government to the credit of a Siamese Officer, who collects in British India royalties on timber extracted from Siamese forests and floated down to British India, is not income accruing or arising in British India within the meaning of S. 4: *A. I. R.* 1925 *Cal.* 34 and *A. I. R.* 1921 *Bom.* 159, *Cons.*: *Commissioner of Taxation of Kirk*, (1900) *A. C.* 588; 43 *Mad.* 75; and *A.I.R.* 1926 *Rang.* 97 (*F.B.*); *Dist.*: *A. I. R.* 1923 *Mad.* 574 (*F.B.*); *A. I. R.* 1923 *Lah.* 14; and *A. I. R.* 1925 *Pat.* 281; *Ref.* [P 4 C 1]

K. Eggar—for the Crown.

Daniel—for Assessee.

Ormiston, J.—This is a reference under S. 66 (2), Income-tax Act, 1922, on the application of one Phra Phraison Salarak, a forest officer in the service of the Siamese Government, stationed at Moulmein, where he collects the royalty on timber, extracted from forests in Siamese territory, whence it is floated down streams, the earlier of whose courses is in that territory. For his services he receives remuneration which is paid to his credit in Bangkok. He was assessed to income-tax under the head of "salary" for the year 1927-28 in respect of the total amount so paid to his credit and of the value of the rent free quarters enjoyed by him. He appealed against the assessment on the grounds, first, that the salary paid to him was not "salary" for the purposes of S. 7 of the Act, and secondly, that it was not liable to assessment as it did not arise or accrue in British India. The Assistant Commissioner decided the appeal against him on both points, whereupon he asked the Commissioner to refer to the Court the following questions:.

(1) That the income is not salary within the meaning of S. 7 (1) of the Act, since the Siamese Government cannot be regarded as the "Government or as a public body or association or a private employer."

(2) That, in any case, whatever may be the classification of the income for the purposes of S. 6, such income cannot be said to "accrue or arise in British India" within the meaning of S. 4 of the Act.

The Commissioner was of the opinion that the remuneration of the applicant could not be classified as "salaries," and, therefore, referred only the second question

By S. 4 (1), save as thereinafter provided the Act is to apply to all income profits or gains, described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of of the Act to accrue, arise, or to be received in British India. Under S. 6, save as otherwise provided by the Act, six heads of income, profits and gains are to be chargeable to income-tax. The first of these heads is "salaries" and the sixth is "other sources." The Commissioner having held that the remuneration in

question cannot be classified under the first head, classified it under the sixth head

The question is as to whether the remuneration "accrues, or arises" in British India The Commissioner is of the opinion that the remuneration accrues or arises in the place where the work is done in respect of which the remuneration is given, and that consequently, the work having been done in British India, the remuneration is attracted by S 6 The Government Advocate has supported this view The expression is not defind in the Act, and no authority directly bearing on the point now to be decided has been quoted Reference, however, has been made to a number of authorities where the expression has been discussed, and it is suggested that as a result it should be interpreted as meaning "earned in" or "derived from "

In *Board of Revenue, Madras* v. *Ramanadhan Chetty* (1), it was held under S 3 (1) of the Act of 1918, the wording of which is similar to that of S 4 (1) of the present Act, that a resident in British India is not liable to tax in respect of the income of a business carried on outside British India, where such income is not remitted to British India The case itself is not in point, and the only passage in the report to which the Government Advocate has directed attention are a discussion by Abdur Rahim, Offg C J , (on p 82) on a possible difference between the phrases "accrues and arises" and "accrues or arises," and quotations by Oldfield, J., (on pp 84 and 85) from dictionaries as to the meaning of the word "accrue " From these it appears that the primary meanings are "to arise or spring as a natural growth or result," "to come by way of increase" and "to grow or arise"; while as secondary meanings it has "to become a present and enforceable right," and "to become a present right of demand "

Seshagiri Ayyar, J , (at pp. 90 and 91) quotes some further definitions. In Murray's Oxford Dictionary the words "accrue" and "arise" are regarded as synonymous In the Century Dictionary the word "accrue" is defined to mean "to become a present or enforceable right to demand " Stroud defines "arising in the United Kingdom" as "coming into the person's hands in the United Kingdom."

In *Re Rogers Pyatt Shellac & Co* v. *Secretary of State* (2), Mukerji, J , after discussing theoretical distinctions between "accruing" and "arising" arrives at the conclusion that the words denote the same idea or ideas very similar, and that both words are used in contradistinction to the word "receive" and indicate a right to receive They represent, he says, a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. These definitions do not support the view that income accrues or arises in a particular country by reason of the fact that it is "earned" in that country On the contrary they go to show that income "accrues" and "arises" in the country where there is a right to demand payment of it, or where, in fact, it is paid In the case referred the applicant is a Siamese Government servant and there is nothing to indicate that he has a right to demand payment of his income in Moulmein, and, according to the case, it is actually paid in Bangkok

Commissioner of Taxation v *Kirk* (3) was a decision of the Privy Council on a New South Wales Act which imposed income-tax on incomes inter alia:

"(1) accruing or arising to any person wheresover residing from any profession, trade, employment or vocation carried on in New South Wales," (2) "derived from lands of the Crown held under lease or license issued by or on behalf of the Crown" and (3) "arising or accruing to any person wheresoever residing from any kind of property"

(with an immaterial exception)

"or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

A company in a part derived its income from the extraction of ore from leasehold lands held from the Crown in that colony and from the conversion in that colony of the crude ore into a merchantable product. It was held that, notwithstanding that the finished products were sold exclusively outside the colony, this income was assessable. Their Lordships said that the real question seemed to be whether any part of the profits of the company were earned or produced in the colony And, later in the judgment after pointing out that the word " derived " is

(1) [1919] 43 Mad. 75=37 M. L. J. 663=10 M. L. W. 570=53 I. C 976=(1919) M. W. N. 826 (F.B).

(2) A I R. 1925 Cal. 34=52 Cal. 1.

(3) [1900] A. C. 588=69 L. J. P.C. 87=83 L. T. 4.

synonymous with arising or accruing, they went on to observe that

"there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil, (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process, (3) the sale of the merchantable product, (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-S (3), and the second or manufacturing process, if not within the meaning of "trade" in sub-S 1 is certainly included in the words "any other source whatever in sub-S (4)"

Their Lordships' view, therefore, was that it is the source of the income which has to be considered, and not the place where it is received

This case was referred to *In re Aurangabad Mills, Ltd* (4), a decision under S 3 (1) of the Act of 1918 It was there held that the profits of a company which are made from manufacture carried on beyond British India cannot be said to accrue or arise in British India on account of head office being in Bombay, where also the directors control the business Macleod, C J, (at pages 1290 and 1291) after quoting the above cited passage from the judgment of their Lordships remarked that the doubt which might have arisen in *Commissioners of Taxation* v *Kirk* (3) whether the profits were not derived at a place where the third and fourth processes were carried out, did not arise in the case before him because all the four processes were carried out in Hyderabad This case was followed in *Board of Revenue* v *Ripon Press*, (5) In *Commissioner of Income-tax, Burma* v *Steel Bros & Co Ltd* (6), it was held, applying the principles laid down in *Commissioners of Taxation* v. *Kirk* (3), that in determining whether any income, profits or gains arise or accrue

"we must not be content to look at the last stage of the accrual, but must take into consideration the previous stages as well."

The company was non-resident in British India, but at mills situate in Burma it worked up commodities and raw materials into forms suitable for use and shipped them to the United Kingdom where they were sold It was held that the profits or gains accruing to the company in respect of this business must be deemed [within S 42 (1) of the Act] to be income accruing or arising within British India.

Sunder Das v *Emperor* (7) and *Ali Imam* v *Emperor* (8) have been cited. These cases deal with the meaning of the expression "received in British India," which is not part of the reference in this case, and need not be discussed

Reference has been made by the Government Advocate to S 42 (1) and 18 (2A) Indian Income-tax Act, 1922 S. 42 (1) provides that in the case of a non-resident, all profits or gains accruing to him through or from any business connexion or property in British India is to be deemed to be income accruing or arising within British India The effect of S 18 (2A), which was inserted by Act 16 of 1925, is to render subject to income-tax any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government These sections do not appear to be of assistance in the general construction of the words "accruing" and "arising" in S 4 (1) They seem to be designed to bring within the ambit of the tax special classes of cases which would otherwise escape I am unable to appreciate the argument to be found in the reference and which is based on the position of a salary earner It is said that in his case the salary accrues and arises in the place where he does the work, which is in British India, and that it therefore accrues in British India and is taxable But this argument overlooks the fact that the Commissioner has expressly held that the remuneration of the assessee is not "salary" and has classified it under "other sources"

If the correct principle be that the words accrue and arise when applied to income are to be governed by the source from which the income accrues and arises, it would appear that in the case referred that source is to be found in Bangkok rather than in Moulmein The assessee is a Forest Officer in the service of the Siamese Government It is not stated that his remuneration is in the nature of a commission on the amount of revenue collected On the contrary it is said to be 600 ticals per mensem. The inference to be drawn is that he would get his

(4) 45 Bom. 1286 = A. I. R. 1921 Bom. 159
(5) A. I. R 1923 Mad. 574=46 Mad. 706 (F.B.)
(6) A. I. R. 1926 Rang. 97=3 Rang. 612 (F. B.).
(7) A. I. R. 1923 Lah. 14 = 3 Lah. 349.
(8) A. I. R. 1925 Pat. 281 = 4 Pat. 210.

remuneration *qua* Forest Officer, whether he worked in Moulmein collecting royalty, or whether he worked in Siam in that or any other capacity From this point of view his remuneration accrues and arises in Bangkok where it is payable and is in fact paid If on the other hand we are to have regard to the definition of the words, the only place where it would seem that there is a present and enforceable right on part of the assessee to demand the remuneration and where it comes into his hand, is also Bangkok

In conclusion I may refer to the observation of Sir Shadi Lal, C. J., in *Sundardas* v. *Emperor* (7) after citing the rule of interpretation applying to fiscal enactments, that :

" it is a sound principle that the subject is not to be taxed without clear words to that effect ; and that in dubio, you are always to lean against the construction which imposes a burden on the subject. "

The Government Advocate expressed the view that the legislature had advisedly refrained from defining the terms accuring and arising In my view the meaning of the terms, as applied to the facts of case is as above stated and is perfectly plain. If, on the other hand, the meaning is ambiguous, the sound principle enunciated by Sir Shadi Lal is applicable and it ought to be applied

I would answer the question referred by saying that the income the subject-matter of the reference cannot be said to " accrue or arise in British India " within the meaning of S. 4, Income-tax Act, 1922

Pratt, Offg. C. J —I have had the advantage of reading my brother Ormiston's judgment and I concur in his proposed answer to the reference.

We are asked to decide whether salary paid in Bangok by the Siamese Government to the credit of a Siamese Forest Officer, who collected at Moulmein royalties on timber extracted from Siamese forests and floated down to Moulmein, is income accuring or arising in British India within the meaning of S 4, Income-tax Act

The officer in question resides in Moulmein, presumably for the purposes of his work of collecting royalties We are not asked to decide whether the income is " salary " within the meaning of S 7 (1), of the Act, nor whether the portion of the pay remitted from Bangkok to Mr. Salarak in Moulmein can be said to be " received " within the meaning of S. 4 (1). It has been argued by the Government Advocate that for the purposes of present reference the words " accruing and arising " must be construed as equivalent to " earned ".

None of the cases cited is an authority for this contention

Had the legislature intended to include income earned in British India within the meaning of income " accruing or arising " there, it would have been perfectly simple to say so

I do not consider that salary paid in Siam to a Siamese official for services rendered in Burma can under the circumstances be regarded as income arising or accruing in British India

The respondent will be allowed the costs of the reference Advocate's fee seven gold mohurs

Cunliffe, J —I also concur. The scope of this reference has been very much narrowed The Commissioner has satisfied himself of the answer to the first proposition put forward by the respondent In that regard the Commissioner holds the view that the respondent's income does not come under the head of " salary " within the meaning of S 6 of the Act Nor did the respondent (very wisely, I think) suggest to the Commissioner that he should ask the opinion of the Court as to whether the emolument which he (the respondent) is paid by the Siamese Government is received in British India All we have to do here is to decide, as my brother Ormiston has pointed out, whether such emolument accrues or arises in British India It has been held on several occasions that there is no difference between the two words " profits " or " gains " which are used in the section we are considering. I am inclined to think that there is no real difference in law between the words " accruing " and " arising. " Some authorities have thought that the word " accrue " suggests a periodical right to money and the word " arise " suggests only a single right or possibly the beginning of a perodical right But these views seem to me to be refinements and over-refinements of the language of the statute. To my mind, the double expression " accruing and arising " connotes the source from which the right to obtain money springs. Undoubtedly the source here was in the Kingdom of Siam, remu-

neration from the Siamese Government to one of the officers of their forest service In my view, too, the expression "accruing or arising" is used in contradistinction to the word "received," but as I have pointed out, we are not considering the question of where the money was actually received or to what place it was remitted after its receipt which may be the same thing in law as "received" It was very strongly urged upon us that the real meaning of "accruing" and "arising" as applied to the income of the respondent was to be found in the place where the income was earned; but, for the reason mentioned above, I do not agree with that view.

R.K *Reference answered.*

A I R 1929 Rangoon 5

DAS AND BAGULEY, JJ.

N N Chettyar—Appellants

v

Tan Ma Pu and *others*—Respondents

First Appeals Nos 199 and 206 of 1926, Decided on 2nd September 1927, from judgment of Dist Judge, Bassein, in Civil Suit No 3 of 1925.

(a) Probate and Administration Act, S. 90—Letters of Administration issued under Probate and Administration Act where they should have been issued under Succession Act — Administrator mortgaging property without Court's permission—Letters must be taken to give the powers that they appear to give upon their face until revoked or altered—Mortgage would not bind heirs—Succession Act (1865), S 269.

Letters of Administration were issued under the Probate and Administration Act. But had the application for the letters properly described the deceased, it would have been necessary to issue the letters under the Succession Act. The Administrator mortgaged the property of the deceased without permission of the Court.

Held that the Letters of Administration issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under the Act unless and until the powers under them were extended by the Letters being altered to Letters under the Succession Act. The mortgage, therefore, being without authority would not bind the heirs: 35 *Cal.* 955, *Rel. on. A. I. R.* 1922 *P. C.* 197, *Dist.* [P 6 C 1, 2]

(b) Probate and Administration Act, S. 90 (3) (a)—Permission to sell property does not ipso facto mean permission to mortgage.

Where Court gives permission to the Administrator to sell property, that permission to sell does not ipso facto give permission to mortgage: 9 *Bur. L. T.* 236, *Foll.* [P 6 C 2]

(c) Debtor and Creditor—Person authorized to deal with property by Letters of Administration and also by powers-of-attorney from heirs—He mortgaging property — Creditor need not enquire into application of money borrowed.

A person had authority to deal with certain property by Letters of Administration and powers-of-attorney from the heirs. He mortgaged the property but the creditor did not enquire with regard to the disposal of the money borrowed

Held that there was no need for the creditor to make enquiries with regard to the disposal of money. A man with such authority may be dealt with safely, provided he keeps within limits of the authority. If every man who does business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible. The special rules applying to the karta of a joint Hindu family do not apply to people acting under powers-of-attorney. [P 7 C 2]

N N Burjorjee—for Appellants

Zeya—for Respondents

Baguley, J.—These two appeals arise out of a suit brought by the N N. Chettyar Firm against six defendants on a series of mortgages The lower Court gave the plaintiffs a decree for the full amount claimed against defendants, 1, 2 and 5 but against 2, 3 and 6 only gave a decree for the amount admitted

The claim was on a series of transactions The property mortgaged was the property of one Ma Twe, who died in 1912 She left some sons and daughters. Tan Po Shwe, the eldest of them, applied for Letters of Administration to her estate in the late Chief Court of Lower Burma in 1917. It was then stated that she left eight children, six of whom are the defendants in the present case; one has died and one has apparently disappeared from the proceedings altogether. Letters of Administration were issued to Tan Po Shwe and he proceeded to deal with the estate He applied to the Court for permission to sell the immovable property and permission was granted The estate of the deceased was admittedly encumbered and to pay off the debts due he mortgaged the property now in question for Rs 40,000 by registered mortgage bond. The liability on this mortgage bond is admitted by all the defendants, but a considerable part of this debt has been paid back. Afterwards a second mortgage over the same property for Rs 15,000 was executed The title-deeds of the property had been deposited with the plaintiff firm and afterwards defen-

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ALL INDIA REPORTER

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Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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N.B.—Column No. 1 denotes pages of I. L. R. 7 RANGOON.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 7 Rangoon=All India Reporter.

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For **11 & 12 All India Criminal Reports=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

For **30 Criminal Law Journal, 113 to 120 Indian Cases and Indian Rulings, 1929 Rangoon=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

For **1929 Criminal Cases=All India Reporter.**

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

Table No. III.

Showing seriatim the pages of ALL INDIA REPORTER, 1929, Rangoon Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 Rangoon. Column No. 2 denotes corresponding references of other REPORTS & JOURNALS.

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97	7 *Rang*	345	158	117 *I C*	591	216SB	119 *I C*	220	282	7 *Rang*	409
FB	115 *I C*	901	155	7 *Rang*	240	218	7 *Rang*	193		120 *I C*	670
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	117 *I C*	247	168	7 *Rang*	126	241	7 *Rang*	263	306	7 *Rang*	806
116	7 *Rang*	18		117 *I C*	582		119 *I C*	215		121 *I C*	807
	117 *I C*	251	170	120 *I C*	664	243	.		307	7 *Rang*	451
117	7 *Rang*	118	172	120 *I C*	661	244	7 *Rang*	300		120 *I C*	137
	117 *I C*	580	173	120 *I C*	663		119 *I C*	740	310	7 *Rang*	558
120	7 *Rang*	3	175	7 *Rang*	113	245	7 *Rang*	644		120 *I C*	910
	117 *I C*	254		117 *I C*	575	248	7 *Rang*	644	311	7 *Rang*	425
	30 *Cr L J*	752	177	7 *Rang*	319	FB				120 *I C*	142
121	7 *Rang*	11	FB	30 *Cr L J*	986	251	7 *Rang*	288	313	7 *Rang*	815
	117 *I C*	248		119 *I C*	209		119 *I C*	744		121 *I C*	812
	30 *Cr L J*	753		1929*Cr C*	169	253	7 *Rang*	578	316	...	
122	7 *Rang*	23	179	7 *Rang*	140		121 *I C*	774	318	7 *Rang*	865
	117 *I C*	250		117 *I C*	577	254	7 *Rang*	266		120 *I C*	288
	30 *Cr L J*	754	181	...			30 *Cr L J*	990	320	7 *Rang*	556
123	118 *I C*	694	182	119 *I C*	223		119 *I C*	213		120 *I C*	911
126	118 *I C*	632	183	119 *I C*	222		1929*Cr C*	450	321	7 *Rang*	588
	7 *Rang*	352	184	7 *Rang*	144	256	7 *Rang*	316		1929*Cr C*	497
127	118 *I C*	416					30 *Cr L J*	990		120 *I C*	912
128 (1)	119 *I C*	213	187	119 *I C*	749		119 *I C*	228		31 *Cr L J*	186
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	118 *I C*	415	190	7 *Rang*	529	257	7 *Rang*	751	331	1929*Cr C*	507
129 (1)	118 *I C*	415		119 *I C*	751	259	...			7 *Rang*	470
129 (2)	7 *Rang*	374	191	119 *I C*	751	260	7 *Rang*	296		30 *Cr L J*	1164
FB	118 *I C*	409	192	120 *I C*	130		119 *I C*	742		120 *I C*	290
134	7 *Rang*	245	193	7 *Rang*	608	262	...		333	7 *Rang*	276
FB	118 *I C*	609	SB	119 *I C*	746	263	...			119 *I C*	217
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139	7 *Rang*	94	198	120 *I C*	693	269	7 *Rang*	310	339	7 *Rang*	527
	117 *I C*	568	200	7 *Rang*	706		119 *I C*	742		120 *I C*	897
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	118 *I C*	625	203	7 *Rang*	329	271	...			121 *I C*	718
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	117 *I C*	255	207	120 *I C*	695	274	7 *Rang*	423		118 *I C*	113
	30 *Cr L J*	755	209 (1)	120 *I C*	897		120 *I C*	240		30 *Cr L J*	882
	1929*Cr C*	60	209 (2)	7 *Rang*	96	275 (1)	...			1929*Cr C*	617
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	117 *I C*	253		30 *Cr L J*	750	277	...		352 (2)	...	
148 (2)	7 *Rang*	75		1929*Cr C*	356	278	7 *Rang*	355	354	7 *Rang*	677
	117 *I C*	589	210	120 *I C*	698		120 *I C*	692	FB	121 *I C*	705
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	30 *Cr L J*	750	213	...		279	7 *Rang*	358	363	7 *Rang*	431
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RANGOON HIGH COURT

*** * A. I. R. 1929 Rangoon 1**
Full Bench

PRATT, Offg. C. J., CUNLIFFE AND ORMISTON, JJ.

Commissioner of Income-tax, Burma.

v.

Phra Phraison Salarak—Assessee.

Civil Reference No. 2 of 1928, Decided on 20th June 1928.

*** * Income Tax Act, S. 4—Remuneration by Foreign Government paid to its servant for work done in British India is not income accruing or arising in British India.**

Remuneration, not in the nature of commission, paid in Siamese territory by the Siamese Government to the credit of a Siamese Officer, who collects in British India royalties on timber extracted from Siamese forests and floated down to British India, is not income accruing or arising in British India within the meaning of S. 4: *A. I. R.* 1925 *Cal.* 34 and *A. I. R.* 1921 *Bom.* 159, *Cons.*: *Commissioner of Taxation of Kirk*, (1900) *A. C.* 588; 43 *Mad.* 75; and *A.I.R.* 1926 *Rang.* 97 (*F.B.*); *Dist.*: *A. I. R.* 1923 *Mad.* 574 (*F.B.*); *A. I. R.* 1923 *Lah.* 14; and *A. I. R.* 1925 *Pat.* 281; *Ref.* [P 4 C 1]

K. Eggar—for the Crown.

Daniel—for Assessee.

Ormiston, J.—This is a reference under S. 66 (2), Income-tax Act, 1922, on the application of one Phra Phraison Salarak, a forest officer in the service of the Siamese Government, stationed at Moulmein, where he collects the royalty on timber, extracted from forests in Siamese territory, whence it is floated down streams, the earlier of whose courses is in that territory. For his services he receives remuneration which is paid to his credit in Bangkok. He was assessed to income-tax under the head of "salary" for the year 1927-28 in respect of the total amount so paid to his credit and of the value of the rent free quarters enjoyed by him. He appealed against the assessment on the grounds, first, that the salary paid to him was not "salary" for the purposes of S. 7 of the Act, and secondly, that it was not liable to assessment as it did not arise or accrue in British India. The Assistant Commissioner decided the appeal against him on both points, whereupon he asked the Commissioner to refer to the Court the following questions:.

(1) That the income is not salary within the meaning of S. 7 (1) of the Act, since the Siamese Goverament cannot be regarded as the "Government or as a public body or association or a private employer."

(2) That, in any case, whatever may be the classification of the income for the purposes of S. 6, such income cannot be said to "accrue or arise in British India" within the meaning of S. 4 of the Act.

The Commissioner was of the opinion that the remuneration of the applicant could not be classified as "salaries," and, therefore, referred only the second question

By S. 4 (1), save as thereinafter provided the Act is to apply to all income profits or gains, described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of of the Act to accrue, arise, or to be received in British India. Under S. 6, save as otherwise provided by the Act, six heads of income, profits and gains are to be chargeable to income-tax. The first of these heads is "salaries" and the sixth is "other sources." The Commissioner having held that the remuneration in

question cannot be classified under the first head, classified it under the sixth head.

The question is as to whether the remuneration "accrues, or arises" in British India The Commissioner is of the opinion that the remuneration accrues or arises in the place where the work is done in respect of which the remuneration is given, and that consequently, the work having been done in British India, the remuneration is attracted by S. 6 The Government Advocate has supported this view The expression is not defind in the Act, and no authority directly bearing on the point now to be decided has been quoted. Reference, however, has been made to a number of authorities where the expression has been discussed, and it is suggested that as a result it should be interpreted as meaning "earned in" or "derived from"

In *Board of Revenue, Madras* v. *Ramanadhan Chetty* (1), it was held under S 3 (1) of the Act of 1918, the wording of which is similar to that of S. 4 (1) of the present Act, that a resident in British India is not liable to tax in respect of the income of a business carried on outside British India, where such income is not remitted to British India The case itself is not in point, and the only passage in the report to which the Government Advocate has directed attention are a discussion by Abdur Rahim, Offg C J, (on p 82) on a possible difference between the phrases accrues and arises" and "accrues or arises," and quotations by Oldfield, J., (on pp 84 and 85) from dictionaries as to the meaning of the word "accrue" From these it appears that the primary meanings are "to arise or spring as a natural growth or result," "to come by way of increase" and "to grow or arise"; while as secondary meanings it has "to become a present and enforceable right," and "to become a present right of demand."

Seshagiri Ayyar, J., (at pp. 90 and 91) quotes some further definitions. In Murray's Oxford Dictionary the words "accrue" and "arise" are regarded as synonymous In the Century Dictionary the word "accrue" is defined to mean "to become a present or enforceable right to demand." Stroud defines "arising in the United Kingdom" as "coming into the person's hands in the United Kingdom."

In *Re Rogers Pyatt Shellac & Co.* v. *Secretary of State* (2), Mukerji, J, after discussing theoretical distinctions between "accruing" and "arising" arrives at the conclusion that the words denote the same idea or ideas very similar, and that both words are used in contradistinction to the word "receive" and indicate a right to receive. They represent, he says, a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. These definitions do not support the view that income accrues or arises in a particular country by reason of the fact that it is "earned" in that country On the contrary they go to show that income "accrues" and "arises" in the country where there is a right to demand payment of it, or where, in fact, it is paid In the case referred the applicant is a Siamese Government servant and there is nothing to indicate that he has a right to demand payment of his income in Moulmein, and, according to the case, it is actually paid in Bangkok.

Commissioner of Taxation v *Kirk* (3) was a decision of the Privy Council on a New South Wales Act which imposed income-tax on incomes inter alia:

"(1) accruing or arising to any person wheresover residing from any profession, trade, employment or vocation carried on in New South Wales," (2) "derived from lands of the Crown held under lease or license issued by or on behalf of the Crown" and (3) "arising or accruing to any person wheresoever residing from any kind of property"

(with an immaterial exception)

"or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

A company in a part derived its income from the extraction of ore from leasehold lands held from the Crown in that colony and from the conversion in that colony of the crude ore into a merchantable product. It was held that, notwithstanding that the finished products were sold exclusively outside the colony, this income was assessable. Their Lordships said that the real question seemed to be whether any part of the profits of the company were earned or produced in the colony And, later in the judgment after pointing out that the word "derived" is

(1) [1919] 43 Mad. 75=37 M. L. J. 663=10 M. L. W. 570=53 I. C. 976=(1919) M. W. N. 826 (F.B.).

(2) A. I. R. 1925 Cal. 34=52 Cal. 1.

(3) [1900] A. C. 588=69 L. J. P.C. 87=83 L. T. 4.

synonymous with arising or accruing, they went on to observe that

"there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil, (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process, (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-S. (3), and the second or manufacturing process, if not within the meaning of "trade" in sub-S. 1 is certainly included in the words "any other source whatever in sub-S (4)."

Their Lordships' view, therefore, was that it is the source of the income which has to be considered, and not the place where it is received

This case was referred to *In re Aurangabad Mills, Ltd.* (4), a decision under S 3 (1) of the Act of 1918 It was there held that the profits of a company which are made from manufacture carried on beyond British India cannot be said to accrue or arise in British India on account of head office being in Bombay, where also the directors control the business Macleod, C. J, (at pages 1290 and 1291) after quoting the above cited passage from the judgment of their Lordships' remarked that the doubt which might have arisen in *Commissioners of Taxation* v *Kirk* (3) whether the profits were not derived at a place where the third and fourth processes were carried out, did not arise in the case before him because all the four processes were carried out in Hyderabad This case was followed in *Board of Revenue* v *Ripon Press*, (5). In *Commissioner of Income-tax, Burma* v *Steel Bros & Co Ltd* (6), it was held, applying the principles laid down in *Commissioners of Taxation* v *Kirk* (3), that in determining whether any income, profits or gains arise or accrue

"we must not be content to look at the last stage of the accrual, but must take into consideration the previous stages as well."

The company was non-resident in British India, but at mills situate in Burma it worked up commodities and raw materials into forms suitable for use and shipped them to the United Kingdom where they were sold It was held that the profits or gains accruing to the company in respect of this business must be deemed [within S 42 (1) of the Act] to be income accruing or arising within British India.

Sunder Das v. *Emperor* (7) and *Ali Imam* v. *Emperor* (8) have been cited. These cases deal with the meaning of the expression "received in British India," which is not part of the reference in this case, and need not be discussed

Reference has been made by the Government Advocate to S 42 (1) and 18 (2A) Indian Income-tax Act, 1922 S. 42 (1) provides that in the case of a non-resident, all profits or gains accruing to him through or from any business connexion or property in British India is to be deemed to be income accruing or arising within British India The effect of S. 18 (2A), which was inserted by Act 16 of 1925, is to render subject to income-tax any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government. These sections do not appear to be of assistance in the general construction of the words "accruing" and "arising" in S 4 (1) They seem to be designed to bring within the ambit of the tax special classes of cases which would otherwise escape I am unable to appreciate the argument to be found in the reference and which is based on the position of a salary earner It is said that in his case the salary accrues and arises in the place where he does the work, which is in British India, and that it therefore accrues in British India and is taxable But this argument overlooks the fact that the Commissioner has expressly held that the remuneration of the assessee is not "salary" and has classified it under "other sources"

If the correct principle be that the words accrue and arise when applied to income are to be governed by the source from which the income accrues and arises, it would appear that in the case referred that source is to be found in Bangkok rather than in Moulmein The assessee is a Forest Officer in the service of the Siamese Government. It is not stated that his remuneration is in the nature of a commission on the amount of revenue collected. On the contrary it is said to be 600 ticals per mensem The inference to be drawn is that he would get his

(4) 45 Bom. 1286 = A. I. R. 1921 Bom. 159.
(5) A. I. R. 1923 Mad. 574=46 Mad. 706 (F. B.)
(6) A. I. R. 1926 Rang. 97=3 Rang. 612 (F. B.).
(7) A. I. R. 1923 Lah. 14 = 3 Lah. 349.
(8) A. I. R. 1925 Pat. 281 = 4 Pat. 210.

remuneration *qua* Forest Officer, whether he worked in Moulmein collecting royalty, or whether he worked in Siam in that or any other capacity From this point of view his remuneration accrues and arises in Bangkok where it is payable and is in fact paid If on the other hand we are to have regard to the definition of the words, the only place where it would seem that there is a present and enforceable right on part of the assessee to demand the remuneration and where it comes into his hand, is also Bangkok

In conclusion I may refer to the observation of Sir Shadi Lal, C J , in *Sundardas* v *Emperor* (7) after citing the rule of interpretation applying to fiscal enactments, that :

" it is a sound principle that the subject is not to be taxed without clear words to that effect , and that in dubio, you are always to lean against the construction which imposes a burden on the subject "

The Government Advocate expressed the view that the legislature had advisedly refrained from defining the terms accuring and arising In my view the meaning of the terms, as applied to the facts of case is as above stated and is perfectly plain If, on the other hand, the meaning is ambiguous, the sound principle enunciated by Sir Shadi Lal is applicable and it ought to be applied

I would answer the question referred by saying that the income the subject-matter of the reference cannot be said to " accrue or arise in British India " within the meaning of S 4, Income-tax Act, 1922

Pratt, Offg. C J —I have had the advantage of reading my brother Ormiston's judgment and I concur in his proposed answer to the reference

We are asked to decide whether salary paid in Bangok by the Siamese Government to the credit of a Siamese Forest Officer, who collected at Moulmein royalties on timber extracted from Siamese forests and floated down to Moulmein, is income accuring or arising in British India within the meaning of S 4, Income-tax Act

The officer in question resides in Moulmein, presumably for the purposes of his work of collecting royalties We are not asked to decide whether the income is " salary " within the meaning of S 7 (1), of the Act, nor whether the portion of the pay remitted from Bangkok to Mr Salarak in Moulmein can be said to be " received " within the meaning of S 4 (1). It has been argued by the Government Advocate that for the purposes of present reference the words " accruing and arising " must be construed as equivalent to " earned "

None of the cases cited is an authority for this contention

Had the legislature intended to include income earned in British India within the meaning of income " accruing or arising " there, it would have been perfectly simple to say so

I do not consider that salary paid in Siam to a Siamese official for services rendered in Burma can under the circumstances be regarded as income arising or accruing in British India

The respondent will be allowed the costs of the reference Advocate's fee seven gold mohurs

Cunliffe, J —I also concur The scope of this reference has been very much narrowed The Commissioner has satisfied himself of the answer to the first proposition put forward by the respondent In that regard the Commissioner holds the view that the respondent's income does not come under the head of " salary " within the meaning of S 6 of the Act Nor did the respondent (very wisely, I think) suggest to the Commissioner that he should ask the opinion of the Court as to whether the emolument which he (the respondent) is paid by the Siamese Government is received in British India All we have to do here is to decide, as my brother Ormiston has pointed out, whether such emolument accrues or arises in British India It has been held on several occasions that there is no difference between the two words " profits " or " gains " which are used in the section we are considering I am inclined to think that there is no real difference in law between the words " accruing " and " arising " Some authorities have thought that the word " accrue " suggests a periodical right to money and the word " arise " suggests only a single right or possibly the beginning of a perodical right But these views seem to me to be refinements and over-refinements of the language of the statute To my mind, the double expression " accruing and arising " connotes the source from which the right to obtain money springs Undoubtedly the source here was in the Kingdom of Siam, remu-

neration from the Siamese Government to one of the officers of their forest service In my view, too, the expression "accruing or arising" is used in contradistinction to the word "received," but as I have pointed out, we are not considering the question of where the money was actually received or to what place it was remitted after its receipt which may be the same thing in law as "received" It was very strongly urged upon us that the real meaning of "accruing" and "arising" as applied to the income of the respondent was to be found in the place where the income was earned, but, for the reason mentioned above, I do not agree with that view

R K *Reference answered*

A I R 1929 Rangoon 5

DAS AND BAGULEY, JJ

N N Chettyar—Appellants

v

Tan Ma Pu and *others*—Respondents

First Appeals Nos 199 and 206 of 1926, Decided on 2nd September 1927, from judgment of Dist Judge, Bassein, in Civil Suit No 3 of 1925

(a) Probate and Administration Act, S. 90—Letters of Administration issued under Probate and Administration Act where they should have been issued under Succession Act — Administrator mortgaging property without Court's permission—Letters must be taken to give the powers that they appear to give upon their face until revoked or altered—Mortgage would not bind heirs—Succession Act (1865), S 269.

Letters of Administration were issued under the Probate and Administration Act But had the application for the letters properly described the deceased, it would have been necessary to issue the letters under the Succession Act The Administrator mortgaged the property of the deceased without permission of the Court.

Held that the Letters of Administration issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under the Act unless and until the powers under them were extended by the Letters being altered to Letters under the Succession Act. The mortgage, therefore, being without authority would not bind the heirs 35 *Cal.* 955, *Rel. on A. I R.* 1922 *P C.* 197, *Dist.* [P 6 C 1, 2]

(b) Probate and Administration Act, S 90 (3) (a)—Permission to sell property does not ipso facto mean permission to mortgage.

Where Court gives permission to the Administrator to sell property, that permission to sell does not ipso facto give permission to mortgage. 9 *Bur. L. T.* 296, *Foll.* [P 6 C 2]

(c) Debtor and Creditor—Person authorized to deal with property by Letters of Administration and also by powers-of-attorney from heirs—He mortgaging property — Creditor need not enquire into application of money borrowed.

A person had authority to deal with certain property by Letters of Administration and powers-of-attorney from the heirs He mortgaged the property but the creditor did not enquire with regard to the disposal of the money borrowed.

Held that there was no need for the creditor to make enquiries with regard to the disposal of money. A man with such authority may be dealt with safely, provided he keeps within limits of the authority. If every man who does business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible. The special rules applying to the karta of a joint Hindu family do not apply to people acting under powers-of-attorney [P 7 C 2]

N N Burjorjee—for Appellants

Zeya—for Respondents

Baguley, J —These two appeals arise out of a suit brought by the N N Chettyar Firm against six defendants on a series of mortgages The lower Court gave the plaintiffs a decree for the full amount claimed against defendants, 1, 2 and 5 but against 2, 3 and 6 only gave a decree for the amount admitted

The claim was on a series of transactions The property mortgaged was the property of one Ma Two, who died in 1912 She left some sons and daughters Tan Po Shwe, the eldest of them, applied for Letters of Administration to her estate in the late Chief Court of Lower Burma in 1917 It was then stated that she left eight children, six of whom are the defendants in the present case, one has died and one has apparently disappeared from the proceedings altogether Letters of Administration were issued to Tan Po Shwe and he proceeded to deal with the estate He applied to the Court for permission to sell the immovable property and permission was granted The estate of the deceased was admittedly encumbered and to pay off the debts due he mortgaged the property now in question for Rs 40,000 by registered mortgage bond The liability on this mortgage bond is admitted by all the defendants, but a considerable part of this debt has been paid back. Afterwards a second mortgage over the same property for Rs 15,000 was executed The title-deeds of the property had been deposited with the plaintiff firm and afterwards defen-

dant 1 gave a letter of authority to the plaintiffs authorizing them to lend further sums of money on promissory notes to Tan Babu and his clerk, Tan Kya Lu, and it was agreed that the sums so advanced should constitute a further lien on the properties already mortgaged In this way considerable sums of money were advanced and the plaint shows that the total debt outstanding at the time of filing of the suit was Rs 1,07,340-6-0

Various defences are raised, and I will deal with them in order

In the first place it is argued that, as the Letters of Administration were issued to Tan Po Shwe under the Probate and Administration Act and he never got permission from the Court to mortgage the immovable property of the deceased, these mortgages are bad, except, of course, so far as they are admitted. In reply to this, it is urged that the deceased, Ma Twe, although described in the application for Letters of Administration as a Chinese Buddhist, was, in fact, a Karan Christian, and how she came to be described as a Chinese Buddhist is not explained. It would seem that her husband was a Chinaman, but his religion is doubtful Be that as it may, however, there can be no doubt that, had Ma Twe been correctly described in the application for Letters of Administration, the Letters would have issued under the Succession Act, and, in that case, the mortgage by the administrator would have been good It is argued that, as the Letters should have been issued under the Succession Act, the administrator had the powers to mortgage that he would have had, had they been correctly issued The argument in my opinion, fails The letters must be taken to give the powers that they appear to give upon their face until they are revoked or altered.

No case directly in point has been quoted, but for the converse there is authority vide *Debendra Nath Dutt* v. *Administrator General of Bengal* (1) In that case Letters of Administration which were issued owing to the fraud of the applicant and which, therefore, might be considered as bad from the start were nevertheless held to be good until and unless they were revoked In the same way I hold that Letters issued under the Probate and Administration Act must be regarded as being under that Act and giving only the powers that they could give under that Act until and unless the powers under them are extended by the Letters being altered to Letters under the Succession Act The case of *Ma Yait* v *Maung Chit Maung* (2), was quoted as being authority for beginning the administration under the Probate and Administration Act and completing it under the Succession Act But in that case, no question of the powers of the administrator was gone into Originally, Letters of Administration were taken out under the Probate and Administration Act, but the Privy Council decided that, as the deceased was a person whose estate had to devolve according to the rules laid down in the Succession Act, the administrator would have to divide the property among the heirs in accordance with the rules of the Succession Act

It is true that the administrator got permission to sell, but permission to sell does not ipso facto give permission to mortgage vide *Ram Dhon Dhor* v *Sharf-ud-din* (3).

Under the Letters of Administration issued, then, I must hold that Tan Po Shwe had not got power to bind the interests of the heirs The case, however, cannot be disposed of so easily Various heirs had given Tan Po Shwe direct authority to act on their behalf under powers-of-attorney Ex M is a power of attorney given by Tan Lon Dan, defendant 5 to Tan Po Shwe This authorizes him to do various things in the way of administering the estate and carrying on the family business of Maung Gwan The power, however, contains a paragraph

'It is hereby expressly provided that nothing herein contained will authorize the agent to contract debts etc "

It is impossible to say that under this power Tan Lon Dan authorized Tan Po Shwe to mortgage his interest in the family property

Ex N is a power-of-attorney given by Tan Ma Pu, Tan Pu Su and Tan Babu to Tan Po Shwe This also authorizes Tan Po Shwe to deal with the administration of the estate, but being differently worded it does directly give him authority to deal with the estate

"to pay off all debts and encumbrances due to the said estate, by selling mortgaging or in any

(1) [1908] 35 Cal. 955=35 I. A 103=12 C W. N. 802=8 C. L. J. 94 (P. C).

(2) A. I. R. 1922 P. C. 197=49 Cal. 810=48 I. A. 553 (P.C.).

(3) [1916] 9 Bur. L. T. 236=34 I. C. 128.

other way alienating any part of the estate, if necessary etc."

After this power-of-attorney had been given by these three defendants it is impossible for them to say that Tan Po Shwe had not got their direct authority to mortgage and encumber the estate property.

The remaining defendant Tan Kyauk Ho has apparently given no power-of-attorney to Tan Po Shwe His position then would apparently be that Tan Po Shwe could not bind his interest. It seems, however, that he had no interest to bind at all

The point was overlooked in the lower Court it would seem, but the record contains a statement repeated more than once by Tan Po Shwe that Tan Kyauk Ho was not the son of Ma Twe He was the son of Ma Twe's husband by a Chinese wife and Tan Kyauk Ho himself never went to the witness-box to deny this, and the statement is completely unrebutted I will refer to this later on in the judgment.

Another defence raised on behalf of Ma Pu and Ma Pu Su was that they were insane generally and that their interests could not be bound I have been through the oral evidence on this point, and the conclusion I have come to is that they are persons liable at times to fits of insanity The evidence of Dr San C Po is really to the effect He says that Ma Pu Su had attacks of epilepsy which have rendered her unsound and that Ma Pu has been treated out off for years for melancholia, general infirmity of the mind In cross-examination, it appears that their normal condition is one of sanity It is only at times that they are of unsound mind, and as they gave Tan Po Shwe authority to apply for Letters of Administration on their behalf and also gave him a power-of-attorney, authorizing him to deal with their interests they must prove to invalidate these acts that at the time they did them they were in one of their insane fits. Of this there is no evidence The medical evidence is that Ma Pu Su is liable to become uncontrollable under any excitement or even at the sight of new faces But the proceedings in the late Chief Court of Lower Burma, when Letters of Administration were applied for show that she was able to come to Rangoon, and sign a paper agreeing to the issue of Letters of Administration to Tan Po Shwe in the presence of her Rangoon lawyer. This story suggests that her agoraphobia was not of a very pronounced type This defence of insanity must, I think, be held of no avail

Then it is argued that it has not been proved that this money was applied for the benefit of this estate, or for the benefit of the family business In my opinion, there was no need for the creditor to make enquiries with regard to the disposal of money He was dealing with a man whose authority to deal with the property lay in his possession by Letters of Administration and powers-of-attorney from the heirs, with whom we are now concerned. A man with this authority may be dealt with safely, provided he keeps within the limits of his authority and to the extent of his authority If every man who did business with an attorney had to go beyond the four corners of the power-of-attorney and had to enquire into the destination of the money which he lent and so on, ordinary business would be impossible I can see where the argument comes from. It comes from the various cases of persons who deal with the karta of a joint Hindu family; but the special rules applying to a karta of a Hindu joint family do not apply to people acting under powers-of-attorney

It was argued that the agreement Ex O forbids Tan Po Shwe to encumber the estate or incur any loan as administrator. This is quite true, and it is also a fact that the date of this agreement is subsequent to the date of the power-of-attorney Ex N As against third parties, however, none of the defendants can claim this to be a revocation of the power-of-attorney Ex. M It may be good as between the defendants themselves, but with that we are not concerned. If by means of Ex O any of the remaining defendants wished to alter the terms of Ex N it was their duty to withdraw Ex. N in order that Tan Po Shwe should not hold it out as an authority in his favour as against third parties

One further point must be touched on and that is that Lon Dan, defendant 5, the only one of the defendants who took the precaution of expressly forbidding Tan Po Shwe to encumber the estate, admits his liability not only for the money due on original Rs. 40,000 mortgage bond Ex A but he also admits liability for a further Rs. 6,000 which he received out of the money borrowed from the plaintiff's firm.

As a result, therefore, I would hold that Tan Po Shwe, defendant 1 is responsible personally and as an heir for the whole of the money due Tan Babu, Tan Ma Pu, and Tan Pu Su are responsible to the full extent of their interests in the estate, and also personally because they authorized Tan Po Shwe to borrow this money Tan Lon Dan cannot be held responsible for anything more than he admits liability for, because Tan Po Shwe's power to mortgage comes not from the Letters of Administration given to him. Tan Lon Dan admits liability for the remainder of the debt due on Ex A and for the further sum of Rs 6,000 It does not seem to be stated which sum of Rs 15,000 provided this Rs 6,000 for Tan Lon Dan I must, therefore, say that he is liable for Rs 6,000 with interest from 17th August 1919

As regards Kyauk Ho as he is not an heir, I do not see how it is possible to charge him with any liability under any of the mortgages. None of the mortgaged properties belongs to him and he has given Tan Po Shwe no authority to borrow on his behalf

Turning now to the two appeals that have been filed: with regard to appeal No 199/26 this in the main is successful, for I am of opinion that Tan Ma Pu and Tan Pu Su are both liable for the money borrowed

As regards Tan Kyauk Ho, I think the appeal must be said to have failed, because I can place no liability on him, but he will not get any benefit out of this, for I hold that he has no interest in the estate

As regards appeal No 206/26, in this appeal the first three appellants are quite unsuccessful Appellant 4 Tan Lon Dan is successful to a certain extent, for I hold that he is only responsible on Ex A and for the further sum of Rs 6,000 which he received

In this appeal Kyauk Ho must be regarded as unsuccessful, I think As a result the decree of the lower Court will be varied The plaintiff will get a decree for the full amount claimed against the interest of the first four defendants He will get a decree against Tan Lon Dan and his interest in the property to the extent of the amount due on Ex A together with Rs 6,000 with interest out of the promissory note dated 17th August 1919, which will be a charge on Tan Lon Dan's interests The interests of these five defendants will be declared as 1/5 each, so that the plaintiff will be entitled to sell the whole interest in the mortgaged property

As regards Kyauk Ho the claim will be dismissed without costs The plaintiff-appellant in appeal No 199/26 will get his costs of the appeal against Tan Ma Pu and Tan Pu Su and in Appeal No 266/26, the plaintiff-respondent will get one-half of his costs against first three defendant-appellants

Das, J —I concur

S N /R.K *Decree varied*

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*A I R 1929 Rangoon 8

PRATT, OFFG C J , AND CUNLIFFE, J.

A K. A C. T V V Chettyar—Applicant

v

Commissioner of Income-Tax — Opposite Party

Civil Misc Appln No 26 of 1928, Decided on 16th July 1928

*** Income-tax Act, S 30, proviso—Meaning explained—Assessment under S 23 (4) followed by refusal to make fresh assessment under S 27 does not come under proviso.**

Assessment under S. 23 (4) and a dismissal of an application under S 27 for a fresh assessment, is not an assessment made under S 23 (4) read with S 27 which would preclude an appeal being filed from it under the proviso to S. 30 What the proviso means is that there shall be no appeal against (i) an assessment made under S 23 (4) and (ii) when the assessment under S. 23 (4) is cancelled and a fresh assessment under S 27 is made [P 9 C 2]

Clark and *Venkatram*—for Applicant.

A Eggar—for the Crown

Judgment —This is an application for a mandamus to compel the Commissioner of Income-tax to state a case under S 66, Income-tax Act The facts are set forth at length in the application The A K A Firm of Rangoon, which consisted of two partners the applicant A K. A C. T V V Chettyar and A K A C T A L Alagappa Chettiar, discontinued business in August 1925, the assets were divided between the two partners, who have been since carrying on business as separate joint family firms under the styles of A K A C T V and A K C T. A L respectively.

For the financial year 1925-26 notice was served on the then agent of the A K A Firm on 8th April 1925 to make a return for income-tax purposes

Applicant eventually made a return and claimed the benefit of S 25 (3), Income-tax Act as the firm had been dissolved. Applicant objected to producing the books of the firm, and to the proposed method of assessment Ultimately the Income-tax Officer peremptorily settled 31st March 1926, for the production of accounts The accounts were not produced and the officer made an assessment ex parte against each member of the A K. A Firm Applicant appealed to the Assistant Commissioner who dismissed his appeal, and left him to apply for a fresh assessment under S. 27 An application was made under S 27 but was refused An appeal to Commissioner of Income-tax was unsuccessful The Commissioner was asked but declined to make a reference to this Court, hence the present application under S 66 (3) for an order to state a case on specified points of law

A preliminary objection has been taken by the Government Advocate that the application is incompetent since no appeal lies to the Assistant Commissioner from the order refusing to make a fresh assessment under S 27 It is contended that the proviso to S 30 that no appeal shall lie in respect of an assessment made under sub-S (4), S 23, or under that sub-section read with S 27 precludes such an appeal, since it must be taken that, the Officer having dismissed the application for a fresh assessment under S 27, there remains an assessment under sub-S (4), S 23, read with S 27

The contention is clearly not maintainable There was an application for a fresh assessment under S 27, which was refused The assessment under S 23 (4) was not cancelled There was not therefore an assessment under S 23 (4) read with S 27 as argued A refusal to make an assessment is not an assessment S 30 definitely provides for an appeal against a refusal of an Income-tax Officer to make a fresh assessment under S 27 What the proviso clearly means is (1) that there shall be no appeal against an assessment made under S 23 (4) and (2) that when an assessment under S 23 (4) has been cancelled under S 27 and a fresh assessment made there shall also be no appeal: that is to say that if the assessee succeeds in his effort to obtain a fresh assessment under S 27 he shall be debarred from appealing against that fresh assessment. The assessee in not precluded by the proviso from preferring the appeal against the refusal to make a fresh assessment under S 27, which is allowed in the body of S 30

In his order rejecting the two applications for a reference to this Court under S 66 (2) on a number of questions the Commissioner of Income-tax took the view that the only questions for decision were of pure fact viz whether applicants had a reasonable opportunity of complying with the Income-tax Officer's notice and whether there was an adequate reason for non-production of accounts There was therefore no question of law to refer We consider that the only question for determination was whether applicant had sufficient cause for non-compliance with Income-tax Officer's notices He obviously had not, and we see no reason to think the findings of fact wrong Applicant and his quondam partner were obviously placing every obstacle in the way of a just assessment and they have only themselves to thank, if the result of their efforts is that they have been assessed in a way and under a section, which they do not like We do not feel called upon to require the Commissioner to state a case upon any of the points raised before us The application is dismissed with costs Advocate's fee five gold mohurs.

M N /R K *Application dismissed.*

* A I. R 1929 Rangoon 9

CARR, J.

Ma Nyun—Appellant

v

Maung San Mya and *another*—Respondents

Special Second Appeal No 52 of 1928, Decided on 18th June 1928, from judgment of Dist Judge, Tharrawaddy, in Civil Appeal No 102 of 1927.

*** Stamp Act, S 36 — Insufficiently stamped promissory note admitted by trial Court—Admissibility of the document cannot be questioned in appeal**

The trial Court purporting to act under S. 35 but overlooking its proviso (a) admitted an insufficiently stamped promissory note in evidence after recovering penalty.

Held that the terms of S. 36 are exceedingly wide and they undoubtedly refer to any document which has, in fact, been admitted in evidence, and are sufficient to cover the case of a promissory note or any other document to which proviso (a) to S. 35 is not applicable. So under S 36 the appellate Court cannot question the admissibility of the docu-

ment. 2 *L. B. R.* 103, *Held wrongly decided*: 14 *Bom.* 102 and 18 *Bom.* 369, *Dist.*. 2 *U. B. R. Stamp* 36 ; 13 *Bom.* 449 (*F.B*), 3 *Cal.* 787; and 12 *Cal.* 64, *Foll.* [P 10 C 2]

Paw Tun—for Appellant.

Kin U—for Respondents

Judgment—This was a suit on a promissory-note Both the Courts below have agreed that the plaintiff proved the execution of the note The Township Court on that finding gave a decree for the plaintiff, but, on appeal, the District Court reversed that decision on the ground that the promissory-note sued upon was insufficiently stamped The facts as regards the promissory-note were that it was for Rs. 600 and stamped with one one-anna stamp only As it should have been stamped with two-annas the Township Judge impounded it and levied the deficient duty of one-anna and a penalty of Rs 5 purporting to act under S 35, Stamp Act He was wrong in his action, having overlooked the fact that proviso (a) to S 35 does not apply to a promissory-note However, he did levy the duty and penalty and he did admit the promissory-note in evidence The District Judge was right in his finding that the note could not properly have been admitted in evidence He held on the authority of *Maung Ba Kywan* v *Ma Kyi Kyee* (1) that S 36 did not apply in this case and, therefore, on his finding that the note was inadmissible he set aside the decree and dismissed the plaintiff's suit

In the case relied upon by the District Judge, Fox J held, that S 36 Stamp Act, was not applicable to a promissory-note He said that the Township Court by admitting and acting on the document had acted illegally and that that illegality could be corrected by an appellate Court He remarked that the cases of *S A Ralli* v *Caramali Fazal* (2) and *Chenbasappa* v *Lakshman Ramchandra* (3) supported his view. That appears to be the latest reported Lower Burma decision on this point. There is, however, an Upper Burma case, *Mi Ke* v *Nga Kan Gyi* (4) in which the Judicial Commissioner, now Sir George Shaw, expressly dissented from Fox, J's ruling He said in his judgment that the Bombay cases relied upon in the Lower Burma decision did not deal with the point for determination I have myself referred to those cases and I entirely agree with his view.

The terms of S 36, Stamp Act, are exceedingly wide and in their plain ordinary meaning they undoubtedly refer to any document which has, in fact, been admitted in evidence, and are sufficient to cover the case of a promissory-note or of any other document to which proviso (a) to S. 35 is not applicable There are a number of other cases in which the view taken by Sir George Shaw has been taken These refer to earlier Stamp Acts but there is no material difference between the relevant provisions of those Acts and those of the Act now in force. In *Devachand* v *Hirachand Kamaraj* (5), the document in question was a promissory-note but the Judge of the trial Court held that it was a bond and admitted it in evidence on payment of duty and penalty Later, before the suit had been decided, his successor formed the opinion that the document was a promissory-note and that its admission in evidence was illegal On that ground, therefore, he dismissed the suit A Full Bench of three Judges of the Bombay High Court held that the promissory-note having once been admitted in evidence could not afterwards be rejected on the ground that it was not duly stamped. In *Khoob Lall* v *Jungle Singh* (6), the trial Court held that the document before it was not a promissory-note but a letter of agreement and admitted it in evidence on payment of penalty Before the High Court it was argued that the document was, in fact, a promissory-note and that it being a promissory-note S 39 of Act 18 of 1869* was not applicable The Calcutta High Court held that the admissibility of the document could not be questioned in appeal.

In *Panchanand Dass* v *Taramoni Chowdrain* (7) the document in question was held by the trial Court to be a bond and it was admitted on payment of duty and penalty The first appellate Court held that the document was a promissory-note and was not admissible in evidence and therefore reversed the decision.

(1) [1903] 2 L B. R. 109.
(2) [1890] 14 Bom. 102.
(3) [1894] 18 Bom. 369.
(4) [1907-03] 2 U. B. R. Stamp 36.

* [Stamp Duties Act repealed by Stamp Act 1 of 1879 which in its turn has been repealed by the present Stamp Act 2 of 1899—Ed.]

(5) [1889] 13 Bom. 449 (F.B).
(6) [1878] 3 Cal. 787=2 C. L. R. 439.
(7) [1886] 12 Cal. 64.

It was held by the High Court that the Subordinate Judge sitting in appeal had no authority to review the question of the admission of the document It held that the Stamp Act, 1 of 1879, governed the cases and that under proviso of S 34 of that Act, which was essentially identical with S 36 of the present Act, the admission of the document could not be questioned in appeal All these cases are directly relevant to the question now before me and they all support what in my view is the plain meaning of S 36. In my opinion, therefore, the decision of Fox, J in *Maung Ba Kywan* v *Ma Kyi Kyee* (1) was wrong I therefore allow this appeal, set aside the judgment and decree of the District Court and restore those of the Township Court The respondents will pay appellant's costs in all Courts

M N /R K. *Appeal allowed*

* A I R 1929 Rangoon 11(1)

MAUNG BA, J

Ma Kalay Ma and *another* — Applicants

v

Emperor—Opposite Party

Criminal Revn No 686-A of 1928, Decided on 28th June 1928, from order of Township Magistrate, Pyinmana, in Criminal Regular Trial No 124 of 1928

*** Railways Act, S 113—Application under Sub-S.4 is not a criminal prosecution—Court has no power to fine or to order imprisonment in default.**

An application under S. 113 (4) is not a prosecution for criminal offence and on such application the Magistrate has no power to fine the defaulter or to order a sentence of imprisonment in default of such fine. The Magistrate can only direct him to pay the fare and the excess charge under sub-S (3) and then proceed to recover it as if it were a fine

[P 11 C 1, 2]

Judgment.—The Magistrate was quite correct in considering that S 112, Railways Act, did not apply to this case and that action could only be taken under sub-S (2), S 113, but his procedure under this latter section was entirely misconceived An application under sub- S (4), S. 113, Railways Act, is not a prosecution for a criminal offence It should be registered as a Criminal Miscellaneous Case and not as a Regular Trial. The Magistrate, on an application under this section, has no power to fine the respondent or to order a sentence of imprisonment in default of such fine All that the Magistrate can do is to direct the respondent to pay the fare and excess charge, referred to in sub-S (3), S 113, and then proceed to recover it as if it were a fine. In fact, the Magistrate is compelled to do this and has no authority to enter into the merits of the matter The Magistrate should study the provisions of S 113 and S. 132, Railways Act, and also General Letter No 17 of 1926 of this Court, which sets out the circumstances under which a person proceeded against under S 113 may be detained in custody

Consequently in the present case the fines of Rs 7 each, imposed on the two respondents, and the sentence of ten days' imprisonment passed in default of payment were entirely illegal All that the Magistrate could do was to order each of the respondents to pay the deficit railway fare of six annas and six pies, plus an excess charge of the same amount. Consequently the amount of deficit fare plus excess charge to be recovered from each respondent was 13 annas This amount should now be deducted from the amounts of fares and fines deposited by the respondents and the balance should be refunded to them The amounts so recovered under sub-S (4), S 113, must be paid to the railway administration It is noticed that in regard to the deficit fares of 13 annas already recovered this has not been done.

M N /R K *Order set aside*

* A I R 1929 Rangoon 11 (2)

BAGULEY, J

Basudev—Appellant

v

Bideshi and *another*—Respondent.

Second Appeal No 733 of 1927, Decided on 25th June 1928, from judgment of Dist Judge, Insein, in Civil Appeal No.41 of 1927.

*** Civil P. C , O 41, R. 17—Rule empowers Court to adjourn a case—For default, appellate Court should not pass order without hearing appellant's advocate.**

Order 41, R. 17, is intended to give the Court power to adjourn a case, if it thinks fit. It seems distinctly unfair that for default, the appellate Court may pass an order without hearing the appellant's advocate or without hearing the appellant, which would entirely preclude him from even afterwards questioning the finding of fact. *A. I. R.* 1923 *Mad.* 13, *Foll.*

[P 12 C 2]

N K Bhattacharya—for Appellant.

P B. Sen—for Respondents.

Judgment.—This is an appeal against a decree of the District Court of Insein confirming a decree passed by the Township Court of Insein The history of the appeal in the lower lower Court is rather peculiar It was filed on 13th June and admitted the next day after hearing the appellant's advocate It was adjourned twice and then on 29th July, when advocates for both sides were present, the learned Additional District Judge came to the conclusion that another witness ought to be examined He cited that witness and examined him. It was then found that some documents were missing and they were sent for Finally, on 2nd September 1927,the case came up for hearing The documents apparently had still not been received The appellant's advocate asked for an adjournment as he was engaged elsewhere The learned Judge refused the adjournment, but gave him an hour and a half in which to deal with his other work The hour and a half expired and another half hour and as the appellant's advocate still had not come, the learned Judge stated in the diary that he would pass orders without the help of the advocate Whether the advocate for the respondent still remained present is not clear from the diary order, but when the matter was argued before me by the same advocates who appeared in the lower appellate Court, no stress was laid on the fact, if it were a fact, that the respondent's advocate was still present The order of the lower appellate Court when passed dismissed the appeal on the merits and, therefore, the appellant will be debarred from questioning any finding of fact in second appeal.

The question before this Court is whether the lower appellate Court had power to pass an order on the merits without having heard the appellant's advocate in full There appears to be a case similar to the present one in the Madras ruling. *Muhammad* v *Manavikrama* (1) In this case, what happened before the lower appellate Court was that there was no appearance on behalf of the appellant and the lower appellate Court passed an order dismissing the appeal on the merits Both Judges on the appellate Bench passed separate orders in which they came to the conclusion that an order dealing with the merits in the absence of the appellant's advocate was an illegal order. Under the previous Code, there is ample authority for holding that an appeal dismissed under these circumstances must be one dismissed for default, but the wording of O 41, R 17 is not quite the same as the wording of old S 556 The present order runs

"Where, on the date fixed . . . the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed,"

The old section ran "the appeal shall be dismissed for default "The point for consideration is whether the present wording of the section makes it possible for a Judge to dismiss an appeal on its merits In the *Madras* case quoted, the Bench were of opinion that consideration of the merits could not be gone into when O 41, R 17 applied There seems to be an absence of authority on the point, this being the only officially reported case There are two unofficially reported decisions of the Patna High Court, each by a single Judge, but as these two decisions are directly at variance to one another, it is impossible to gain much idea from them

My own view is that O 41, R 17 is intended to give the Court power to adjourn a case if it thinks fit It seems distinctly unfair that for default the appellate Court may pass an order without hearing the appellant's advocate or without hearing the appellant, which will entirely preclude him from ever afterwards questioning the findings of fact This being the case and following the Madras ruling, I set aside the order of the learned Additional District Judge as ultra vires and I direct him to restore the appeal to the file and dispose of it according to law As this trouble has arisen through the default of the appellant, I direct that he do pay the costs of respondent in this Court whatever may be the outcome of the appeal and he will also pay the costs of the respondent already awarded to him in the Court of the Additional District Judge When the District Court comes to a fresh finding after hearing both sides, it will pass an order for costs independent of its first order

S L /R K *Order set aside*

(1) A. I. R. 1929 Mad. 13=45 Mad. 882.

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* A I R 1929 Rangoon 12

CHARI, J

Afazuddin—Appellant

v

Howell and *others*—Respondents.

Second Appeal No 47 of 1925, Decided on 23rd June 1928.

*** Civil P C., O. 21, R. 84—Auction-purchaser whose bid is accepted by fall of hammer, can withdraw offer before acceptance by Court without liability of paying deficit on resale.**

An execution sale is not complete until the presiding officer of the Court accepts the bid and declares the bidder to be the purchaser, The highest bid when the hammer falls is merely a conditional bid, which it is open to the Court to accept or not and it must, therefore, equally be open to the purchaser to withdraw his offer before it is accepted by the Court. If he fails to pay the 25 per cent. before Court's acceptance, though after the fall of hammer, he is not liable for difference if the property is resold *A I R.* 1923 *Cal.* 316, *A. I. R.* 1925 *Mad.* 318, and *A I. R* 1923 *Pat* 525, *Foll.* [P 13, C 1, 2]

Tun Aung Gyaw—for Appellant

Jeejeebhoy—for Respondents

Judgment —This case comes before me for disposal on a point raised in my judgment some time ago As the point was one which was raised by me after the argument had closed, I posted the case for further argument which was heard only to-day on account of some of the parties being dead and their legal representatives having to be brought on the record

The point now for consideration is whether a person who has not been declared a purchaser of immovable property in a Court auction sale, but whose bid had been accepted by the fall of the hammer and who fails to deposit the 25 per cent of the amount of his purchase money, can be made liable for the difference in price when the property is sold immediately after

I have already dealt with the facts of the case in my previous judgment and I have drawn attention to the fact that even the bailiff is not quite sure whether the person withdrew his offer before or after the fall of the hammer I thought at first it was necessary to remand the case for a finding whether the defaulting bidder had actually been declared to be the purchaser, but it is unnecessary in view of the evidence of the bailiff In the case to which I refer in my judgment, *Jaibahadur Jha* v *Matukdhari Jha* (1) it was held that an execution sale is not complete until the presiding officer of the Court has accepted the bid and declared the bidder to be the purchaser under O 21, R 84 That rule clearly states that the bidder shall pay the 25 per cent deposit only after such declaration. In the Patna case, it is stated that the presiding officer of the Court to whom an order declaring that a person has purchased the property is submitted for signature should enquire before signing the bid from the persons present in Court whether there is any advance on the highest bid given by the officer who conducted the sale This shows beyond all doubt that the highest bid at the time when the hammer fell was merely a conditional bid, which it was open to the Court to accept or not If it is open to the Court to accept the bid or reject it, it must equally be open to the purchaser to withdraw his offer before it is accepted by the Court

The learned advocate for the respondent wants to draw a distinction between the contract of an ordinary person and a bid at an auction sale I fail to see any distinction whatever and if a bid can be kept hanging by the Court, it can equally be withdrawn by the bidder Two cases reported in unauthorized reports, *Fazil Meah* v *Prosanna Kumar Roy* (2) and *Ratnasami Pillai* v *Sabapathy Pillai* (3) deal with the same point In the first case, the Calcutta High Court held that an execution sale is not concluded when property is knocked down to a bidder, even though he had made the necessary deposit of 25 per cent and the bid had been accepted by the Nazir In the *Madras* case, where the person conducting the sale was a receiver and not a bailiff, the High Court held that it is the acceptance by the Court that constitutes the contract and that therefore the person who asserts that the Court officer had power to bind the Court by acceptance must prove it Under the rules of the Civil Courts Manual, the bailiff is undoubtedly the officer of the Court who is authorized to conduct the sale, but this does not imply any power to accept an offer on behalf of the Court or to make a declaration that a bidder has become a purchaser

I hold, therefore, that it is open to a bidder to withdraw his offer, since his bid is nothing more than an offer, until that offer has been finally accepted by the Court and declaration made that he is the purchaser His liability to make a deposit of 25 per cent of the purchase-money only arises after such a declaration is

(1) A. I. R. 1923 Pat. 525 = 2 Pat. 548.

(2) A I R. 1923 Cal 316

(3) A I. R. 1925 Mad. 318.

made. As he has withdrawn the offer before the declaration, he cannot be held liable for any deficiency of price on a re-sale I therefore allow the appeal and set aside the order of the lower Court directing the appellant to pay the deficiency As the appellant's nephew bought the property, he ought to be satisfied with the property and there will therefore be no order for the costs of the appeal

S L /R K *Appeal allowed*

A. I R 1929 Rangoon 14 (1)

BAGULEY, J

S Ganguli—Accused—Applicant

v

Emperor—Opposite Party

Criminal Revn No 544-B of 1927, Decided on 21st November 1927, from order of Eastern Sub-Divl Mag. Rangoon, D/- 23rd August 1927, in Criminal Summary Trial No 404 of 1927

(a) Motor Vehicles Act, S. 5—Road sufficient for four cars to pass abreast—Two cars going in one direction at 15 miles an hour—Another car coming from opposite direction—Person driving baby car at 25 miles per hour passing the two cars—He is not guilty of rash or negligent driving.

Two cars were going under 15 miles per hour along the road from South to North, and while another car came in the opposite direction from North to South, *G's* baby car passed the two cars going towards the North. *G* was going about 25 miles per hour The road was at the place 40 to 50 feet wide as would give ample room for 4 cars to pass abreast with any amount of room to spare. There was no traffic of any kind on the road at the time except the 4 cars *G* was not shown to be over the wrong side of the road.

Held, that there would be ample room for a very small car like that of *G* to pass without trenching on the right hand side of the road Even if he did go slightly over the middle line the car coming in the opposite direction had 20 feet in which to swing to its left. *G's* driving could not therefore be assumed to be reckless or negligent ; an estimate speed of 25 miles per hour could not be regarded as anything out of the ordinary, on that road. [P 14, C 2]

(b) Criminal P. C., S. 250—Compensation

Where a case is not wilfully false nor is there perversion or exaggeration of evidence, compensation should not be awarded [P 14, C 2]

M. A Rauf—for Applicant

Order.—All that has been proved in this case is that there were 2 cars going along the road from South to North, and while another car came in the opposite direction from North to South, the applicant passed the two cars going towards the North The two cars going North, were going at something under 20 miles per hour, the applicant was going about 25 miles per hour, although his car being a Baby Peugeot, it may have seemed to be unimitiated as going faster The road is wide at the place, 40 to 50 feet, according to P W 2, and that would give ample room for 4 cars to pass abreast with any amount of room to spare There was no traffic of any kind on the road at the time except the 4 cars, in question Whether the applicant was over the wrong side of the road, is not shown Cars going at 15 miles per hour are slow traffic for cars, and they should be well over to their left if they were being driven properly, and there would be ample room for a very small car like that of the applicant to pass without trenching on the right hand side of the road Even if he did go slightly over the middle line, the car coming in the opposite direction had 20 ft in which to swing to its left, and it might be expected to do so ; among decent drivers there must always be certain amount of give and take On these facts that have been proved I entirely fail to see where reckless or negligent, driving can be assumed I am unable to feign ignorance of the usual conditions of one of the best known roads in Rangoon, and on that road an estimate speed of 25 miles per hour cannot be regarded as anything out of the ordinary

I set aside the conviction and sentence, and acquit the applicant I do not think that it is a case in which compensation should be awarded There is nothing to show that the case is wilfully false, nor does there seem to have been any perversion or exaggeration of the evidence. I merely do not consider that from the facts as stated by the complainant, and his witness, one is justified in assuming rashness and negligence

R K *Accused acquitted*

A. I R. 1929 Rangoon 14 (2)

MAUNG BA, J.

U Mo Gaung—Applicant

v

U Po Sin—Opposite Party

Criminal Revn No. 214-B of 1928, Decided on 25th July 1928.

(a) Penal Code, Ss. 421 and 424—Magistrate's jurisdiction is not taken away by Presidency Towns Insolvency Act.

The Presidency Towns Insolvency Act does not take away a Magistrate's jurisdiction to

try the insolvent for an offence under Ss. 421 and 424. 95 *Bom.* 63, *Foll.* [P 15 C 1]

(b) Criminal P. C., S. 259—Complainant dying before hearing — Offence non-compoundable and non-cognizable—Magistrate can still proceed with the case.

In a case under Ss 421 and 424, Penal Code, the complainant died before the date of hearing. The Magistrate proceeded with the trial.

Held: that the offences being non-compoundable, though non-cognizable, he was right in the procedure he adopted. [P 15 C 2]

Judgment —Applicant U Mo Gaung was a paddy broker He was adjudicated insolvent by this Court. From the report of the Official Assignee it appears that his house and its site were mortgaged to Messrs Steel Brothers & Company, Limited But he never made over the Insurance Policy although the property was insured The house was destroyed by fire and the agents of the Insurance Company informed the Official Assignee that they had paid the insolvent Rs 4,925 The insolvent concealed the insurance and the receipt of the assured amount not only from Messrs Steel Brothers but also from the Official Assignee and he never made over the amount to the Official Assignee Consequently the Official Assignee in his report expressed an opinion that the insolvent was guilty of an act falling under S 103 (b) (ii), Presidency Towns Insolvency Act or in other words that he had made away with or concealed part of his property

U Po Sin, one of the creditors, applied to the Insolvency Court to direct the insolvent's prosecution The learned Insolvency Judge declined to do so, remarking that such prosecution was not recommended by the Official Assignee and that case was not of importance From that order an appeal was filed The learned Judges of the appellate Bench observed that it could not be doubted that there were grounds which prima facie, would justify an enquiry, but they declined to interfere with the exercise of the Insolvency Judge's discretion.

U Po Sin then filed a direct complaint to the District Magistrate charging U Mo Gaung with offences under Ss 421 and 424, I P C. The complaint was in order, because, nothing contained in the Presidency Towns Insolvency Act takes away a Magistrate's jurisdiction to try the insolvent for an offence under those sections This view was held by a Bench of the Bombay High Court in *Emperor* v *M H. Bhat* (1) The complaint was transferred to the Second Additional Magistrate, Rangoon, for disposal. During the trial the Magistrate was transferred and the accused person claimed a de novo trial The case was accordingly adjourned for three weeks to summon witnesses On the adjourned date the complainant's advocate asked for an adjournment on the ground that he had a case in the High Court The case was adjourned When the case was called on due date the complainant was too ill to attend and the case was adjourned for nearly a month When the case was called again the complainant was reported to have died The accused's advocate asked the Magistrate to discharge his client under S 259, Criminal Procedure Code The Magistrate rejected that application From the order of rejection this application for revision has been filed

Section 259 gives a Magistrate discretion to discharge the accused when in the case instituted upon the complaint the complainant is absent on any day fixed for the hearing of the case and when the offence is one which may lawfully be compounded or when it is a non-cognizable offence The offences under Ss 421 and 424 are non-cognizable but they are non-compoundable The complainant has been examined and cross-examined His evidence can therefore, be used under S 33, Evidence Act The learned Magistrate has exercised his discretion and decided to proceed with the trial I see no sufficient reason to interfere with his exercise of that discretion I therefore dismiss this application for revision

M N /R K *Application dismissed*

(1) [1910] 35 Bom. 63 =7 I. C. 963 =12 Bom. L. R. 750.

A I R 1929 Rangoon 15

CARR, J

Dayalal and *Sons*—Appellants

v

Ko Lon and *another*—Respondents

Second Appeal No 769 of 1927, Decided on 23rd July 1928, from judgment of Dist. Judge, Toungoo, in Civil Appeal No 123 of 1927.

Evidence Act, S 115—A tenant is estopped from denying his landlord's title till he surrenders possession.

A tenant who has been let into possession cannot deny his landlord's title however defec-

tive it may be, so long as he has not openly restored possession by surrender to his landlord. [P 16 C 2]

A person entered into possession of a house as a tenant of *A* and obtained legal title to it by a conveyance from *B* the true owner, and sued for a declaration that his landlord *A* had no title to the property.

Held that he was estopped under S. 116 from denying his landlord's title till he surrenders possession *A I. R.* 1915 *P. C.* 96, *Expl.* and *Foll.* [P 16 C 2]

P. B Sen—for Appellants

So Nyun—for Respondents

Judgment —The house in dispute in this case originally belonged to one U Tun U who appears to have lived in it along with his daughter Ma Dun until he died. It seems that he occupied one floor while the defendant-appellants occupied the other When U Tun U died Ma Dun left the house leaving the defendants in possession of it The defendants claim that they had, in fact, bought the property from U Tun U before his death, but had not obtained from him a registered conveyance The plaintiff came into occupation of the house as tenant of the defendants in 1924 This has been found in the present suit by the Sub-Divisional Court and had previously been found in two suits for rent brought by the defendants against the plaintiff

After he had entered into occupation of the property as tenant of the defendants, the plaintiff obtained a registered conveyance from Maung Tha Dan as the legal representative of Ma Dun, who by then had died The plaintiff has remained in occupation of the property ever since he entered into it as tenant of the defendants He now in this suit prays for a declaration of his ownership, for a declaration that the defendants have no right to the property, and that they have no right to claim rent from him and for an injunction to restrain them from continuing the second suit for rent abovementioned, which has been decided since the institution of the present suit

The question that arises in this appeal is whether the plaintiff is estopped under S 116, Evidence Act, from bringing this suit and denying his landlord's title Both the Courts below have held that he is not estopped In my opinion, both the decisions are wrong and are based on an entire misconception of the law of estoppel The Sub-Divisonal Judge held that if the plaintiff could prove that by his conveyance from Tha Dun he acquired the legal title to the property it would show that his tenancy had determined as from the date of that conveyance He also argued that since the date of that conveyance the plaintiff has been in possession as owner of the property and not as a tenant The District Judge took very much the same view. He referred to the decision of their Lordships of the Privy Council in the case of *Bilas Kunwar* v *Desraj Ranjit Singh* (1) in which their Lordships held that:

> "a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlords."

The District Judge further held that if the plaintiff was able to prove that by his conveyance he had obtained legal title that would show that the tenancy had determined from the date of that conveyance I am unable to follow fully the arguments by which the Judge was able to hold that this present case did not come within the ruling of the Privy Council above quoted In my opinion, it clearly does come within that ruling

The whole case of the plaintiff depends on the allegation that the defendants, his landlords, never had any title at all and that the property belonged to U Tun U and passed on his death to Ma Dun and on her death to the administrator Tha Dun who, in his turn, conveyed it to the plaintiff This clearly amounts to a denial of the defendants' title at the time of the commencement of the tenancy, and it also, in my opinion, clearly comes within the very explicit rule laid down by their Lordships of the Privy Council. Admittedly the plaintiff came into possession as tenant of the defendants and he has never surrendered possession to them. He is, therefore, still a tenant, and, even if his lease itself has actually determined, he is still holding on under that lease and is still in possession of it as a tenant He is very clearly estopped from bringing this suit and will continue to be estopped unless and until he delivers possession of the property to the defendants I allow this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts

M N /R K *Appeal allowed.*

(1) A. I R. 1915 P. C. 96=37 All. 557=42 I. A. 202 (P. C).

A. I R. 1929 Rangoon 17

BAGULEY, J

Maung Kyaing and *another*— Appellants.

v.

P. L. T. A. R Chettyar Firm—Respondents.

Second Appeal No. 722 of 1927, Decided on 11th July 1928, from judgment of Dist. Judge, Pegu, in Civil Appeal No. 123 of 1927.

(a) Civil P. C., S. 100— Second appellate Court is not bound by deductions of lower Courts as to negligence — Whether certain facts constitute negligence is question of law.

Whether certain facts constitute negligence is a deduction from facts and appellate Court, though bound by the findings of fact by the lower Courts is not bound by their deductions from those facts 18 *Cal.* 23 (*P.C*) and 20 *Cal.* 93 (*P.C*), *Rel on.* 48 *Cal* 1 *at* 16, *Ref.* [P 18 C 2]

Negligence cannot be imputed to a subsequent purchaser of a lease, who, if he had made ordinary inquiries that an ordinary prudent man would have made in purchasing the lease, would not have come across anything which would have put him on an enquiry of a prior sale of the lease. [P 19 C 2]

(b) Evidence Act, S. 115—Laches—Length of delay and nature of acts done during the interval are material for estoppel.

Where a prior purchaser of a lease had omitted (i) to get the original lease-deed from his vendor, (ii) to report the purchase of the lease to the Collector as required, (iii) to get his name entered as owner of the lease in the Collector's registers and (iv) to give notice to the subsequent purchasers of the lease of his claim to it as soon as he had reason to believe that the subsequent purchasers were building on the land comprised in the lease, on a title which they might reasonably be expected to regard as good

Held, that the prior purchaser is estopped from asserting his title to the lease as against the subsequent purchasers. [P 19 C 2]

Kya Gaing—for Appellants.

Jeejeebhoy—for Respondents

Judgment.—The facts of this case are fairly simple. One Ma Gun had a thirty-years lease from Government of a certain holding (No. 48). The lease was in the ordinary form, with power of renewal under the Town and Village Lands Act. She sold this lease by a registered deed to the P L. T A R Firm. The firm sold the lease again to Ma Thein Yin, and Ma Thein Yin took the precaution of having the lease transferred to her name in the Collector's office—a precaution which the P L. T A. R. Firm had never taken Subsequently, the P L T A. R. Firm bought the lease back again from Ma Thein Yin The then agent asked her to give them the lease, but she put him off with some excuse and he took no further interest in the matter. The lease was not re-transferred to the P. L. T A. R. Firm, but the puchase from Ma Thein Yin was by a duly registered deed Ma Thein Yin being thus left in possession of the lease, proceeded to come to some arrangement with the Collector. She surrendered the lease to Government and received in place of it eight leases for portions of the original holding 48 The new plots were known as holding A 48 to H-48 Part of the land reverted to Government and was used for roads and, presumably, conservancy lanes The lease of one of these new plots was sold to Maung Kyaing and Ma Mya Khin by a registered sale deed by Ma Thein Yin. They got the new lease of a small plot from Ma Thein Yin and had it transferred to their name in the Collector's records. The P. L T. A R Firm now sue Maung Kyaing and Ma Mya Khin for possession of this holding (No E-48)

Unfortunately, as is so often the case, the whole matter from end to end has been dealt with as though the parties were the absolute owners of the land. The plaint says in para 1: "That plaintiff is the absolute owner of a piece of land," and the defendants in para 4 of their written statement claim that they are the absolute owners of the land As a matter of fact, all the interests that any of these parties had ever had in the land were only those of a lessee from Government on a certain lease The trial Court decreed the claim. The issues which it framed were :

(i) Whether the plaintiff was the owner of the land in suit, (i. e. holding E-48)?

(ii) Whether the defendants made a bona fide purchase of the land from the owner, Ma Thein Yin, without the knowledge of the plaintiff's title? and,

(iii) Whether the plaintiff was estopped from disputing the sale between the defendants and Ma Thein Yin by his own act and conduct?

The answers to the issues were as follows :

The first issue was answered in the affirmative, that the plaintiff was the owner of the land This, of course, was entirely wrong The owner was Government. The plaintiff may have the right of a lessee, but nothing more than that. Issue 2 the trial Judge answered in the negative, holding that the defendants were not bona fide purchasers The reason for this is that he was of opinion that Maung Kyaing made no enquiries about the said

land before buying the lease from her, as Ma Thein Yin was a respectable person; and he held that, because Maung Kyaing failed to make a search in the registration office, he could not be considered a bona fide purchaser. As regards issue 3, the trial Court answered this in the negative, saying:

"There is nothing to show that the plaintiffs by their declaration, act or omission intentionally caused the defendants to believe that Ma Thein Yin was the owner of the said plot. This absence of intention on the plaintiffs' part takes the case out of the law of estoppel * * *."

On appeal by Maung Kyaing and Ma Mya Khin, the learned District Judge came to the same conclusion as the trial Court. In his judgment he discusses the question of whether registration is notice or not, finally quoting their Lordships of the Privy Council in *Tilakhari Lal* v. *Khedan Lal* (1) to the effect that notice cannot in all cases be imputed from the fact that a document can be found in the Register, and, therefore, he says that in the present instance it may be correct to say that the defendants did not have notice of the plaintiffs' purchase. After this, however, he proceeds to argue that, when there are two transferees, the second transferee takes the property subject to the claims of the first transferee; and that, because the first transferee in this case had taken the whole interest of Ma Thein Yin, she had nothing to convey to the defendant-appellants. The question of estoppel, the learned Judge does not appear to have touched upon at all in his judgment.

In second appeal I am asked to hold that the plaintiff-respondents were estopped from claiming the land against the defendant-appellants, who were bona fide purchasers for valuable consideration without notice. A preliminary point was raised that, as negligence was a fact and not a matter of law, this could not be raised in second appeal: vide 48 *Calcutta* p. 1 at p 16, above quoted "* * * the proposition involved is not one of law but of fact, * * *." With this contention, I am unable to agree. It is true that the lower Courts have both come to certain conclusions on facts. I am bound by the facts which they have found, but I am not, in my opinion, bound by the deductions which they have made from those facts.

There is no such thing as "legal negligence," and "negligence" is, I think, nowhere defined. Whether certain facts constitute negligence is a deduction from those facts, and, although I am bound by the findings of fact by the lower appellate Court, I am not bound by its deductions from those facts. On this point I would refer to *Durga Chowdharani* v. *Jewahir Singh* (2) and *Ram Gopal* v. *Shameskhaton* (3). The facts, I have to take from the lower appellate Court. The point for consideration is: Of what transactions had Maung Kyaing notice, actual or constructive, at the time he bought his lease of holding E-48? He certainly had before him the lease issued by the Collector or Ma Thein Yin, because she transferred it to him. He bought the lease on 16th August 1925, the date of the lease issued to Ma Thein Yin was 17th April 1925, four months earlier. The lease was, *on the face of it, good, it had not been transferred to anybody else*. Ma Thein Yin was living on plot No 48, which had been broken up into these eight sub-plots, and I have little doubt that an ordinary man would have bought that lease without enquiry like Maung Kyaing.

A theoretically prudent man, however, perhaps should have taken more care. He would have to go to the registration office to see that Ma Thein Yin had not parted with her interest in this lease. But I am not quite sure that an ordinary man of ordinary prudence would have gone behind the lease issued by the Collector to Ma Thein Yin. Supposing we take a man of more than ordinary caution, he might have looked into the Collector's proceedings. What he could have found there was that this lease was issued to Ma Thein Yin by the Collector in return for the surrender of a lease of a larger piece of land of which the new holding formed part. That lease, though issued to somebody else, had been transferred to Ma Thein Yin's name, and I cannot conceive of any man of ordinary prudence going any further than this. It is argued that the registration office is the place to look, and that without a search in the registration office a man cannot be held to have made the searches which an ordinary man would make. But it must be remembered that these transfers of leases are not

(1) A. I. R. 1921 P. C. 112=48 Cal. 1=47 I.A. 239 (P.C.).

(2) [1890] 18 Cal. 23=17 I. A. 122=5 Sar. 560 (P.C.).

(3) [1892] 20 Cal. 93=19 I. A. 228 (P.C.).

like transfers of ordinary freehold land ; for one thing, the leases themselves issued by the Collector are never registered at all, and, therefore, cannot be found in the registration office.

Another point is that, in accordance with the terms of the lease, all changes have to be reported to the Deputy Commissioner within one calendar month under penalty, and the Collector will only recognize people the transfer to whom has been reported to him ; and, therefore, I hold that any man who satisfied himself of the genuineness of a lease that has been issued in the name of his vendor, or transferred to his vendor by the Collector, and that there has been no dealing with it reported in the registration office from the date of issue up to the date of sale, has done all that any ordinary prudent man could be expected to do. I do not say for a moment that Maung Kyaing did all these things, but had he done so, it is quite clear that he would have found no suggestion that the plaintiff firm had any interest whatsoever in this lease, and, therefore, he can only be held to have notice of what he would have discovered —this is nothing at all.

On the other hand, we have to consider the position of the plaintiff firm The plaintiff firm by the negligence of their agent had undoubtedly put it in the power of Ma Thein Yin to defraud, and she availed herself of the opportunity Had the plaintiff firm's agent insisted on her making over the lease itself, she could not have surrendered it to Government On her saying that she could not find the lease, all that the plaintiff firm had to do was to report the fact that they had bought the interests of Ma Thein Yin to the Collector, and he would no doubt, after enquiry, have entered them as the new lessees They did not do this I note that the original lease, which is on the file of the record, though it has twice been bought by this particular firm, has never been transferred to them at all It is true that it has been laid down that it is not always negligence to fail to secure the title-deeds of land mortgaged to anyone : [vide *Imperial Bank of India* v. *U Rai Gyaw Thu & Co Ltd.* (4), and *A. L.R.M Chettyar Firm* v. *L P R Chettyar Firm* (5)] But it must be remembered that in this case it was the purchaser who failed to get his title-deeds from his vendor and not the mortgagee who failed to get his title-deeds from the mortgagor ; and in a case like this, where this title-deed is a Government lease, I should say that to fail to get the lease itself, and also to fail to report the transfer to the Collector, or to get it entered in the Collector's books, is undoubtedly negligence

My attention has been drawn to Ex. J. This is a certified copy of the sale-deed by Ma Thein Yin to Maung Kyaing of holding E-48 This, the present agent of the firm says, he found when he took over the office from his predecessor It was issued on 4th November 1925, presumably to the firm When this copy came into the possession of the firm, they must be held to have had notice of the transfer of the lease of holding E-48 by Ma Thein Yin to Maung Kyaing, and, therefore, they were aware that Ma Thein Yin was swindling Maung Kyaing and themselves No notice of their claim to this piece of land was given to Maung Kyaing until 17th May 1926, when he was just on the point of finishing the house which he erected on the land In other words, they allowed him to build the house first throughout the whole working season, and then claimed the land It is impossible for a plaintiff who does this sort of thing to ask for any equitable relief I hold, therefore, that the defendant-appellants, had they made ordinary enquiries that an ordinary prudent man would have made in this particular case, would not have come across anything which would have put them on enquiry as regards the plaintiff firm having any interest in this lease.

I hold also that the plaintiff firm is estopped from asserting their title to the lease of holding E-48, because they failed —(i) to get the original lease-deed of holding E-48 from Ma Thein Yin ; (ii) to report the purchase of the lease of holding E-48 from Ma Thein Yin to the Collector ; (iii) to get themselves entered in the Collector's Registers as the owners of that lease ; and, (iv) to give notice to Maung Kyaing of their claim to the land as soon as they had reason to believe that he was building on the land on a title which he might reasonably be expected to regard as good I, therefore, allow the appeal, set aside the decrees of

(4) A.I.R. 1923 P.C. 211=1 Rang. 637=51 Cal. 86=50 I.A. 283 (P.C.).
(5) A.I.R. 1926 Rang. 195=4 Rang. 238.

the lower Courts and dismiss the suit with costs in all Courts.

M N./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 20

DAS AND DOYLE, JJ.

U Po Maung and *others*—Appellants.

v.

U Tun Pe and *others*—Respondents.

Civil Misc. Appeal No 39 of 1928, Decided on 19th June 1928, from order of Dist Judge, Thaton, in Civil Misc No. 56 of 1927.

Civil P. C, S. 92—Scheme — Power to modify or alter a scheme is subject to the conditions under S. 92

Where a scheme has been framed, any modification or alteration of the scheme is in effect a new scheme and power to frame a new scheme is given only subject to the condition laid down in S. 92. [P 20 C 2]

For the managment of the affairs of a "pagoda" trustees were appointed for life under a scheme which the trustees had no power to vary. On the application of the trustees the lower Court changed the tenure to three years and appointed by election new trustees

Held, that the appointment of new trustees was illegal under S. 92 which lays down that in order to vary the terms of an express trust, the proper course is for the Advocate-General or two or more persons with his permission to institute a suit to obtain such variation : *A. I. R.* 1927 *Mad.* 1073 (*F B.*), *Foll*, *A. I R.* 1928 *Rang* 168, *Dist.* [P 20 C 2]

Ba Maw—for Appellants

Thein Maung—for Respondents

Judgment—In Civil Regular No. 169 of 1906 of the District Court of Thaton a scheme was settled for the managment of the affairs of the Kyaiktiyo Pagoda and seven trustees were appointed for life, their tenure of office being otherwise terminable only by resignation, misconduct or prolonged absence R 26 of the scheme gave the trustees power with the permission of the Thaton District Court to frame rules for the guidance of the public provided that they were not contrary to the formulation of the scheme R. 26 clearly gave the trustees power only to frame bye-laws within the purview of the scheme and was not intended to give either themselves or the District Court power on mere application to vary the original scheme

In Civil Misc. Case No. 5 of 1927, the District Court of Thaton on the application of the existing trustees varied the scheme to the extent that the tenure of office of the trustees should be for three years, an election to be held triennially on 1st August it being agreed that the existing trustees should cease to hold office on 1st July 1927. An election was held on 7th August 1927, and the old trustees who stood for election did not secure re-election Disputes as to handing over the trust property led to an order from the High Court that the existing old trustees should hold office until the result of the election was confirmed by the District Court

In Civil Misc. Case No 56 of 1927, the District Court of Thaton, after hearing objections as to the irregularities in the course of the election, confirmed the election of the new trustees Five old trustees have now applied to this Court in appeal urging that the holding of the new election is invalid since the District Court, Thaton, has no power on mere application to vary the original scheme The situation is somewhat piquant since it was on the application of the five old trustees that the original scheme was varied This, however, does not operate as an estoppel against them since, if their contention be correct, the whole of the proceedings in connexion with the variation of the scheme were annulled ab initio.

Proceedings in connexion with the variation of a trust such as the Kyaiktiyo Pagoda Trust are governed by S 92, Civil P C On a plain construction of S 92, it would appear that where it is desired to vary the terms of an express trust the proper course to adopt is for the Advocate-General, or two or more persons with his permission, to institute a suit to obtain such variation But it has been held in the past that, where such a trust has been constituted by suit, subsequent variation of the trust can be made within that suit itself and that no fresh suit should be filed.

In *Veeraraghavachariar* v. *Advocate-General of Madras* (1), the law on the subject has been discussed at great length by a Full Bench of the Madras High Court which, after reviewing exhaustively the case-law on the subject, has laid down the proposition that where a scheme has been framed, any modification o ralteration of the scheme is in effect a new scheme and power to frame is given only subject to the conditions specified in S 92 although there may be cases in which the Court reserves to itself the right to allow

(1) A.I.R. 1927 Mad. 1073=51 Mad 31 (F.B..)

aperson or persons to apply for a relief which will come within S 92, Civil P C.

Our attention has been drawn to *U Ba Pe* v. *U Po Sein* (2), a Bench ruling of the Rangoon High Court which contains the following passage .

" It has been repeatedly held that in suits under S 92 of the Code, which in England would have come before the Courts of Chancery, the Court which framed a scheme has power to vary it "

This judgment was delivered prior to the publication of *Veeraraghavachariar* v. *The Advocate-General of Madras* (1)

The comment quoted is obiter since the point for decision in *U Ba Pe* v *U Po Sein* (2), was :

" that where a Court reserves to itself the right of confirm elections held under a scheme framed by it under the provisions of S 92, Civil P. C., and where application for confirmation it made by parties on the one side in the suit and is opposed by parties on the other side, the order is a decree in the suit itself and is, therefore, appealable as a decree under the Code. "

It will be seen therefore that the point at issue did not come within the purview of S. 92 and that the decision of the Bench was not in conflict with the decision of the Full Bench just quoted We are in complete agreement with the conclusions come at in *Veeraraghavachariar* v. *The Advocate-General of Madras* (1) and would merely add that it seems to us only right that where the presence or consent of the Advocate-General was necessary for the purposes of formulating a trust scheme his presence or consent should equally be necessary for varying it particularly in such a case as the present one where the trust affects the interests of the whole community If it were possible by mere miscellaneous application to vary the trust it would be possible for a small party of local inhabitants to alter the terms of the trust to the detriment of worshippers from remote parts of the province whose interests it would be the duty of the Advocate-General in a regular suit to protect.

We have been asked to hold that the election is valid under the old rules. This we cannot do for two reasons : (1) because the resignation of the old trustees was clearly provisional on the introduction of their proposed scheme and (2) because it cannot be assumed that the electors who would be willing to elect trustees for a term of three years would be equally willing to elect these trustees for life, although the converse proposition might well apply We, therefore, hold that the whole of the proceedings commencing with Civil Misc No. 5 of 1927 are void and that the appellants are still in office as trustees of the pagoda

We may point out in passing that there are two vacancies which should have been filled up under the original scheme which provides for seven trustees. As the present situation has been created entirely by the act of the five appellants they will pay all the costs of the litigation. Advocate's fee in this Court five gold mohurs.

M.N./R.K *Appeal allowed.*

(2) A. I. R. 1928 Rang. 168=6 Rang. 97.

A. I R. 1929 Rangoon 21

DOYLE, J.

U Kyawa Lu and *another*—Applicants.

v

U Shwe So—Respondent

Civil Revn No 83 of 1928, Decided on 26th July 1928

(a) Specific Relief Act, S. 9—Suit under —Order under S. 145, Criminal P. C., is no bar.

An order under S 145, Criminal P. C. is no bar to suit under S. 9, Specific Relief Act, where the dispossession had taken place long before the order confirming the status quo was passed under S. 145, Criminal P. C., 30 *All.* 331, *Foll* [P 21 C 2, P 22 C 1]

(b) Civil P. C., S. 115—Case not deciding a question of jurisdiction—No revision lies.

The High Court has no power of revision in a case which decides a question of law and not a question of jurisdiction. 11 *Cal.* 6.*(P.C.)*, *Foll.* 30 *All* 331, *Ref.* [P 22 C 1]

McDonnel—for Applicants.

N M Cowasjee—for Respondent

Judgment —Shwe So sued U Kyaw Lu and Maung Shwe Hpyu for recovery of possession of land under S 9, Specific Relief Act, alleging that he had been wrongfully dispossessed on 9th May 1927. It was argued that the suit was not maintainable as an order had been passed against Shwe So by the Sub-Disvisional Magistrate, Maubin, under S 145, Criminal P. C. The learned District Judge Maubin, however, decided that the order under S. 145, Criminal P C , was no bar and decreed the suit This Court is asked to revise the order on the ground that the conclusion of the learned District Judge that the order under S. 145 is no bar was erroneous. It is clear from the order of the Sub-Divisional Magistrate, in Criminal Misc. No. 57 of 1927 that dispossession took place long before the order of

the Sub-Divisional Magistrate, which merely confirmed the status quo. Under these circumstances, as pointed out in *Juala* v *Ganga Prasad* (1), the order under S 145 of the Code was no bar

In that case it was furthermore held that as another remedy was open to the applicant interference by way of revision was not called for I would go further and say that the High Court has no power of revision in the present case since the learned District Judge was deciding a point of law and not of jurisdiction in deciding that a suit lay, and the priciples laid down by the Privy Council in *Amir Hassan Khan* v *Sheo Baksh Singh* (2) would apply For the above reasons this application is rejected with costs

M N /R K *Application rejected*

(1) [1908] 30 All. 331=5 A. L. J. 297=(1908) A. W. N 142.

(2) [1885] 11 Cal 6=11 I. A 237 (P C.).

A. I R 1929 Rangoon 22

PRATT, OFFG C J AND CUNLIFFE, J

Chan Pyu—Appellant.

v

Saw Sin and *others*—Respondents.

First Appeal No 87 of 1928, Decided on 4th July 1928, from the judgment of the Original Side in Civil Regular No 13 of 1927.

(a) Burma Laws Act (1898), S. 13 (1)—Buddhist Law means not Buddhist law prevalent in Burma but law applicable to Buddhist parties—Chinaman residing in Burma is not, therefore, debarred from disposing of property by will.

The Dhammathat is not an exclusive lex loci and the expression "Buddhist Law" is not limited to the Buddhist Law prevalent in Burma The expression "Buddhist Law" in S. 13 (1) means the law applicable to the Buddhist parties in the case And although it has been held with regard to the law of marriage, that Buddhist law means Buddhist law prevailing in Burma, and the ruling is binding, yet it cannot be extended to the law of inheritance. A Chinaman domiciled in Burma, therefore, can dispose of his property by will, although such disposition is contrary to Burmese Buddhist Law, because it is the Chinese customary law which governs the succession to the estate of a Chinaman domiciled in Burma : (1881) *L. B. R.* 135 , 2 *L. B. R.* 95 , 10 *L. B. R.* 159 ; *A. I. R.* 1923 *Rang.* 180 , *A I. R* 1924 *Rang.* 219 and *A. I. R* 1926 *Rang* 172, *Appr; Rutledge C. J, in A. I. R.* 1927 *Rang* 265, *Doubted.* [P 23 C 2, P 24 C 1, 2 , P 25 C 1]

(b) Buddhist Law (Chinese)—Chinese domiciled in Burma have custom whereby they can dispose of property by will—They also have customary rules of inheritance which are in conflict with Burmese Buddhist law—These customs ought to govern Chinese Buddhists in Burma.

A custom having the force of law is prevalent among Chinamen in Burma whereby they dispose of their property by will—a custom which is opposed to the provisions of the Burmese Buddhist Law They also have customary rules of inheritance which are in conflict with those to be found in the Burmese Buddhists. It is these customs which should govern Chinese Buddhists in Burma *A. I. R.* 1925 *Rang.* 29 ; 24 *Mad.* 650 , *Mr. Anwaruddin's* case, (1917) 1 *K. B.* 649 , *Chetti* v. *Chetti*, (1909) *P. D.* 87 and *A. I. R.* 1915 *P. C.* 86, *Rel. on.* [P 25 C 1]

(c) Buddhist Law (Burmese) — Keittima adoption—Adoptive father having already natural son—Adoptee (plaintiff) not treated as natural children were treated—Plaintiff described as son in adoptive father's will but not given equal share with natural sons—Father giving plaintiff power-of - attorney describing him as son—Power - of-attorney less extensive than one given to natural son—Plaintiff described as son in inscription on tablet in ordination hall built by adoptive father and in tombstone of adoptive parents—Natural son married to plaintiff's neice which would be impossible if they were brothers—Plaintiff had not status of Keittima son but was merely fondling—Description as son in inscription and tombstone did not prove his right to inherit.

Neither ceremony nor written document is necessary to constitute a keittima adoption , and fact of adoption can be inferred from a course of conduct which is inconsistent with any other supposition, but there must be proof of the publicity given to the relationship.

The alleged adoptive father had already an eldest son before he adopted plaintiff. Plaintiff received no proper education, did dot receive the same amount of pocket money or kind of clothes, and he slept in the bedroom of the clerks. He was never treated as an equal with the natural children. He was, however, described as son in the power-of - attorney which the adoptive father gave him as also in his will But the power-of-attorney was less extensive than the power given to the natural son and he received a very minor share in the will. The natural son was married to the neice by marriage of plaintiff which would not be possible if the plaintiff and that son were regarded as brothers. He was described as "son ko Pyu" in the inscription in a tablet in a Them or ordination hall built by the adoptive father ; and on the tombstone of his adoptive parents he was described as son.

Held that under these circumstances plaintiff could not be said to have proved that he was adopted by the adoptive father with the intention that he should be an heir to his estate and that he had the status of a Keittima son. Description as son in the inscription and on tombstone did not prove his right to inherit. He was, therefore, only a fondling and no better. [P 27 C 2]

Kyaw Din—for Appellant.

Leach—for Respondents.

Pratt, Offg. C. J.—Plaintiff Chan Pyu alias Chan Kyin Hlyan, sued, on the al-

legation that he was the "keittima" adopted son of Chan Ma Phee deceased, for a declaration that the will of Chan Ma Phee was invalid, for administration of the estate, and for a one-fifth share therein. Chan Ma Phee was a Chinaman from Amoy, who settled down in Burma at the age of 16 or 17. He married a Burmese Buddhist wife by name Ma E Mya. He left a will at his decease in which he bequeathed to plaintiff and his children after him the income of certain property. Plaintiff's case was that Chan Ma Phee being a Buddhist the Burmese Buddhist law was applicable to him and he (i. e. Chan Ma Phee) could not make a will.

As "keittima" adopted son plaintiff claimed under the Burmese Buddhist law a right to succeed on an equality with the natural sons. The defence was that although Chan Ma Phee was a Chinese Buddhist he was governed by Chinese customary law and had the right to make a will. It was denied that plaintiff was adopted with any right of inheritance. The two main points for decision therefore were, whether the deceased was governed by Chinese customary law, and if not, whether it was proved that plaintiff was his "keittima" adopted son under the Burmese Buddhist law. It is not disputed that, if it is held that the succession to Chan Ma Phee's estate is governed by Chinese customary law, plaintiff's case falls to the ground.

The learned Judge on the original side framed as first issue:

"what law governs the succession to Chan Ma Phee's estate"

but after discussing the authorities on the point, came to no decision on this issue and held that on the assumption that Burmese Buddhist law was applicable plaintiff had failed to prove that the deceased adopted him as his "keittima" son, and had therefore, no claim to inherit. The suit was accordingly dismissed. To my mind under the circumstances the more satisfactory course is to decide first what law applies to the succession to the deceased's estate. It has been the almost invariable practice for the Courts of this province to apply the Chinese customary law, so far as it was known, to the succession to the estate of Chinese resident in Burma. The right of the Chinese to make wills has also been recognized to which fact the insertion in the Burma Courts Manual, and before that in the Lower Burma Courts Manual and the Upper Burma Courts Manual, of an appendix on Chinese wills is eloquent testimony.

It is, however, contended on behalf of plaintiff that in the rule laid down in S. 13 (1), Burma Laws Act (1898) that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, the Buddhist law shall form the rule of decision in cases where the parties are Buddhists, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law, the words "Buddhist law" must be interpreted to mean the Buddhist law prevailing in Burma.

In *Hong Ku* v *Ma Thin* (1), it was held by the Special Court of Lower Burma that the Buddhist law as administered in Burma is not usually applicable to Chinese residents. In an exceedingly able and erudite judgment Jardine, J., discussed the construction of S. 4, Burma Courts Act (corresponding to S. 13 of the present Laws Act) where the words used are also:

"the Buddhist law in cases where the parties are Buddhists,"

and observed:

"I know of no authority for the proposition that the Dhammathat or even the general body of Buddhist law is an exclusive lex loci. Under S.4, Courts Act it becomes one of several leges fori."

He also pointed out that in S. 4 of the Courts Act the word Buddhist is not limited by such words as Burmese, religious or written. Towards the end of the judgment he further remarked:

"questions of a similar kind are also liable to arise wherever Chinese communities are settled, and the Chinamen are found everywhere, especially in the towns."

In the judgment reference was also made to the received opinion of the Judges of the Supreme Court at Hongkong that a Chinaman can make a will, subject to the vague control of the family or clan. Jardine, J.'s Judgment in *Hong Ku's* case (1) was discussed in the Bench ruling of the Lower Burma Chief Court in *Fone Lan* v *Ma Gyee* (2) by Fox, J., who held that in S. 13, Burma Laws Act the term Buddhist law must be read as meaning the law of succession, marriage etc., applicable to the Buddhist parties to

(1) [1872-92] L.B. R. 135.
(2) [1903] 2 L. B. R. 95.

the case, and that the law of succession applicable to a Chinese Buddhist was customary law wholly unconnected with the Buddhist faith.

This ruling was followed in *Maung Kwai* v *Yeo Choo Yone* (3), where a Bench of the Lower Burma Chief Court held that the Chinese customary law is the law of succession applicable to Chinese Buddhists and contemplates the disposition of property by will. In *Maung Po Maung* v. *Ma Pyit Ya* (4) where both the parties were Chinese, it was held by a Bench of this Court, after discussing the authorities at length that the law of inheritance applicable is the Chinese customary law. This was applied to the estate of a Chinese Buddhist woman who had taken a Burman for her second husband In *Ma Sein* v *Ma Pan Nyun* (5), the Bench went still further and held that, where a Burmese woman married to a Chinese Buddhist attached herself to the Chinese community and adopted her husband's religion, succession to her estate was to be governed by Chinese Buddhist law that is to say Chinese customary law.

In *Man Han* v. *R M. A L Firm* (6) Chari, J , doubted whether Chinese customary law would apply to the property acquired by the wife by her personal exertions.

Recently, however, in *Ma Yin Mya* v *Tan Yauk Pu* (7), it was held by a Full Bench of this Court (1) that the Burmese Buddhist law regarding marriage is prima facie applicable to Chinese Buddhists as the lex loci contractus (2), that to escape from the application of Burmese Buddhist law regarding marriage a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma and that that custom is opposed to the provisions of Burmese Buddhist law applicable to the case ; and (3) that in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese Buddhist woman, he must show that the application of the custom having the force of law will not work injustice to the Burmese Buddhist woman.

It has been argued before us with great plausibility that the effect of this ruling is that the Burmese Buddhist law will extend to the case of the inheritance to the estate of a Chinese Buddhist resident in Burma. In the course of his judgment in *Ma Yin Man's* case (7) the learned Chief Justice observes .

" the phrase in S. 13 (1), Burma Laws Act is "the Buddhist law where the parties are Buddhists" and not the Burmese Buddhist law. We know that there are Chinese, Tibetan, Sinhalese and Chittagonian Buddhists. The only Buddhist law, however, in my opinion of which the Courts in this province have ever taken cognisance is Burmese Buddhist law. And for a foreign Buddhist to escape from the application of Burmese Buddhist law he must show that he is subject to a custom having the force of law in this country and that that custom is opposed to the provision of Burmese Buddhist law applicable to the case."

It is clear from this passage that the learned Chief Justice's view was that the expression Buddhist law in S 13, Burma Laws Act means the Buddhist law prevailing in Burma His answer to the reference, in which the other Judges concurred, however, was confined strictly to the Buddhist law of marriage, where the important point is the lex loci contractus. There is therefore to my mind no obligation to extend the ruling regarding the law of marriage to the law of inheritance.

The view of the Chief Justice regarding the interpretation of the terms Buddhist Law in S. 13 (1) must be regarded as an expression of his personal opinion, and as such is entitled to great weight, but it was not necessary (to decide the exact connotation of S. 13) in order to answer the question referred. The expression of opinion on this point cannot be taken as of the Bench as a whole, and I do not therefore consider we are bound by it. Personally I incline to the view of Jardine, J., already referred to that there is no authority for the proposition that the Dhammathat is an exclusive lex loci and that the expression Buddhist law is not limited to the Buddhist law prevalent in Burma.

I agree with Fox, J.'s interpretation in *Fone Lan's* case (2) that Buddhist law means the law applicable to the Buddhist parties in the case. I notice that S. 1 (3), Burma Laws Act, lays down that, save in so far as it applies expressly or by necessary implication to particular territory only, it extends to the whole of British India. It would seem a legitimate inference that in S. 13 (a) the words Buddhist law extend at least to the Buddhist law prevailing in parts of India outside

(3) [1919] 10 L. B. R. 159=57 I. C. 900=13 Bur. L. T. 18.
(4) A. I. R. 1923 Rang. 180=1 Rang. 161.
(5) A. I. R. 1924 Rang. 219=2 Rang. 94.
(6) A. I. R. 1926 Rang. 172=4 Rang. 110.
(7) A. I. R. 1927 Rang. 265=5 Rang. 406 (F.B.).

Burma, in the same way that the section comprehends the different schools of Hindu and Mahomedan law in India. I would also observe that strictly speaking the expression Burmese Buddhist law is to my mind a misnomer since it connotes the customary law of Burmese Buddhists, which is of Hindu origin, although it is true that the Vinaya is inter alia a repository of Buddhist ecclesiastical law. It is my considered opinion that it must be regarded as settled law that ordinarily Chinese customary law governs the succession to the estate of a Chinaman domiciled in Burma. If it be held that the words " Buddhist law " in S. 13 mean " Burmese Buddhist law," then I have no hesitation in holding that a custom having the force of law is prevalent amongst Chinamen in Burma whereby they dispose of their property by will, a custom, which is opposed to the provisions of the Burmese Buddhist law applicable.

The evidence of Mr. Taw Sein Ko and the Honourable Mr. Ah Yain is conclusive. They are the two authorities on the subject in the country and to reinforce them we have the consistent practice of the Courts in recognising Chinese wills. It must also be regarded as established that the Chinese Buddhists in Burma have customary rules of inheritance in conflict with those to be found in the Burmese Buddhist law. With reference to the right of the Chinese Buddhists to dispose of their property by will the Privy Council case of *Maung Dwe* v *Khoo Haung Shein* (8) is interesting.

This was a case where the husband disposed of his estate by will, and a suit was brought to determine the succession to his wife's estate. The Burmese Buddhist law was applied by consent, although the deceased was the widow of a Chinese Buddhist. Their Lordships at the end of their judgment commented on the peculiar feature that though the whole theory of succession depended upon the strict Buddhist view that intestacy is compulsory, this had so far been impugned upon that a Chinese Buddhist was allowed to test. Assuming, argumenti causa, as the learned trial Judge has done that the Burmese Buddhist law applies, it has to be considered whether plaintiff has proved that he was the keittima adopted son of Chan Ma Phee.

(8) A. I. R. 1925 P.C. 29=3 Rang. 29=52 I.A. 73 (P.C.).

The law on the subject has been very clearly and definitely explained in a succession of judgments of their Lordships of the Privy Council. In *Ma Me Gale* v *Ma Sa Yi* (9), it was laid down that neither ceremony nor written document is necessary to constitute a keittima adoption. There must be, on the one hand the consent of the natural parents, and on the other the taking of the child by the adoptive parent with the intention and on the footing that the child shall inherit. In *Ma Ywet* v. *Ma Me* (10), it was further ruled that not only is a formal ceremony not necessary to constitute adoption, but the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct with is inconsistent with any other supposition.

But in either case publicity must be given to the relationship, and the amount of proof of publicity required is greater in cases of the latter category, where no distinct occasion can be appealed to. In the later case of *Ma Than* v. *Ma Pwa Thit* (11) (also dealing with the question of keittima adoption) the facts that the claimant had lived continuously in the house of the deceased from her babyhood for 12 or 13 years, that the deceased was entered on the school register as her parent and had paid the school fees, that the claimant had been given jewellery by the deceased to wear and that her clothes were also paid for by him were held to be strong evidence of the notoriety and publicity of the adoption

In the present case the main point to be established is that the plaintiff was adopted by Chan Ma Phee with the intention that he should be an heir to his estate It is not disputed that plaintiff was brought up from the time he was about seven years of age in Chan Ma Phee's household ; but it is alleged by the defence that there was no intention that he should inherit and that he was merely what the Chinese term a fondling adopted son with no rights of inheritance, corresponding to what the Burmese Buddhists call an apathitta or casually adopted son, who can only inherit in the ab-

(9) [1904] 32 Cal. 219=4 L. B. R. 172=8 Sar. 743 (P.C.).

(10) [1907] 36 Cal. 978=3 I. C. 797=36 I. A. 192 (P.C.).

(11) A. I. R. 1923 P. C. 156=1 Rang. 451 (P.C.).

sence of natural or keittima adopted children (After dealing with oral evidence the judgment proceeded) It is patent that there was no formal adoption of plaintiff. It has therefore to be considered whether the fact of adoption with rights to inherit can be inferred from the treatment of Chan Pyu by Chan Ma Phee and from the position he occupied in his household. The strongest evidence to prove that plaintiff was adopted as a keittima son is on the face of it the power-of-attorney, Ex A, given to him by Chan Ma Phee in which plaintiff is described as his son, an inscription on a tablet in a Thein or ordination hall built by Chan Ma Phee and Me E Mya, in which he is described as "son Ko Pyu" and the tombstones of his adoptive parents on which he is described as son. His mention as adopted son in the will is also relied on, although, as I will point out later, the terms of the will, are in my opinion against his claim.

Even if the Burmese Buddhist Law is to be applied, it is impossible under the circumstances to rule out from consideration the fact that the deceased Chan Me Phee was in fact Chinese, observed Chinese customs, and ceremonies, and was a Taoist, a Confucian, and an ancestor worshipper, as well as a Buddhist As regards the power-of-attorney, it is to be noted that the natural son Chan Chor Lye was given a much wider power-of-attorney, and that plaintiff never was manager of Chan Ma Phee's business

There is evidence of experts in Chinese custom, that the Chinese are fond of euphemism, and that a fondling son might well be described as a son in a power-of-attorney The same remarks would apply to the inscription in the "Thein," but this is of less importance as it was kept under lock and key, and there is no evidence by whom it was erected It may be observed that it is unlikely that Chan Ma Phee would apply the expression 'elder brother' "Ko" to an adopted son and that the use of the word makes it more difficult to believe that Chan Ma Phee was responsible for the wording of the inscription

As regards the tombstone inscription, it is clear that they have not the same significance, as they would have, had Chan Ma Phee been a Burmese Buddhist. It should be noted moreover that Ma E Mya herself appears to have adopted Chinese customs, and was given a Chinese funeral with all its ritual and ceremony It is proved that amongst the Chinese the words used in inscription on tombstones are largely conventional. Moreover the names of children of another adopted son, who admittedly had no status to inherit, appear as mourners before the natural grandchildren. The Minister of Forests stated that his own fondling adoptive brother who was also like plaintiff, Burmese, was given first place in the inscription on the tombstone of his father It is obvious therefore that the documents and inscriptions under the circumstances are not conclusive evidence that the plaintiff was the keittima adopted son of Chan Ma Phee.

As regards the will, the fact that plaintiff was only given a minor legacy must in view of the size of the estate, be considered proof positive that though Chan Ma Phee called him his adopted son, he did not in fact place him on the same footing as his sons by birth When the evidence for the defence is examined it must be regarded as proved up to the hilt that plaintiff never had the status of a keittima adopted son. The evidence against his claim is overwhelming It is proved that Chan Ma Phee's eldest son was born before plaintiff was taken into the household There was therefore no need for a son to represent Chan Ma Phee before his ancestors. Had there been such a necessity his own brother's son was available, and by Chinese custom would certainly have been selected, if the intention was to adopt a son with full rights. It is abundantly proved that plaintiff was never treated in the family in the same way as the natural sons He was given no proper education in Burmese and was never taught English. He was not treated so liberally in the matter of pocket money or clothing and he did not sleep in the same bed room with them but with the clerks

The evidence has been dealt with in extenso by the trial Judge and it is not necessary to refer to the witnesses in detail, but I observe that Ma Shwe Mya's own sister deposed that she had never heard that Nga Nga Pyu had been adopted (that is from a Burmese point of view) by Chan Ma Phee. U Thet She, admittedly a man of great influence in the Delta, and of very considerable wealth, a first cousin of both Ma E Mya and plaintiff's

own mother Ma Le and an intimate friend of Chan Ma Phee's family stated definitely that Chan Ma Phee took Nga Pyu out of pity and brought him up and that he had nothing to do with inheritance (at p. 359). He was not treated as his own son (p 356) and deposes, 'did not receive the same education. pocket money, or clothes, and had his meals at a different table' His evidence alone is conclusive U Thein Maung another friend of the family, a retired Extra Assistant Commissioner, gave similar evidence. He points out that the plaintiff never came to visit Chan Ma Phee during his illness. It is not disputed that plaintiff did not visit his adopted father for eight months before his death and thereafter never visited Ma E Mya prior to her death.

Another important point is that plaintiff was married under Chan Ma Phee's auspices to a sister of Lim Chin Tsong, but this did not prevent Chan Ma Phee from subsequently marrying his own son to Chin Tsong's daughter, which he would never had done had he regarded plaintiff as on the same footing of his own sons, for he would have been marrying one son to the niece by marriage of another. It is clear from the evidence of Khoo Sein Kho (p 467, and Taw Sein Kho (p 119, 420) It is also significant that at the funeral of both parents, the golden flag was carried by Chan Chor Lye and not by plaintiff as he alleged It is unnecessary to discuss the evidence further I agree with the trial Judge that it is not proved that plaintiff was adopted by Chan Ma Phee with the intention that he should be an heir to his estate and had not the status of a keittima son I would dismiss the appeal with costs

Cunliffe, J —I am of the same opinion, and have nothing to add on the facts, in deference, however, to the arguments addressed to us by counsel, I desire to state my opinion on the law arising

Section 13, Burma Laws Act, is in the following terms :

"13. (1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution.

(a) the Buddhist law in cases where the parties are Buddhists,

(b) the Mahomedan law in cases where the parties are Mahomedans ; and

(c) the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S (1) or sub-S (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

(4) This section does not extend to the Shan States."

In the Full Bench case of *In re Ma Yin Mya* v. *Tan Yauk Pu* (7), the meaning of sub-S (1) above was closely considered. *Ma Yin Mya's* case was one in which a Burmese Buddhist woman had married a Chinese Buddhist resident in Burma The general conclusion arrived at by the learned Chief Justice, who delivered the leading judgment, with which the other members of the Court agreed, was that the expression

"the Buddhist law in cases where the parties are Buddhists"

means, so far as Burma is concerned, the Burmese Buddhist law in cases concerning any adherents to the Buddhist religion irrespective of whether they are Burmese Buddhists or not I am exceedingly doubtful (and I only say so with great respect) whether had I been sitting on the Full Bench I should have been able to agree to this interpretation It appears to me firstly that such a reading introduces by implication into the statute an adjective qualifying the words "Buddhist law," and, secondly, having introduced this adjective the qualification is not again applied to the second use of the term "Buddhists". I incline to the view that once the term "Burmese" is introduced, the interpretation should rather read

"the Burmese Buddhist law in cases where the parties are Burmese Buddhists."

The question whether the qualification should have been introduced at all may perhaps be tested by the application of some adjective to the two other provisions in the section dealing with the Mahomedan and the Hindu law Would it be possible, for example, to qualify the expressions "Mahomedan law" and Hindu law in some special way and direct that this special law in some particular province in India should apply to all Mahomedans and to all Hindus ? It may here

he noted that the preamble to the Burma Laws Act provides that it is an act applicable to the whole of British India unless there is a direct statement to the contrary in any part of it There is a further difficulty also. Maung Ba, J., who is especiallly fitted to speak on such a subject [he in fact made the Reference to Full Bench in *Ma Yin Mya's* case (7)] appears to be exceedingly doubtful whether the term " Burmese Buddhist law" is an accurate one. In his concurring judgment, he describes it as a misnomer. It certainly seems to be so, if one attempts to put Burmese Buddhist law (so-called) in the same category as Hindu or Mahomedan law. Although there must be thousands of Buddhists in India proper, none of the corresponding statutes applying to the Indian High Courts or the Government of India Act, 1915, mention Buddhist law. In my opinion, the more correct term to be substituted would be the Burmese Common law, for as Maung Ba, J., points out, Buddhism has laid down no law applicable to secular matters. However, though I differ from the interpretation of the learned Chief Justice for the reasons adduced, the Courts of this country are in my opinion bound by his reading of sub-S. (1).

Ma Yin Mya's case (7), however, was one of marriage and to look into the judgment further, we find that on the lines of the rule followed in *Simonin* v. *Mallace* (12) and *Sottomayor* v. *De Barros* (13), the lex loci contractus was held to govern the formal requisites of the marriage. Further, reliance was placed upon the two well-known English decisions of *Chetti* v. *Chetti* (14) and *Mir Anwaruddin's* case (15). These four cases are instances of a resistance on the part of the English Courts to the introduction, or, rather I should say the recognition, of a theory put forward by text-book writers and certain international jurists. The theory amounts to this that personal law governs personal relations and questions involving family transactions have mostly been governed by personal law and not by the local law of the country in which one or other of the parties is residing, or where the transactions actually took place. The reason underlying these efforts on the part of the English Courts is to prevent on equitable principles, in cases of marriage, hardship or injustice being experienced by English women who have ignorantly married husbands who are foreigners in a legal sense. And by " ignorantly", I mean without a full knowledge of their husbands' family customs, personal law or religious disabilities. The learned Chief Justice has applied this principle in terms to the case of a Burmese woman marrying a native of China, who has settled down in Burma and whose family traditions are widely different from those of the Burmese. He has indeed gone even further and has held that dealing with the second part of S. 13, sub-S. (1) Burma Laws Act, no family custom of a foreigner will be recognized unless it is shown that the application of the custom will not work injustice to the native woman. [This is following a dictum of Lord Gorell's in *Chetti* v. *Chetti* (14)]

I have referred to *Ma Yin Mya's* case (7) at such length because it was the basis of the argument relied on behalf of the appellant to support his case as a native of this country dealing with a native of China. It would not be going too far if I say that we are now invited to extend this ruling in relation to marriage to all questions regarding succession, inheritance, caste or any religious usage or institution. The manner in which the case was put for the appellant may be paraphrased thus :

" I am a Burman. I was adopted by a native of China domiciled in Burma. The law governing my adoption must be the Burmese Buddhist law. In point of fact, my adoptive father went so far as to make a will, in which he did not recognize my adoption as he ought to have done. He put me on a much lower status than a keittima adopted son, as I claim to be. If my adoptive father is governed by Burmese Buddhist Law, he is not entitled in law to make a will at all. There is no such thing as Chinese customary law, but even if there is and it is proved to have the force of law in this county, under the decision in *Ma Yin Mya's* case (7) the application of such a custom on the lines put forward by the respondents will work an injustice to me a Burman."

Bound as we are, therefore, by the Full Bench ruling, as to what Buddhist Law controls Buddhists in Burma, it becomes necessary to test the appellant's arguments from the point of view of customs having the force of law. Have the Chinese Buddhists who were originally

(12) [1860] 29 L. J. Mat. 97=2 Sw. & Tr. 67 =6 Jur. (n.s.) 561=2 L. T. 327.
(13) [1877] 3 P. D. 7.
(14) [1909] P. D. 87.
(15) [1917] 1 K. B. 649.

emigrants into Burma and their descendants, customs of their own in reference to adoption and inheritance? In my opinion having regard to the respondents' evidence there can be no doubt that they do possess distinctive family customs. Their view of adoption is fundamentally at variance with the Burmese Buddhist law. Incidentally it is not derived from Buddhist principles but from Taoism. The Chinese habit of making testamentary disposition of their property is widespread and cannot be seriously disputed. But if this is so, the question then arises—Have these customs the force of law? In the case of *Rama Lakshmi Ammal* v. *Sivanatha Perumal* (16), the Privy Council laid down that the legal recognition of a custom in British India depended upon its antiquity, certainty and uniformity. I have no difficulty in regard to the second and third requirements, but as to the first it is necessary to enquire what amount of antiquity the particular customs of the Chinese Buddhists in Burma have to their credit. It is obviously impossible for a Court of the British Empire to extend its enquiries much beyond its own establishment. Varying terms have been laid down. For example, in Calcutta the year 1773 constitutes the date from which legal memory is reckoned. In the case of *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (17) a Privy Council case, it was held that evidence of unbroken custom for eighty years since the British occupation is sufficient. I am satisfied that having regard to the expert testimony in this case, I am enabled to hold that the length of the prevalence within the province of the customs we are here considering is ample to bring it within the requirements of the term "legal memory."

Moreover a series of legal decisions confirming the customs in dispute is the most cogent and satisfactory evidence that such a custom has the force of law, see the opinions given in *Jianutullah* v. *Romonikant Roy* (18), and *Nala Thambi* v. *Mella Kumara* (19). There are numerous rullings in both Upper and Lower Burma confirming the customs of Chinese settlers. As to the question of hardship to the native Burman, I think adoption and marriage may be clearly distinguished. Some forms of adoption may possibly be contracts between the adoptive parents and the persons handing over the child; but "qua" the child, Burmese adoption is not a contract. It is perhaps difficult to bring adoption within a stereotyped legal category; but it seems to me in law to be a form of declaration of trust. If this view be correct, hardship to the cestui que trust need not be too closely considered.

There remain two further aspects of this appeal to which I desire to refer. The first is that there exists a great scarcity among the Indian High Court Reports of any recognition of customs imported into British India by foreigners. The reported cases of various customs belonging to shifting or peripatetic families and tribes within British India are of course numerous. I have only been able to find one, however, in which a foreigner imported a custom by emigration into India and succeeded in securing the confirmation. This was in the case of *Marlathi Anni* v *Subbaraya Mudaliar* (20), where a Bench held that migration by the widow of a Hindu subject of French India into British India and the acquisition of a British domicile enabled her to inherit her husband's estate under her own imported customary law. The learned Judges followed the dictum contained in para. 45 of Mayne's Hindu law which it may be noted is prima facie in opposition to *Chetti* v *Chetti* (14) and *Mir Anwaruddin's* case (15). In other parts of the British Empire the validity of personal law introduced by Indian emigrants who have acquired a domicile has been recognized in principle. See the case of *Abdurahim Haji Ismail Mithu* v *Halimabai* (21) where members of a sect of Mahomedans known as Memons had migrated to Mombassa and their family customs were adjudicated upon both by the East African Courts and the Privy Council. The Privy Council also in the case of *Bartlett* v *Bartlett* considered the validity of a will of a British Mahomedan subject domiciled in Egypt made contrary to the provisions of Mahomedan law. Their Lordships con-

(16) [1872] 14 M. I. A. 570=I. A Sup. Vol. 1=17 W. R. 552=3 Sar. 108 (P C).
(17) [1901] 23 All. 97=27 I. A 298 = 7 Sar. 724 (P.C.).
(18) [1887] 15 Cal. 239.
(19) [1873] 7 M. H. C. R. 306.
(20) [1901] 24 Mad. 650=11 M. L. J. 307.
(21) A I. R 1915 P. C. 86=43 I. A 35 (P.C.).

strued S. 90, Ottoman Order, as upholding the Mahomedan personal law.

In conclusion after a consideration of many cases in which customary law has been applied, I cannot help observing that most of the disputes as to whether the personal law of their caste or family shall prevail against the general law of the land have taken place between parties of the same domicile or origin, and nationality. It is rare to find persons of a different race in conflict with reference to custom. Had I not been bound by the Full Bench decision in *Ma Yin Mya's* case (7) as to Burmese Buddhist law controlling all Buddhists, I should undoubtedly have held that the peculiar facts of this case brought it within the legal category of sub-S. (2) or (3) or S. 13 the Burma Laws Act. The case on principle has much affinity with the decision in *Ma Yait* v *Maung Chit Maung* (22). This was the well-known Kalai case in which the Privy Council held that the testamentary powers of a Hindu Burman were not governed by either Hindu or Buddhist law, but that they were sui generis and, therefore, within the purview of the Indian Succession Act under the second part of S. 13, Burma Laws Act.

For these reasons and as I share my Lord's view of the facts, I agree that this appeal should be dismissed.

S.N./R.K. *Appeal dismissed.*

(22) A. I. R. 1922 P. C. 197=49 Cal. 310 = 48 I. A. 553 (P.C.).

A. I. R. 1929 Rangoon 31

BAGULEY, J.

Emperor

v

Jan Maistry and *others*—Accused—Non-Applicants

Criminal Revn. No. 372-B of 1928, Decided on 20th July 1928, from the order of 2nd Addl. Magistrate, Yenangyaung, in Criminal Regular Trial No. 10 of 1928

Burma Gambling Act (1899), Ss. 11 and 12—Daing should be punished much more heavily than ordinary gambler.

A comparison of the maximum fines and the maximum sentences of imprisonment under Ss. 11 and 12 clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler. It is the Daing who makes opportunities for other people to commit offences under S. 11 and not vice versa. [P 31 C 1]

Judgment.—The Second Additional Magistrate of Yenangyaung tried nine men under Ss. 11 and 12, Gambling Act. Some he acquitted, some he fined Rs. 10 each under S. 11, and the other two he found guilty under S. 12, Gambling Act, and fined one of them Rs. 15 and the other Rs. 20.

The accused, Maw Pet Khan, whom he fined Rs. 20 at the time of the commission of the offence, was a police-officer, and the Magistrate was of opinion that he had acted as an agent provocateur and that was the reason for punishing him more severely than the others. He, however, went out of his way to make some sweeping statements against the police in general. He says:

"It seems to me that the idea of the second accused is to create crime first and detect it afterwards. This bad practice is mostly adopted by some of the subordinate members of the C. I. D. and the police either to get promotion or to justify their existence"

and in another passage of his judgment he says

"The increase of crime in Burma will not be checked unless and until the subordinates employed in the C. I. D. and the police department realize the fact that it is not paying to create the crime first and detect it afterwards."

The Inspector General of Police takes exception to these two remarks and asks that these may be expunged from the record. With this view I am in entire agreement.

The man Mawpet Khan was a police recruit of only a few months' service and his services have since been dispensed with, as he was not considered likely to turn out an efficient policeman. Because one new and unsatisfactory recruit went wrong in one instance the Magistrate was not justified in making sweeping statements against the Police force in general and the C. I. D. in particular, the more so as Maw Pet Khan was not employed in the C. I. D.

From the first passage I direct that the words from "This bad practice . . . to justify their existence" be expunged and I also direct that the whole of the second passage be expunged.

As the case is now before me, I may as well make a few remarks for the benefit of the Magistrate who tried the case.

In the course of his judgment, there is a page of quotation from a lecture by Mr. Justice Carr to the students at the Provincial Training College. The lecture

was undoubtedly one containing very good advice to Magistrates; but it is quite unnecessary for a Magistrate to quote a page from it in his judgment. Most Magistrates would not have time to make unnecessary quotations in their judgments and there is no necessity for this long extract.

I would also point out that the sentences passed show a failure to grasp the relative seriousness of offences under Ss. 11 and 12 Gambling Act. The moral turpitude of gambling in itself is regarded by most people as small, and the man who commits an offence against S 11, Gambling Act merely by going to a waing and having a flutter is not really committing a crime involving serious moral turpitude The principal portion of his offence is that he is breaking the law of the country The law has been framed in the way that it is because gambling of a certain kind among certain classes of people is apt to lead to more serious crime and that, I gather, is the main, if not the only reason for which it is forbidden by law. On the other hand, the man who commits an offence under S 12, Gambling Act, is a man who is breaking the law of the country not merely for the sake of gaining a passing amusement but with the intention of making money The gambler may win, or he may lose. On the whole, the general body of gamblers lose, because the daing always wins. If there were no daings to run illegal gambling, no one could commit an offence under S. 11, Gambling Act It is the daing who makes opportunities for other people to commit offences under S. 11 and not vice versa.

A reference to the two sections will show that the law regards the offence of the daing as far greater than the offence of the mere gambler. If the maximum fines which can be inflicted are looked at, it will be seen that the daing can be punished five times as heavily as the gambler. If the maximum sentences of imprisonment are looked at, the daing can be punished three times as heavily as the gambler, and this clearly shows that the daing under ordinary circumstances should be punished very much more heavily than the ordinary gambler.

In this case the Magistrate has fined the ordinary gamblers Rs. 10 each, and the ordinary daing Rs. 15. It would be far more reasonable if the daing had been punished four or five times as heavily as the gambler

R K. *Revision allowed.*

A. I R. 1929 Rangoon 31

BAGULEY, J

Maung Chan Nyein and *others*—Appellants

v

Maung Pwe and *another*—Respondents

Special Second Appeal No. 707 of 1927, Decided on 25th June 1928, from judgment of the Dist Judge, Myingyan, in Civil Appeal No 51 of 1927

Easements Act Ss. 17 (c) and 18—Act does not apply to Burma—Right of receiving surface water can be acquired by custom in absence of statutory prohibition.

Courts can recognize an easement as acquirable by custom so long as they are not forbidden to do so by express statute. An easement of receiving surface water can be created by custom in Burma, where the Easements Act is not applicable and the custom is a proper one without which there could be no cultivation in that area where the custom exists. 2 *U. B. R.* 642 and 24 *Cal.* 865, *Dist.* [P 32 C 2]

Maung Ni—for Appellants

Jagannathan—for Respondents.

Judgment—In this case the appellants claim the land in dispute In the first place it seems to have been filed before the Township Court of Taungtha as a suit for an injunction restraining the defendants from entering upon and working the land and directing them to remove the kazins The claim seems to have been then that the plaintiffs owned certain lands which they cultivated and certain lands which they did not cultivate but from which water ran down on to their cultivable land The Township Court dismissed the suit and the plaintiffs appealed to the District Court. The District Court passed an order remanding the case for disposal on certain issues, the plaintiff's ground having been changed from that ownership of the land entered upon by the defendants to the fact that they had the right to receive the water flowing down from that land In fact, they changed their basis from that of ownership of the land occupied by the defendants to that of having an easement to receive water from that land. The case came back to the trial Court and then apparently the whole file was burnt. The

present file has been re-constructed from copies and such like. The issues framed by the District Court when it remanded the suit were.

(1) Has the surface water flowed from the disputed land to the plaintiffs' lands adjoining thereto ?

(2) If so, how long have they enjoyed the right of use of it ?

(3) Are they entitled to continue the right ?

The trial Court proceeded to determine these issues. The learned Judge answered the first issue in the affirmative He answered the second issue by saying that the right has been enjoyed for more than 25 years and he answered issue 3 in the affirmative also The defendants appealed to the District Court and in appeal the learned Additional District Judge took up the position that the mere right to receive surface water not flowing in a stream and not permanently settled in a pool or tank or otherwise could not be acquired by easement He deduced this from S 17 (c), Easements Act He therefore, allowed the appeal and dismissed the suit with costs in both Courts In doing so he overlooked two points The first is that the Easements Act does not apply to Burma; and the second is that he has made a main point the fact that there is no evidence that the water flows in a stream or in a definite channel As a matter of fact, his predecessor had framed no issue on that point and, therefore, it is quite natural that there was no evidence on the point For all we know the water may have flowded in a stream. I notice that one of the witnesses does refer to the blocking of the "water-course"

It is necessary I think to clear away all idea of the Easements Act which does not apply in this country This land is apparently in the dry zone and there is ample evidence to show that it is the custom in this part of the world, where the land appears to be undulating, for only the lower ground to be cultivated and for each piece of lower ground to have a kind of catchment area attached to it. This is referred to it in the evidence as "yegya," in some places, which is translated sometimes as a "water-fall" This custom is admitted by the defendant himself for he says in his evidence in cross-examination that in that place people mostly keep

water-falls, the water resources for the fields The plaintiffs' land enjoyed the water that falls from the land now in dispute and nowhere else."

Further on he says: "We cannot cultivate the place if it is kept as the water resources for the other fields" In other words the defendant himself admits that in this neighbourhood areas of land which are termed "water resources" are recognized and that one cultivator will not encroach upon the water resources of another man's fields It is quite clear that he has done so. In fact, he admitted it himself.

No doubt in the ordinary way a right merely to receive surface water would not be recognised by the Courts as an easement and if the Indian Easements Act applied, the Courts would be prevented from recognizing such a right. But as the Act does not apply in Burma there is nothing to prevent the Courts recognizing an existing custom which is obviously a proper custom and possibly a custom without which there could be no cultivation in this area at all I hold that the Courts can recognise an easement as acquirable by custom so long as they are not forbidden to do so by express statute and here there is no statue preventing it The plaintiffs have had this right for over 25 years One witness deposes to the right as having existed for as long as 40 years, and in that length of time an easement could be acquired

I have had quoted by the respondents the case of *Man Hnin Nyo* v *Maung Kyin Thu* (1). This is a very old ruling by the Judicial Commissioner of Upper Burma in 1892 There was no question in that case of any custom applying to cultivators for the local area and I am unable to follow the learned Judicial Commissioner when he applied the Easements Act, to Burma, the Act not so for having been extended here The other case quoted before me is *Debi Pershad Singh* v *Joynath Singh* (2) This was a case between riparian owners and is not applicable to the present case at all. I therefore set aside the judgment and decree of the first appellate Court and restore those of the Township Court The defendants will pay the costs of the plaintiffs throughout.

M N /R.K. *Decree set aside.*

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(1) [1892-96] 2 U. B R. 642.

(2) [1897] 24 Cal. 865=24 I. A. 60=7 Sar. 209 (P.C.).

A. I. R 1929 Rangoon 33 (1)

DAS AND DOYLE, JJ.

K. V. A. L. Chettyar Firm—Appellant.

v,

M P. Maricar—Respondent

Civil Misc. Appeal No. 37 of 1928, Decided on 27th June 1928, from order of Dist. Judge, Insein, in Civil Execution No 24 of 1926.

Civil P. C., O. 21, R. 90—Auction-purchaser cannot apply to set aside sale under R. 90 but under R. 91 only.

The auction-purchaser's interest comes into effect only after the sale. He is not a person whose interest is affected by the sale within R. 90. The only rule under which he can apply to set aside the sale is O. 21, R. 91. 3 *Pat. L. J.* 516, *Foll. A.I R.* 1927 *Rang.* 301 and *A I. R* 1925 *All.* 459, *Diss. from.* [P 33 C 1, 2]

K. C Bose—for Appellant.

N. N. Burjorjee—for Respondent

Judgment. — The respondent, who was the auction-purchaser, applied for the sale to be set aside on the ground of fraud under O. 21, R 90, Civil P C. The District Court set aside the sale, and the decree-holder has now appealed against that order. It is contended before us that an auction-purchaser is not a person whose interests are affected by the sale under O. 21, R. 90, Civil P. C. It is admitted that if he is not a person whose interests are affected by the sale he cannot apply under that order to set aside the sale.

We have no hesitation in holding that the words "whose interests are affected by the sale" in the abovementioned order mean persons who have some interest in the property at the time of the sale The auction-purchaser's interest only comes into effect after the sale, and it cannot be said that his interests are in any way affected by the sale.

Our attention was drawn to a decision of Brown, J., in the case of *S. N V. R. S. Subramanian Chettyar* v. *N. L M. Chettyar Firm* (1) In that case Brown, J , following a decision of the Allahabad High Court in the case of *Ravinandan Prasad* v *Jagarnath Sahu* (2), held that an auction-purchaser is a person whose interest is affected by the sale, and, there fore, could apply under O 21, R. 90, Civil P. C., to set aside the sale. We must say that we do not agree with this decision of Brown, J. The reasoning of the learned Judges of the Allahabad High Court in the case of *Ravinandan Prasad* v. *Jagarnath Sahu* (2) does not appear to us to be sound. The learned Judges seem to think that the use of the word "interests" instead of "interest" in the rule makes a difference in the meaning of the words in that rule. We must say that we cannot follow this reasoning.

It is quite clear to our mind that the word "interests" mentioned in that rule refers to interest existing at the time of the sale and not to interest created by the sale The only rule under which an auction-purchaser can apply to set aside the sale is O. 21, R. 91, Civil P C., and if the legislature had intended to allow an auction-purchaser to apply under O. 21, R 90, Civil P. C , his name would have been specifically mentioned in that rule

We are fortified in this opinion by a decision of the Patna High Court in the case of *Khetra Mohan Datta* v. *Dilwar* (3). Brown, J , was mistaken in thinking that the *Patna Law Journal* was not an authorized report It was the authorized report of the Patna High Court till the Patna series of the *Indian Law Reports* was started We, therefore, allow this appeal and set aside the order of the District Judge with costs three gold mohurs in both Courts

S L./R.K *Appeal allowed*

(1) A. I. R. 1927 Rang. 301=5 Rang. 516.
(2) A. I. R. 1925 All. 459=47 All. 479.
(3) [1918] 3 Pat. L. J. 516=46 I. C. 614=5 Pat. L. W. 151.

1929 R/5

* A I. R 1929 Rangoon33 (2)

RUTLEDGE, C J. AND BROWN, J

Mahomed Hussein Barocha — Appellant.

v

Ko Maung Gale—Respondent

First Appeal No. 148 of 1928, Decided on 26th November 1928 from an original side order of Rangoon High Court.

*** Civil P. C., O. 6, R. 17—Defendant grossly careless—Amendment should still be allowed unless Court thinks it to be mala fide.**

However gross the carelessness may be on the part of defendant while giving his written statement, its amendment ought to be allowed unless the Court is satisfied that the object of the defendant was mala fide in that he wanted to defeat and delay the plaintiff's claim. [P 34 C 1]

A. B. Banerjee—for Appellant.

Dantra—for Respondent.

Judgment —This is an appeal from the original side of this Court, refusing to allow certain amendment of the written statement, in consequence of which judgment and decree were passed in favour of the plaintiff-respondent

The whole question turns on whether the learned Judge was justified in refusing this amendment. The defendant-appellant sought to amend para 1 of the written statement by striking out the words "and nine" and subsequently denying certain allegations made by the plaintiff in this paragraph of the plaint How an advocate and a verifying defendant could come to admit this paragraph, when in fact they intended to deny it, it is difficult to conceive The learned advocate for the appellants admits that the carelessness is gross and in saying so he is really under-stating the case But, however gross the carelessness, we are of opinion that an amendment ought to be allowed, unless we are satisfied that in fact the defendant's action was mala fide. If it were a case of mala fide with the object of defeating and delying the plaintiff's claim, we consider that it was so risky and dubious as not likely to commend itself to a litigant. In fact it left the plaintiff's claim undefended, and would be likely to be ineffective if looked on as a written statement merely filed for the purpose of gaining time. The learned advocates have admitted in argument that there was a similar suit arising out of the same fire and the consumption of another party's paddy. In that suit a paragraph similar to para. 8 of the plaint was pleaded, and was in fact denied by the present appellants. We have also taken into consideration the letter dated 21st August 1926, which appellant's advocate addressed to the plaintiff.

Taking all these facts into consideration, we are of opinion that the defendant's admission of para 9 was a mistake That being so, the learned Judge ought to have allowed an amendment but only on terms of full and adequate costs being granted to the plaintiff. Leave to amend necessarily involved an adjournment of the case and the costs accordingly must be substantial. All the evidence taken on the original side must not be thrown away, but it is clear that the services of the plaintiff's advocate have been thrown away, and the plaintiff has also been delayed in recovering his claim if in fact his claim in the end turns out to be a valid one.

We are, therefore, prepared to allow the appeal on terms. If the plaintiff pay into Court the sum of Rs. 500 as costs to indemnify the respondent-plaintiff for the loss which he has sustained within 14 days, the appeal will be allowed, and the necessary amendment asked for will be made, and the case will be remitted to the original side for disposal. On the appellants paying the said sum of Rs.500 into Court, the respondent may withdraw the same without security. The order as to stay of execution will continue till the disposal of the suit on the original side, the appellants to be at liberty to apply, on deposit of Rs 500 into Court, for refund of the Court-fee paid in this appeal.

S N /R.K *Appeal allowed.*

A I. R. 1929 Rangoon 34

HEALD, J.

R. Vaz—Appellant

v

Muni Singh—Respondent.

Spl Second Appeal No 393 of 1928, Decided on 2nd January 1929.

Transfer of Property Act, S. 3—In Burma failure to search register warrants imputing notice to transferee of prior mortgage.

In Burma a search of the registration records is particularly necessary and particularly easy, and failure by subsequent purchaser from a mortgagor in possession to make a search is a circumstance which warrants the imputation of notice to him of the previous mortgage : *A. I. R.* 1921 *P C.* 112, *Expl.*

[P 35 C 1]

P. B. Sen—for Appellant

Judgment. — Appellant sued on a mortgage made in his favour by Abdul Gaffur and his wife Ma Tu and joined as defendants a number of persons, including the present respondent who claimed to have purchased various parts of the mortgaged property from the mortgagors.

The date of the conveyance in respondent's favour was 16th June 1919. The lower appellate Court said that because the mortgagors remained in possession of the property, and the respondent bought without notice of his mortgage his purchase was good as against appellant's prior mortgage, and in support of that view the learned Judge cited the decision of their Lordships of the Privy

Council in *Tilakdhari Lal* v. *Khedan Lal* (1)

It seems clear that the learned Judge misunderstood the meaning and extended the scope of that ruling In that case their Lordships were considering the general proposition that registration of deeds is notice of its contents to all the world and the particular proposition that registration of subsequent transfer of property is notice to prior transferees. It is true that their Lordships said that notice cannot in all cases be imputed from the mere fact that a document is to be found on the Indian register of deeds ; but they went on to say that there may be cases in which omission to search the registers would result in notice being obtained and that the circumstances necessary for this purpose may be very slight

In a country like Burma, where nearly every mortgagor, who remains in possession of the mortgaged property executes at least one subsequent outright conveyance of the property in fraud of the mortgage which he has made and where under the procedure prescribed for the registration of deeds relating to lands the particulars of every transfer which is registered are reported to the revenue authorities, and under the procedure prescribed for the maintainence of the Land Revenue registers these particulars are recorded in the revenue registers in accordance with that report a search of the registration records is particularly necessary and particularly easy, and I have no hesitation in holding that in this case respondent's admitted failure to make a search was a circumstance which warranted the imputation of notice to him.

I therefore hold that the respondent must be regarded as having taken his conveyance subject to appellant's mortgage and that the land conveyed to him is subject to that mortgage.

The judgments and decree of the lower Courts in so far as they reject appellant's claim that the land conveyed to respondent is subject to appellant's mortgage are set aside, and the mortgage decree will be amended by adding to the schedule the piece of land known as holding No. 17, plot No. 87/25-26 as shown in the map (Ex. 13) filed at p. 40 of the trial Court's exhibit record.

(1) A. I. R. 1921 P. C. 112=48 Cal. 1 (P. C.).

The lower appellate Court's order for costs is set aside and the respondent will bear appellant's costs in the lower appellate Court and on the uncontested scale in this Court.

R K. *Decree modified.*

A. I R. 1929 Rangoon 35

RUTLEDGE, C. J., AND BROWN, J.

Official Assignee—Appellant

v

Ma Hla Htwe and *others*—Respondents.

First Appeal No 166 of 1928, Decided on 27th November 1928, from judgment of Chari, J in Civil Regular No. 17 of 1928.

(a) Mahomedan Law—Marriage—Burmese Buddhist woman cannot marry a Shia unless converted to Islam.

Unless a Burmese Buddhist woman is converted to the faith of Islam prior to her marriage, no marriage can be contracted between her and a Shia Mussalman [P 37 C 2]

(b) Mahomedan Law—Marriage — Shia—Muta—Period of marriage and dower must be specified.

"Muta" is a very vague and unsatisfactory form of contract for personal relations. There must be definite time during which the relationship is to last and definite sum or thing specified as dower. [P 38 C 1]

Dantra—for Appellant.

Masani for *Administrator-General* — for Respondent 4

Judgment from which the appeal was preferred was as follows :—

Chari, J.—The plaintiff in this case is a brother of one Mahomed Ali Khorasany, a Shiah Mahomedan, who died at Rangoon on 26th January 1924. He claims to be the sole heir of the deceased, as being his brother, and alleges that defendants 2 and 3, young children who are admittedly the children of Mahomed Ali Khorasany, are illegitimate and therefore not entitled to inherit as sons under the Shia Mahomedan Law to the estate of their father. He asks for a declaration that he is the sole heir.

This suit was filed this year, almost four years after the death of Mahomed Ali Khorasany This by itself raises no serious presumption against the plaintiff. In Civil Miscellanous Case No 70 Ma Hla Htwe, who is said to be a Burmese Buddhist, alleging that she was the widow of the deceased Mahomed Ali Khorasany, asked the Court to direct the

Administrator-General to apply for letters of administration to the estate of her husband. She later filed another miscellaneous application to be allowed to sue as a pauper She never pursued this application, which was dismissed for default She is alleged to have written a letter on 5th December 1925 to the Administrator-General of Burma that she and her sons gave up their claims in the estate of Mahomed Ali Khorasany in favour of the plaintiff The letter is not produced by the advocate who appears for the Administrator-General and even if produced would carry no weight whatever, as it was not competent for defendant 1 to give up the claims of her infant children

The question for determination is whether defendants 2 and 3 are legitimate or illegitimate children of Mahomed Ali Khorasany The evidence on the point is extremely meagre It consists only of the statements of the plaintiff himself and a cousin of his, that the deceased was not married to either Ma Hla Htwe or Annie The cousin merely says that the deceased was not married and that he would have known of the marriage if a marriage had taken place This may be true of a marriage taking place with formalities before a kazi or in a mosque. but it is quite possible that the deceased was married in a private way to these women and did not want that fact advertised. The prespmption of law is always in favour of morality and legitimacy and when it is proved that a man and a woman are living together as husband and wife, and legal presumption is in favour of a legal union and against an illegal union. *Sastry Velaider Aronegary* v *Sembecutty Vaigalie* (1) Apart from this presumption, there is sufficient evidence from which I could infer in favour of these innocent children that they were acknowledged by their father, which, under Mahomedan Law will lead to an inference of their legitimacy. Mr. Justice Ameer Ali in his book on Evidence, 8th Edition at p 798 referring to Mahomedan Law says:

"Cohabitation and birth with treatment tantamount to acknowledment is sufficient to prove legitimacy, although mere cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimize the offspring."

(1) [1881] 6 A. C. 364=44 L. T. 895=50 L. J. P.C. 28.

I am glad to note that the plaintiff gave evidence in a very straightforward manner, and admitted that on his deathbed his brother asked him to take care of the children

One Martinez gave evidence He is a Christian and says that Annie who is alleged to have been one of the mistresses of Mahomed Ali Khorasany was his daughter He says that she was not married to Mahomed Ali Khorasany. If by this he means that Mahomed Ali Khorasany was not married in Church or before the Marriage Registrar as would be required by the Indian Christian Marriage Act, he is right, but Annie is a Kitabi with whom a marriage under Mahomedan Law is allowed to a Moslem The presumption, therefore, would be much stronger of her being the legal wife of Mahomed Ali Khorasany I cannot accept or act on the evidence of a witness, the tendency of whose evidence is to put a stigma on his own daughter and bastardise his grandchild. Even he admits that the deceased always admitted that these two children were his own children

In a case of this kind where it is sought to have a declaration the effect of which is to bastardise two innocent children and deprive them of the patrimony of their father, I must have evidence much stronger and more convincing than what has been been adduced by the plaintiff, before I can come to a conclusion adverse to the children I therefore hold that the plaintiff is not the heir to the estate of his brother and the heirs are defendants 2 and 3 who are his sons This may seem to imply that defendant 1 is his widow, but as she a major does not defend the suit, and as she has renounced her claim to the Adminstrator General, it is unnecessary to declare her to be entitled to any portion of the estate of Mahomed Ali Khorasany.

The plaintiff's suit is accordingly dismissed

Judgment.—As the plaintiff-appellant was adjudicated an insolvent last August, and as the Official Assignee in whom the insolvent's estate vested wished to be joined as appellant, and was ready and willing to continue the appeal without any adjournment, we substituted him as appellant and heard the appeal

The plaintiff brought a suit to declare his right as the heir to the estate of his deceased brother, Mahomed Ali Khora-

sany, and according to the plaintiff's evidence, the said deceased cohabited with Ma Hla Htwe, respondent 1, and her neice one Annie and had by them respectively two minor children, respdts. 2 & 3.

The learned Judge on the original side, by means of certain inferences and presumptions has held that these two minor children are the legitimate heirs of the deceased Khorasany. Hence this appeal.

At the trial no appearance was made on behalf of Ma Hla Htwe, or either of the minor children, and the appeal has proceeded ex parte so far as they are concerned.

The Assistant Registrar was appointed guardian ad litem over the two minors inasmuch as their respective mothers did not appear and were not making any claim upon the estate The Assistant Registrar, however, stated to the Court that he had no funds in his hands to enable him to conduct the suit and on reference being made to the Administrator-General who had obtained letters of administration to the estate, it was found that there were no funds in his hands to enable the Assistant Registrar to take an active part in the proceedings Mr Masani on behalf of the Administrator-General, has, however, assisted the Court in urging what he could on behalf of the minor respondents, and asked that the judgment appealed from should not be disturbed.

Certain evidence has been adduced at the trial. The plaintiff has not been shaken in his evidence that his brother had not married either of the women but had maintained them as his mistresses for a certain period up to the time of his death, and that he acknowledged the two minors as being his sons, but not as legitimate sons and had asked the plaintiff to look after them

No doubt, the plaintiff is an interested witness who requires corroboration He calls a cousin of the deceased A. H A Khorasany, who states that the deceased M. A. Khorasany was not married in his lifetime and that he would have known if he had been married to any one. It is not suggested that this witness has any interest He is a relative and a fairly close one who ought to be in a position to say whether his cousin was married or not. We see no reason for rejecting his evidence which, if accepted, negatives the fact that the deceased at any rate could have been married in any public way, or such as his relatives or the people of his community would know of the fact.

Then there is the evidence of Martinez, the father of Annie, the mother of the second minor If the learned trial Judge had discarded his evidence because of his demeanour and the impression which his manner of giving evidence had made upon him, we would naturally have refrained from differing with him on a question in which he was in a far better position to judge than we. But he seems to have rejected this witness' evidence because it affects the status of his daughter and the legitimation of his grand child Neither of these, in our opinion are good grounds for rejecting the evidence. He had been subpoenaed to give evidence, and as such it was his duty to speak the truth, even if this disclosed painful and unpalatable facts The learned Judge may have thought but he has not said that this Phillipino to have given evidence against the interests of his daughter and grandchild must have been tampered with by the plaintiff. There is no evidence, however, of this, and we see no reason why his evidence should be rejected If his evidence be accepted it proves that Ma Hla Htwe is a Burmese Buddhist If that is so then unless she was converted to the faith of Islam prior to the marriage, no marriage could be contracted between her and a Shiah Mussulman

These Courts have frequently to try cases where women claim to be the wives of Mahomedans and where the Courts find in fact that they are in fact not wives; but we have not observed any tendency on the part of actual wives refraining from putting forward their claim to that status. It is true that in the first place Ma Hla Htwe, respondent 1 did make a claim to be the widow of the deceased and applied to be allowed to sue in forma pauperis, but her application was dismissed for want of prosecution and as already mentioned, she has taken no steps at the trial of the present case to establish her status

Annie, the other woman concerned, is admittedly her niece At no stage since the deceased's death has she put forward any claim to be a widow of the deceased. Her father in his evidence does not claim for her a higher status than that of a

mistress. He states that he asked the the deceased to marry his daughter but that the deceased, who had a number of other mistresses, merely asked to wait

The learned advocate for respondent 4 has drawn our attention to a form of temporary marriage "Muta" which is lawful among Shiah Mahomedans and asked us to presume that such a form had taken place between the deceased and these two women. "Muta" is a very vague and unsatisfactory form of contract for personal relations; but even here there must be definite time during which the relationship is to last and a definite sum or thing specified as dower.

There is no evidence nor circumstances in the present case which would justify us in presuming that such a form of temporary marriage had been arranged between the deceased and either of these women. In the case upon which the learned Judge relies, 6 *Appeal Cases* p. 364, there were various circumstances which fully justify the Courts in drawing the presumption of marriage In the present case, so far as we can see there is no evidence whatsoever of even living together as husband and wife On the other hand there is direct evidence that no such status in fact existed and we see no reason to reject this evidence.

The learned advocate for the appellant mentions that Annie had not been made a party to the original suit or to this appeal. This may or may not have been unfortunate, but at this late stage of the proceedings, we do not think that we would be justified in joining her now She is not consequently formally bound by the result of this appeal.

For the reasons already given, we allow this appeal, and declare the plaintiff to be the sole heir to the estate of the deceased Mahomed Ali Khorasany

In the cirumstances of the case we do not consider that any order as to costs is necessary

R K *Appeal allowed*

**A I R 1929 Rangoon 38 Full Bench

RUTLEDGE C. J , BROWN AND CARR, JJ.

Commissioner of Income Tax, Burma—Referee

v.

R. M. P. Chettyar Firm—Assessee.

Civil Ref. No 10 of 1928, Decided on 3rd January 1929.

**** Income Tax Act (1922), S. 22 (4)—Notice under, can be issued even after return is made.**

Even after an 'assessee has made a return of his income under S. 22 (2) assessment can be made under S. 23 (4) for non-compliance with the terms of a notice under S. 22 (4). *A. I. R.* 1928 *Pat.* 529 (*F.B.*), *A.I.R.* 1928 *Cal.* 587 (*S.B.*); *A. I. R.* 1928 *All.* 288, *Foll.* 106 *I. C.* 193=*A. I. R.* 1927 *Pat.* 390, *deemed Overruled.*; *A.I.R.* 1928 *Lah.* 219, *not Foll.*

Government Advocate—for the Referee

Foucar—for the Assessee.

Opinion—This is a reference made by the Commissioner of Income-tax under S 66, Income-tax Act (11 of 1922) the question referred being:

"After an assessee has made a return of his income under S. 22 (2) can the assessment be made under S 23 (4) of the Act for non-compliance with the terms of a notice under S. 22 (4)?"

The essential question raised in the argument before us is whether a notice under S. 22 (4) may or may not be issued by the Income-tax authority after the assessee has made a return of his income as required by a notice under S 22 (2).

The assessee's contention that a notice under S. 22 (4) can be issued only before a return has been made, receives some support from the case of *Brijraj Ranglal* v. *The Commissioner of Income-tax A I.R.* 1927 *Pat* 390 and that of *Kushi Ram Karam Chand* v. *The Commissioner of Income-tax A.I.R.* 1928 *Lah* 219 neither of which appear in the authorized reports. But the first of these decisions has been expressly overruled by a Full Bench of five Judges of the same Court—the High Court of Patna in *Ram Khelawan Ugan Lal* v. *Commissioner of Income-tax* (1) and the same view was taken by the two other Judges of the Court who referred the question to the Full Bench. Thus seven Judges of that Court are of opinion that the decision in *Brij Raj's* case was wrong. The same question has been considered by the High Court of Calcutta *In the matter of Harmukhrai Dulichand* (2) and by the High Court of Allahabad *In the matter of Chandra Sen Jaini* (3) and both of these Courts are in agreement with the decision in *Ram Khelwan's* case. That being so the weight of authority is very strongly against the contention advanced by the assessee. The question has been very fully discussed in the judgments quoted and we agree with the

(1) A. I. R. 1928 Pat. 529=7 Pat. 852 (F. B.).
(2) A. I. R. 1928 Cal. 587 (S. B.).
(3) A. I. R. 1928 All. 288=50 All. 589.

arguments there set out and with the decision arrived at. We consider it unnecessary, therefore, to enter into further discussion of the questiou.

We answer the question referred in the affirmative. The assessee must pay the costs of this reference, advocates fee five gold mohurs.

R K *Reference answered in affirmative.*

A I. R. 1929 Rangoon 39

CARR AND MYA BU, JJ.

U Tha Maung and *others*—Appellants.

v.

U Aung Myat, *Gyaw* and *another*—Respondents

First Appeals Nos 81 and 82 of 1928, Decided on 9th January 1929 from Dist Judge of Pyapon

(a) Deed—Construction—Mortgage or sale—Sale-deed an outright conveyance—Right of redemption expressly refused—Simultaneous agreement to reconvey if certain amount paid regularly as rent for five years—In default of any payment agreement to be void—The two documents constituted sale with right of repurchase and not mortgage.

A conveyed certain land to *B* by deed of sale which was in its terms an outright conveyance and contained a clause expressly renouncing any right of redemption. At the same time *B* executed an agreement referring to the same land, that if *A* would annually pay to *B* certain sum as rent he may repurchase the land at any time within five years by paying the original price. There was also an express provision that default in payment of the rent would render the agreement of the resale void :

Held: that on the terms of the deeds the relation of debtor and creditor did not exist. *B* could not have sued for the recovery of his money. The two deeds purported to be an outright conveyance with a separate agreement to reconvey on certain conditions, and not to be a mortgage. [P 40 C 2]

(b) Evidence Act, S. 114—Executants, men of experience—Strong proof is necessary to show that the deed was signed without being read over.

An ordinary sane person would have the final terms of a written document read over before accepting the deed and, therefore, when the executants are men of considerable experience it would require very strong evidence to convince a Court that the deed was signed without being read over. [P 40 C 1]

Ba Shin—for Appellants.

Ba Han—for Respondents.

Judgment.—These are appeals from decisions of the District Court of Pyapon in cross-suits, which were heard and decided together. In suit No, 44/26 the appellants were the plaintiffs. They were formerly the owners of some 444.95 acres of paddy land, but on 15th August 1925, they conveyed this to the defendants for Rs 25,000 by the deed of sale Ex. 5, which was in its terms an outright conveyance and contained a clause expressly renouncing any right of redemption. At the same time, the defendants executed the agreement Ex. 6 This deed is badly drawn and is lacking in precision, but it is common ground that it refers to the land in suit. According to the terms of this agreement if the plaintiffs annually pay to the defendants 4,000 baskets of paddy as rent, they may repurchase the land at anytime within five years by paying the original price of Rs. 25,000 at the same time as the rent of 4000 baskets of paddy. There was also an express provision that default in payment of the rental paddy should render the agreement to resell void.

The appellants in their suit claimed that these two documents together created a mortgage by conditional sale and prayed for a decree for redemption, adding an alternative prayer that if it were held that the transaction was not a mortgage by conditional sale they should be given a decree for specific performance of the agreement.

In their cross-suit, the respondent claimed a declaration of their ownership of the land and asked for a decree for its possession Both suits were decided in favour of the respondents.

With their plaint, the appellants filed certified copies of Exs 5 and 6, both of which were registered They made certain allegations that the agreement between the parties differed from the terms of the document, but so far as their first plaint goes there was no suggestion that the terms of the document differed from those agreed upon at the time by the parties. Nor when the defendants on their written statement set out the terms of Ex. 6 with considerably more precision than in the deed itself was any objection taken. It was only after some months and during the course of argument on the first three issues that the plaintiff-appellants filed a reply to the written statement and asked leave to file an amended plaint. Leave was granted and a new plaint filed In this it was

alleged that certain terms had been inserted in Ex. 6 which had not been agreed to by them. The .plaint itself did not expressly allege fraud, but this allegation had been made in reply to the written statement.

An additional issue was then framed namely :

" Did the plaintiffs know the contents of the registered agreement at the time it was executed. "

This was recorded in the diary under date 17th May 1927, and not at the usual place in the record It is, however, set out in the judgment.

This issue is quite sufficient to raise the question of fraud, and the contention in para 1 of the memorandum of appeal that the District Court erred in not framing an issue on the question of fraud is without substance.

We think that this issue should first be decided. The District Judge's finding was that the plaintiff did not know the terms of Ex 6 when it was executed With that finding we agree The burden of proving fraud was on the plaintiffs, and that burden was considerably increased by the fact that in their original plaint filed when they must have been fully aware of the terms of the document they made no suggestion that these terms were not those to which they agreed The circumstances distinctly suggest that this allegation of fraud was only made in order to introduce evidence contradicting the terms of the document itself, when it seemed likely during the argument of issue 2, that otherwise such evidence would be rejected as inadmissible (Their Lordships then discussed evidence and proceeded) The real point of the evidence for the plaintiffs on this subject is that the agreement was not read over to the parties before being signed On the other hand there is a considerable amount of evidence to the effect that it was read over There are of course other discrepancies on both sides but we do not think it necessary to go into them in detail. The parties are not children but men of considerable experience and it would require very much stronger evidence than any that has been given to convince us that this agreement was signed without being read over, when the sale-deed was read, and there had been considerable difference of opinion before agreement was reached as to the terms of the agreement for repurhase In such circumstances any ordinary sane person would have the final terms, as written down read over before accepting the deed. And all the circumstances suggest that the plaintiffs were fully aware of the terms so written We find therefore that no fraud has been proved It follows that no extraneous evidence as to the terms can be admitted and that the parties are bound by the terms as contained in the two documents.

The ,next question is whether these two documents together created a mortgage by conditional sale We are clearly of opinion that they did not It is obvious that on their terms the relation of creditor and debtor did not exist. The defendant could not have sued for the recovery of his money The two deeds, are in our opinion, merely what they purport to be that is, an outright conveyance with a separate agreement to reconvey on certain conditions The prayer for redemption cannot therefore be accepted And to succeed on their prayer for specific performance, it is necessary for the plaintiffs to show that the agreement to reconvey is still in force. And to do that they must show that they have carried out the conditions laid down in the agreement itself (The judgment then discussed evidence and proceeded) A considerable amount of evidence was led to show that the land in suit was worth very much more than the amount of the purchase price. We do not consider this evidence of any importance in the case Admittedly there was consideration for the transaction and this evidence could only be relevant to show that the transaction between the parties was something different from that set out in the deeds themselves. Since the plaintiffs cannot be allowed to show this, all this evidence becomes irrelevant whatever view we might be inclined to take it

We dismiss both these appeals with costs

R K. *Appeals dismissed.*

** A. I. R. 1929 Rangoon 41
Full Bench

PRATT, OFFG. C. J., AND CARR, CUNLIFFE, ORMISTON AND DARWOOD, JJ.

P. K. P. V. E. Chidambaram Chettyar and *another*—Applicants.

v.

N. A. Chettyar Firm—Respondents.

Civil Ref. No. 6 of 1928, Decided on 27th August 1928, from Civil Misc. Appeal No. 183 of 1927.

(a) Practice—Precedents—Stare decisis.

The principle of stare decisis has far less applicability to the law of procedure than to that of substantive law. [P 43 C 2]

*** * (b) Letters Patent (Rangoon), Cl. 13—Finding having effect of allowing suit to proceed is not a judgment within Cl. 13 :** *Rang. Civil App. No.* 153 *of* 1924 ; *Rang. Civ. Misc. No.* 82 *of* 1925 and *A. I. R.* 1928 *Rang.* 20, *Overruled.*

If the effect of an adjudication "is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment, otherwise not. [P 43 C 1]

The finding that the parties intended to treat a document on which the suit was filed as an inland and not as a foreign instrument, which had the effect of allowing the suit to proceed, does not amount to a judgment within the meaning of Art. 13 . **Rang. Civ. F. A. 153 of 1924 ; Rang. Civil Misc. No. 82 of 1925 and A. I. R. 1928 Rang. 20, Overruled;** 35 *Mad.* 1; *A. I. R.* 1925 *Rang.* 43 and *A. I. R.* 1922 *Lah.* 380, *Rel. on.* (*Case Law discussed.*) [P 42 C 2]

Hay—for Applicant.

Young—for Respondents.

Order of Reference (*Pratt Offg C. J.* and *Cunliffe, J.*)—Plaintiff sued on a hundi. Objections were raised that the hundi was improperly stamped and could not be sued upon and that there was no cause of action against defendant 3. The learned Judge on the original side discussed the points raised at some length and recorded findings that the intention was to treat the document as an inland instrument, and that there was therefore no force in the arguments about its being improperly stamped, which were based on its being a foreign instrument. The Court also found that the question of the liability of defendant 3 could not be decided till a later stage of the case. An appeal was filed and on the case coming on for hearing the preliminary objection was taken that the order under appeal does not constitute a judgment within the meaning of Art. 13, Letters Patent. The principles on which the question of what constitutes a judgment under Cl. 13 should be determined, were discussed, and clearly laid down by Robinson, C. J., in *Yeo Eng Byan* v. *Beng Seng & Co.* (1) in the following words :

"I agree that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a "judgment," and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a "judgment", nor can a more formal order merely regulating the procedure in the suit or one which is nothing more than a step towards obtaining a final adjudication. Adopting the principle here laid down it is difficult to see how the finding now under appeal can be held to be a "judgment."

The first part of the finding that the document in dispute is an inland instrument and that there is no force in the contention that it is inadequately or improperly stamped practically amounts to a finding that the suit is maintainable and paves the way for the determination of the main question between the parties.

If eventually the suit is decided against defendants they will have the right to challenge this finding on appeal.

The intention of Art. 13 was to allow an appeal in certain cases not allowed by the Civil Procedure Code, where the rights of the parties had been determined, and the absence of a right of appeal might cause an injustice. The position is well put by White, C J., in *Tuljaram Row* v. *M K. R. Alagappa Chettiar* (2) :

"The test seems to me to be not what is the form of the adjudication but what its effect is on the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

This view would rule out the present judgment. A broader view has been taken in the Calcutta cases of *Budhu Lal* v. *ChattuGope* (3) and the well-known case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4), and we are in-

(1) A.I.R. 1925 Rang. 43=2 Rang. 469.
(2) [1910] 35 Mad. 1(7)=21 M.L.J. 1=8 I.C. 340=(1910) M.W.N. 697 (F.B.).
(3) [1916] 44 Cal. 804=25 C.L.J. 193=39 I.C. 465=21 C.W.N. 269.
(4) [1872] 8 Ben. L.R. 433=17 W.R. 364.

clined to think too broad. We prefer Garth, C. J.'s dictum in *Ebrahim* v. *Fuckhrunnissa Begum* (5) that the word "judgment" means a judgment or decree, which decides the case one way or other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point not affecting the merits or result of the entire suit.

It is obviously undesirable that as soon as a preliminary point of law is decided against defendants they should have a right to appeal and hold up the trial of the suit indefinitely. It is easy to conceive a case with many legal points, which would lend itself to a number of preliminary appeals, and consequently continual postponements and delays, if appeals were allowed from every separate finding on preliminary issues

It would be most objectionable to have a case tried and appealed piecemeal in this manner. It should be observed that so far as the latter part of the Judge's order, in which he declines to give a decision on the liability of defendant 3 without further materials, is concerned, it is obviously not a judgment even by Calcutta standards.

The ruling of the Bench in the recent case of *Tar Mahomed* v. *Zulaikha Bai* (6) that an appeal lies under the Letters Patent against the finding of the High Court that it has jurisdiction to hear and decide a suit, appears, however, undoubtedly to be support for the view that the present finding that the suit is maintainable (at least that is the real effect of the finding) is a 'judgment' within the meaning of Art. 13

It is true that the findings are not identical and each case must be considered on its own merits, but under the circumstances we are of opinion that the point should be decided before a Full Bench.

We accordingly refer for the decision of a Full Bench the question whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent.

(5) [1879] 4 Cal. 531=3 C.L.R. 311.
(6) A I.R. 1928 Rang. 20=5 Rang. 782.

Opinion

Ormiston, J.—The question referred for decision is :

"Whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not as a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent."

This involves the question of what is the meaning of the word "judgment" as used in Cl. 13 The reference arises out of an appeal from a Judge of the original side exercising ordinary original jurisdiction. The clause (which, it may be stated, is placed under the heading of "Civil Jurisdiction of the High Court") so far as material, permits an appeal to the High Court from the judgment of one Judge of the High Court. With this article may be compared Cls 37 and 38 (placed under the heading of "Appeals to the Privy Council") Cl 37, so far as material, permits an appeal to the Privy Council from any final judgment, decree or order of the High Court made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction from which an appeal does not lie to the High Court under Cl. 13. The Letters Patent apparently contemplate a Bench of two Judges sitting on the original side Cl. 38 gives jurisdiction to the High Court on the application of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the High Court " in any such proceeding as aforesaid" to grant permission to such party to appeal against the same to the Privy Council. The words " in any such proceeding as aforesaid" must, I think, refer to the proceedings specified in Cl. 37.

It may be suggested that, inasmuch as the expression used in Cl. 38 is " preliminary or interlocutory judgment, decree or order" whereas in Cl 13 the word "judgment" is used, His Majesty in Cl. 13 must have intended to have allowed an appeal to the High Court only from a final judgment. I am of the opinion that this is not the case, and that Cl. 38 must be read in connexion with

Cl. 37, the expression " preliminary or interlocutory judgment, decree or order" being used in contradistinction to the expression " final judgment, decree or order" employed in Cl. 37. The Letters Patent themselves, treated as a whole, therefore, give little assistance in construing the word " judgment" as used in Cl. 13.

It is apparent from the exceptions made by Cl. 13 to the general right of appeal thereby conferred, that the word " judgment" is intended to cover an order as well as a decree Three criteria have been suggested as means for determining whether or not an order is appealable within the meaning of the Article The first is that adopted by the Madras High Court in 1868, where a judgment is stated to have the meaning of

"any decision or determination affecting the rights or the interest of any suitor or applicant."

The second is that adopted by the Calcutta High Court in 1872, and which has on very many occasions been described as classical According to this view, "judgment" means

" a decision which affects the merits of the question between the parties by determining some right or liability"

and it is immaterial whether it is final, or merely preliminary or interlocutory. It is this view which Mr. Hay presses on us The third criterion, which is that suggested by Mr. Young, and which may be described in contradistinction to the others as the modern view, being that laid down by the Chief Justice of the Madras High Court in 1910; and adopted by the late Chief Justice of this Court in 1924 According to this view, the test is whether or not the effect of the adjudication

" is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding";

if it has this effect the adjudication is a judgment ; otherwise not.

As is pointed out in the order of reference, it is undesirable that, as soon as a preliminary point of law is decided against a defendant, he should be at liberty to appeal and to hold up a case indefinitely, and in a suit with many legal points there might be many preliminary appeals. Against this view it is urged that the necessity of paying heavy Court-fees might act as a deterrent, although there would be no such necessity in High Courts to which the Court-fees Act is not applicable. It is further urged that the mere fact that an appeal is filed would not of itself prevent the Judge on the original side from going on with the case, although the tendency would undoubtedly be for him to postpone the hearing and thus save himself, possibly, a large amount of useless labour in taking evidence and delivering a judgment on the facts which might be rendered nugatory by the success of the appeal on the legal points. Such a system of preliminary appeals on law might indeed have its conveniences if it were practicable, as it seems to be in England, to obtain a decision of the appellate side within a few days of the delivery of the order on the original side. There can be no question, however, to my mind, but that the balance of convenience preponderates in favour of a narrower construction. While the inconvenience to which a particular construction of the word " judgment" may lead is no reason for not adopting it, if on its plain meaning it must be so construed, yet if the interpretation is doubtful, the circumstance is to be taken into account, for it is a legitimate assumption that His Majesty must be taken to have meant that the operation of the Letters Patent should tend to convenience rather than to inconvenience.

A large number of authorities of this and other High Courts have been cited to us, and these authorities I propose, as briefly as possible to review, taking them Court by Court and in chronological order The earlier view of the Madras High Court has not found favour and the view which to a large extent, to outward appearance, holds the field is that enunciated by the Calcutta High Court in 1872 It may be urged that it is undesirable to disturb a long current of judicial authority, but in my opinion, the principle of stare decisis has far less applicability to the law of procedure than to that of substantive law, and I think, when the authorities are examined, they will be found to be far less unanimously in favour of the principle contended for by Mr. Hay than, at the outset, we were led to suppose.

The decision to which I have just referred is that of *The Justices of the*

Peace for Calcutta v. *The Oriental Gas Co. Ltd.* (4). At p. 452 of the Report, Couch, C. J., in delivering the judgment of the Court on a preliminary objection that no appeal lay under Cl. 15 of the Letters Patent of 1865 (corresponding to Cl 13, Rangoon Letters Patent) gave a definition of a judgment which has been very frequently repeated. The definition is as follows :

"We think that "judgment" in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. Both classes are provided for in Cls. 39 and 40 (corresponding to Cls 37 and 38, Rangoon Letters Patent) of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of the question between the parties, cannot be considered a judgment."

The order which was before the Court was an order refusing to issue a writ of mandamus to the Justices. It was pointed out that a mandamus if issued would not be peremptory, but merely to do certain things, or to show cause to the contrary , so that the order of the Judge does not determine any question whatever between the parties : it only initiates the proceedings by which the liability of the Justices to make compensation will be ascertained and determined. Consequently, the order is not a judgment. The interpretation of "judgment" by the High Court of Madras in 1868 is referred to only to be disapproved as being too wide. It would, the learned Chief Justice remarked, put it in the power of a vexatious litigant to appeal against all discretionary orders which the Judge of original jurisdiction may make in the course of the suit, with no result, as such orders would have to be, as a matter of course, confirmed ; and, further, it would give a far more extensive right of appeal against the orders of the Judge of the original side of the High Court than exists against the orders of a Judge of original jurisdiction in the mofussil , which he did not think it at all probable that Her Majesty intended. Then comes the passage which I have quoted at length. He then proceeds to deal with the contention that the Calcutta High Court had already put a wider construction on Cl. 15 by entertaining appeals in cases where the plaint had been rejected as insufficient, or as showing that the claim is barred by limitation, and also in cases where orders had been made in execution. These in his opinion were within his definition, and he went on to say :

"There is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term."

This passage enshrines the third criterion which I have mentioned above, and which was amply sufficient for the determination of the point at issue in the case and which was, I think, the criterion according to which the Court did decide it. Unfortunately, in some subsequent decisions this has been overlooked and stress has been laid on the dictum that the test is that the decision must be one

"which affects the merits of the question between the parties by determining some right or liability."

This definition, if stress be laid on the words "some right or liability," is unnecessarily wide ; if all the qualifications are taken into account, it may be too narrow, as excluding orders which, although they relate to procedure, may have the effect of finally deciding the question in issue so far as the Court passing them is concerned

In *Hubbeeb* v. *Joosub* (7), it was held that an appeal lies from an order granting leave to the plaintiff to institute a suit under Cl. 12, Calcutta Letters Patent Referring to the Madras decision of 1868, the same learned Chief Justice said that he agreed with the conclusion that the order was appealable, because it was not a mere formal order or an order merely regulating the procedure in the suit, but had the effect of giving a jurisdiction to the Court which it otherwise would not have, and that it did "determine some right" between the parties, namely the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit on pain of having an ex-parte decree passed against them.

(7) [1874] 13 B. L. R. 103

This is an obvious reference to his own previous definition, but he appears to have ignored the qualifications of it which he himself had made. From the point of view of " merits," anything less meritorious than the question whether a litigant shall be allowed to bring his suit in one Court rather than in another it is difficult to conceive, for in theory His Majesty extends equal justice to all his subjects in all his Courts.

Ebrahim v *Fuckhrunissa Begum* (5) is a case which has a close resemblance to that now under reference On the settlement of issues the Judge held that a certain hibbanamah was invalid, but raised two issues as to a will. The effect of the decision was to allow the suit to proceed Garth, C J., took the preliminary point that an appeal did not lie, the suit not having been dismissed The matter was argued and it was held by the learned Chief Justice (Markby, J., not dissenting), that the decision of the original side was not a "judgment" and that the appeal did not lie He held that the word "judgment" means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory nature, which merely decides some isolated point, "not affecting the merits or result of the whole suit" He appears to have regarded "merits" as synonymous with "results of the whole suit." He distinguished the cases of the rejection of a plaint or the admission of a suit as determining whether the plaintiff has or has not a right to sue at all in the particular case, and went on to point out the possibility, if such appeals lay, of having three or four appeals all pending in one cause at the same time, and all proceeding contemporaneously with the trial of the suit in the Court below.

In *Mt. Brij Coomaree* v. *Ramrickdass* (8) it was held that an order refusing to stay the issue of probate and the discharge of the receiver appointed in a probate action is a "judgment" within the meaning of Cl. 15. By the judgment in the action probate had been ordered to issue to the respondent and the receiver ordered to be discharged The appellant, being about to appeal, asked for a stay which the Judge refused. On appeal, Maclean, C. J., referred to Sir Richard Couch's definition, which he said was becoming classical, and stated that he concurred in it, but that it was not exhaustive. He said that as the result of the appeal from the decree in the action, a new and important question had arisen, whether under the circumstances the respondent ought to be given control of a large estate, which, if answered in the affirmative, might have the possible effect of rendering the appeal from the decree entirely infructuous I think that, in referring to Sir Richard Couch's definition. he had in mind its qualifications, and was of the opinion that the order appealed from might for all practical purposes finally determine the rights of the parties to the estate, for the reason that when the appeal from the decree came to be decided, there might be no estate left. He thought his decision was consistent with the observations of their Lordships of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisundari Debi* (9), when dealing with the interpretation of the word "judgment" in Cl. 15, that "Mr Pontifex, J., had in fact," exercised a judicial discretion and had come to a decision of great importance which if it remained, would entirely conclude any right of Kalisundari to an execution of this suit His view, therefore, was that the test to be applied is whether the order is conclusive of the rights of the parties to the suit. Whether he correctly applied the test is another matter.

In *Budhu Lal* v. *Chattu Gope* (3), sanction to prosecute the plaintiff in a suit in the Presidency Small Cause Court was refused by a Judge of that Court The defendant applied to the original side of the High Court for a reversal of the order and obtained an order of remand to the Small Cause Court Judge It was held on appeal that the order of remand was a "judgment " The learned Judges appear to have adopted the definition of Sir Richard Couch without its qualification The decision of Sir Richard Garth was applied in a somewhat technical manner, the learned Chief Justice holding that the decision of the question as to whether the statements were made in a judicial proceeding was one which affected the merits or result of "the entire matter," for if it had been decided one way, viz , in favour of the applicants' contention it would have put an

(8) [1901] 5 C. W. N. 781.

(9) [1882] 9 Cal. 482=10 I. A. 4=12 C. L. R. 511=4 Sar. 407 (P C.).

end to the proceeding altogether. The "entire matter" was whether there should be another enquiry by the Small Cause Court Judge, which might or might not result in a further enquiry by a Magistrate, which might have one of two results.

In *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co. Ltd.* (10), an order setting aside an abatement was held to be a "judgment," the reason assigned by Richardson, J , being that it deprived the party in whose favour the abatement operates as a valuable right An equally good reason would be that an abatement has the practical effect of dismissing the suit and concludes the rights of the parties so far as the Court in which the suit is brought is concerned.

With this may be compared the decision of the same Bench in *Maharaj Kishore Khanna* v *Kiran Shashi Dasi* (11), that no appeal lies from an order under O. 9, R 9, Civil P C., restoring, a suit. There is no discussion of the principle, and the decision seems to be inconsistent with that in *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co. Ltd* (10).

I now come to the decisions of the Madras High Court The earliest is that to which I have already made reference, namely, that in *De Souza* v. *Coles* (12) where it was held by Bittleston, J , that a judgment "cannot be limited to a final judgment in a suit—nor indeed to a judgment in a suit at all—but must be held to have the more general meaning of any decision or determination affecting the rights or the interests of any suitor or applicant."

The learned Judge held that the language of Cl 15 is so general that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from."

The actual decision was that an appeal lies from an order of a Judge exercising original jurisdiction, refusing to give leave to institute a suit on the original side in a case in which the cause of action has arisen in part within the ordinary original jurisdiction of the High Court. It might have been given on grounds less sweeping than the principle adopted This principle may possibly be a logical deduction from the language of the Letters Patent, but it has not found favour.

The next case to which I will refer is *Tuljaram Row* v. *Alagappa Chettiar* (2). The Full Bench, after an exhaustive review of the authorities, held that an order of a single Judge on the original side refusing to frame an issue asked for by one of the parties is not a judgment within Cl 15 *De Souza* v *Coles* (12) was commented on the wide interpretation of the expression "judgment" being disapproved, the decision of Garth, C J., in *Ebrahim* v *Fuckhrunissa Begum* (5) was approved, and no less than four cases in the Madras High Court were either disapproved or dissented from At p. 7 of the report, Sir Arnold White, C. J , enunciated a test of what is a judgment for the purpose of Cl. 15 in these words

"The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Applying this principle, he was of the opinion that an order under the Administrator Generals Act giving the Administrator-General a commission at a fixed rate, an order dismissing an application by the assignee of a plaintiff to be brought on the record, an order dismissing a petition to receive a sum of money as security for costs of an appeal, an order refusing a stay of execution, an adjudication based on a refusal to exercise discretion, if its effect is to dispose of the suit so far as the Court making it is concerned, an order refusing to issue a mandamus [herein differing from *the Justices of the peace for Calcutta* v. *The Oriental Gas Co* (4),] an order refusing to confirm an award, an order refusing to set aside an award, an order refusing to extend the time for giving security for costs, an order setting aside a judgment and a decree and directing a remand, an order dismissing a Judge's summons to show cause why leave granted under Cl. 12 should not be rescinded, an order under Cl. 12 giving leave

(10) A. I. R. 1922 Cal. 335=49 Cal. 62.
(11) A. I. R. 1922 Cal. 407=49 Cal. 616.
(12) [1868] 3 M. H. C. 384.

to sue and an order made on an application to revoke a submission to arbitration, are all appealable On the other hand he held that an order fixing a date for the hearing and an order allowing or refusing a commission fail to satisfy the test. Krishnaswamy Ayyar, J, distinguished between a "preliminary or interlocutory judgment" and an "interlocutory order" and was of the opinion that the latter was not a "judgment," he having previously quoted with approval the definition of an order in Black on Judgments as being :

"the mandate or determination of the Court upon some subsidiary or collateral matter arising in action, not disposing of the merits but adjudicating a preliminary point or directing some steps in the proceedings."

Discussing *the Justices of the Peace for Calcutta* v. *The Oriental Gas Co* (4), his view was that in one respect the definition of Sir Robert Couch was too narrow, for a decision which determines the cause or proceedings so far as the particular Court is concerned, though it refuses to adjudge the merits, must also be deemed to be a judgment ; for otherwise the rejection of a plaint for defect of form or insufficiency of Court-fee, or its return for want of jurisdiction, would not be a judgment.

In *Kanlal Bhoya* v *Balaram Paramasukdoss* (13), an order having been passed directing security to be given by the defendant for the amount claimed and not having been appealed against, a subsequent order cancelling the original order and directing the return of the security and that the suit should proceed as an ordinary suit was held to be a "judgment" Sir Walter Schwabe, C. J., was satisfied that the order satisfied all definitions previously attempted. Coutts-Trotter, J., resolved his doubts by holding that the order was a judgment:

"because it might result in shutting out the defendant from the Court altogether."

If that had been the inevitable result of the order I should have been disposed to agree with him

In *Sonachallam Pillay* v. *Kumaravelu Chettiar* (14), it was held that an order of a single Judge in the admission Court refusing to stay execution of the decree of a mofussil Court pending the appeal was a judgment. Krishnan, J., professed to follow the dictum of Sir Arnold White, C. J., while Waller, J, was apparently prepared to go so far as to accept the wide interpretation of Bittleston, J, in *De Souza* v. *Coles* (12), that it is impossible to set any limits to the right of appeal founded on the nature of the order or decree appealed against. I think that this case and that last cited show a tendency to try to avoid the implications of the previous Full Bench decision.

The first decision of the Bombay High Court to which we have been referred is that of *Miya Mohamed* v *Zorabi* (15), where it was held that an order directing the issue of a commission to examine a witness was not a judgment, inasmuch as it merely regulated the procedure for his examination. I need only say that an order of his nature would seem to fail to satisfy any test which has ever been suggested, with the exception of that suggested in *De Souza* v *Coles* (1)

In *Charandas Chatturbhuj* v *Chhaganlal Pitambardas* (16), the plaintiff had agreed to sell to the defendant certain goods, which the defendant in turn had agreed to sell to one Alibhoy The plaintiff having filed a suit against the defendant for breach of contract, the defendant, who claimed a right to be indemnified by Alibhoy, obtained leave, under the third party procedure which had been introduced by rules framed by the Bombay High Court to serve a third party notice on him. Alibhoy having appeared, the defendant sought a direction from the Original Side Judge under R 130 and 131 that Alibhoy be at liberty to appear at the trial of the suit and the question in issue between him and the defendant be tried simultaneously with the questions in issue between the plaintiff and the defendant. The Judge having by his order refused to give such a direction, it was held on appeal that the order was not a "judgment." The definition of Couch, C. J., in *the Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4), was quoted as having been consistently approved of by all the High Courts, and the case was held not to come within that definition, the reason being that nothing had been decided which affected the merits of those questions between the defendant and Allibhoy, by determining any right or liability between them. It may be noted that the case would equally

(13) A. I. R. 1923 Mad. 44.
(14) A. I. R. 1921 Mad. 507 = 47 Mad. 316.
(15) [1903] 11 Bom. L. R. 241 = 2 I. C. 157.
(16) A. I. R. 1921 Bom. 320 = 45 Bom. 428.

have failed to satisfy the test suggested by Sir Arnold White in *Tuljaram Row* v. *Alagappa Chettiar* (2).

In *Nagindas Motilal* v. *Nilaji Moroba* (17), it was held that an appeal lies under Cl. 15, Letters Patent, from an order of a Division Court refusing to excuse delay in filing an application for a certificate of appeal to the Privy Council Decisions that merely introductory orders on matters of procedure or otherwise are not judgments within the meaning of Cl. 15 are distinguished as being essentially different in that they can in no way be said finally to end or determine the litigation and so do not fulfil the test adopted by the Madras High Court in *Tuljaram Row* v. *Alagappa Chettiar* (2). It is pointed out that the refusal to excuse the delay and the consequent refusal to entertain the petition for the necessary certificate of appeal to the Privy Council amounts to a final decision and put an end to the litigation so far as the High Court is concerned

In *Goverdhanlalji Maharaj* v. *Chandraprabhavati* (18), it was held that a finding that a suit for increase in the rate of maintenance fixed by a consent decree is maintainable, is not a " judgment " within the meaning of Cl. 15, Sir Norman Macleod, C. J., in delivering the judgment of the Court, observed that Sir Richard Couch's attempt at a definition had not prevented lengthy argument being brought forward in each case as it came up as to whether it was a judgment or not and that for himself he preferred to consider each decision as it came before him and form his own opinion. The succeeding passage is highly relevant to the present reference and I will quote it in full.

" For the purposes of this case to my mind the distinction between decisions and orders thereon which stand by themselves, and decisions on a single issue in a suit, is a very real one. It is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never to my mind amount to a judgment. If in this case the Judge had decided that the suit was not maintainable and had dismissed the suit, then undoubtedly an appeal would lie against that decision. But in this case the Judge has decided that the suit should proceed. He will then consider the remaining issues in the suit, whether the plaintiff should be granted in the circumstances of the case increased maintenance, or not, and when he has decided that question there will be a judgment, against which all the arguments which are now sought to be raised against the decision on this issue can be placed before the Court. We are not shutting out the defendant from any objection which he may eventually be advised to raise against the final decree in the suit. We are merely pointing out that so far nothing has been decided with regard to the rights and liabilities of the parties, there is only a decision that the suit should proceed and against that decision no appeal lies. "

We have not been referred to any decision of the Allahabad High Court. It should be noted that neither this High Court nor the Punjab High Court possess ordinary original civil jurisdiction, and that the Letters Patent Appeals in those Courts to which reference will be made are all appeals from the decision of a Judge exercising appellate jurisdiction.

Before the enactment of the Civil Procedure Code of 1908, that Court had apparently taken the view that notwithstanding Cl. 10 of its Letters Patent, the only appealable orders were those in respect of which the Code had expressly provided for an appeal. And even after the substitution of S. 104 of the Code of 1908 for S. 588 of the Code of 1882, the tendency has been to take a narrow view. Thus in *Ramjas* v. *Mahadeo Prasad* (19), an order granting sanction to prosecute was held not to be a " judgment, " the ground being that that order did nothing except arm the applicant with a sanction which he could bring to the Court which was to investigate the alleged offence. And in *Piari Lal* v. *Madan Lal* (20), it was held that no appeal would lie under Cl 10 from an order of a single Judge of the High Court dismissing an appeal from an order of an execution Court refusing to set aside a sale. The learned Judges held that they were bound by the previous Full Bench decision of the Court in *Muhammad Naim-ullah Khan* v. *Ihsan-ulla Khan* (21), and that the enactment of the new Code did not affect the position

In *Sadiq Ali* v *Anwar Ali* (22), it was held that Cl. 10 gave a right of appeal from an order of a single Judge rejecting an application to set aside the abatement of an appeal. The test adopted was that of Sir Arnold White, C J., in *Tuljaram*

(17) A. I. R. 1924 Bom. 333 = 48 Bom. 442.
(18) A.I.R. 1926 Bom. 196.
(19) [1917] 39 All. 147=36 I.C. 585=14 A.L.J. 1230.
(20) [1917] 39 All. 191=39 I.C. 460=15 A.L.J. 46.
(21) [1892] 14 All. 226=(1892) A.W.N. 14 (F.B.).
(22) A.I.R. 1923 All. 44=45 All. 66.

Row v. *Alagappa Chettiar* (2), and the order of the single Judge was held to be

" a judicial act, and an act which did settle once and for all, if unappealable, the rights of the parties, "

and, therefore, a " judgment " within the meaning of Cl. 10.

But in *Tirmal Singh* v. *Kanhaiya Singh* (23), a Bench differently constituted again followed the previous Full Bench decision of the Court and held that no appeal lay from an order of a single Judge rejecting an application for review of judgment, the case of *Sadiq Ali* v. *Anwar Ali* (22), being held to be distinguishable for reasons which are not given.

We have been referred to two cases in the Lahore High Court. In the earlier, *Gokal Chand* v. *Sanwal Das* (24) the interpretation of the term " judgment " as used in the Letters Patent, was very wide It was held to include any interlocutory judgment which decides so far as the Court pronouncing it is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit The view of the Court was that an order on an application to stay execution pending appeal came within the definition.

In the later case, *Ruldu Singh* v. *Sanwal Singh* (25), the earlier case *Gokal Chand* v. *Sanwal Das* (24), was not referred to The trial Court had dismissed a suit as time barred ; the District Judge on appeal held otherwise and remanded the case for trial on the other issues ; against this order of remand an appeal was preferred to the High Court and was heard by a single Judge who affirmed the decision of the District Judge and dismissed the appeal. From this decision there was a further appeal under the Letters Patent. The decision of the single Judge was held to be a "judgment" and, therefore, appealable. The authorities were discussed by Sir Shadi Lal, C. J , in delivering the judgment of the Court, and, in his opinion, the definition of Sir Arnold White afforded a better test than that of Sir Richard Couch. If an adjudication put an end to the suit or appeal, of if its effect, if not complied with, was to put an end to the suit or appeal, then it was clearly a judgment. He went on to discuss the position which arose when the adjudication disposed merely of an application made in a suit or appeal, and to adopt Sir Arnold White's differentiation between an application which is nothing more than a step towards obtaining a final adjudication in a suit, which would not be a "judgment," and an application which is an independent proceeding ancillary to the suit and instituted, not as a step towards judgment but with a view to render the judgment effective if obtained, which would be a "judgment." In the former category would be included applications for transfer, summoning witnesses, issue of commission for the examination of witnesses, adjournments, directing a party to produce and give inspection and framing an issue. In the latter category would be included applications for the appointment of a receiver, the issue of on interim injunction and, generally, all orders which are appealable under S 104 or O 43, R. 1, Civil P C. He was of the opinion, however, that in certain applications, such as those for a mandamus and for leave to defend a summary suit on a negotiable instrument, the test adopted by Sir Arnold White was not of practical assistance. He, therefore, thought that it was impossible to lay down any definite rule which would meet the requirements of every case, and that all the Court can do in determining whether an order constitutes a judgment is to take into consideration the nature of the order and its effect upon the civil proceeding in which it was made The case before the Court was, however, held to present no difficulty, because the decision of the Judge of the High Court undoubtedly put an end to the appeal before him. It seems clear that in his opinion the test most generally applicable is whether or not the order finally puts an end to the suit or proceeding

I will now refer to the cases in which Cl. 13 of its Letters Patent has been discussed in this Court The first is *Yeo Eng Byan* v. *Beng Seng & Co.* (1), a decision of Sir Sidney Robinson, C J , and Brown, J. An order of the Judge on the Original Side, giving directions to a commissioner, appointed under the preliminary decree in a partnership suit, as to what accounts he should and what accounts he should not go into was held

(23) A.I.R. 1928 All. 356=45 All. 535.
(24) [1920] 1 Lah. 348=55 I.C. 933=2 L.L.J. 92.
(25) A.I.R. 1922 Lah. 380=3 Lah. 188.

not to be appealable After citing the oftquoted definition of Couch, C. J , in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (4) but without the subsequent qualifying words, the further dictum of Couch, C J , in *Hubbeeb* v *Joosub* (7) and the definition of Sir Arnold White, C J., in *Tuljaram Row* v. *Alagappa Chettiar* (2), Robinson, C. J , continued:

"with these dicta I am in general agreement. I agree that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a "judgment" and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a "judgment" . nor can a more formal order merely regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication."

He went on to say that the order before the Court

"did not decide on the merits of the suit for the dissolution of the partnership, nor does it decide the rights or liabilities of the parties to the suit so far as the partnership is concerned. . . . It cannot be that the framers of the Letters Patent intended to allow appeals which do not arise directly from the suit itself."

Brown, J , laid stress on the fact that the order did

"not purport finally to decide any of the rights between the parties "

We have been referred to the case of *Ma Mi* v *Kalenthar Ammal* (25-a), a decision of Robinson, C J., and Baguley, J., as to what is a final order within the meaning of S 109, Civil P C. One of the issues was whether the respondent had been divorced. The District Court tried this issue first and held that she had been divorced. This Court reversed the decision and remanded the suit The applicants applied for leave to appeal to the Privy Council on the ground that the order of remand was a final order Objection was raised on the ground that this was not so, as it would be open to the applicants to raise the point in appeal to the Privy Council when the whole case was decided. While agreeing that S 105 (2) of the Code would not debar them from taking this course, Sir Sidney Robinson, C. J,, was of the opinion that if the order in question had the effect of deciding finally the cardinal point in the suit (as it would have had in the case before him), it must be held to be a final order for which leave to appeal should be granted. Here he was following the decision of their Lordships of the Privy Council in the case of *Saiyid Muzhar Hossein* v. *Mt. Bodha Bibi* (25-b), where under similar circumstances they granted special leave to appeal. Mr. Hay argues that in the appeal from which this reference arises, the issues decided against him are cardinal points the decision of which in the appellant's favour would decide the suit. I do not, however, consider that decisions on what is a "final order" under S. 109 of the Code are of assistance in construing Cl, 13, Letters Patent

Another unreported decision is that of Carr and J. A. Maung Gyi, JJ , (*Moolla Goolam Mahomed* v *Ameena Bee Bee*; Civil First Appeal 153 of 1924) Under a preliminary administration decree, a commissioner had been appointed to take accounts Three questions arose: (a) and (b) as to a sum of money and jewellery alleged to have belonged to the estate of the deceased and to have come to the hands of the defendant, and (c) a house which the plaintiff claimed as belonging to the estate aud which the defendant claimed as her own property. Before the commissioner the parties agreed that a receiver should be appointed to file a suit to determine the ownership of the house, and a receiver was appointed, but no suit was filed The commissioner recorded evidence on the other two issues, and came to findings thereon The matter then came before May Oung, J , who passed an order reversing the commissioner's finding as regards one of the issues and modifying it as regards the other. He also commented on the fact that no suit as regards the house had been filed and said that he would fix a day to try the remaining issue, i.e , as to whom the house belonged The plaintiff appealed from this order, so far as it decided the first two issues. The preliminary objection was taken that no appeal lay, the order not being a "judgment." A number of authorities including *Yeo Eng Byan* v. *Beng Seng & Co.* (1) were cited but not discussed, with the exception that the definition of Couch, C. J , in *The Justices of the Peace for Calcutta* v *The Oriental Gas Co.* (4) was quoted at length (but without its qualifications) and was stated to have been generally accepted. The decision appealed against was held

(25-a) A. I. R. 1925 Rang. 147.

(25b) [1894] 17 All. 112=22 I. A. 1 (P. C.).

to be a "judgment" as it was a determination of the rights of the parties as regards two of three issues,

"final as far as concerns the original side of this Court, and that the Judge or his successor could not in his final judgment reverse the findings already arrived at."

From this conclusion I must respectfully differ

In *Mooljee Dharsee & Co* v. *M E. Molla* (26) the appellate side, on an application to stay execution of a decree pending appeal therefrom ordered a stay, "the security already given being accepted, with liberty to the respondent to apply for fresh or further security, if it is decided that the security given is invalid or insufficient."

The Judge on the original side after enquiry accepted the security as valid and sufficient. On appeal from his order it was held by the Bench (Heald and Chari. JJ), that it did not determine any right or liability which arose between the parties on the original side, and was not, therefore, a "judgment" In discussing 'the new classic" case of *The Justices of the Peace for Calcutta* v *The Oriental Gas Co.* (4), it was observed that the expression "affects the merits of the case by determining some right or liability" was not intended to cover the determination of every right or liability, as was shown by the succeeding sentence where Couch, C J , states that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only a part of it It seems to me clear that the learned Judges would not have held that a finding on a preliminary issue which had the effect of allowing a suit to proceed was a "judgment "

This case was followed, this time by Heald and Lentaigne, JJ., in *Mahomed Hussain* v. *Hoossain Hamadanee & Co.* (27) where they held that an order of dismissal of an application for the examination of a witness on commission is not a judgment, *Tuljaram Rao* v. *Alagappa Chettiar* (2) being cited as showing that a refusal to issue a commission

'is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits.".

It was again followed by the same Bench in *Mengau Singh* v *Sucha Singh* (28) where they held that an order under O. 38, R 5, Civil P 'C , directing the defendant to give security before judgment did not come within Cl. 13, Letters Patent.

In *Soonıram Jeetmul* v *R D. Tata & Co* (unreported Civil Misc No 82 of 1925), Sir Guy Rutledge, C. J , and Maung Ba, J , dealt with an appeal from an order of the Judge on the original side giving leave to institute a suit on the ground that part of the cause of action arose in Rangoon The appeal is stated to have been admitted on the authority of *De Souza* v. *Coles* (12) and *Hubbeeb* v. *Joosub* (5), but there is no discussion.

Arumugam Chettyar v *Kanappa Chettyar* (29), cited to us, is merely a decision that where an appeal from an order is allowed by the Civil Procedure Code, such an order is to be construed as a "judgment" and is not in point

In *Hajee Tar Mahomed* v *Zulaikha Bai* (6) a suit was filed on the original side for the administration of the estate of one Esak Vally Mahomed, the allegation of the plaintiff being that Esak and the defendants were partners in a business carried on in Rangoon and the Shan States. The defendants took the preliminary objection that the original side had no jurisdiction because the business was not carried on in Rangoon. The learned Judge tried as a preliminary issue the question whether or not this Court had jurisdiction, and found that it had, inasmuch as the business was carried on partly in Rangoon The defendants claimed to be entitled to appeal from this finding, which was a finding on a preliminary issue, on the ground that it was a "judgment" within the meaning of Cl. 13 On the authority of *Soonıram Jeetmul* v. *R. D. Tata & Co* (unreported , supra) and the two cases therein referred to, it was held by Heald and Darwood, JJ., that an appeal lay After having pointed out that in *Hubbeeb* v. *Joosub* (7) some doubt had been cast on some of the reasons given for the decision in *De Souza* v *Coles* (12) and that *De Souza* v *Coles* (12) was an appeal not from a finding that a Court had jurisdiction but from an order refusing to give leave to institute the suit in the High Court, the learned Judges went on to say :

"It is, however, clearly desirable that an appeal should lie since otherwise much time and money might be wasted in a Court which

(26) A. I. R. 1925 Rang. 225=3 Rang. 255.
(27) A. I. R. 1925 Rang. 290=3 Rang. 293.
(28) A. I. R. 1925 Rang. 267=3 Rang. 307.
(29) A. I. R. 1927 Rang. 139=5 Rang. 99.

might ultimately be found to have no jurisdiction."

The logical corollary of this decision if it is correct, appears to be that the decision on any preliminary issue, if its effect is to allow a suit to proceed, is appealable But with all respect I am unable to agree with either the decision or the grounds on which it is based The *argumentum ab inconvenienti* is not in itself conclusive, and, as I have already indicated in my opinion, the balance of convenience is the other way. The reasoning in *Hubbeeb* v. *Joosub* (7) on which the case is really based is not convincing, the right between the parties which it determined being merely the right to compel defendants who are out of the jurisdiction to defend the suit in the High Court rather than to defend it in the Court of the local area where they are resident If it is to be supported at all, it can, I think, be supported only on the principle adopted by Bittleston, J., in *De Souza* v *Coles* (12), a principle which has since its enunciation found little favour except in the judgment of Wallis, J., in *Sonachalam Pillai* v. *Kumaravelu Pillai* (14).

In *Abowath* v *Abowath* (30), the observations before cited of Robinson, C J., in *Yeo Eng Byan* v. *Beng Seng & Co* (1), were again quoted and applied by Sir Guy Rutledge, C J , and Carr, J , and it was held that an order of the Judge sitting on the original side directing the return of an award to the arbitrators to enable them to file it according to the proper procedure was not a "judgment" because the Judge had not purported finally to decide any right between the parties

The last case cited to us was *Syed Khan* v *Syed Ebrahim* (31), a decision of Sir Guy Rutledge C J , and Brown, J , as to what is a "final order" within the meaning of S 109, Civil P. C. The plaintiff filed a suit in a District Court claiming a right of pre-emption under Mohamedan law The District Court dismissed the suit on the ground that such right did not exist in Burma. In October 1925 the High Court on appeal held that the right did exist, and reversing the decision of the District Court, remanded the case for trial. The plaintiff won on the merits and the High Court on appeal confirmed the decision in May 1927. The defendant applied for leave to appeal to His Majesty in Council not only against the profits decided in May 1927, but also against the point decided in October 1925. It was held that the question of the right of pre-emption was a cardinal issue between the parties which was finally decided in October 1925, that it was a "final order" within the meaning of S. 109 ; that the defendant could have then applied for leave ; that the question of pre-emption was not in dispute when the case was finally decided in May 1927 ; and that the defendant could not again raise the point over again in applying for leave to appeal against the points decided in May 1927 The Court, however, holding that there were two other substantial points of law, gave leave to appeal thereon. Unfortunately, the appeal dropped owing to the defendant failing to give security and the opportunity of obtaining the views of their Lordships of the Privy Council as to the correctness of the decision that leave should not be given in respect of the issue of pre-emption was lost It may be noted also that the case of *Ma Mi* v. *Kalenthar Ammal* (25a) in which Sir Sidney Robinson, C J., had expressed a view apparently contrary to that enunciated by Sir Guy Rutledge was not before the Court However, as I have said before, cases on the meaning of the expression "final order" are of little assistance in the task of interpreting the term "judgment"

From this review, it is clear that the view taken by Bittleston, J , in *De Souza* v. *Coles* (12) that every adjudication is a judgment has been disapproved in the vast majority of the decisions, and it is practically common ground that some test must be adopted The definition of Sir Richard Couch, C. J , in *The Justices of the Peace for Calcutta* v *The Oriental Gas Co* (4) pressed upon us by Mr Hay, if isolated from its context, has been not infrequently cited and treated as conclusive without discussion Taken with its qualifications it contains the germ of the later doctrine enunciated by Sir Arnold White, C J , in *Tuljaram Row* v. *Alagappa Chettiar* (2) but has been held to be defective in that it apparently excludes decisions on points of procedure which have the effect of finally deciding questions in issue between the parties to a suit or proceeding so far as the Court deciding them is concerned. On the other hand, the test enunciated by Sir Arnold

(30) A. I. R. 1928 Rang. 110=6 Rang. 25.
(31) A. I. R. 1928 Rang. 132=6 Rang. 169.

White, C. J , and adopted in *Yeo Eng Byan* v. *Beng Seng and Co.* (1), the key-note of which is finality in relation to the Court passing the order, has the merit of simplicity and, as pointed out by Sir Shadi Lal, C. J , in *Ruldu Singh* v. *Sanwal Singh* (24), affords a working rule in respect of the great majority of interlocutory orders. I am of the opinion that in the decision of the question referred to us it should be applied. And, in applying it, I am fortified by the opinion of Sir Richard Garth, C. J , *Ebrahim* v. *Fuckhrunissa Begum* (5), that the decision on an issue which has the effect of allowing a suit to proceed does not "affect the merits or result of the whole suit" in that it does not decide the case one way or another, and is, therefore, not a " judgment " Put in another way, it does not " shut out " the defendant

If the contention pressed on us by Mr Hay were to succeed, it would seem almost inevitably to follow that if no appeal is preferred from an order deciding a preliminary issue having such effect the party against whom the issue is decided cannot raise the point in an appeal from the decree in the suit And, so far as I am aware, this has never been held by any Court in India The question of what is a final order within the meaning of S 109, Civil P C , is not, in my opinion, analogous If it were, I should be inclined to hold that *Syed Khan* v *Syed Ebrahim* (31) had been wrongly decided

It is suggested to us that the decision of a preliminary issue is final so far as the Court which decides it is concerned, and this was so held by this Court in *Moolla Goolam Mahomed* v *Ameena Bee Bee* (unreported , supra.) That the decision of a Judge on a preliminary issue is not binding on his successor was held by the late chief Court of Lower Burma in *Ma Nyo* v. *Ma Yauk* (32), the soundness of which has never been questioned. If the decision is not binding on his successor, I see no reason why the Judge himself, on a more mature consideration, should not be allowed to change his mind.

The contention of Mr. Hay may be subjected to the touchstone of a practical test The learned Judge on the Original Side in the case out of which this reference has arisen, might orally have expressed his opinion on the preliminary issues and allowed the case to proceed. In that case there would have been no written order from which an appeal could have been presented. This difficulty might perhaps have been surmounted in some such manner as by filing an affidavit setting out what the learned Judge had said But the learned Judge might equally well have contented himself by intimating that he would hear the evidence and at the end of the case would deliver a judgment covering all the issues. In this last event the parties would have known perfectly well what was in his mind, but the party against whom it was practically certain that the issue had been decided would have been powerless to appeal All three possible courses would have been equally legitimate, and it seems incongruous that the question of whether or not an appeal lies in such a case should depend on whether the learned Judge had stated, or even written, his determination on a preliminary issue.

For these reasons my answer to the question referred, is in the negative

If the view which I have taken is correct, it follows that certain cases in this Court have been wrongly decided, and that they should be overruled. These cases are *Moolla Goolam Mahomed* v. *Ameena Bee Bee* ; *Sooniram Jeetmul* v. *R. D Tata and Co.* (both unreported ; supra) and *Hajee Tar Mohamed* v. *Zulaikha Bai* (6).

Pratt, Offg C. J.—In the order of reference I have already given my reasons for holding that the finding of the learned Judgeon the Original Side does not amount to a judgment within the meaning of Art. 13 Letters Patent

I have now had the opportunity of reading my brother Ormiston's answer to the reference, in which I fully concur.

In view of his exhaustive analysis of the authorities on the subject, it seems unnecessary to discuss them at any length.

I would, however, remark that I agree with the observation of Macleod, C. J., in *Goverdhanlalji* v. *Chandraprabhavati* (18) that the distinction between decisions and orders, which stand by themselves, and decisions on a single issue, is a very real one. I am also at one with him, when he says that it is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the

(32) [1908] 4 L. B. R. 256.

suit should proceed does not amount to a judgment.

As held by Robinson, C J., in *Yeo Eng Byan* v. *Beng Seng and Co.* (1) an order which merely paves the way for the determination of the question between the parties cannot be considered to be a judgment The finding with which we are concerned is one, in effect, which decides that the suit is maintainable, and so paves the way for the determination of the main question between the parties

It does not finally decide the rights of the parties and will be subject to attack on appeal, if the decree is ultimately against the appellant

I would point out that the finding which forms the subject of the present reference is in an entirely different category to the order in the recent Bench case of *Ma Hman* v. *The Official Receiver* (33) We there held that an order of the Judge on the Original Side allowing the Official Receiver commission at 5 per cent. on the sale proceeds of certain properties sold by a firm of auctioneers under the orders of the Court was a judgment Our reason was that the order in question was in effect a decree in favour of the Official Receiver for a large sum of money. On the facts, obviously, had there been no right of appeal a grave injustice would have resulted to appellants

I would answer the question referred in the negative

Carr, J.—I agree with the judgment of my learned brother Ormiston and with his answer to the question referred.

In particular I agree that when I said in *Moolla Goolam Mahomed* v. *Ameena Bee Bee* (unreported , supra) that preliminary findings on certain issues were final and could not be reversed in the final judgment, I was wrong.

Cunliffe, J.—On 1st September 1927, Chari, J , on the Original Side of this Court, passed an order dealing with various contentions raised in a suit before him on a hundi. It is apparent from the learned Judge's order that a number of arguments were raised before him on the question of the legal liability of the defendants 1 and 3. They were of a technical nature and do not appear to have had much merit At any rate, the order concludes with these words :

" For these reasons no final order is possible either against defendant 1 or against defendant 3 on the arguments raised by the learned advocate on their behalf. The case will therefore, proceed . . . . . "

And so it would have proceeded, had there not been some delay in collecting evidence on commission

Taking advantage of the delay, however, the parties adversely affected, obviously against the intention of the learned Judge who desired to dispose of the whole case as soon as possible in a business like manner, took the opportunity of coming to this Court in appeal

It is argued that the order passed by Chari, J , is a judgment within Art 13 of our Letters Patent In my opinion, it is not a judgment at all. It may be part of a judgment ; but it was certainly never contemplated by the Letters Patent that, at every stage of the final hearing of a case, litigants dissatisfied with the view expressed by the trying Judge should immediately proceed to the Court of appeal. One can imagine the state of affairs where six or seven visits to the Court of appeal on six or seven issues decided against the contentions of one or other of the parties would precede the final disposal of the case In these circumstances I agree that the question referred to the Full Bench should be answered in the negative

Darwood, J—I concur.

R K. *Reference answered in negative*

(33) A. I. R. 1928 Rang. 301.

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* A. I R 1929 Rangoon 54

PRATT, OFFG. C J. AND ORMISTON, J.

Ma Kyway—Appellant.

v

Ma Mi Lay and *another*—Respondents.

First Appeal No 131 of 1928, Decided on 9th August 1928, from judgment of Original Side in Civil Regular No 146 of 1928

*** Provident Funds Act (19 of 1925), S. 5 —Nomination prohibited by personal law is valid—Such nomination, though made before the Act of 1925, and though no fresh nomination was made after that Act is validated by S. 5.**

The effect of S. 5 is that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination and this holds good even if the nomination was made before the passing of the Act of 1925 and no fresh nomination was made after the Act was passed. [P 55 C 1]

Ba Han—for Appellant.

Leong—for Respondent 1.

Judgment—Maung Po Hla, deceased was an employee of the Burma Railways and a subscriber to the Railways Provident Fund. He nominated his sister Ma Kywe as his beneficiary. His wife and sole heir under the Burmese Buddhist law Ma Mi Le sued for recovery of the sum standing in her husband's name at his death and obtained a decree

In the diary of 11th May 1928 the learned Judge on the original side recorded

"the point for decision is whether the Provident Funds Act overrides the personal law of Maung Po Hla to the extent of enabling him to direct his money to be paid to his sister."

The Judge found that the effect of S 5, Provident Funds Act, 1925, was that a nomination is valid in spite of any prohibition in the personal law of the person making the nomination We agree that there can be no doubt of the correctness of this construction

The provisions of S 5 are perfectly clear and definite, and on this finding the suit by the wife should have been dismissed. The learned Judge has, however, held that as the nomination of the sister was made by a declaration, dated the 27th September 1924, before the Act came into force, it was invalid. He considered that the Act was not intended to have a retrospective force and a fresh nomination was required

This was a point not taken in argument and the Court was not justified in coming to a decision on this ground without hearing the advocates on the point

We find ourselves quite unable to accept the reasoning of the learned trial Judge The effect of the new Act was clearly to render valid a nomination which was previously invalid as contravening the provisions of the Burmese Buddhist law. It is not a question of retrospective effect since the declarant did not die till after the Act came into force

No fresh nomination was necessary. The nominee is entitled to the money We set aside the decree of the original side and direct that the suit be dismissed. Appellant will have costs in the suit and appeal. Advocate's fee three gold mohurs.

S.N /R K *Decree set aside*

A. I. R. 1929 Rangoon 55

PRATT, OFFG C J. AND ORMISTON, J.

G. Bhandari—Plaintiff—Appellant.

v

R. Nihalchand and *others*—Defendants—Respondents.

First Appeal No 100 of 1928, Decided on 21st August 1928, from judgment of original side in Civil Regular No. 102 of 1927.

(a) Landlord and Tenant—Tenant holding over—Conditions of lease continue.

At the expiration of the term of a lease the lessee holding over must be taken to have done so on the conditions of the lease. [P 56 C 1]

(b) Limitation Act, S 14—Claim for rent allowed without specific issue but disallowed in appeal as S. 12, Rangoon Rent Act, did not apply—Whole period of suit can be deducted in fresh suit for rent.

A plaintiff obtained a decree for rent which was revised in appeal on the ground that provisions of S. 12, Rangoon Rent Act, were not satisfied. In trial Court no specific issue was raised on the point. Plaintiff sued again for the rent.

Held that the plaintiff was entitled to deduct the whole time required for the previous suit as he was bona fide litigating his claim throughout that period: *A. I. R.* 1916 *P. C.* 96, *Expl.* [P 57 C 2]

(c) Civil P. C., S. 11—Issue of law—Decision on admission due to erroneous conception of law is not res judicata.

A decision based solely on an admission which was based on an erroneous conception of law cannot operate as res judicata. [P 58 C 2]

(d) Rangoon Rent Act, S. 19 (1)—Standard rent not fixed—Collateral agreement to pay fixed rent is not covered by the Act.

There was a contract subsisting between a lessee and a sub-lessee that the sub-lessees should pay to the landlord the daily rent, whatever it was.

Held in a suit by lessee for reimbursement of rent paid for the sub-lessee, that the agreement, the standard rent not having been fixed by the Controller, was not illegal under S. 19 (1) of the Act, and consequently the contract being merely collateral was not avoided by the Act. [P 59 C 1]

N. N. Burjorjee—for Appellants

J. K. Munshi—for Respondents

Judgment.—The plaintiff appellant is a jeweller who occupied a stall in the Suratee Bara Bazaar under a tenancy agreement providing for the payment of a daily rent Although in theory such a tenancy is merely a daily tenancy, the practice of the bazaar authorities is to allow a tenant to continue to occupy the

stall as long as he continues to pay his rent and does not do or omit to do anything which causes inconvenience in the administration of the bazaar. If circumstances render it desirable, the rent is raised and a new tenancy agreement is entered into at an increased rent, but it seldom, if ever, happens that the rent is raised to a point which induces the tenant to give up his tenancy Again, while sub-letting without the consent of the authorities is not allowed, so long as the sub-lessee does not cause trouble and the outward aspect of the transaction is that he has merely a license to occupy the stall, no objection appears to be taken.

In 1919 the plaintiff-appellant left Rangoon having entered into an agreement, Ex. A (1), with the defendant-respondents, a joint family carrying on the trade of jewellers through their manager, defendant 1. By this agreement which is in the form of a lease, the plaintiff let to defendant the stall and its furniture a list of which is attached, its value being stated to be Rs 1,196, for two years from the date on which possesssion would be given.

"paying therefor the monthly rent of Rs. 90 per month and also the daily rent to the company during the said term."

The lessee covenants:

"(1) to pay the said rent on 10th day of each month, (2) to surrender at the end of the term, and (3) to pay also rent to Suratee Bazar Co, Ltd., and observe all the rules and regulations of the said company."

There is a proviso for determination on one month's notice if the lessor comes to Rangoon with intention to resume his own business The only reasonable construction of this document, having regard to the 3rd covenant, is that the lessee agreed with the lessor to pay the daily rent to the company, not to the lessor. At the time of the execution of the lease the daily rent was Re 1-4-0 and it remained the same until it was increased under the circumstances hereinafter set out Possession was given on 23rd October 1919, bnt at the expiration of the term the defendants held over, and they must be taken to have done so on the conditions of the lease

The defendants continued to pay the monthly rent to the plaintiff up to 22nd October 1922, as and from which date they ceased to pay it, and on 10th December 1922, by means which need not be particularized, the defendants persuaded the bazaar authorities to determine the plaintiff's tenancy and to give them a tenancy at a daily rent of Rs. 4-4-0, thus ousting the plaintiff

The plaintiff returned to Rangoon, and, as the result of his representation, on 10th February 1923, the Bazaar Company again recognized him as their tenant at an increased rent of Rs. 4 a day.

On 28th April 1923 the plaintiff gave the defendants notice to vacate by 23rd May 1923 and there having been noncompliance with the notice, on 4th July 1923, he instituted Civil Regular Suit No 354 of 1923 of this Court. In this suit, as originally framed, he claimed, among other reliefs, possession, Rs 630 as rent for the period from 23rd October 1922 to 23rd May 1923, thereafter Rs 90 as compensation for use and occupation for the period from 23rd May 1923 to 23rd June 1923, and further such compensation at the same rate

On 14th August 1923, he filed an amended plaint in which no claim for rent as such was made, but a claim was made for Rs. 720 (being the aggregate of the sums of Rs 630 and Rs 90) as mesne profits On 2nd September 1924, a decree was passed by May Oung, J, in favour of the plaintiff for (inter alia) possession, Rs 630 as rent from 23rd October 1922 until 23rd May 1923, and compensation for use and occupation at Rs. 90 per mensem from 23rd May 1923, till possession was given. The defendants appealed in Civil First Appeal No 202 of 1924, and by the decree of the appellate side dated 30th March 1925, the decree of the original side was confirmed, except as to the item of Rs. 630 for rent as to which it was held that no decree for rent could be passed by reason of S. 12, Rangoon Rent Act 1920, which provides that a plaint in a suit for the recovery of rent is not to be accepted unless a certificate certifying the standard rent has been attached thereto. No such certificate had been attached to the plaint in the suit.

On the same date, 30th March 1925, the defendants gave possession to the plaintiff It should be stated that the defendants paid to the Bazaar Company daily rent at the rate of Rs. 4-4-0 a day from 10th December 1922 to 10th February 1923, the date on which the plaintiff was again recognized by the Bazaar

Company as its tenant. Thereafter they ceased to pay such rent. From 23rd May 1923 to 17th July 1923, the plaintiff paid rent at the rate of Rs 4 a day, aggregating Rs. 224 to the Bazaar Company although the defendants were actually in occupation. From 18th July 1923 to 30th March 1925 the Bazaar Company refused to accept rent from either party, but after being given possession, the plaintiff, on 19th August 1925 paid to the Bazaar Company the rent which had accrued during this period aggregating Rs 2,488

The plaintiff filed the present suit on 26th February 1927, claiming Rs 3,750 under four heads:

	Rs.
(a) Rent at Rs 90 month from 23rd October 1922 to 22nd May 1923 ...	630
(b) Amount paid by the plaintiff on account of the defendants' default to the Bazaar Company from 10th February 1923 to 22nd May 1923 at Rs. 4 a day ...	408
(c) Amount paid by the plaintiff for the defendants' use and occupation to the Bazaar Company from 23rd May 1923 to 17th July 1923 at Rs. 4 a day ..	224
(d) Amount paid by the plaintiff to the Bazaar Company on account of the defendants' use and occupation of the stall from 18th July 1923 to 30th March 1925 ...	2,488
Total ...	3,750

The learned Judge on the original side dismissed the suit, holding that the claims under the several heads were barred by limitation, by the provisions of O. 2, R. 2, Civil P. C., or by res judicata, in certain cases by a combination of two of them

The claim for rent is based on a consideration different in the main to those governing the claims under the other heads. As to this the plaintiff claimed for the purposes of limitation to exclude the period from the institution of the suit to the decision of the appeal from the decree therein The learned Judge held that, the defendants in their written statement having pointed out that the suit in so far as it was based on a claim for rent by reason of the non-observance of the provisions of S 12, Rangoon Rent Act, 1920, and the plaintiff having taken no steps to legalize his claim for rent, he could not be held to be prosecuting the previous suit in good faith as regards this claim, and that, therefore, he was not entitled to the benefit of S. 14, Lim Act. In Civil Regular No. 354 of 1923, there was no issue covering the point, except, perhaps the general issue as to the relief to which the plaintiff was entitled, and the matter could not have been seriously discussed, as May Oung, J., gave a decree for the rent as a matter of course. So long as the decree was in existence, that is to say, until it was in part set aside by the appellate Court, the plaintiff could not file another suit for the rent, and Mr. Munshi concedes that the plaintiff is entitled to deduct the period intervening between the two decrees But this is not enough to save limitation, and Mr. Burjorjee urges that the period of exemption should begin on the date of the institution of the suit In support of his argument he cites *Nrityamoni Dassi* v *Lakhan Chandra Sen* (1) where the decision of the Calcutta High Court in *Lakhan Chandra Sen* v. *Madhusudan Sen* (2) was affirmed by the Privy Council The decision of the High Court had been that the plaintiffs in the suit should be allowed the period between the date of his decree and the date when it was set aside But their Lordships laid it down as a general principle that limitation would.

" without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice."

Having regard to the fact that no specific issue was raised on the point, and that the rent was in fact decreed, we think that it must be held that the plaintiff was bona fide litigating his claim throughout the period of the suit. Mr. Munshi, however, relies on S. 1 (4), Rangoon Rent Act, 1920, which provides that the expiration of the Act shall not render recoverable any rent which during the continuance of the Act was irrecoverable, and argues that notwithstanding that before the institution of the suit the Act had expired, no rent in excess of Re. 1-4-0 a day, the standard rent, is recoverable. But it has to be remembered that the agreed rent of Rs 90 a month, on any possible construction of Ex. A(1) covered not only the right to occupy the stall but the hire of valuable furniture, and on the materials before us, it is impossible to say that the rent in excess of Rs. 1-4-0 a day exceeded the

(1) A. I. R 1916 P. C. 96=43 Cal. 660 (P.C.).
(2) [1907] 35 Cal. 209=7 C. L. J. 59=12 C. W. N. 926.

permissible amount. We are of opinion, therefore, that the claim for Rs 630 rent is not barred by limitation or by S 1 (4) of the Act.

After the hearing of the appeal, before we had delivered judgment, it came to our notice that at the hearing of Civil First Appeal No 202 of 1924 Mr Burjorjee had

"admitted that no decree for rent can be passed, by reason of the provisions of S 12, Rangoon Rent Act"

The question arises whether, by reason of the admission, the claim for Rs 630 is not res judicata Mr Munshi did not argue the point, and no reference was made to it by either counsel As, however, the point was raised in the written statement and was covered by the issues, we set down the appeal for further hearing with respect to it

Mr Burjorjee argues that the admission was based on an erroneous conception of the law, and that a decision based on that admission cannot operate as res judicata He cites to us the remarks of their Lordships of the Privy Council in *Ganendro-mohun Tagore* v. *Juttendro Mohun Tagore* (3) that

"the plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain relief to which, upon a true construction of the law, he may appear to be entitled"

And in *Beni Pershad Koeri* v *Dudh-nath Roy* (4), their Lordships observed :

"The High Court seems to have understood counsel to have admitted that receipt of rent by the Maharajah operated as a confirmation of the pattah, and the only question which remained was the construction of the pattah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellant on this appeal from claiming his client's legal rights."

If the admission before the appellate Bench was in fact erroneous we are unable to hold that a decision based solely on such admission could operate as res judicata The only reference to the matter in the judgment beyond the recording of the admission, is the statement by their Lordships that they were

"of opinion that the decree of the Court below, except in regard to the granting of rent, is correct, and with that exception it will be confirmed."

We are unable to accept Mr Munshi's contention that this was the determination of an issue after independent consideration. It should also be noted that the judgment of the appellate Court was, not that the rent was not due, but that so far as the claim in respect of it was concerned the plaint should not have been accepted, because the Rent Controller's certificate was not attached thereto, and, therefore, the claim could not be entertained

Mr. Burjorjee contends that the admission was erroneous, because S. 12, Rent Act had no application, the lease being not of a stall, but of a stall with furniture of considerable value The Rent Act, unlike the English Acts, did not bring within its ambit furnished premises. It should further be noticed that two separate rents were reserved, one of Rs 90 a month to be paid to the plaintiff and one of Rs. 1-4-0 a day to be paid to the Bazaar Company It is not an unreasonable construction of Ex A (1) that the whole of the monthly rent is to be attributed to the furniture Be this as it may, in our opinion, the admission of law was erroneous and the claim to the Rs 630 is not barred by res judicata

Item (b) consists of the daily rent of Rs 4 a day paid by the plaintiff to the Bazaar Company from 10th February 1923, when he was recognized by the Company as its tenant, to 23rd May 1923, when the defendants' sub-tenancy expired By reason of Ex A (1) there was a contract subsisting between the plaintiff and the defendants that the defendants should pay to the Bazaar Company the daily rent, whatever it was As and from 10th February 1923 it was Rs 4 a day, having been reduced from Rs. 4-4-0 a day, which was the amount which the defendants had agreed to pay to the Bazaar Company, when on the 10th December 1922, they became its direct tenants The defendants failed to implement their contract and the plaintiff paid the money In dealing with this matter, the learned Judge misapprehended Ex. A (1) and held that, under it. the contract was that the defendants should pay to the plaintiff rent at Rs 90 a month and rent at Rs. 1-4 a day, which latter rent the plaintiff should pass on to the Bazaar Company, whereas, as has been pointed out, the contract, on its true construction, provided nothing of the sort. He accordingly held, first, that during the period in question, the plain-

(3) I A. Sup. Vol. 47=9 B L. R. 377=18 W. R. 359=2 Suther 692=3 Sar 82 (P C).
(4) [1899] 27 Cal. 156=26 I. A. 216=4 C. W. N. 274=7 Sar. 580 (P C.).

tiff could not recover more than Rs. 1-4-0 a day, the standard rent, and, secondly, that the plaintiff should have included this claim in his prior suit. As regards the first point, the plaintiff's claim was not for rent, but to be reimbursed a sum of money which in consequence of the defendants' breach of contract, he had been bound to pay to the Bazaar Company The plaintiff's agreement with the Bazaar Company to pay rent in excess of the standard rent was the direct consequence of the defendant's previous wrongful conduct in procuring himself to be recognised by the Bazaar Company as its immediate tenant Such an agreement, the standard rent not having been fixed by the Controller, was not illegal under S. 19 (1) of the Act, and consequently the contract, Ex. A (1) in so far as it rendered the defendants liable to the plaintiff to pay to the Bazaar Company the daily rent at whatever sum it might be fixed by the Bazaar Company, being merely collateral, was not avoided by the Act The same misapprehension caused the learned Judge to hold that the amount being rent, ought to have been claimed in the former suit It was not rent and did not arise from any cause of action on which the former suit was based At the time of the institution of the former suit it had not been paid, and it was not, in fact, paid till August 1925

Item (c) is a claim for Rs. 224 being the amount paid to the Bazaar Company for the defendants' use and occupation at the rate of Rs 4 a day from 23rd May 1923, when the plaintiff's notice to the defendants determining the sub-tenancy expired, to 17th July 1923. when the Bazaar Company ceased to collect the daily rent This claim the learned Judge held to be barred by res judicata, as being compensation to the plaintiff in respect of the use and occupation of the defendants, which had already been awarded at Rs 90 a month, and barred under O 2, R 2 because it ought to have been included in the former suit The claim was, in reality, to be reimbursed money which the plaintiff was obliged to pay owing to the default of the defendants Mr Burjorjee, however, admits that the daily rent up to the date of the institution of the former suit had been paid before its institution ; to that extent, the claim should have been included in the former suit and, not having been so included. is now barred. The suit was instituted on 4th July 1923, On this head, therefore, the plaintiff is entitled to receive Rs. 4 a day for 13 days or Rs. 52 only and the claim as to the balance of Rs. 172 fails

Item (d) is the amount paid by the plaintiff to the Bazaar Company on account of the defendants' use and occupation of the stall from 18th July 1923 to 30th March 1925 It stands on the same footing as the Rs 52 part of item (c) which has been allowed, and must itself be allowed for the same reasons The result is that the plaintiff succeeds as to the sum of Rs 3,578. The decree of the original side will be set aside and in lieu thereof there will be a decree in favour of the plaintiff for Rs 3,578 and costs on that amount in both Courts We certify for two counsel on the original side

M N /R K *Appeal allowed.*

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* A I. R. 1929 Rangoon 59

PRATT, OFFG. C. J., AND ORMISTON, J.

U Po Hnyin — Appellant.

v.

Official Assignee—Respondent.

First Appeal No. 141 of 1928, Decided on 13th August 1928, from judgment of original side in Civil Regular No. 371 of 1927

*** Presidency Towns Insolvency Act, S. 52 —Insured goods with commission agent— Goods destroyed — Agent becoming insolvent—Insurance money recovered by Official Assignee can be followed** (*cf* 5 *Rang.* 73—*Ed.*).

Plaintiff had some corn lying in the godown of defendant on comission sale when the building was burnt down and the corn was destroyed. Agent became insolvent. The corn was covered by a fire insurance policy and the insurance company paid the insurance money to the receiver. The insurance premium was paid by the plaintiff.

Held , that the insurance money paid to the Official Assignee for goods destroyed by fire could be recovered by the plaintiff-creditor who would have a first claim on it. Even if the trust property had been changed into money, still it could be ear-marked and it could be followed and claimed by the cestui que trust . *In re Hallett's Estate* (1879) 13 *Ch. D.* 696, *Foll.* [P 60 C 1, 2]

N. N. Burjorjee—for Appellant

Auzam—for Respondent.

Judgment.— It is common ground that plaintiff had 1346 bags of gram

lying in the godown of Syed Kazim on commission sale, when the building was burnt down and the gram destroyed. The gram was covered by a fire insurance policy and the Java Sea and Fire Insurance Company paid the Official Assignee Rs. 5,721 on account of the value of 1000 bags of gram destroyed by fire. It should be explained that Sayed Kazim had died and his estate was administered in insolvency. There is also no reason whatever to doubt the very definite evidence that the insurance premium Rs. 150 was paid by plaintiff. Plaintiff sued to recover the insurance money from the Official Assignee.

The learned Judge on the original side held that the plaintiff would have been entitled to recover the gram had it remained gram at the time of the insolvency, but that, as it has been converted into money, he could not follow and recover the money. To our mind the authorities on which the learned Judge relies do not support his view He quotes a passage from William's Bankruptcy Practice at p. 230 (Edn. 13) to the effect that according to the ordinary course of business between merchants and their factors, the former voluntarily became the creditors of their factors in respect of the moneys so received, whereby the moneys, although the proceeds of goods received on trust, lose their trust character. But this in no wise justifies a finding that the insurance money for goods belonging to the creditor lose its trust character On the previous page it is pointed out that property vested in the bankrupt as an agent, such as a factor, etc , will not pass to the trustee of the creditors, so long as it or its proceeds remain distinguishable from the mass of the bankrupt's property.

It is also pointed out shortly after the passage quoted that goods brought by the bankrupt with the proceeds of property deposited with him can be followed by the cestui que trust, if such goods can be identified, even though the purchase of them is breach of trust,

There would seem no reason therefore why the insurance money paid to the trustee for goods destroyed by fire should not be recoverd by the creditor *In re Hallett's Estate* (1) is clearly good authority for following the proceeds of trust property so long as they are identifiable, and in this case they obviously are. So it is laid down in the Laws of England, Halsbury, in S 275 (p. 169) that if the trust property is disposed of by a trustee the proceeds of the disposition may be followed and claimed by the cestui que trust, if they can be identified The same rule applies if the trust property has been changed into money and the money can be ear-marked. We consider that plaintiff had a first claim on the insurance money and his suit should have been decreed. The appeal will be allowed and the suit decreed with costs in both Courts

M.N /R.K. *Appeal allowed*

(1) [1879] 18 Ch. D. 596=49 L. J. Ch. 415= 28 W. R. 732=42 L. T. 421.

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* A. I. R. 1929 Rangoon 60

PRATT, OFFG C J., AND ORMISTON, J.

Official Assignee of Rangoon and *another*—Appellants.

v.

L. Roopjee—Respondent.

Civil Misc Appeal No. 44 of 1928, Decided on 6th August 1928, from order of the Insolvency Judge., on original side in Ins. Case No 271 of 1926.

(a) Presidency Towns Insolvency Act, S. 55—Person claiming to be secured creditor must prove good faith and consideration.

The burden of proving good faith and consideration in cases arising under S. 55 is on the person claiming to be a secured creditor . 43 *Mad.* 739, *Foll* [P 61 C 1]

***(b) Evidence Act, S. 91—Registrable document of contract not being registered—It is inadmissible and no evidence of its terms can be given**

Where a document, embodying a contract between parties, should have been, but was not registered, the document itself is inadmissible in evidence and further no evidence can be given of its terms under S. 91. [P 61 C 1]

P. B Sen—for Appellants.

Halker—for Respondent

Judgment — Laxmishanker Lalljee was adjudicated an insolvent on 14th December 1926. On 16th October 1926, he being the owner of a half share of a leasehold plot of land with a building thereon, mortgaged it for Rs. 1,500 to the respondent who was the owner of the other half share. Subsequent to the insolvency he applied to the Court for the realization of his security The claim was referred to the Official Assignee for

enquiry and report The Official Assignee reported against the claim, and applied under S 55, Presidency Towns Insolvency Act, 1909, that the mortgage be declared void on the ground that it had been given within two years of the date of the insolvency, not in good faith or for consideration. The learned Judge of the original side in his insolvency jurisdiction held in favour of the respondent, declared him to be a secured creditor and directed that the mortgaged property be sold and that the proceeds, after deducting the Official Assignee's commission, be paid to the respondent to the extent of his debt. It is in respect of this order that the present appeal is filed.

The burden of proving good faith and consideration in cases arising under S 55 is on the person claiming to be a secured creditor; see *Official Assignee of Madras* v *C Sambanda Mudaliar* (1). The learned Judge has based his decision on a finding that a certain transaction which took place between the insolvent and the respondent on 5th August 1926, was a genuine transaction. This transaction is evidenced by a promissory note for Rs 1,000 executed by the insolvent in favour of the respondent, a document which also contains words which amount to a mortgage or charge over the insolvent's half share in favour of the respondent for the amount of the debt The document ought therefore to have been, but was not, registered The short answer to the respondent's case is that the terms of the contract between the parties having been reduced to the form of a document, under S 91, Evidence Act, no evidence of its terms is admissible except the document, which itself is inadmissible. Therefore, no evidence at all can be given of the transaction of 5th August

As, however, the learned Judge has come to the conclusion that the transaction of 5th August was genuine and that the later mortgage was merely exchanging a security which, for technical reasons, was invalid for a security which was legally valid, we propose briefly to examine the salient features of the evidence. (Here the judgment discussed evidence and continued) We are satisfied that the respondent has failed to prove that the mortgage was given in good faith and for consideration. We are less reluctant to disturb the finding on a question of fact of the trial Judge for the reason that only a very small fraction of the evidence was given before him.

It follows that the order of the learned Judge of the original side sitting in insolvency must be set aside, and that for it there must be substituted an order that the mortgage in favour of the respondent be declared to be void as against tht Official Assignee and that it be set aside. The respondent will pay the costs of the appellants here and below, advocate's costs in each Court five gold mohurs

S.N./R K. *Order set aside.*

(1) [1920] 43 Mad. 739=60 I. C. 205=39 M. L. J. 845.

A I R. 1929 Rangoon 61

DOYLE, J.

Mohamed Siddiq—Plaintiff.

v

Mohamed Ahmed and *another*—Defendants.

Civil Regular No 121 of 1927, Decided on 6th August 1928.

Letters Patent (Rangoon), Cl.12—Plaintiff not applying for leave though necessary—Defendant submitting to Court's jurisdiction—He cannot subsequently object to Court's jurisdiction.

Where in a suit leave of the High Court, although necessary under Cl. 12, Letters Patent, is not obtained, the defendant must raise the objection as to the jurisdiction of the High Court at the first available opportunity. If he fails to do so, and at first submits to the High Court's jurisdiction, such submission constitutes waiver which cures the defect created by omission to apply for leave : 35 *Cal.* 394 and 17 *C. W. N.* 512, *Foll.*, 4 *Bom* 482, 20 *Bom.* 764 and 37 *Bom.* 563, *Dist.* [P 62 C 1]

Ray—for Plaintiff

Auzam—for Defendant 2.

Judgment.—In the case now about to be heard it is objected that, as part of the cause of action arose in Paungde, and as the leave of this Court has not first been obtained under S. 12, Letters Patent, the Court has no jurisdiction and the case should stand dismissed.

Reference is made to the cases of *Jairam Narayan* v. *Atmaram Narayan* (1), *Haribhai Gandabhai* v *Secretary of State* (2), and *Abdul Kadir* v. *Doolanbibi* (3), where it has been held that leave

(1) [1880] 4 Bom. 482.
(2) [1895] 20 Bom. 764.
(3) [1913] 37 Bom. 563=20 I. C. 530=15 Bom. L. R. 672.

not having first been obtained, the High Court has no jurisdiction In each of these cases objection to the jurisdiction was raised at the first available opportunity.

There has in the present case been submission on the part of the defendant to the jurisdiction of the Court, since he has filed a written statement and asked for the issue of a commission, and the objection now taken is an afterthought

It has been pointed out in *A J King* v. *Secretary of State* (4), which has been followed in *Saraswati Dassee* v *Biraj Mohini Dassee* (5), that where there is in the beginning a submission to the jurisdiction of the High Court, such submission constitutes waiver, and that, therefore, where the jurisdiction of the Court is fettered only by the fact that leave to sue must be given by the Court itself, such waiver cures the defect created by omission to apply for leave The same principle has been affirmed in *Ganesh Narain Sahi Deo* v. *Manik Lal Chandra* (6). It commends itself as based on a sound legal concept as well as on practical common sense. The objection is not upheld; the case proceeds

S.N./R.K. *Objection not upheld*

(4) [1908] 35 Cal. 394=7 C. L. J. 441=12 C. W N 705.
(5) [1913] 17 C. W. N. 512=18 I C. 898.
(6) A. I. R. 1923 Pat. 562.

A. I. R. 1929 Rangoon 62

RUTLEDGE, C. J., AND BROWN, J.

Bowrammah—Appellant

v

A. N A. N. Chettiar and *another*—Respondents.

Civil Misc. Appeal No 114 of 1928
Decided on 18th January 1929.

Limitation Act. S. 18—Mere act of fraud is not sufficient—It must be proved that a person's title or right had been kept from his knowledge by other party's fraud.

It is not sufficient to make S. 18 operative that the cause of action should be based on fraud. It is necessary that the right claimed or the title on which it is founded, should have been kept from the knowledge of the applicant by means of fraud, although it may be that in certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected: *A. I. R.* 1922 *Pat.* 507; 17 *Cal.* 769 and 30 *Cal.* 142, *Appr.* [P 63 C 1]

M. C. Naidu—for Appellant
K. C. Bose—for Respondents

Judgment.—The respondent Chettyar Firm obtained a mortgage-decree against the appellant Bowrammah and others In execution of this decree certain property was sold by auction on 3rd March 1928. The sale was confirmed on 4th April 1928 On 5th April one of the defendants Veena Subba Row, filed an application asking to have the sale set aside. He stated that the plaintiffs in collusion with the present appellant had sold the land privately for Rs. 1,250 This application was dismissed on 7th April. On 9th June the present appellant filed an application to set aside the sale. She is the mother of Subba Rao, who made the application on 5th April She states that she heard about a week before filing her application that Subba Rao had negotiated with the plaintiffs for sale of the property to a Chinaman for 6,000 that the Chettyar then said that they would arrange not to hold the sale if payment was made within three months, and that subsequently the Chettyar fraudulently arranged to prevent the Chinaman from being present at the auction

The appellant's application was filed under the provisions of O 21, R 90, Civil P. C. It was filed three months after the date of the sale sought to be set aside, and was prima facie therefore clearly barred by limitation. The appellant, however, claims that she is saved from the bar by the provisions of S. 18, Lim. Act The learned trial Judge held that she has not established this claim, and rejected her application as time barred. She has now appealed against this decision.

Three cases have been cited to us, but none of them appears to have any direct bearing on the point at issue

In the case of *Ramdhari Chowdhuri* v. *Deonandan Prasad Sing* (1), it was held at p 70 (*of I. L. R. 2 Pat*), in circumstances similar to the present that the application was time barred, unless it could be shown that the respondents' right to set the sale aside was concealed from him by fraud of the appellant.

A similar view was taken in the case of *Mohendro Narain Chaturaj* v. *Gopal Mundul* (2) and in the case of *Golam Ahad Chowdhury* v. *Judhistir Chandra Shaha* (3)

(1) A. I. R. 1922 Pat. 507=2 Pat. 65.
(2) [1890] 17 Cal. 769.
(3) [1903] 30 Cal. 142=7 C. W. N. 305.

These decisions merely set forth the provisions of S. 18, Lim. Act, as applying to cases such as the present.

We have been referred on behalf of the appellant to a passage in the judgment in *Golam Ahad Chowdhury's* case (3) at p 153.

"But if the right of the appellant to apply under the section was concealed from him by fraud of the respondents he would by the operation of S. 18, Lim. Act, and notwithstanding the confirmation of the sale, have 30 days within which to make his application from the date on which the fraud first became known to him."

It is contended that this is an authority in favour of the appellants' claim in the present case, because the fraud alleged in the present case is a fraud by the respondents We are unable, however, to see how this helps the appellant

Section 18, Lim. Act does not say that when the cause of action is based on fraud, time only begins to run from the date when the fraud became known to the applicant. S. 18 says

"When any person having a right to institute a suit or make an application has by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, * * *

bulb stolen from a street lamp by a Burman and a Chinaman. A search was made in the Chinaman's house and a bulb was found, which was recognized as the respondent's. The respondent has never at any time professed to have any personal knowledge as to who was the thief, and the facts stated by him in the first information report are substantially true. Evidence was given as to the theft by the durwan and the jamadar and admittedly an electric bulb was found in the house of the appellant. The respondent may have been wrong in his identification of the bulb as belonging to the Electric Supply Co., but it appears that even in the criminal case he admitted that the bulb which was found in the possession of the appellant might have been obtained elsewhere. The respondent calls himself a shareholder in the Electric Supply Co. and he appears to have been also a manager. There is nothing whatever to show that he intentionally gave false information to the police and the investigating police officer says that he investigated the case and sent it up for trial and that the respondent never came to him, before he sent up the case The trial Judge considered it to be evidence of malice that the Chinese elders of the town told the respondent that the appellant was innocent, and yet he did nothing. The respondent does admit that he was told by the elders that the appellant was an honest man, and got the bulb by purchase. But that was after he had made the first information report By that time the case was out of his hands and there is nothing to show that he took any further action against the appellant I am quite unable to accept his retaining the services of an advocate in the Magistrate's Court as evidence of malice He was perfectly entitled to do this, and the filing of the present civil case against him suggests that he was wise in doing so.

It is not suggested that that the parties had had any quarrel before the complaint was made to the police, or that the respondent had any reason whatever for wishing to get the appellant into trouble. I am of opinion that the appellant has entirely failed to prove that the respondent acted with malice.

I therefore dismiss the appeal with costs.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 64

HEALD, J.

Maung Ngwe San — Defendant—Appellant

v.

Ma Gyi—Plaintiff—Respondent

Special Second Appeal No. 206 of 1928, Decided on 21st December 1928.

(a) Buddhist Law (Burmese)—Divorce.

Where a Burmese Buddhist man slaps his wife though once and cohabits with another woman and gets a child from her, the wife is entitled to divorce. [P 64 C 2]

(b) Evidence Act, S. 114—Marriage.

Presumption of marriage arises from long cohabitation. [P 64 C 2]

So Nyun—for Appellant.

Thein Maung—for Respondent

Judgment. — Respondent sued appellant for divorce under Burmese Buddhist law on the ground of cruelty She alleged that the appellant had ill-treated her, and deserted her and had taken another wife without her consent

The Township Court found that respondent proved that appellant had beaten her and had left her and cohabited with another woman by whom he had had a child, but the learned Judge said that "merely slapping by a husband to his wife and once in a blue moon cannot be taken as cruelty and as such good ground for divorce" and that although appellant had lived with the other woman and had had a child by her, his living with her did not amount to taking another wife so as to entitle respondent to a divorce

The learned Judge was clearly wrong on both points On the first point he has overlooked the rulings in the cases of *Mg Po Han* v. *Ma Talok* (1) and *Ma Sat* v. *Mg. Nyi Bu* (2) and on the second he has overlooked the presumption of marriage which arises from long cohabitation.

His judgment was quite rightly set aside by the District Court and it is clear that there are no merits in the appeal

Respondent was in my opinion entitled to a decree for divorce on the ground of serious misconduct on the part of the husband and the appeal is dismissed with costs, advocate's fee in this Court to be five gold mohurs

R K. *Appeal dismissed.*

(1) [1913] 7 L. B. R. 79=20 I.C. 674=6 Bur. L. T. 134.

(2) A. I. R. 1921 U. B. 2=4 U. B. R. 68.

* A. I. R. 1929 Rangoon 65

RUTLEDGE, C. J., AND BROWN, J.

V. E A. R. M. Chettyar Firm — Appellant.

v.

A K. R. M. K. Chettyar Firm — Respondent.

First Appeal No. 182 of 1928, Decided on 3rd December 1928.

*** Transfer of Property Act, S. 59—*S* holding two plots with building thereon by sale-deed and also possessing lease-deeds under which his vendor held those plots — *S* depositing sale-deed and one lease-deed with *A* with intention to create mortgage thereon and subsequently other lease-deed with *B*— Lease-deeds bearing endorsements showing sale of the property — Mortgage of whole property was created in *A*'s favour—*B* cannot get priority over *A* merely because *A* did not insist on obtaining other lease-deed— Transfer of Propety Act, S. 78.**

All that is required to prove to establish an equitable mortgage is (1) that documents of title were deposited with a creditor and (2) that the intent was to create a security thereon. [P 66 C 1]

One *S* held two plots of land and a building thereon, by virtue of a registered sale-deed. He also possessed with him the original lease-deeds under which the plots were held by his vendor. He deposited the sale-deed and also the lease-deed with regard to one of the plots with *A*, with intention to create a security thereon, and thereafter deposited the other lease-deed with *B* with the same intent. On each of the lease-deeds there was an endorsement that the property was sold to *S*.

Held that *A* had title-deeds with regard to the whole property deposited with him and an equitable mortgage was created on the whole property in his favour although he did not possess the other lease-deed: *A. I. R.* 1916 *P. C.* 115, *Dist. Roberts* v. *Croft*, 53 *E. R.* 343, *Rel. on.* [P 66 C 1]

Held further that the mere fact that *A* did not insist on obtaining the other lease-deed which on the face of it showed that there was a sale of the property effected, did not constitute gross negligence on *A*'s part so as to give priority to *B*'s mortgage over *A*'s *A.I.R.* 1926 *Rang.* 195, *Rel. on.* [P 66 C 2]

Ba Maw—for Appellant

K C Bose—for Respondent.

Judgment —The respondent, A. K. R M. K Chettyar Firm sued one Ma Ohn Sein and 3 others on an equitable mortgage, the property claimed to be mortgaged consists of 2 plots of land and a building thereon The two plots of land are known as lots Nos. 232 & 232-A. They were originally held under a lease from the Rangoon Development Trust by one Ma Pyu who by a registered deed sold the two plots of land and the building thereon to one U Po Gyi The respondent-plaintiffs claimed that they took an equitable mortgage of the property from U.Po Gyi on 5th December 1924. U Po Gyi is now dead, and the first three defendants in the case are his legal representatives They first contested the suit, but finally dropped out of it and the real contest was between the respondent-plaintiffs and the appellants, who were the defendants 4.

The appellant V. E. A. R. M. Firm claimed that they have an equitable mortgage on the property known as lot No 232A and so much of the building as stands thereon The learned trial Judge held that the respondents had established their mortgage as regards lot No 232 and as regards all the buildings on both the pieces of land The learned Judge, held, however, that the respondents had failed to establish their claim as regards lot No 232-A and gave a decree in favour of the appellants as regards this site. Otherwise the decree grants the plaintiffs' prayer The V E A R M Firm have appealed against this decree and cross-objections have been filed on behalf of the original plaintiffs

It is contended on behalf of the appellants that the transfer of land of necessity carries with it a transfer of any building on that land, and that the learned trial Judge having found against the respondents that their mortgage on lot No 232-A failed should have rejected the respondents' claim and refused a mortgage decree, on so much of the building as stands on lot No 232-A

The mortgage in favour of the appellants was effected some 16 months after the mortgage in favour of the respondents The learned trial Judge held that the appellants having obtained the lease-deed as regards lot No 232-A, that piece of land was under mortgage to them, and not to the respondents He referred to the case of *Pranjivandas Jagajivandas Mehta* v *Chan Mah Phee* (1), where it was settled that the scope of the security created by a deposit of title-deeds is the scope of the title covered by those deeds. It does not seem to us, however, that very much help can be derived here from the decision in that case in which the point at issue was not whether an equit-

(1) A. I. R. 1916 P C 115 = 43 Cal. 895 = 43 I. A. 192 (P.C.).

able mortgage could be created although there was not a complete deposit of all the title-deeds. An equitable mortgage is created by deposit with a creditor of documents of title to immovable property with intent to create a security thereon All that is necessary to prove to establish such a mortgage is (1) that documents of title were deposited with a creditor and (2) that the intent was to create a security thereon

In the case of *Roberts* v *Croft* (2) the facts were in many ways very similar to the facts in this case In that case Roberts had deposited with one Miss Wilis documents of title relating to certain property. These documents included all the previous title-deeds to the property but did not include the deed whereby Roberts himself obtained title. Subsequently Roberts deposited the remaining deed with Messrs. Bult In each case the deposit was made with intent to create an equitable mortgage. It was held that in order to establish an equitable mortgage it was not necessary to prove that the deeds deposited showed a good title in the depositor, and although she received no deed showing any right to the property in her mortgagor, it was nevertheless held that Miss Wilis' mortgage was a perfectly good one It was further held that the subsequent mortgage to Messrs Bult by deposit of the remaining deed was also a perfectly good mortgage, but that there had been negligence on the part of Messrs. Bult and that, therefore, Miss Wilis' mortgage must be preferred to theirs In the present case the documents deposited with the respondent's firm consists of a sale-deed with regard to both the pieces of land, and the house, and the lease-deed with regard to lot No 232. Title-deeds have, therefore, been deposited with regard to the whole property and in our opinion a valid equitable mortgage has been created on the whole property if it has been shown that was the intention of the parties at the time of the deposit.

The question of intention has not been specifically considered by the learned trial Judge, but we are of opinion that the respondent-plaintiff did establish their case in this connexion. The clerk of the Chettyar firm has given evidence on the point and he is supported in his evidence by one Maung Kan Hla His explanation with regard to the lease-deed of the property lot 232-A, is that at the time U Po Gyi said he could not find the document. We understand that the bulk of the building affected is on lot 232, but that the building on lot 232 extends into lot 232-A, and it seems to us extremely unlikely that the respondent firm would accept a mortgage of part only of a house. We consider it sufficiently established that the intention was to mortgage both the lots and the building thereon We therefore hold that a valid mortgage of the whole property was effected in favour of the respondents.

It only remains therefore to consider whether the respondents have by their negligence entitled the appellants to claim any priority over them It does not seem to us that they have established their case in this particular Under S 78, T. P. Act, the respondents' mortgage would have to be postponed to the appellants' mortgage if the respondents have been guilty of gross negligence.

It was held in the case of *A. L R M. Chettyar Firm* v *L P. R. Chettyar Firm* (3) that there was no universal rule to the effect that parting with title-deeds by a mortgagee amounted to gross negligence. In this case the lease-deed which was the only document of title held by appellants bears an endorsement that the property was sold to U Po Gyi by registered deed The appellants must therefore be held to have been aware of the fact that they had not got all the title-deeds relating to the property and there is no explanation as to why they made no enquiries The respondent firm presumably knew that there was this endorsement on the lease of lot 232-A as there was a similar endorsement on their lease, and the mere fact that they did not insist on obtaining one of the documents of title which on the face of it, must clearly have shown the existence of another important document does not in our opinion amount to such gross negligence as to justify the appellants' mortgage being preferred to theirs.

It has been suggested on behalf of the appellants that the respondents admitted that the appellants' mortgage was taken without notice of their previous mortgage We cannot, however, find anything on the record to justify their contention. It is true that it is recorded in the depo-

(2) 53 E. R. 343.

(3) A.I.R. 1926 Rang. 195=4 Rang. 238.

sition of Rathnam Pillay that the learned advocate for the respondents, who had been questioning the witness with a view to establish actual notice did not pursue that line. And the learned trial Judge comments on this matter to the same effect

It is admitted that the respondents do not allege actual notice by the appellants What they do allege is that the appellants were put on their enquiry and could have received actual notice had they taken reasonable precautions. One other matter has been raised in appeal and that is as regards costs. It is contended that the actual proof of the respondents' mortgage was necessary only because other respondents in the case denied the mortgage, and that the costs of this part of the case should not have been awarded against the appellants It is clear, however, that the appellants also though not denying the mortgage did not admit it, and that being so, it became necessary for the respondents to prove their mortgage as against the appellants We do not think therefore that there is any force in this contention We dismiss the appeal and allow the cross-objections We alter the decree of the trial Court and give a mortgage decree in favour of the respondents for the whole of both the plots of land and the building thereon. The appellant-defendants will pay the costs of the respondent-plaintiffs in the trial Court and in this Court the appellants will pay the respondents costs both on the appeal and on the cross-objections

S.N./R.K. *Decree varied*

A. I. R. 1929 Rangoon 67

PRATT, OFFG. C J. AND ORMISTON, J.

Ma Kho U and *others*—Appellants

v.

Maung Ba Sein and *another*—Respondents.

First Appeal No. 93 of 1928, Decided on 7th September 1928, from judgment of Dist. Judge, Pyapon, in Civil Regular No 34 of 1927.

(a) Civil P. C., S. 10—Subsequent suit for mesne profits accruing subsequent to institution of prior suit is not barred by S. 10.

Where a suit was brought for the recovery of mesne profits which had accrued subsequently to the institution of a prior suit relating to the same property, and although there was one issue common to both the suits, yet they did not embrace the entire subject in controversy between the parties, the subsequent suit for mesne profits does not attract the operation of S. 10. *A. I. R.* 1923 *Cal.* 716 and *A. I. R.* 1925 *Mad.* 574, *Rel. on.* [P 69 C 1]

(b) Civil P. C., S. 10—Applying for or obtaining leave to appeal to His Majesty does not amount to pendency of appeal.

The mere applying for or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed 21 *Mad.* 18 *Foll.* [P 69 C 2]

Young—for Appellants

Paw Tun—for Respondents

Judgment—In Civil Regular No. 39 of 1924 of the District Court of Pyapon the plaintiffs (respondents) obtained a decree against U Shwe Dun and defendant 1 (appellant 1) for possession of certain lands. By the decree dated 2nd May 1927, of this Court in Civil First Appeal No 213 *of* 1925 the decree of the District Court was varied and U shwe Dun and defendant 1 were ordered to give to the plaintiffs possession of the following lands:

(a) Holding No 23 of 1923-24 in Taungbogyi kwin, Yondaung Circle, Kyaiklat Township, measuring about 25·44 acres.

(b) Holding No 10 of 1923-24 in Kyaungsu kwin, aforesaid measuring 24·21 acres.

(c) Holding No 6 of 1923-24 in Kywesa-gyet, Taung kwin aforesaid measuring about 22 26 acres

(d) 50 acres out of holding No 10 of 1923-24 in Ywathagyi kwin, aforesaid.

(e) Holding No. 5 of 1923-24 in Ywathagyi kwin, aforesaid measuring about 23 acres

In Civil Miscellaneous No. 80 of 1927 of this Court U Shwe Dun and defendant 1 on 2nd July 1927, applied for leave to appeal to the Privy Council against the decree of this Court on appeal. On 6th December 1927, a certificate was granted in respect of this and two other cases, the subject matter of Civil Miscellaneous Applications No 78 and 79 of 1927, that they were fit cases for appeal to the Privy Council. The appeal was admitted on 30th January 1928 and the record was despatched to England on 31st July 1928.

In the meantime the plaintiffs had been put into possession of the suit land and had on 5th September 1927, instituted Civil Regular No. 31 of 1927 of the District Court of Pyapon against defendant 1 (ap-

pellant 1) and the heirs and legal representatives of U Shwe Dun, then deceased (the appellants), claiming mesne profits which had accrued since the institution of Civil Regular No 39 of 1924. On 24th September 1927 the defendants filed a written statement in which inter alia they pleaded that an appeal to the Privy Council had been "admitted," and asked for a postponement until after the decision of the Privy Council. On that day a single issue was framed namely "are the plaintiffs entitled to mesne profits as claimed? If so to what extent". It should be noted that no issue was asked on the question of whether there should be a stay and that in the written statement the defendants had not pleaded that the District Court was bound to stay the suit On 4th November 1927 they filed a substantive application asking for stay until after the Privy Council decision. On 10th November 1927, this application was dismissed Up to that time no certificate had been granted and as the Additional Judge pointed out, there was no certainty that the application for a certificate would be granted, or, if it was granted, that the appeal to the Privy Council would be successful. The case was fixed for hearing on 29th November 1927 and on that day it was postponed to 12th January 1928 The defendants did not appeal on that day and an ex-parte decree was passed in favour of the plaintiffs on 13th January 1928 On 20th January 1928, the defendants filed an application to re-open the case, and with this application they filed a copy of the order of this Court dated 6th December 1927, certifying that the case was a fit one for appeal to the Privy Council This appears to have been the first intimation to the Court that such an order had been passed The Additional Judge refused to re-open the case. Two appeals have been filed by the defendants, one from the refusal to re-open the case, which is dealt with in a separate judgment, and one from the decree in the suit

So far as the decree in the suit is concerned only two grounds have been argued. It is possible to dispose, shortly, of one ground, that the decree should have been against the defendants, not personally, but in their capacity of legal representatives. The persons who had been in possession of the suit lands and who were ordered to give up possession thereof were U Shew Dun and Ma Kho U the (defendant 1) U Shwe Dun died leaving as his heirs and legal representatives the defendants In Civil Regular No. 34 of 1927 the defendants were sued for mesne profits and it was not stated whether any and if so which of them were sued as legal representatives of U Shwe Dun. The decree was passed against all the defendants personally. Mr. Paw Tun for the respondents concedes that this was erroneous The decree as regards the mesne profits should have been passed against defendant 1 personally and against all the defendants as heirs and legal representatives of U Shwe Dun deceased. There is no reason why all the defendants, who must be taken to have wrongfully resisted the suit, should not pay the costs in their personal capacities It should be stated that the ground of appeal covered the case of all the defendants, but defendant (1) was clearly liable in her personal as well as in her representative capacity.

The third ground of appeal is that inasmuch as the plaintiffs based their case on a decree of this Court which is now

"and was at the time of the decision of the present suit the subject of an appeal to His Majesty in Council and could not or should not under such circumstances have been made the grounds for a decision by the trial Court."

If and in so far as the District Court had a discretion to proceed with the trial of the suit, there seems to be no ground for interference with its discretion So long as the decree of this Court stood the plaintiffs had a right to sue and there was no reason why the proof of their claims and the realization of the amount due to them should be postponed for an indefinite time:

Mr Young for the appellants relies on S 10, Civil P C. That section, so far as material, prohibits a Court from proceeding

"with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending"

before His Majesty in Council

Mr Young's argument would appear to be that, inasmuch as the defendants were appealing to the Privy Council, the District Court was bound to stay the suit. His position is, apparently, that the "matter" in issue in the present suit was

directly and substantially in issue in the previous suit inasmuch as the right to recover the mesne profits depends on the title to the land. The authorities cited by him are not helpful to his argument

In *Wahidunnissa Bibi* v *Zamin Ali Shah* (1), *Z* and *J* brought a suit against *W* and other heirs of *W's* deceased husband, claiming certain property in virtue of a deed of gift from the mother of the deceased The suit was decreed and an appeal was filed from the decree. Pending the appeal, *W* brought a suit against *Z* and *J* and another, in which she claimed one-sixth of her dower debt, exempting the other heirs of her late husband In the second suit the deed of gift in favour of *Z* and *J* was again brought in question, the plaintiff alleging that it was invalid and inoperative. In this suit the Court, at the instance of the defendants made an order under S 10 staying proceedings until the appeal in the former suit should have been decided The High Court on revision refused to interfere with this order Both the learned Judges of the High Court appear to have regarded the matter as one for the exercise of discretion as to whether the second suit should or should not be stayed

In *Jamini Nath Mallik* v *Midnapur Zamindary Co* (2), which was an application for revision, two suits involving claims for certain cesses against the petitioners were decided against them and were pending in appeal, when a rent suit was brought against the petitioners. They applied for stay of the suit under S 10, inasmuch as it concerned cesses alleged to be due for a subsequent period Rankin, J, held that although appeals fall within the purview of the section yet it was not applicable to the case before him, which was a suit for a different debt altogether and for a debt which was not in existence when the last of the previous suits was brought.

In *Kuberan Nambudri* v. *Koman Nair* (3) it was held by Srinivasa Aiyangar, J, that the expression "Matter in issue" in S. 10 has reference to the entire subject in controversy between the parties and the mere fact that one of the issues in two suits is common is not sufficient to attract the operation of S. 10. The common issue in the case before him was whether the plaintiff had been validly adopted.

Applying the two last named cases, which seem to have been well decided, to the matter before us, if we take the chronological test adopted by Rankin, J., the right to mesne profits accrued subsequently to the institution of the prior suit and was not in existence at the date of such institution, while it is manifest that although there is an issue common to the two suits, they do not embrace the entire subject in controversy between the parties

For these reasons alone the appeal must fail. There are yet other reasons. As is pointed out in *Nainappa Chetty* v. *Chidambaram Chetti* (4).

"the mere applying for, or obtaining leave to appeal to the Privy Council cannot of itself amount to the pendency of an appeal till such appeal is actually filed, for it may happen that the parties, who obtain such leave, may never appeal at all against such decree or order."

At the time when the defendants applied to stay the suit, the application for a certificate that the case was a fit one for appeal to the Privy Council had not been heard, and it would be to somewhat violently stretch the language of S. 10 to hold that an appeal was pending before the Privy Council The certificate was granted on 6th December 1927, the defendants took no steps to amend the written statement, and consequently, when the suit came on for ex-parte hearing, it was tried on the single issue which had been previously fixed As has been said above the certificate was brought to the notice of the Court only after the case had been heard, namely on 20th January 1928, and it was not until 30th January 1928 that the appeal to the Privy Council was admitted It is not necessary for the decision of this appeal to decide the exact point of time at which an appeal may be said to become pending before the Privy Council, whether it is when it is registered as such in the Privy Council Office, or when it is admitted by the High Court or when the certificate of fitness is given It is sufficient to say that even if the last mentioned time is taken, the Court was unaware that the certificate had been granted and there was no issue raised as to S. 10, Civil P. C

Mr. Young has asked us to act under S. 151. If the appellants had been pre-

(1) [1920] 42 All. 290=55 I. C. 89=18 A. L.J. 145.
(2) A. I. R. 1923 Cal. 716.
(3) A. I. R. 1925 Mad. 574.
(4) [1897] 21 Mad. 18.

pared, as was at one time it was suggested might have been the case to deposit the decretal sum in Court, with a view to its ultimate ownership being determined by the result of the appeal to the Privy Council, there might have been ground, which under the existing circumstances is lacking, for the application of that section The decree of the District Court will be modified by a provision that in so far as it is a decree for 4,200 baskets of paddy or Rs 8,400 the value thereof, it shall be a decree against defendant 1 personally and against all the defendants as legal representatives of U Shwe Dun. The appellants will pay the costs of this appeal

S N /R.K *Decree modified*

A I R 1929 Rangoon 70

CARR, J.

Maung Sein Myi and *another*—Applicants

v.

Maung Tun Pe and *another*—Respondents.

Civil Misc. Appln. No. 81 of 1928, Decided on 18th September 1928, from judgment of Mosely J., in Second Appeal No 540 of 1927.

(a) Civil P. C., O. 47, R. 1—Mistake or error—Error of law must be obvious.

An error of law is a proper ground for review when that error is apparent on the fact of the record *A. I. R.* 1924 *Mad.* 98, *Foll. A. I. R.* 1928 *Rang.* 12, *Ref.* [P 70 C 2]

(b) Civil P. C., O. 47, R. 1—Ground for review—Illegal delivery of judgment depriving right to appeal—Ground is sufficient for granting review.

Delivery of judgment without previous notice to the parties or their pleaders is illegal, and this illegal action, if it deprives a party of a very important right of obtaining leave to appeal, is a sufficient ground for granting a review *A I R.* 1922 *P.C.* 112, *Ref* [P 71 C 1]

P. B. Sen—for Applicants

Paget—for Respondents.

Judgment—This is an application for review of a judgment of Mosely, J., and comes before me because he is no longer attached to the Court. The first ground of the application is that the decision is wrong in law. It has been urged by the advocate for the applicants that an error of law is a proper ground for review, and in support of this proposition he quotes, among others, the cases of *Ma Hta Yi* v *Ma Pwa Hnit* (1) and *Murari Rao* v. *Balavanth Dikshit* (2)

I am willing to accept the proposition that an error of law is included within the second category of R. 1, O. 47, Civil P. C, but that error must be one that is apparerent on the face of the record I agree with the view expressed by the learned Judges in the *Madras* case above quoted, where they say at p. 957 of the report

"We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review."

In the present case I do not think that there is any such error I do not say that the decision of the learned Judge is correct It may or may not be correct; but I am certainly not prepared to say that it is so obviously incorrect that there is an error apparent on the face of the record The question raised is one that is extremely difficult and controversial It was, in fact, the question on which the whole appeal turned, and it was decided after full consideration by the learned Judge This ground, therefore, in my opinion, must fail.

The other ground is different. The facts are that Mosely, J. was officiating as a Judge of this Court up to 29th May 1928, and after that date ceased to be a Judge of the Court. It is admitted that he delivered judgment in this appeal on 29th May 1928, and that he did so without previous notice being given to the parties or their advocates of the date on which judgment would be given The advocates were informed shortly afterwards that judgmeut had been given, and Mr Sen for the applicants says that he endeavoured on the same day to see the Judge in order to obtain from him a certificate for appeal under Cl 13 of the Letters Patent of this Court He was unable, however, to find the Judge, and, therefore, could not make that application He did subsequently make an application; but this was rejected on the ground that under Cl. 13 of the Letters Patent it is only the Judge who passed the judgment who can declare that the case is a fit one for appeal

The rules of this Court provide that an application for such a declaration may be made orally at the time of delivery of

(1) A. I. R. 1928 Rang 12=5 Rang. 610.
(2) A. I. R 1924 Mad. 98=46 Mad. 955.

judgment, or afterwards, in writing at any time within one month. The fact that the learned Judge ceased to be attached to the Court from the day on which he passed judgment deprived the petitioners of their right to make such an application in writing, and the fact that the Judge delivered judgment without previous notice to the parties deprived them of the opportunity of making the application orally.

Delivery of judgment in this way, without previous notice was illegal and by his illegal action the Judge deprived the petitioners of a very important right. In my view this should be held to be a sufficient reason under R. 1, O. 47, Civil P. C. The case was, in my opinion, a very fit one for grant of a declaration under Cl 13 of the Letters Patent, and in all probability, had such an application been made to him, the Judge would have granted the declaration.

I do not think that in holding this to be a sufficient cause for review I am departing from the ruling of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (3). There was, in my opinion, an error of procedure apparent on the face of the record, and this brings the matter within the view taken by their Lordships that the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified immediately previously.

I, therefore, grant the application for review The judgment of the learned Judge is set aside and the appeal will be re-heard. The question, as I have already said, is an extremely difficult and controversial one, and I think that the appeal is one that should properly be heard by a Bench I direct, therefore, that the rehearing of the appeal be before a Bench, or, should the Chief Justice so decide, before a Full Bench. The respondents are in no way to blame for the error committed by the learned Judge. I, therefore, direct that the costs of this application shall be costs in the appeal when reheard ; advocate's fee in this application three gold mohurs.

M.N./R K *Order accordingly*

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(3) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P.C.).

* A. I. R. 1929 Rangoon 71

DAS AND BAGULEY, JJ.

E H. Joseph—Appellant.

v.

A. P Joseph—Respondent

First Appeal No. 132 of 1928, Decided on 4th September 1918, from judgment of Original Side in Civil Regular No. 356 of 1925, *Reported in A I R*, 1926 *Rang* 186.

(a) Mortgagor and mortgagee — English cases not good guides in mortgage suits.

English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts; 31 *Cal.* 57 and 33 *Cal.* 410, *Foll.* [P 72 C 1]

*** (b) Transfer of Property Act, S. 69— Clause in mortgage-deed giving mortgagee power to sell on certain amount of interest falling in arrears but not power to claim repayment of principal on such default—No suit on mortgage can lie until debt is repayable.**

Where mortgage-deed contains a clause which gives mortgagee power to sell in case certain instalments of interest fall in arrears, but the clause does not provide that on such default mortgagee shall have the right to claim repayment of principal, the mortgagee has no right of suit on the mortgage up to the date on which the mortgage debt is repayable. *Edwards* v. *Martin* (1856) 2 *J. J Ch.* 284, *Dist.* [P 72 C 2]

Shaffee -for Appellant.

Banerji—for Respondent.

Judgment.—This is a suit upon a mortgage. The mortgage is one covering the mortgagor's life interest in certain immovable property. The parties are Jews. The property is within Rangoon and the mortgage is in the English form with a power of sale, which is the power governed by S 69, T P. Act. The date of the mortgage is 16th May 1919 and the date fixed for payment is 15th May 1924. It is agreed that the mortgagor has been in arrears of interest more than once and that the mortgagee has filed suits against him to recover the interest The last of these suits was filed before the 15th May 1924 The only point for decision in this appeal is whether owing to the filing of these suits the plaintiff is debarred from suing on his mortgage for the recovery of the principal and the interest which subsequently became due.

There is no doubt that at the date of the filing of the last of the suits for interest the principal money had not become due in the ordinary way and that therefore O. 2, R 2, would not bar his suit. It is claimed, however, that by vir-

tue of the power of sale a right of suit on the mortgage for the payment of the principal money would arise before the 15th May 1924, and if this contention is good then no doubt O 2, R 2, would bar the suit The mortgage is a somewhat complicated one, but I would only give the salient points. First of all, in consideration of the sum of Rs. 10,000 the mortgagor assigned all his life interest to the mortgagee subject to the proviso that he might redeem his interest by repaying the mortgage money on 15th May 1924 together with all arrears of interest at 9 per cent. per annum It further covenants for payment of interest month by month on or before the 15th day of the month succeeding that for which the interest is due So far it is clear that the mortgage money had not become due before the 15th May 1924, and it is also clear that there is a separate covenant for payment of it. We then come to the clause giving the power of sale

"It is hereby agreed and declared that if the said mortgagor shall fail to pay the said sum of Rs. 10,000 with arrears of interest due thereon on the expiration of the period of three months from the serving of a notice on him by the mortgagee calling upon him to pay up the said sum of Rs 10,000 and interest on the said 15th May 1924 or if at any time during the continuance of this security, interest due hereunder amounting to Rs. 500 at the least shall be in arrear and remain unpaid for three months then and in such case the mortgagee shall be at liberty and shall have the power to sell the said premises hereby assigned either by public auction * * * * *."

It is argued that in this clause default of payment of interest amounting to Rs. 500 for more than three months gives the mortgagee the right to claim his principal money The appellant relies upon one old English case only, *Edwards* v *Martin* (1)

It is quite clear that in these cases the rights of the parties and the question of whether any default accelerates the claim on which the principal money can be called in would depend entirely upon the wording of the mortgage in question. It must also be remembered that English cases are not necessarily good guides for the decision of mortgage suits in the Indian Courts, for the Indian cases are governed by the Transfer of Property Act and the Indian Courts know nothing of the refinements between the legal estate and the equitable estate which form the basis of all such decisions in the Court of Chancery. vide *Webb* v. *Macpherson* (2) and *Gokul Dass* v *Eastern Mortgage and Agency Co.* (3) This particular power of sale is one which is to be exercised by the mortgagee himself personally and not through the agency of the Court, and supposing Rs 500 interest had been in arrears for more than three months, we entirely fail to see how he could approach the Court with any form of suit on this clause. The Court could merely tell him to go away and sell the property himself, if he was advised that the clause conformed with S. 69, T P. Act, and that default had arisen. There is no clause in this mortgage stating that if the interest is in arrears to the extent of Rs. 500 for more than three months, the mortgagee shall have the power to call in the principal money mentioned in the deed.

With regard to the case cited, *Edwards* v. *Martin* (1) in this case there was a mortgage of leaseholds upon which interest was payable half-yearly The mortgagee took possession and asked for foreclosure, although the time or the date fixed for repayment had not arrived It was admitted that in this case the capital was not due but it was claimed that the right to foreclose had arisen The circumstances of this case are therefore quite different to the circumstances in the present case. There is no claim to foreclose and the mortgage deed is quite silent with regard to any right to foreclose. In fact the power of sale would appear to negative the idea that any question of foreclosure was contemplated between the parties. It is also to be noted that in this case no reasons are given for the decision but the Court merely followed a dictum in another case for which no reasons have been given.

We are of opinion that as there is no clause providing that on default of payment of interest the mortgagee shall have the right to claim repayment of principal, he had no right of suit on the mortgage before the 15th May 1924. No suit for interest has been filed since that date and therefore O 2, R 2 cannot apply. The appeal will be dismissed with costs.

S N./R.K *Appeal dismissed.*

(1) [1856] 25 L. J. Ch. 284=1 W. R. 219.

(2) [1904] 31 Cal. 57=30 I. A. 238=8 C.W.N. 41=8 Sar. 554 (P.C.).

(3) [1906] 33 Cal. 410=4 C. L. J. 102=10 C. W. N. 276.

A. I. R. 1929 Rangoon 73

DAS AND BAGULEY, JJ.

Chandanam and *another*—Appellants.

v.

A M. C P. Samsugany and *others*—Respondents

First Appeal No. 290 of 1927, Decided on 3rd September 1928, from judgment of Dist. Judge, Hanthawaddy, in Civil Regular No 4 of 1927.

(a) Civil P. C., O 17, R. 2 — Burden of proof on defendants—They failing to appear on date fixed by Court on its own motion—Court proceeding with case and passing order — Order purporting to be on merits—Order should not have been on merits — Order must be held to be one ex parte under R. 2.

Court on its own motion fixed a case for hearing on a particular date, but the defendant, on whom the burden of proof lay, failed to appear, and the Court proceeded with the case and passed order which purported to be on merits,

Held . that the order should not have been on merits and the case must be held to have been decided as ex parte under O. 17, R. 2 · 37 *All.* 460 , *A. I. R.* 1923 *All.* 551 ; *A. I. R.* 1925 *All* 182, *A. I. R* 1923 *Bom.* 27 and 41 *Cal.* 956, *Rel. on* ; 41 *All.* 663, *Dist.* [P 74 C 2]

(b) Civil P. C., O. 17, R. 3 — Defendants not appearing on date fixed—Court making order that case would be proceeded with without reference to defendants' witnesses and proceeding to examine plaintiffs' witnesses — Defendants then appearing—Court asking them to cross-examine plaintiffs' witnesses if they so wished — Court's procedure was unjustified.

On the date fixed for evidence the defendants did not appear although burden lay on them. The Court made an order to proceed with the case without further reference to defendants' witnesses and began examination of plaintiffs and their witnesses. The defendants then appeared and the Court asked them to cross-examine the plaintiffs' witnesses if they desired to do so.

Held : that the procedure of Court allowing defendants to cross-examine plaintiffs' witnesses without allowing chance to examine witnesses was unjustified. [P 74 C 2]

Ba Han—for Appellants.

Chowdhury—for Respondents.

Judgment —In this case the appellants were the main defendants in the lower Court. The suit was filed against them on 10th January 1927, and proceeded on a usual course. Issues were framed on 26th March, and the case was put down for hearing on 17th May On 17th May it could not go forward and was put down for hearing on 31st May. On that date, the hearing could not be proceeded with, because certain proceedings were necessary which were in the High Court, but no date was fixed. The case was mentioned the next day, and the defence advocate asked for an adjournment to consider his position until 4th June He was called upon to furnish security for costs and advocate's fees. On 4th June it was stated that an agreement had been come to, and that a compromise petition would be filed. The 7th June was fixed for this. It was next put over to the 8th and then to the 9th and finally to the 10th, on which date the compromise petition was directed to be filed peremptorily On 10th June it was not so filed, and the case once more went down for peremptory hearing for 22nd and 23rd. On 22nd June some evidence was led, and it was put down for next day, but was not taken up, and further hearing was put down for 21st and 22nd July The case was apparently never put up on 21st July at all, and the diary does not explain why It came up, however, on 22nd July, on another point, and was adjourned till 22nd August, and steps were taken to have a handwriting expert examined. On 4th August a commission was ordered to issue, returnable on 1st September For some reason not apparent in the diary the case was put up on 17th August, and it was then put down for hearing at 10 a m sharp the next day, 18th August On this date the Judge gave the defendants on whom the burden of proof lay eight minutes' grace and, as they did not arrive at 10-8 a. m . he recorded a diary order :

" Under the circumstances the case proceeds without further reference to defendants' witnesses."

The plaintiff was examined, and a few minutes later defendants 1 and 2 arrived, followed by their advocate. Meanwhile, the plaintiffs' witnesses were being examined, and the Judge asked the defendants' advocate if they wished to cross-examine ; they elected not to do so, and the case was put for orders on 25th August, and orders were finally passed on 5th September. This order purports to have been passed on the merits. Against this order the present appeal has been filed.

It is argued that under these circumstances no order on the merits could possibly be passed. With this contention we are in entire agreement *Phul Kuar*

v. *Hashmatullah Khan* (1) is authority for holding that under similar circumstances, the case should be decided as though by default :

"When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the Court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance."

In the present case the burden of proof lay upon the defendants, and, therefore, it should have been decided, as though ex parte, against them.

In another Allahabad case, *Ram Charan Lal* v. *Raghubir Singh* (2), in a similar case, the defendants' advocate was present, but said he had no instructions One defendant, who was present, asked for an adjournment, but failed to get it. The Subordinate Judge took the evidence produced by the plaintiff, and, as there was no evidence produced on behalf of the defendants, he disposed of the case at once It was held that the case must be held to have been decided under O 17, R. 2, Civil P. C.

The same point came up again in the case of *Ram Adhin* v *Ram Bharose* (3) The headnote of this runs:

"On a date to which the hearing of a suit had been adjourned for the production of the defence evidence the defendant was absent and the Court passed a decree in favour of the plaintiff. No order or rule was mentioned in the judgment."

The High Court in appeal held that the decree must be taken to have been passed ex parte under O. 17, R. 2, Civil P C.

Ratanbai Bhratar Shivlal v *Shankar Deochand* (4) is to the same effect. The point also arose in *Enatulla Rasunia* v. *Jiban Mohan Roy* (5) In this case it has been pointed out that there is a definite difference between O 17, R. 2, and O. 17, R 3, Civil P C, and that when O 17, R. 3, is applied there must have been an adjournment at the instance of a party. In the present case there seems to have been no adjournment at the instance of any party, but the Court merely set the case down for hearing of its own motion

The only case which has been cited against these is *Sukkhu Koeri* v *Ram Lotan Koeri* (6). This is a very peculiar case In it the plaintiff had had his case partly heard, but, then though appearing in Court, he failed to continue with it His action is given in the judgment:

Here he seems either to have lost his head or to have shown unnecessary obstinacy. It would probably have been better if he had put his witnesses in the box, but he declined either suggestion. He did not in our opinion withdraw the suit, but merely confessed his inability to go on any further."

The facts in this case are obviously quite different to the facts in the present one, and in that case the judgment, which was passed, was stated to have been under O 17, R 3, Civil P. C

We are quite unable to understand the procedure of the learned Judge offering the defendants a chance of going on and cross-examining the plaintiffs' witnesses, although refusing to examine their own witnesses, who are said to have been present in Court . Two courses, in our opinion, were open to him. He could either have refused to hear the defendants any more, which seems to have been his original intention, in which case the suit would be regarded as proceeding ex parte, or, when the defendants put in an appearance a few minutes, after he had begun to examine the plaintiff, he might have cancelled his previous order and allowed the suit to proceed in the ordinary way To allow the defendants to cross-examine and continue the contest to that extent, while at the same time refusing them permission to examine their witnesses, appears to us quite unjustified.

Following the first ruling quoted above *Phul Kuar* v. *Hashmatullah Khan* (1), we hold that there should have been no decision on the merits, and that the case must be held to have been decided under O 17, R. 2, Civil P. C, as ex parte Holding this as we do, the defendants would have their remedy of applying to have the ex-parte decree set aside, if they can show good cause, in the ordinary way for their nonappearance at the time and date fixed. They will be given one month from to-day in which to make application to the District Court ; if they fail to do so in that time, the ex-parte decree will stand in the same way as if they failed to satisfy the Judge of the District Court that they had good reasons for their non-appearance If they satisfy the Judge

(1) [1915] 37 All. 460=29 I.C. 553=13 A.L J. 679.
(2) A.I.R. 1923 All. 551=45 All. 618.
(3) A. I. R. 1925 All. 182=47 All. 181.
(4) A. 1. R. 1923 Bom. 27=46 Bom. 1026.
(5) [1914] 41 Cal. 956=18 C. W. N. 775=23 I. C. 769=19 C. L, J. 525.
(6) [1919] 41 All. 663=51 I. C. 850=17 A. L. J. 849.

that they had good reasons for their non-appearance, the case will be reopened and be heard in the ordinary way. The costs of this appeal to be costs in the case as ultimately decided.

S.N /R K *Order accordingly.*

A. I. R 1929 Rangoon 75

MYA BU, J

Ma Khwet Kyi and *others*—Accused—Applicants.

v

Emperor—Opposite Party.

Criminal Revn No. 123-B of 1928 (Mandalay), Decided on 10th September 1928

Burma Rural Self-Government Act (1921), S. 12—Abetment of breach of bye-laws is not offence under Penal Code, S. 109.

The abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act is not punishable under S. 109, I. P. C., as it is not an abetment of an offence within the meaning of that section : 23 *P. R.* 1894 *Cr., Rel. on.* [P 75 C 2]

Judgment —This case is connected with Criminal Revision No. 122-B of 1928 of this Court, which relates to the conviction and sentence passed upon Pongyi U Kalayana for holding a private market within the compound of his monastery at Pale without a license in contravention of S. 7 of the bye-laws framed by the Monywa District Council in exercise of the power conferred by S. 52, sub-S (2), Cl (a), Burma Rural Self-Government Act, 1921 (Burma Act 4 of 1921 as amended by Act 9 of 1922) The penal provision for the breach of the bye-laws is contained in S 12 thereof which enacts, inter alia, that a breach of any of the bye-laws shall be punishable with a fine not exceeding Rs. 50.

The petitioners were some of the persons who exhibited goods for sale at U Kalayana's private market on 30th November 1927, and the prosecution against them was that by exhibiting goods for sale at that market they "committed an offence punishable under S. 12 of the said bye-laws, read with S. 109, I. P. C."

Section 109, I. P. C , prescribes punishment for the offence of abetment, if the act abetted is committed in consequence of the abetment, and provides that where no express provision is made for punishment of such abetment, the abettor shall be liable to be punished with the punishment provided for the offence abetted. Therefore, in any abetment of an offence, which is an offence itself, the substantive charge against the abettor is the abetment The prosecution in this case is therefore one under S 109, I. P. C

The question for determination is whether the abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act above referred to is punishable under S. 109, I. P C; in other words, whether it is an abetment of an offence within the meaning of S. 109, I P. C. Under S. 40, I. P. C. the term "offence" employed in S. 109 denotes a thing punishable under the Code, or under any special or local law, and it is clear that the Burma Rural Self-Government Act is a local law within the meaning of S. 42 of the Code. But the Act itself has not declared a breach of a bye-law of a District Council to be an offence ; it merely authorizes the District Council by S. 80 (2) to direct, inter alia, that a breach of the bye-laws of the Council shall be punishable with fine not exceeding Rs. 50. Thus, a breach of S 7 of the bye-laws under consideration punishable under S 12 thereof, is not an offence rendered punishable by the Act itself

I am, therefore, of the opinion that the offence under S. 12 of the bye-laws is not an offence within the meaning of S. 40, and, consequently, of S. 109, I. P. C. I am fortified in this opinion by the decision in *Ganda Shah* v *Queen-Empress* (1) where it was held, inter alia, that a local law does not necessarily include a rule made under the provisions of a local law It is conceivable that where a local law declares a breach of the rules made under its authority to be punishable then a breach of such rules might constitute an offence within the meaning of S. 40, I P. C.

There being no provision either in the Act or in the bye-laws rendering exhibition of goods at a private market punishable, and as such exhibition cannot constitute an offence of abetment punishable under the Indian Penal Code, I feel constrained to set aside the conviction and sentences passed on the petitioners. I therefore allow their application and set aside the conviction and sentences.

(1) [1894] 23 P. R. 1894 Cr.

passed on them by the Township Magistrate, Pale, in Criminal Regular No. 130 of 1927, and I direct that the fines paid by them be refunded to them

M.N /R.K *Application allowed.*

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* A. I. R 1929 Rangoon 76

PRATT, OFFG. C. J., AND ORMISTON, J.

Motor House Co. Ltd.—Appellant.

v.

Charlie Ba Ket—Respondent

First appeal 145 of 1928, Decided on 3rd September 1928, from judgment of Original Side in Civil Regular No. 595 of 1925

*** (a) Tort — Trespass — Unskilled minor driving car with driver's permission — Car being damaged due to accident—Minor's unskilful driving is not trespass nor amounts to negligence.**

Where a minor with the permission of the driver drives a motor car, and owing to his unskilled driving an accident occurs which causes damage to the car, the minor's driving is not a trespass nor does his unskilful driving amount to negligence. [P 76 C 2]

*** (b) Tort—Minor driving car with lack of skill—It does not itself amount to tort.**

Where a minor drives a car, his lack of skill in driving does not itself amount to an independent tort *Fawcett* v. *Smethurst* (1914) 84 *L. J. K. B.* 473 *Rel. on.* [P 76 C 2]

McDonnell—for Appellant

Kyaw Din—for Respondent.

Pratt, Offg. C. J.—Lim Po Leong was in possession of a Dodge Car the property of the plaintiff Company under a hire-purchase agreement The hirer had complete dominion over the car, which was in charge of his driver Maung Po Tin On 29th April 1925 the car was being used as a private taxi by a film troupe. Some films were taken at the Victoria Lakes and the taxi returned to 64, Prome Road. It was found that a mask had been left behind at the Lakes and, as the driver was having his breakfast, defendant Charlie Ba Ket a lad of 16 drove back with his brother and an actor to fetch it.

In the course of the drive he attempted to pass a car in front of him only to meet a car coming from the opposite direction He swerved to the left to avoid the car in front and piled his car up on a heap of laterite on the side of the road Plaintiff's case was that defendant entered and drove the car without the permission of the driver Maung Po Tin and in spite of his protests. It is admitted that, if this were so, defendant committed an independent trespass and would be liable for damages.

The learned trial Judge found on the evidence that the defendant drove the car with the permission and consent of the driver Maung Po Tin, who was at that time in charge of it On the evidence we are satisfied of the correctness of this finding. The Judge also found that there was no negligence on the part of the defendant, which could render him liable for damages, although he was of opinion that he was careless The fact seems to be that defendant drove to the best of his ability and was not negligent, but the accident occurred through his inexperience and want of skill

It has been argued before us that, as defendant was below the legal age to obtain a driving license, and therefore liable to a penalty for driving, a fact which he must have known, his action in driving the car is in itself a trespass It is urged that, if he drove with less skill than an experienced driver, that itself under the circumstances was negligence, and that negligence constituted a trespass I am quite unable to accept this argument The evidence shows that the defendant drove the car with the full consent and concurrence of the driver and of the film actors who had hired the car.

The driver and the actors had apparent dominion over the car, and it is impossible to hold that the action of the boy under the circumstances in driving was a trespass, nor could his merely unskilful driving amount to negligence, because he was not a licensed driver Neither the hirer from plaintiff, nor the film actors, nor the driver Maung Po Tin are parties to the case, and we are not therefore concerned with their liability. If defendant is to be regarded as a bailee and the suit based on contract, then he can have no liability, because he was not of legal age to contract.

It is to my mind impossible to hold also that defendant's lack of skill in driving, which resulted in the damage to the car, amounts to an independent tort. In the English case of *Fawcett* v. *Smethurst* (1), which has been referred to it was held that where a minor lad hired a

(1) [1914] 84 L. J. K. B. 478=31 T. L. R. 85 =59 S. J. 220=112 L. T. 309.

car and drove it for a longer journey than contemplated by the contract, with the result that the car was damaged without negligence on the part of the defendant, his action did not amount to a trespass. The cases are not parallel but the principle involved is similar In my opinion on the facts defendant is not liable in tort I would dismiss the appeal with costs

Ormiston, J. –I concur.

S.N /R.K *Appeal dismissed.*

A I R 1929 Rangoon 77

MYA BU AND BAGULEY, JJ

U Ahsaya and *another*—Appellants

v

U Pyinnya and *another* — Respondents

Letters Patent Appeal No 11 of 1928 (Mandalay) Decided on 10th September 1928 from the judgment in Second Appeal No. 105 of 1927.

(a) Civil P. C., S. 100—New plea—Question of jurisdiction not raised in last appeal —Question can be raised in Letters Patent Appeal.

Appellants in a Letters Patent Appeal are not precluded from raising a question of jurisdiction even when they had not raised it in the second appeal. *A I R.* 1924 *P. C.* 95, *Foll.* [P 77 C 2]

(b) Civil P. C., S. 9—Dispute in Upper Burma involving ecclesiastical matter within competence of Buddhist ecclesiastical authorities—Civil Courts have no jurisdiction—Buddhist law (Burmese)—Ecclesiastical jurisdiction.

In a suit, the nature and extent of the rights of the monks to use and occupy monastic lands which is religious property invokes a dispute regarding ecclesiastical matter within the competence of the Buddhist ecclesiastical authorities to decide, consequently, the Civil Courts in Upper Burma have no jurisdiction to entertain the dispute· (1897-01) 2 *U. B. R.* 42, (1892-96) 2 *U.B.R.* 59 and (1892-96) 2 *U B.R.* 72, *Ref.* (1902-03) 2 *U. B. R. Buddhist Law, Ecclesiastical P.* 1, *Rel. on.* [P 78 C 2, P 79 C 1]

Tha Gywe—for Appellants.

Aung Thin—for Respondents.

Mya Bu, J.—This is an appeal made from the judgment in Civil Second Appeal No 105 of 1927, on a certificate issued under Cl. 13, Letters Patent. The grounds of appeal are numerous; but putting the appellants' case before us in a nutshell, it is that the civil Courts have no jurisdiction to decide the dispute between the parties to the case. The parties are Buddhist monks who occupy the monasteries shown on the map (Ex. A), at Pakokku, in Upper Burma, and the dispute between them is concerning monastic land The question for determination is whether the dispute is of the nature cognizable by the civil Courts

The appellants before us were the appellants in the Second Appeal, in which it appears that they did not make a point of assailing the judgment of the Court of first appeal on the ground of want of jurisdiction. In view of the ruling of their Lordships of the Privy Council in *Ram Lal Hargopal* v *Kishanchand* (1), however, the appellants are not precluded from raising this question now

The Court of first instance, the Court of first appeal and this Court in second appeal, all have regarded the plaintiff-respondents' suit as one for enforcement of an arbitration award The plaint in the case is somewhat vague in its indication as to the nature of the suit; the heading shows that it was a suit for setting up stone-pillars along the red dotted line shown in the map annexed to the plaint It is set out in the plaint that the plaintiffs (respondents) and the defendant U Ahsaya (appellant 1), had a dispute over the boundary line of their monasteries and had in consequence appeared before the *Thamuti Gaingok Pondawgyi* U Kyi, who with the consent of the plaintiffs and the defendant demarcated the boundary on 1st October 1923 by setting up stone-pillars and writing a memorandum to that effect; and that, however, in *Tabaung* 1286 B.E. (February and March 1925), the two defendants (the appellants) removed the stone-pillars, with the result that the parties had to approach *Sayadaw* U Pyinnya of Mahawithutarama Taik in *Wazo* 1288 B E., who declared the demarcation made by U Kyi as correct, but the defendants would not abide by the decision and prohibited the plaintiffs from setting up stone-pillars and defendant 1 also wrote to the plaintiffs protesting against the setting up of stone-pillars The plaintiffs, therefore, prayed that the suit be decreed with costs

"allowing the setting up of stone-pillars along the red dotted line as shown in the map according to the decision of the pongyis."

The defendants in their written statement denied having agreed to submit

(1) A. I. R. 1924 P. C 95=51 Cal. 961=51 I. A. 72 (P.C.).

themselves to the authority either of U Kyi or U Pyinnya or that either of them made the decisions alleged by the plaintiffs They also pointed out that they objected to the plaintiffs setting up stone-pillars in their (defendants') kyaung compound, that the land in dispute belonged to them and not to the plaintiffs, and that as the case was between monks it should be referred for decision to the Thathanabaing. Thus, even in their written statements the appellants did raise the question of jurisdiction of the civil Courts to decide the matter in dispute in the suit But the Court of first instance framed only three issues:

(1) Whether the suit is maintainable for the enforcement of the award without agreement for reference

(2) Whether the alleged decision was arrived at by Pongyi U Pyinnya; and

(3) If so, is the award valid or not?

The learned Judge of the Court of first instance held on the first issue that the plaintiffs failed to prove that both parties agreed to refer the matter in dispute to U Pyinnya for decision, and also held on the issue 3 that the award was invalid as not having been duly stamped, and dismissed the suit accordingly.

The plaintiff-respondents then appealed to the District Court, pointing out in the memorandum of appeal that the issue as to whether the award was enforceable or not was misconceived that they had only mentioned that the reverend ecclesiastics to whom the matter was referred with the consent of the parties set up the demarcation posts, but that the trial Court had wrongly framed and determined the case as if it were one for enforcement of the award. It was further stated in the memorandum, that the reference in the plaint to the decision of U Pyinnya was made merely to show that the latter had made the decision as an ecclesiastical authority; and that, therefore the question of whether the award was enforceable or not was irrelevant. These are the materials from which the nature of the dispute is to be ascertained.

Somehow or other, the Court of first appeal considered that what was relied on as the award was the decision of U Kyi and not the decision of U Pyinnya, and accordingly framed certain issues which were considered necessary for the determination of the question as the validity of the award of U Kyi and remanded the case to the Court of first instance for evidence on those issues. The trial Court having, in obedience of the order of remand, given its findings on such issues, the District Court confirmed them and the plaintiff-respondents' suit was decreed. Thus arose the second appeal from which the present one has arisen.

It appears to me that the suit was not one for enforcement of an award, and it was not one of a mere boundary dispute between the pongyis holding adjacent plots of monastic land It is quite evident that the land occupied or claimed by the two respondents on the one hand and by appellant 1 on the other formed one monastic compound and was held as one piece of monastic property commonly known as a kyaungtaik, and that recently, the plaintiff-respondents and defendant-appellants 1 tried to break up this kyaungtaik, to have separate holdings, with the result that the dispute arose as to the extent of land to which each party was entitled to occupy, and, therefore, when the plaintiff-respondents attempted to set up boundary pillars, the defendant-appellants objected In my opinion, therefore, the suit relates to the nature and extent of the rights of the monks in question to use and occupy monastic land which is religious property and that, consequently, the dispute involved in the suit is purely an ecclesiastical matter.

In the sanad granted to the Thathanabaing, it is provided that the civil Courts will, within the limits of their jurisdiction, give effect to the orders of the Thathanabaing and of the Gainggyoks, Gaingoks, Gaindauks and other ecclesiastical authorities duly appointed by him, in so far as those orders relate to matters which are within the competence of those authorities: see U Tha Gywe's Treatise on Buddhist Law, Vol I, p 234, at 235. In *U Thatdama* v. *U Meda* (2), where the plaintiffs sued for a declaration of their right to the ownership of a monastery and certain land appertaining to it, and it was found that the Thathanabaing had declared the monastery to be theinghika property and had forbidden the plaintiffs to interfere with it, it was held that the dismissal of the suit without a decision on the merits of the case was correct: reliance was placed on the earlier rulings in *U Teza* v *U Pyin*.

(2) [1897-01] 2 U.B.R. 42

nya (3) and *U Te Zeinda* v. *U Teza* (4), which laid down that the orders and proceedings of the Buddhist ecclesiastical authorities so long as they keep within their jurisdiction and do nothing contrary to law, cannot be questioned by the civil Courts. In *U Wayama* v. *U Ahsaya* (5), which arose out of a suit for full control by one of the appellants, in trust for the other appellants and respondent, of certain property consisting of tari trees situated in the premises of a kyaungtaik, on the ground of appellant 1's superior ecclesiastical position, it was held that the question in dispute was purely an ecclesiastical matter and the civil Courts are bound by the decisions of the Buddhist ecclesiastical authorities in matters within their competence; and also that civil Courts should abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction.

To my mind, the question in dispute in the present case is purely an ecclesiastical matter, and, therefore, is a matter within the competence of the Buddhist ecclesiastical authorities to decide. consequently, the civil Courts have no jurisdiction to entertain the dispute, for, if the civil Courts also exercised jurisdiction while the Buddhist ecclesiastical authorities have jurisdiction to deal with the matter, there is bound to be a clashing of jurisdiction and a grave deadlock will be the inevitable result In the result, I hold that the plaintiff-respondents' suit should have been dismissed for want of jurisdiction I would allow this appeal, and direct that the suit be dismissed.

Since the appellants did not raise this question of jurisdiction in their original appeal in this Court, I would direct that each party bear their own costs in this Court. But the plaintiff-respondents should pay the defendant-appellants' costs in the Court of first instance and in the Court of first appeal

Baguley, J.—I agree with my learned brother, Mya Bu, J., that the civil Courts in this case have no jurisdiction, but would like to add a few remarks. In the first place I would emphasize that this decision applies to Upper Burma only There is no Thathanabaing in Lower Burma and in consequence disputes of this nature if brought before the civil Courts would have to be settled by them in Lower Burma, there being no ecclesiastical authority having power to decide them.

The question of jurisdiction has to be settled in the first instance on the plaint In the terms of translation of the plaint we find it headed

"Suit for setting up stone-pillars along the red dotted lines shown in the annexed map."

The trial Court on the statements given in the plaint looked upon the case as one for enforcement of an award and this view was persisted in by the Courts right up to the second appeal in the High Court, but it must be remembered that the original plaint was filed by U Pyinnya and U Thagayya and, when they lost their case in the trial Court, they came on appeal to the District Court of Pakokku in Civil Appeal No. 40 and in their grounds of appeal emphasized the fact that they were not suing to enforce an award at all The first ground of appeal contains the passage:

"But the lower Court wrongly framed an issue as to whether the award is enforceable or not."

The third ground of appeal contains the passage:

"But the lower Court wrongly framed an alternative issue that if the case was one for enforcement of award;"

and the fourth ground of appeal contains the passage:

"Therefore the question whether the award is enforceable or not is irrelevant"

It is therefore quite clear that the plaintiffs themselves were not basing their case on the award, but if they were not basing their case on the award I can see nothing upon which they could base their case, except their right to partition the land which forms the original kyaungtaik. There are no rules of civil law by which a kyaungtaik could be partitioned. The pongyis inhabiting the kyaungtaik are not co-owners or coparceners or tenants-in-common or any other form of owner known to the ordinary civil law. Their rights inter se are entirely governed by ecclesiastical law which must be decided by the ecclesiastical authorities where there are ecclesiastical authorities in a position to do so The argument put forward on behalf of the appellants went so far as to claim that every case between Pongyis concerning religious property is only to be decided by the Thathanabaing I would not myself accept this statement in toto but I

(3) [1892-96] 2 U.B.R. 59.
(4) [1892-96] 2 U.B.R. 72.
(5) [1902-03] 2 U.B.R., Buddhist Law, Ecclesiastical, P. 1.

agree that in the present case, as the original plaintiffs stressed the fact that they were not basing their claim on an award, the civil Court must be held to have no jurisdiction

M N./R K *Appeal allowed*

A. I. R. 1929 Rangoon 80

PRATT, OFFG. C. J., ORMISTON AND CARR JJ

Wor Moh Lone & Co —Appellants.

v.

Japan Cotton Trading Co. Ltd.—Respondents.

First Appeal No 157 of 1928, Decided on 28th August 1928, from judgment of Original Side in Civil Regular No 96 of 1927

(a) Contract—Construction—(*Per Pratt, C. J.*, and *Carr, J.*)—Sellor agreeing to sell goods from his or other mills—No intention to supply from particular mill given nor milling notice issued—Seller's mill burnt—Seller is liable under contract—(*Ormiston, J.*, contra).

Vendors contracted to sell a certain quantity of rice. The wording of sale-note did not justify the inference that the parties intended or contemplated, even primarily, the sale by the vendors of the produce of their own mill, nor was there any express statement to this effect. It was found that the contract gave vendors an option of delivery from their own mill if they chose, and that, if they did not so choose, they could deliver from any of the other mills specified in the contract. No intimation of intention to deliver from a particular mill was given and no milling notice was issued. Vendors' mill was burnt down.

Held, that the burning down of the mill did not absolve vendors from liability to perform the contract 11 *Bur. L. T.* 63, *Dist.*

[P 80 C 2]

(b) Contract—Construction—Construction of contract should not be dependent on convenience only.

Convenience is not the only thing to be considered, and it should not be permitted to persuade a Court to place a construction on a contract which it cannot legitimately bear.

[P 84 C 2]

Clark—for Appellants.

N M Cowasjee—for Respondents

Pratt, Offg. C. J.—Plaintiffs the Japan Cotton Trading Co., Ltd sued the defendants Wor Moh Lone & Co for damages for breach of a contract to supply 2,000 bags of rice on or before the 20th September 1927.. The contract was embodied in a printed Rice Sale Note, Ex. A, in the form commonly used in similar transactions. It contains provisions regarding gunnies, twine, day and night milling of seller's option, delivery ex-hopper, right of sellers to require a deposit in case of a fall in price, payment in cash before removal, etc Cl. 16 runs "accident to machinery, strikes or sickness of mill hands or coolies always excepted."

The final Cl. 19 gives a long list of firms whose milling the defendants have the option of delivery

Defendants' case was that on a true construction of the contract and on the intention of the parties, the contract was one for the supply of rice from defendants' own mill, that Cl. 19 merely gives the sellers the option of supplying rice from the other mills specified, but that the contract was primarily for the sale of rice of defendants' own milling It was contended therefore that as defendant's mill was burnt down they were absolved from performance of the contract.

The learned Judge who heard the case was unable to accept this contention. He held that the contract was generally for sale of a certain quantity of rice of a specified quality, that taking the wording of the sale-note as it stood there was nothing to justify the inference that the parties intended or contemplated, even primarily, the sale by the defendants of the produce of their own mill, nor was there any express statement to this effect He came to the conclusion that the contract gave sellers an option of delivery from their own mill if they chose, and that, if they did not so choose, they could deliver from any of the other mills specified in the final clause As no intimation of intention to deliver from a particular mill had been given and no milling notice issued, the Court was of opinion that the burning down of defendant's mill did not absolve them from liability to perform the contract. Plaintiffs were accordingly granted a decree for damages.

On appeal it has been argued before us that, taking the sale-note as it stands, apart from the last clause, it must be construed as a contract by a miller to deliver rice milled in his own mill, Cl. 19 giving him an added option, at his discretion, of supplying rice from other specified mills. The contract being therefore primarily for delivery of rice from defendants' own mill, when their mill was burnt down, it was op-

tional with them to terminate the contract or deliver rice from any of the mills specified in Cl. 19, but they were not bound to perform their contract by delivering rice from other mills

I agree with the learned Judge on the Original Side that the contract will not bear this construction The form of note used (Ex. A) may have been originally intended for sales by millers of rice from their own mills. The wording is suitable and was probably designed in the first instance for such transaction There is, however, no doubt that the form has become the standard form for bought and sold notes for rice contracts as my learned brother points out in he judgment. Though the wording in the earlier clauses is more especially applicable to the circumstances of sales by a miller of the produce of his mill, yet, as pointed out by the trial Judge, it is not incompatible with the sale of rice from other mills.

It is obvious that too much stress cannot be laid on the exact terms of the earlier clauses, as applying to determine from the seller's own mill, since the last clause gives the option of supplying from any of a long list of mills. It may or may not have been understood that the defendants were at liberty to supply rice of their own milling, but the contract is silent on the point I am quite unable to read the note, as it stands, as a contract by the seller to sell rice of his own milling. He is given the choice of delivering rice milled by a large number of specified firms

Defendants had not elected to supply rice from their own mill or issued any milling notice This fact differentiates the case from that of the *Arracan, Co Ltd.* v *H. Hamadanee & Co* (1), in that in the case cited the sellers had issued a milling notice and commenced delivery from their own mill before it was burnt down It is not alleged that there was anything to prevent sellers from milling rice of contract quality from one of the mills specified in Cl. 19 of the contract

In the present instance the defendants had not given notice of intention to deliver rice from their own mill, nor does the contract show that they intended to do so. Cl 16, on which stress has been laid, will refer to the mill from which delivery is to be taken, as pointed out by the Bench in the case already cited. There is no reason to confine its application to defendant's mill, which is not mentioned in the contract Defendants do not allege that they gave notice of their intention to rescind the contract or of their inability to perform it, when their mill was burnt down It is clear that the burning of the mill did not render the contract impossible of performance, and the presumption is that the real reason of non-performance was the unfavourable state of the market I agree with the trial Judge that defendants were not absolved from performance of their contract. I would dismiss the appeal with costs

Ormiston, J.—This is an appeal of the defendants from a decree of the Original Side awarding damages to the plaintiffs for the breach by the defendants of a contract to sell rice. The issues were

(1) Are the defendants exempted from delivery of rice according to the contract by the terms of Cls (16) and (19) of the sold note or by any local usage ? (2) Assuming that the defendants are, by reason stated above, exempted from performing that contract, had they by subsequent conduct waived that claim ? (3) To what damges, if any, are the plaintiffs entitled ?

The learned Judge having answered the first issue in the negative, the second issue did not arise, and he adjourned the hearing for evidence on the third issue At the adjourned hearing the defendants did not contest the issue of damages and a decree was passed in favour of the plaintiffs for the amount claimed. If the appeal is successful the case will have to be remanded to the original side to take evidence on issue 2 As regards issue 1, two of the grounds of appeal are directed to the finding that the defendants were exempted by reason of a local usage, but no part of the argument has been directed to these grounds.

The contract, which was entered into on 15th January 1927, was that the defendants should sell and the plaintiffs should buy 2,000 bags of rice of a particular quality at an agreed rate, delivery to be taken on or before 20th February 1927. The defendants are rice-millers whose mill was burnt down on 27th January 1927. No milling notice of their own or any other mill was issued by the defendants to the plaintiffs, and

(1) [1918] 11 Bur. L. T. 63=47 I. C. 541.

no paddy was delivered on or before 20th February 1927. The contract was embodied in what has for many years been the standard form of bought and sold notes for rice contracts. Its material provisions it will be convenient first to summarize.

By Cl. 3 the rice is to be Ngatsin $\frac{\text{and}}{\text{or}}$ Ngakyauk, at sellers' option, usual S. Q. Quality cleaned rice. The grain to be fair average of quality procurable at the time of milling Cl 4 provides that the buyer is to supply gunnies and twine. If owing to late arrival at mill of his gunnies or other causes, the sellers' gunnies are used, the rate to be paid is prescribed, as is also the rate for the use of his twine Cls. 5 and 6 prescribe rates for bagging, sewing and shipping, and for landing and receiving gunnies at mill. Under Cl 7 the rice is to be milled by day $\frac{\text{and}}{\text{or}}$ night at sellers' option. Cl. 8 stipulates that delivery is to be taken ex-hopper on or before 20th February 1927, date at seller's option and payment is to be made in cash before any rice is removed, but not in any case later than immediately after milling Payment is to be made in cash on completion of each 1,000 bags if required Cl 10 gives the seller the right of disposing of any rice milled against the contract by private or public sale on buyer's account. By reason of Cl 13 the buyer cannot claim the right of leaving the rice in the sellers' godown after the 15 days allowed for removal have elapsed. Cl 15 gives the seller, on the expiry of the 15 days, the right of removing the rice to other than mill godowns at the risk and expense of buyer after 24 hours' notice has been given. Cl 16 is: " Accidents to machinery, strikes or sickness of mill hands always excepted " Cl. 19 provides that " sellers have the right of delivering under this contract the milling of " some twenty named mills, in which the mill of the defendants is not included.

This form of rice contract provided the subject matter of a decision of a Bench of the late Chief Court of lower Burma in *Arracan Co. Ltd.* v *H Hamodanee & Co.* (1). The defendant-appellants agreed to sell to the plaintiff-respondents 10,000 bags of rice, delivery to be taken ex-hopper in April 1916, and gave to them a milling notice on its own mill. The plaintiffs took delivery of 6,442 bags from the defendants' mill up to 26th April when the mill was burnt down and deliveries under the contract ceased Cl 18 (corresponding to Cl 19 of the form before us) gave the seller the right to deliver under the contract the milling of seven specified firms, the defendant's mill not being therein included. The plaintiffs sued for damages and the defendant relied on Cl 16 (the clause exempting accident to machinery) The lower Court held that Cl. 18 applied, not only to the defendants' mill, but to the other mills mentioned therein as well, and that the defendant was bound to deliver from those other mills if it could not deliver from its own mills The appellate Court pointed out that the Judge of the lower Court was

" in error in construing Cl. 18, which is clearly inserted for the benefit of the seller, as if it imposed an obligation upon the seller to deliver, in certain circumstances, from all the mills. Cl. 16 clearly refers to the mill from which delivery is to be taken, or is being taken, and means that if that mill breaks down, the seller is absolved from giving or completing delivery of so much rice as the buyer would have had to take from that mill, if it had not broken down. The clause absolves the seller from anticipating and providing against a breakdown in the mill from which delivery is to be given."

Consequently, as the defendant under the contract was entitled to say that it would give delivery from one mill only, and had said so by giving a milling notice on its own mill. Cl 16 applied to a breakdown in the defendants' mill which actually occurred, and the defendant was absolved from any further delivery.

In the case before us the circumstances are different, inasmuch as the defendant have given no milling notice on their own or any other mill. The learned Judge on the original side said that if he could have accepted the defendants' contention that the sale contemplated by the contract was primarily the sale of the produce of their own mill, though an option is given to supply the produce of any one of other specified mills, they were bound to succeed He was, however, unable to accept that contention. Nor was he able to accept the contention of the plaintiff that the defendants were bound to supply rice of the milling of one of the mills specified in Cl. 19, and not from their own mill In his opinion, the clause gave the defendants an option to deliver

from their own mill if they choose to do so, and, if they did not so choose, to deliver from any of the other mills specified. As he put it,

"the defendants' mill is, by implication, one of the mills from which they can, if they choose, deliver rice."

He distinguished the *Arracan* case (1) on the ground that, in the present case, no milling notice had been issued and no election had been made by the seller, and Cl 16 could not begin to operate till such election was made. Consequently, he held that the burning of their mill did not, under Cl. 16, absolve the defendants from liability to perform the contract

Mr. Clark's argument is that, on its construction, the contract is one by a miller to deliver rice which is the product of his own mill; that if his own mill is disabled, Cl 16 applies and he is excused; and that Cl 19 is merely a superadded option, capable of exercise by the seller only, to deliver rice which is the product of other mills Consequently, when the defendants' mill was put out of action, they were at liberty, either to take up the position that they need deliver no rice, or if they chose, to deliver rice from one of the specified mills.

Looking at the contract as a whole, in my view it is cast in a form singularly inappropriate for use by one merchant selling rice to another On the other hand it is entirely appropriate to the case of a miller selling rice the product of his own mill The prescription of charges for the sellers' gunnies if they have to be used owing to the late arrival at the mill of the buyer's gunnies, and of charges for landing gunnies at the mill, the option given to the seller of disposing of rice milled against the contract on the buyer's account, the right given to the seller of removing the rice into other than mill godowns, all point in this direction. I do not think that it is a reasonable construction of the clauses to which I have made reference that they include not only the seller but the miller whom the seller substitutes in his place; for in the case of a sale by a merchant they can have no application. Cls. 7, 8 and 16 point even more strongly in the direction which I have indicated. What is the use of giving to a seller who is not a miller an option to mill by day or by night? How can such a seller deliver ex-hopper? And what is the use of his stipulating for payment on completion of each 1,000 bags? If this were a contract by a merchant, one would have expected, in place of Cl. 16, a proviso exempting him from liability, if, after he had given a notice specifying a particular mill, an accident occurred. For these reasons, in disagreement with the learned Judge on the original side, I would hold that apart from Cl 19, the contract before us is by necessary implication a contract by a miller to sell rice the product of his own mill.

Does then the insertion of Cl. 19 make any difference? Mr Clark's argument is that this clause merely confers an option exercisable by the seller alone, of electing not to give delivery of the rice which by the remainder of the contract he had contracted to deliver, but, in lieu thereof, to deliver the production of the specified mills. If the clause were intended to be an integral part of the primary contract, one would have expected it to be worded somewhat as follows:

"In the performance of the contract, the seller shall have the option of delivering his own rice, or of one or another of the following mills."

But in point of fact the defendants' mill is not amongst those specified. The learned Judge, holding, as I think, correctly, that the seller is not precluded from selling his own rice, but holding, as I think, incorrectly, that the primary contract is not to sell his own rice, holds further that the sellers' mill is by necessary implication included in Cl. 19. As I have pointed out it would have been a perfectly simple matter expressly to have included it in Cl. 19. And, on the view I take, the contract being for the sale of the defendant's own rice, there is no necessity for any implication that their mill is to be included amongst those specified in the clause.

There is, to my mind, no tenable construction of the contract intermediate between that adopted by Mr Clark and that adopted by Mr. Cowasjee. Mr. Cowasjee accepts the finding of the learned Judge, but does not accept the reasoning on which it is based. Mr. Cowasjee's main contention is that, under the contract, the seller must deliver rice the product of one of the mills specified in Cl 19. Reading as I do, the contract as primarily one for the delivery of rice the

product of the defendants' mill, with a proviso that the seller may deliver rice the product of the specified mills, I am unable to accept this contention. It involves the startling conclusion that the whole of the specified mills must have been disabled before Cl 16 can come into operation.

Mr. Cowasjee's secondary contention is based on the *Arracan* case (1). That case decides that if a seller elects to deliver from a particular mill and to that end gives a milling notice, whether on his own mill or on one of the specified mills, he is absolved from liability if there is a breakdown of the mill in respect of which notice has been given. Consequently he argues, inasmuch as in the case before us, no milling notice at all has been issued, and therefore, no election has been made, Cl. 16 cannot come into operation. Herein he adopts the reasoning of the learned Judge on the original side. I agree that a decision of a Bench of the Chief Court is not lightly to be set aside but it does not necessarily follow that the same considerations apply to deductions from such a decision Although the deduction which Mr. Cowasjee and the learned Judge drew from the decision may seem to be its logical corollary, it has to be remembered that the case before us was not the case before the Court which decided the *Arracan* case (1) The *Arracan* case (1) could quite well have been decided on the narrower construction of the contract which I have adopted. The circumstances of that case were more strongly in favour of the seller than those of the present case, and it was not necessary to put forward the interpretation which I consider to be correct. Nor had the Court to consider what the consequences would be, if, subsequent to the delivery of a milling notice on a mill included in Cl. 18, the mill had been burnt down

I do not consider it to be a necessary implication from the view I take that, as the learned Judge says, it would be :

> " open to the seller to say, if any of the 26 mills is burnt down, that that particular mill is the one from which he intended to deliver his rice. "

For, on my view, the only mill to which Cl. 16 applies is the sellers' own mill. If the decision in the *Arracan* case (1) is to be taken to be correct, and it proceeded on a construction of the contract with which I do not agree, it by no means follows that the sellers would be entitled to adopt the fraudulent contention imagined by the learned Judge ; for I think it must be taken that an intention to elect to deliver from a particular mill is quite a different thing from an expression of that intention. It follows from the construction of the contract which I adopt, that the performance of the primary contract having been excused by the destruction of the defendants' mill and there having been no election on their part to deliver from any other mill, they were under no liability to deliver rice to the plaintiff on or before the prescribed date.

I am, of course, aware that a somewhat unreal atmostphere has surrounded the discussion of this case It is quite possible that all that the parties in effect intended to do was to buy and sell, or purport to buy and sell, rice and that from that point of view, nearly the the whole of the printed form was surplusage Nevertheless in the construction of the contract such a consideration should not be allowed to have weight. I am also aware that the construction put upon the contract by the learned Judge is in some respect convenient, But convenience is not the only thing to be considered, and it should not be permitted to persuade a Court to place a construction on a contract which it cannot legitimately bear. In my opinion the construction of the learned Judge does not fulfil the condition precedent. The decision at which I have arrived will cause me the less regret, if it should result in the substitution of a new form of rice contract for one which is utterly unsuited to the conditions of modern business in Rangoon. (His Lordship being of opinion that the appeal should be allowed the case was referred to a third Judge under Cl. 34, Letters Patent).

Carr, J.—The facts of this case appear sufficiently in the judgments of the learned Judges whose difference of opinion has been referred to me. The question before me is whether upon its proper construction the contract in the suit is a contract for sale and delivery of rice from the defendants' own mill only with the addition of an option to the seller only to deliver from other mills specified in Cl. 19 but without any obligation upon

him to do so in the event of it being impossible for him to deliver from his own mill, or whether it is merely a contract for the sale and delivery of rice which may be delivered from any one or more of the mills so specified and which it is incumbent upon the defendant to deliver from some one or more of such mills so long as it is possible for him to do so.

The learned Judge on the Original Side arrived at a construction intermediate between the two above stated, holding that the contract was merely one for the sale of rice which might, at the sellers' option, be delivered either from any of the specified mills or from the sellers' own mill. He thought that the seller's own mill, though nowhere mentioned in the contract, was by implication included among the mills from which delivery might be given I do not think that the question of the correctness of this construction comes before me on this reference, but in any case it is unnecessary to decide upon it, for unless the construction first set out above, which is that put forward by the defendant-appellants (the sellers), can be accepted the appeal must necessarily fail

The case of the *Irrawaddy Co., Ltd.* v. *H. Hamadanee & Co* (1) has been referred to. I have referred to the original records and find that in all matters material to the present question the contract in that case was identical with the one now in dispute. But I do not think that that decision is of any assistance in the present case There was no interpretation of the contract in respect of the question now arising. The parties had in fact so far interpreted it for themselves , the seller had given a milling notice for his own mill, which had been accepted by the buyer and delivery was in progress when that particular mill was burnt down. What the learned Judges said on this subject was merely :

"In the present case the plaintiff accepted a milling notice on the defendants' mill. It must be taken therefore that the parties had agreed that the defendants should be at liberty to give delivery under the contract from their own mill. . . ."

The contract before me contains no mention whatever of the sellers' own mill but the contention for the defendants is that its terms are such as necessarily to imply a primary intention that the rice should be delivered from their mill. In supporting this contention Mr Clark has strongly urged that the contract must be construed strictly upon its own terms, without reference to extrinsic circumstances. But he has at the same time emphasized the fact that the defendants are (or at that time were) millers, and had a mill of their own. In this he is somewhat inconsistent for that itself is a circumstance extrinsic to the contract.

Looking to its terms alone the contract in my opinion is simply one for the sale of rice which is to be delivered from a mill immediately after milling Apart from Cl. 19 the seller could satisfy this contract by delivery from any mill, so long as he complied with the other terms of the contract. In my view of it Cl. 19 not only gives the seller the option of delivering from any of the mills named but also debars him from delivering from any other mill

The defendants claimed that the terms of the contract are such that they can only mean that the rice is to be delivered from the seller's own mill They rely particularly on the references to milling in Cls. 3, 7, 8, 9, 10 and 12. None of these seem to me to justify the importing into the contract of words which it does not contain. The contract is clearly one for rice which is to be milled and to be delivered immediately after milling, but I can see no reason why we should imply from this that the rice is to be milled by the seller himself. The seller has undertaken to deliver rice on those terms and whether he himself has or has not a mill it is incumbent on him so to deliver the rice.

The clauses which seem to me to lend most support to the appellant's contention are Nos 12, 13 and 14. Cl. 12 provides that the buyer will be charged godown rent should he fail to remove the rice within 15 days after milling ; Cl. 13 that the buyer cannot claim the right of leaving the rice in the seller's godown after the 15 days and Cl. 14 that on the expiry of the 15 days the seller has the right of removing the rice to other than mill godowns Here the use of the words seller's godown in Cl. 13 and of mill godowns in Cl 14 certainly does suggest that the two godowns are the same and that the contract contemplates that the mill referred to is the seller's mill. But I do not think that this alone is sufficient to justify the interpretation put forward. We must read the contract as a whole

and if it can be said that these clauses are inconsistent with any other interpretation than that put forward then we must equally say that they are inconsistent with Cl. 19.

Reliance has been placed also on Cl. 4, which provides :

"gunnies and twine to be supplied by buyer or if seller's gunnies are used owing to late arrival at mill of buyer's gunnies or other causes"

they will be charged for at a certain rate. This seems to me to lend only the flimsiest support to the appellants' contention. It does, perhaps, presuppose that the sellers' gunnies will be available at the mill at any time and so suggest that the mill is to be the sellers.' But I do not think that this inference is inevitable. If the buyer can send gunnies to some other person's mill it is equally open to the seller to do so, or to arrange for them to be available there And should he exercise his option under Cl 19 he would necessarily have to do so

My learned brother Ormiston has referred to Cl 10 as supporting the appellants' interpretation of the contract. This clause reads :

"sellers have the right of disposing of any rice milled against this contract, by private or public sale on buyers' account, should he fail to pay for it within 24 hours of the presentation of the bill. . . ."

I can see nothing in this to support the appellants in any way. It is provided in Cl. 8 that the buyer is to pay for the rice in cash not later than immediately after milling, and if he fails to do so the seller will have the resale under S. 107, Contract Act. The principal effect of Cl. 10 seems to be to modify Cl. 8 by allowing the buyer 24 hours grace for payment. Possibly also it may to some extent modify the operation of S. 107. But I can see nothing in it which would not be entirely appropriate had the contract been one for the sale of rice already milled and stored in a godown (except of course the use of the words "milled under this contract," which in the present connexion are not material).

My brother Ormiston also says :

"Looking at the contract as a whole in my view it is cast in a form entirely inappropriate for use by one merchant selling rice to another. On the other hand it is entirely appropriate to the case of a miller selling rice the produce of his own mill,"

and his decision seems to have been largely influenced by that consideration. I am not prepared entirely to agree with his view. The form of the contract would, of course, be entirely inappropriate for the sale of rice which a merchant already had stored in his godown, or which he proposed to buy from some other person who had it so stored. But a merchant might equally well be reselling rice which he had already agreed to buy from a miller (or which he proposed so to buy) and which had not yet been delivered. If then he had bought on a contract similar to that in question it would obviously be in his best interests to require his buyer to accept the same terms If he did not do so he might very probably find himself involved in very considerable difficulties For example, if he allowed his buyer the option of fixing the date of delivery he might find himself called upon to deliver before his seller was ready to do so. Similar difficulties might arise out of almost every clause of the contract. On the other hand if the terms of the two contracts are the same as soon as his seller exercises any of his rights of election the merchant can himself exercise his own right in the same sense against his buyer.

In my view of the contract it is simply one for the sale of rice, which would be carried out by the delivery of rice from any one or more of the mills named in Cl. 19 There are in its terms a few expressions which slightly suggest that the contract was intended to be one for the sale of rice from the sellers' own mill. But those suggestions are not, in my opinion, so strong that it must be held to follow as a necessary implication that there was that intention. On that construction the appeal must fail No other question arises but I wish to add that I am not entirely satisfied that the appeal could succeed even if the appellants' contention that the contract was one primarily for the sale of rice from their own mill were accepted The appeal is dismissed with costs

M N /R.K *Appeal dismissed.*

A I. R. 1929 Rangoon 86

PRATT, OFFG C J. AND ORMISTON, J.

A. Malakyi—Appellant

v.

Ko Po Nyein and *others*—Respondents.

First Appeal No 297 of 1927, Decided on 20th August 1928, from judgment of Dist. Judge, Pyapon, in Civil Regular No. 29 of 1926

Evidence Act S. 92—Person selling land but continuing in possession under oral agreement to repurchase—Vendee selling property to third person—Original vendor can prove against the subsequent purchaser, oral agreement to repurchase and fraudulent nature of subsequent purchase.

Section 92 does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed belonged to a third person, who was not a party to the conveyance. [P 87 C 1]

Where a person conveys property to another but continues in possession under an oral agreement of repurchase such person can prove against his vendee's purchaser that the sale by the vendee was in fraud of his agreement of repurchase : *A. I. R.* 1917 *P. C.* 207, *Foll.*; 3 *L. B. R.* 100 (*F.B.*), *not Foll.* [P 87 C 1, 2]

A. B. Banerji—for Appellant.

Hay—for Respondents

Judgment.—Respondents 1 to 3, defendants in the trial Court have filed a cross-objection to the action of the Court in refusing to allow them to prove their case with respect to the holdings other than No. 17-N, which forms the subject of plaintiff's appeal Plaintiff based his title to the holdings in dispute on a conveyance from the P. L A. V N. K. firm. Defendants' case was that although they had given the P L A V. N. K. firm a conveyance of these lands, there was an oral contract of resale in pursuance of which they were in possession, and that the sale by P L. A. V. N. K. to plaintiff, who was fully aware that his vendor had no right to sell, was fraudulent. The trial Court held that defendants were precluded by S. 92, Evidence Act, from giving evidence of the oral agreement for repurchase, relying on the ruling in *Maung Bin* v. *Ma Hlaing* (1) The lower Court has overlooked the ruling of their Lordships of the Privy Council in *Maung Kyin* v. *Ma Shwe La* (2).

It was then pointed out (at pp. 142 and 137) that S. 92 is applicable to an instrument as between the parties to such an instrument or their representatives-in-interest, but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance

We consider in view of this ruling that defendants were clearly entitled as against plaintiff to prove that his vendee has not an absolute title, and that they are in possession under an agreement of repurchase. They are also entitled to prove that the sale by the Chettyar firm to plaintiff was in fraud of them

We would point out that as no question of specific performance of contract is involved, S. 21, Specific Relief, Act has no application We set aside the finding and decree of the trial Court so far as holdings Nos. 26 and 27 and the house are concerned and remand the suit for trial on the merits. Defendants will have the costs on their objection in this Court. Costs in the trial Court to follow final disposal.

M.N./R.K. *Suit remanded.*

(1) (1905) 3 L. B. R. 100 (F.B.).

(2) A. I. R. 1917 P. C. 207=45 Cal. 320=44 I. A. 236 (P.C.)=(1917) 9 L. B. R. 114.

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* A I. R. 1929 Rangoon 87

DARWOOD, J.

Sulaiman Mohamed Bholat—Accused—Appellant

v.

Emperor—Opposite Party.

Criminal Appeal No. 696 of 1928, Decided on 6th August 1928, from order of Dist. Mag., Rangoon, in Criminal Regular Trial No 63 of 1928.

***(a) Criminal P. C. (1923), S. 162—Statement made by prosecution witness written in police diary—At accused's request Court must refer to it and must furnish him with copies.**

When the statement of a prosecution witness has been reduced into writing whether in a police diary or otherwise, the accused, under the new Code, is entitled to ask the Court to refer to it and to be furnished with a copy of it : 33 *Cal.* 1023, *Dist.* [P 88 C 1]

(b) Criminal P. C., S. 162—Police officers taking statements of witnesses should not extract and enter in diaries as much as is relevant and destroy original.

Police officers who are charged with the duty of investigating crimes should not be in a position to take the statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement The practice is illegal in so far as it deprives the accused of an important right and it may result in the destruction of valuable evidence in favour of an accused. [P 88 C 2]

McDonnell—for Appellant.

Byu—for the Crown.

Judgment—(*6th August* 1928)—The facts of this case have been set out at length in the judgment of the learned District Magistrate and are not really in dispute save in one respect It is alleged by the prosecution that the appellant was the person who used a knife upon the complainant This alle-

gation is strenuously denied. The appellant has produced evidence to prove that at the time the fracas began in the complainant's flat he was in his shop which is below the flat The case really resolves itself into a question of the credibility of evidence

Before deciding this, it is necessary to consider a point raised by Mr. McDonnel, for the appellant. He states, correctly, that he asked the District Magistrate to be allowed to have copies of the statements made by some of the witnesses to the police, in order to cross-examine them on those statements It appears from the evidence of the investigating officer that he took down notes of what each witness know and saw From these notes he compiled his diary and then he thinks he destroyed the notes This, he says, is the standing practice If this is true, it looks very much as if the practice were a deliberate attempt to defeat the provisions of S 162, Criminal P C and to deprive the accused of the very valuable right to be supplied with a copy of such statements in order to contradict the witnesses in the manner provided by S 145, Evidence Act. The learned District Magistrate refused Mr. McDonnell's request on the ground that he could not claim to see the case diaries It is quite true that the accused is not entitled to see the police diaries, but his counsel's request was not to see the diaries but for copies of the statements of the witnesses, and in my opinion he was entitled to have these copies in spite of the fact that the statements were recorded in a police diary S 162, Criminal P. C. says that no

"such statement or any record thereof, whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial . . . . ."

Under the proviso when any witness is called for the prosecution in any such enquiry or trial, whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, for the purpose of contradicting the witness

It is clear from the language of the section that when the statement of a prosecution witness has been reduced into writing, whether in a police diary or otherwise, the accused is entitled to ask the Court to refer to it and to be furnished with a copy of it

The learned District Magisrate was therefore wrong in refusing to allow the accused to have copies of the statements he required What effect this refusal has had upon the trial cannot be gauged unless this Court examines the police diaries and also examines the investigating officer to make sure whether he has actually destroyed the original statements. If he has, and his evidence certainly indicates this or he would have been in possesssion of the original statements, his procedure cannot be too strongly condemned. It is obviously not in the interests of public justice that police officers who are charged with the duty of investigating crimes should be in a position to take the statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement. If such a practice as the investigating officer speaks of really exists it should be stopped at once. It is illegal in so far as it deprives the accused of an important right and it may result in the destruction of valuable evidence in favour of an accused person

I have been asked by the Assistant Government Advocate to adopt the procedure which was followed in the case of *Dadan Gazi* v *Emperor* (1) and to satisfy myself whether there is anything in the statements of the prosecution witnesses recorded by the investigating officer, which would justify their being cross-examined on those statements

That case was decided before S 164, Criminal P. C., was amended by Act 18 of 1923 and under the then existing law it was only if the Court deemed it expedient in the interests of justice that it directed the accused to be furnished with a copy of the statements referred to.

Under the present law the Court is bound to refer to such a statement at the request of the accused and is bound to furnish him with a copy thereof provided that, if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice, it shall record such opinion and shall exclude such part from the copy of the statement furnished to the

(1) [1906] 33 Cal. 1023=10 C. W. N. 890.

accused. The conditions therefore are not the same as they were when *Dadan Gazi's* case was decided.

In my view the appellant had an unquestionable right to test the credibility of the prosecution witnesses by reference to their statements to the police. It is impossible to say how far he has been prejudiced by being deprived of that right.

I therefore direct that appellant or his counsel be furnished with copies of the statements recorded by the police, which were asked for at the trial. As soon as these have been furnished, appellant's counsel will inform this Court whether or not he wishes to cross-examine the witnesses on them.

Judgment—(28*th August* 1928)—The facts of the case may be summarized as follows:

There are two flats on the first floor of 15, Sparks Street. At the time this incident occurred one of these was occupied by Dr. Banerjee and his family and the other by the appellant, Sulaiman Mahomed Bholat.

About 3 p.m. on 13th April 1928, a quarrel broke out at Dr. Banerjee's door, between one Bechai, a servant of Dr. Banerjee and 3 boy servants of the appellant, who accused Bechai of spitting on the appellant's door. That evening about dusk two ladies visited Dr. Banerjee's family. He himself came in about 7-30 p.m. and on being informed about the quarrel said he would speak to Bholat about it. He then went into an inner room to change his clothes. There was a knock at the front door and Dr. Banerjee thinking it was a patient asked the ladies to withdraw. They went to the entrance of the bed room furthest from the hall door. When Dr. Banerjee opened the door he found the appellant, who asked him to produce Bechai. The latter was called, and asked if he had spat on appellant's door; he denied it. Appellant asked Dr. Banerjee to hand Bechai over; he refused. Appellant moved as if to enter the flat, but the doctor put his hand and warned him against trespassing. Appellant then knocked the doctor down with a blow on his nose. His followers then entered the flat, and assaulted the doctor; he says with kicks and sticks. He got up and defended himself but was driven towards the balcony overlooking the street. At this stage he says he saw the appellant aiming a blow at him with a knife. In a frantic effort to avoid this he fell on the balcony and was at once stabbed on the back. He was also beaten with sticks. He does not remember being brought back into the room, but recollects Sergeant Pascal asking him who stabbed him, and he says that he pointed out the appellant, who was then standing just outside the door. He is not corroborated on this point by any other witness. The evidence generally is to the effect, that the appellant had gone before Sergeant Pascal entered the flat. It may be that the shock sustained by Dr. Banerjee, has played a trick on his memory on this point. The ladies who witnessed the assault are five in number, Prabhati Devi, sister of Dr. Banerjee, Sadha Hansi Devi, his wife, Santa Lota Devi, his sister-in-law, Sudha Lata Ghose, the wife of Dr. Ghose, and Hemlata Mazumdar, his sister. Of these Prabhati Devi gives a full account of the incident. She rushed to her brother's assistance and received a scratch on the hand. She states inter alia, that she saw the appellant stab her brother on the back, with a pen-knife.

Santa Lota Devi, deposes to witnessing the blow with which appellant knocked Dr. Banerjee down, the attack made upon him by the appellant's followers and the stabbing of the doctor by the appellant.

Sadha Hansi Devi, Dr. Banerjee's wife, gives a similar evidence. Mrs. Ghose, one of the visitors, saw Dr. Banerjee fall, and several men enter the room and assault him. Dr. Banerjee resisted, but was carried along towards the verandah where he fell face downwards. The witness saw a man between him with something. She thinks that the appellant was the striker. She identified him as the leader of the attack.

Hemlata Mazumdar, the sister-in-law of Mrs. Ghose, confirms the story told by the other ladies. She saw Dr. Banerjee driven towards the balcony his fall there, and saw the appellant strike him with something, but she did not know what it was. The other intruders pressed upon Dr. Banerjee and some of them beat him with sticks. Then as whistle blew from outside the assailants left the room.

The lady states that the appellant owned a black topee which was subsequently found in the room. Presumably she meant, that he was wearing it, when she first saw him in the room. It may

appear strange that neither of the visitors actually saw the knife, which appellant is said to have used whereas the ladies of the house did so, but it is in evidence that Prabhat Devi, and Santa Lota Devi rushed to aid the doctor, and they at least were much closer to him, when he was stabbed, and, therefore probably in a better position to see the weapon In fact Prabhati Devi states that she was actually holding her brother, when he was stabbed The evidence of these ladies is unanimous, that the doctor was struck or stabbed by the appellant, after his fall on the verandah There is, however, a witness D'Silva a telegraphist, who saw something of the affair, from the street. He says he saw women and two men come out to the verandah. The men were fighting and while they were doing so, a third man came, and hit one of the others on the back. The man hit fell forward This is not quite the same, as is told by Dr Banerjee and the ladies, but the discrepancy may be due to various causes, and it is not so serious as to affect the credibility of the testimony given by the ladies

This evidence was quite sufficient to establish a strong prima facie case against the appellant, of having caused hurt with a dangerous weapon

The defence was that he was in his shop, immediately below his flat, when this incident first started, and when the commotion began he went upstairs, and entered his flat.

With regard to this, it is noticeable that Sergeant Pascal who was early on the scene, saw a man disappear into appellant's flat ; Marshall who was with him, says that the man darted out of Dr. Bonerjee's flat, and entered appellant's.

Sergent Pascal found a crowd of men in the hall, some of them armed with sticks He cleared the crowd, and entered Dr. Banerjee's flat He found Dr. Banerjee sitting on the floor, with blood all over him, and the women weeping They told him that the man who had assaulted Dr. Banerjee with a knife had disappeared into the flat opposite. He knocked and banged at the door for 10 minutes, and when it was opened by the appellant, the women with one accord said, "This is the man" So he took him in charge. The appellant admits that he took time to open the door as he was undressing. If his story is true, his conduct cannot but be regarded as extremely strange. Having heard the fracas, which was going on just outside his flat, he went up presumably, to find out what was happening. Instead of doing this, however, he looks himself up, in his flat, and proceeds to undress Even on the arrival of the police, he did not admit them at once. This is certainly not the conduct of an innocent man, and it adds to the strength of the case against him. It suggests that he was trying to rid his appearance of the signs of conflict before facing the police.

The evidence called to prove that the appellant was in his office when the row began, upstairs, must now be considered E E. Dawoodjee, a hardware merchant of substance, says that on the night in question, he was looking at the foundation of a new building he was erecting opposite appellant's shop, and he noticed the appellant, his own nephew E. I. Dawoodjee, one Dursot, and Renderia, in appellant's shop Then he heard some row upstairs, and females crying. The appellant went upstairs, followed by two others, whom he failed to identify. He went away after this This witness is a friend of appellant's father, and went to the police station that night to see if appellant could be bailed out. He may not have known all the circumstances of the charge brought against appellant but it is rather difficult to believe that interested as he was in the release of the appellant, he would not have found out that his evidence was of vital value to him.

E I Dawoodjee, the nephew of the last witness, testifies to appellant talking to him, Renderia, and Dursot, when he heard women crying upstairs. Appellant and Dursot went up he says, and he himself went home One would have thought, that it would have been natural for appellant, to have asked his friends to come up, and see what was happening upstairs, since he lived there himself.

Rendaria gives similar evidence He too very discreetly left after appellant, Dursot went upstairs E. S Dursot, another hardware merchant, whom appellant in his examination calls "one of my men" corroborates the other two On hearing the crying upstairs, he says that he followed the appellant up the steps, but half way up, he met one Ismail, appellant's servant, who told him that he had

had a row with Dr. Banerjee who had hit him, and he had retaliated, and Dr. Banerjee had fallen

In cross-examination, this witness contradicted himself badly, and the impression left in my mind is that he is not a truthful witness.

One J. M. Judah, who occupies the flat above Dr Banerjee's, says that on hearing cries of women coming from below, he ran down Whon he got to the landing he saw appellant run up the stairs, and another man run down the stairs. He then went up to his flat A curious piece of evidence brought in to prove that appellant was not in Dr Banerjee's room when the prosecution witnesses say, he was there.

This brings up to the crux of the case. The appellant denies being in doctor's flat at all, yet we have seven people who depose to his presence in that flat, that night, the doctor, five ladies and the servant Bechai Two at least of the ladies were merely friends of the doctor's family and were utter strangers to the appellant, in fact they may all be said to have been strangers to him. They have given an account of the incident which is reasonable, and consistent with the admitted facts. Very strong grounds would therefore have been made out before their evidence can be rejected. To some extent, their evidence is corroborated by the independent evidence of Sergeant Pascal, and Marshall, who saw a man, step into appellant's flat, from the doctor's flat, according to Marshall. Who was this man if not the appellant ?

When he opened his door, what must in the circumstances of the case, be regarded as suspicious delay, the ladies at once denounced him as the doctor's assailant Yet, if his story is true, this emphatic and unanimous denunciation, was a piece of wanton wickedness The only explanation of all this is that it is true that the appellant did enter the doctor's flat that afternoon.

As regards the prosecution story, what had the defence to offer ? An obviously untrue version of the affair, which did not account for the presence of 2 fezzes, in the doctor's room, of the incident seen by D'Silva, or of the stab wound sustained by Dr. Banerjee, and an alibi, which as the learned District Magistrate remarked, separates appellant from the scene of the assault only by a flight of stairs.

On the ground of respectability there is no reason to discriminate between the witnesses for the prosecution, and the defence, but the appellant's witnesses have a much more powerful motive for saying that the appellant was in his shop when the row began, than the prosecution have for saying that he was the person who stabbed Dr Banerjee. If he was in the row from its commencement then the defence evidence is not true. I cannot find any reason for disbelieving the prosecution story corroborated as it is by the immediate denunciation of the appellant, and his suspicious behaviour in locking himself in his rooms after this occurrence.

Had his story really been true, I think it would have been natural to have expected some of his respectable witnesses to have gone upstairs with him to find out what was happening, instead of departing unobstrusively and leaving him to his fate

I am forced to the conclusion that the District Magistrate was right in convicting appellant under S 324, I. P C.

The proper sentence raises a question of some difficulty The District Magistrate considered a term of imprisonment essential. The appellant does not belong to the class of people, who are usually free with the use of the knife, and in his community he is of good social standing Imprisonment to a man of this class is not only a degrading punishment to himself but it brands the whole family with a stigma, which it has not deserved and is a lasting disgrace

The offence is compoundable with the permission of the Court, and imprisonment is not compulsory.

The injury sustained by Dr. Banerjee was 11/10" long, $\frac{1}{2}$" broad, and 12/5" deep obliquely in the right infra scapular region, not a very serious one therefore.

Where a suitable alternative can be found, it does not appear to me, that this is a case in which imprisonment should be the primary penalty to be inflicted. In place, therefore, of the sentence passed by the District Magistrate, I direct that the appellant do pay a fine of Rs 4,000 or do suffer 4 months' rigorous imprisonment in default. Rs. 1,000 of the fine will be paid to Dr. Banerjee as compensation.

S N /R.K. *Sentence altered.*

A I. R. 1929 Rangoon 92

PRATT, OFFG C. J AND CUNLIFFE, J

Municipal Corporation, Rangoon—Appellant

v

E E. Dawoodjee & Sons—Respondents

Civil Misc. Appeal No 350 of 1928, Decided on 31st July 1928, from judgment of Small Cause Court Judge, Rangoon, in Municipal Appeal No 2 of 1928

Rangoon City Municipal Act (Bur. 6 of 1922), S. 80—Principle of valuation of hereditament is its hypothetical value to any hypothetical tenant - Interpretation of statutes

It is a canon of Rating Law that the principle of valuation of any given hereditament is the hypothetical value of the hereditament as it stands to any hypothetical tenant. It is not appropriate to take as a guide the actual rents paid for other and widely dissimilar buildings occupied on different terms of tenancy. [P 92 C 2]

N. M Cowasjee—for Appellant

Clark—for Respondents

Cunliffe, J —This appeal must be dismissed It arises in the following circumstances No. 186, Merchant Street, was previously rated at Rs 1,265 per month The assessor to the Municipal Corporation recently increased this valuation at Rs 2,950 per month The assessee who is the owner of the premises appealed to the Commissioner who confirmed the assessment The assessee then preferred an appeal to the Chief Judge of the Small Cause Court He reversed the order of the Commissioner The Corporation now come to this Court in further appeal

No 186, Merchant Street, is in the occupation of the Rangoon Times Press under a lease for a term of years The reasons adduced to support the enhancement of the valuation were a general advance in the value of house property in the neighbourhood and the fact that occupiers of nearby buildings were paying much higher rents than the rent paid by the Rangoon Times Press to the assessee Elaborate calculations of floor space and so on were set out in the report of the assessor. Before the Commissioner the assessee gave evidence that No 186, Merchant Street, were difficult premises to let and by no means suitable for ordinary business purposes or for tenement dwellings The building was not new.

It is a canon of Rating Law that the principle of the valuation of any given hereditament is the hypothetical value of the hereditament as it stands to any hypothetical tenant. It seems to us not to be appropriate in such a case as this to take as a guide the actual rents paid for other and widely dissimilar buildings occupied on different terms of tenancy This is exactly what the Commissioner has done In our opinion the only evidence in relation to the proper valuation before him was the evidence of the assessee himself To rebut such evidence it would have been necessary to consider the value of a similar building, devoted to a similar business It is for these reasons that we agree with the learned Judge of the Small Cause Court and dismiss this appeal, with advocate's costs ten gold mohurs

Pratt, Offg C J —I add that it is unnecessary under the circumstances to discuss the many authorities, which have been cited on the subject of the principles, which should determine the assessment of the building in question The principles are not disputed, the difficulty is the application of the principles

It is common ground that the assessment should be on the basis of the rent, which a hypothetical tenant would be prepared to pay for the building as it stands, to be used for the purposes of a printing and newspaper press The assessor and the Commissioner considered that the correct way to obtain the rent, which the hypothetical tenant would be willing to pay, was to be obtained by a mathematical calculation based on the rents paid for buildings in the immediate vicinity

The objection to this method is that three of the buildings are of a superior character used for different purposes, and the fourth is the ground floor only of a four storeyed building also used as a press. The learned Chief Judge of the Small Cause Court did not consider the buildings or the conditions similar, and therefore this fact vitiated the conclusion arrived at He took into consideration the fact that it was not disputed that the building was so constructed that it could not be let in parts to tenants and was not new, and that it was consequently difficult to obtain a trustworthy tenant paying an adequate rent. He did not consider that an allowance of 25 per cent.

on the rent calculated from the average of the adjoining buildings rendered the assessment equal to the hypothetical rent.

The Judge was of opinion that the actual rent paid was more truly representative of the hypothetical rent and was prima facie evidence of the rental value of the building He has given his reasons in a lucid and convincing judgment and I consider no sufficient reason has been adduced to justify our differing from his conclusion

S.L. R K. *Appeal dismissed*

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* A. I. R 1929 Rangoon 93

BROWN, J

Mg. Po Lwin—Appellant

v

Mg Sein Han—Respondent.

Second Appeal No 489 of 1928, Decided on 14th January 1929

(a) Landlord and Tenant — Landlord's claim on produce for rent is not lien.

The claim of the landlord on the produce of the tenant for his rent is not strictly speaking a lien, because the produce is not in landlord's possession A. I. R. 1925 *Rang.* 366, *not Appr.* [P 93 C 2]

*** (b) Landlord and Tenant—Third person taking produce from tenant with full notice of landlord's claim for rent—Landlord can enforce his claim against him under Specific Relief Act, S 27 (b).**

Where a third person takes the produce from the tenant with full notice of the landlord's claim for rent, the landlord can enforce his claim against such third person because his claim is analogous to one for specific performance under S 27 (b), Specific Relief Act. A. I. R. 1925 *Rang* 366, *Rel. on.* [P 94 C 1]

E Maung—for Appellant

Tun Aung—for Respondent

Judgment—The plaintiff-respondent, Maung Sein Han sued one Maung Shwe Hmyin and the appellant, Maung Po Lwin for 375 baskets of paddy valued at Rs 712-8-0, claimed as rent due for paddy land He was given a decree against both defendants for 255 baskets or their value Rs 484-8-0 The land was admittedly leased out to Maung Shwe Hmyin, and Maung Shwe Hmyin did not appeal against the decision of the trial Court Po Lwin was made a defendant on the ground that the landlord had a lien or charge on the crops for his rent and that with full knowledge of this, Po Lwin had taken from the produce of the land 400 baskets Po Lwin appealed to the District Court without success, and has now come to this Court in second appeal.

The appeal is argued on two grounds: firstly it is contended that no cause of action has been made out against Po Lwin, and secondly, it is contended that there is no evidence on the record from which the lower Court could find that 400 baskets of paddy had been taken away by Po Lwin

On the first point, reference has been made to the case of *Maung Han* v *Ko Ho* (1) In that case the landlord sued his tenant, and a third party jointly for rent. The third party was impleaded on the ground that he received half the outturn of the land from the defendant with full knowledge of the plaintiff's lien on the crops It was held that he was liable jointly with the tenant It was pointed out in that case that it is the usual practice in this country for the landlords to have a lien for rent over the paddy reaped by the tenant for their rent In the present case, the contract of lease was by written agreement, and in that agreement, the tenant, Maung Shwe Hmyin bound himself not to sell, to move or dispose of the outturn of paddy in the paddy field or fields in any way whatsoever before paying up the full rent to the landlord

I do not think it is strictly speaking correct to speak of the landlords having a lien in these circumstances A lien denotes that the property over which it is claimed is in the possession of the person claiming it and the paddy in this case was admittedly not in the possession of the plaintiff But there is clearly here a personal obligation on Shwe Hmyin not to dispose of the crops in any way without first paying up the rent in full A third person would not of course ordinarily be bound by this contract, but in view of the custom of the country referred to in *Maung Han's* case, I think the tenant may in a case such as the present, be looked on as holding the property in trust subject to this promise and that anyone who takes the property with knowledge of this promise would be liable to make it good.

Under S 27 (b), Specific Relief Act specific performance of a contract may be enforced against any person claiming under a party by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract and it seems to me that

(1) A.I.R. 1925 Rang. 366.

the claim in the present case is somewhat analogous to a claim for specific performance under this section. It has been found in the present case that Po Lwin had full notice of the landlord's claim and in the circumstances I am not satisfied that there is sufficient reason for departing from the principles followed in *Maung Han's* case I do not think therefore there is sufficient reason for interference with the decision of the lower Courts on this point.

There does, however, seem to be some force in the second contention made on behalf of the appellant. Plaintiff in his plaint states that the appellant received 400 baskets of paddy from Shwe Hmyin but he has not given evidence on that point and does not seem to have any personal knowledge on the point. There is evidence as to the abortive attempt at an agreement whereby Po Lwin would take all the paddy and pay all Shwe Hmyin's debts but that agreement fell through and I can find no real evidence of any kind that 400 baskets were given by Shwe Hmyin to Po Lwin. The witness Kha Kha states :

"I went and visited Shwe Hmyin's talin. I saw 500 odd baskets sold. These 500 baskets were given to U Po Lwin, who was present. I did not see Po Lwin carrying them away."

Witness does not state to whom they were sold and he does not state that Po Lwin took the paddy away. I do not see how this can be held to prove Po Lwin to have received 400 baskets. On the other hand there is evidence of Shwe Hmyin that 150 baskets only were taken by Po Lwin and this figure is admitted by Po Lwin himself.

I alter the decree of the trial Court by directing that so far as Po Lwin is concerned the amount payable is 150 baskets of paddy or their value Rs. 285. The decrees of the lower Courts directing Po Lwin to pay cost are also set aside ; the parties will bear their own costs in this appeal.

S N./R.K. *Decree modified.*

A. I. R. 1929 Rangoon 94

MYA BU, J.

Maung Ba Kin—Appellant.

v.

Ma Pwa Thin—Respondent.

Special Second Appeal No 483 of 1928, Decided on 6th February 1929.

(a) Civil P. C., O. 38, R. 5—Application to restrain person temporarily from withdrawing amount at his credit and Court's order thereon are really for attachment before judgment.

An application praying for a temporary injunction restraining a person from withdrawing certain amount standing at his credit, and the order of Court issued thereon are, in spite of their wording, really for attachment before judgment. [P 94 C 2]

(b) Civil P. C., O. 38, R. 9—Liability of bond executed under R. 9, ceases as soon as suit is dismissed.

Liability on a bond executed in pursuance of the provisions of O. 38 R. 9, ceases as soon as the suit is dismissed by trial Court : *A.I.R.* 1927 *Rang.* 310, *Appl.* [P 94 C 2]

L Choon Foung—for Appellant.

Judgment.—The bond in question was executed to enable the defendant in suits Nos. 221 and 249 of 1926 of the Township Court of Thaton to withdraw Rs. 1,500 which was lying to her credit in the Sub-Divisional Court of Thaton, over which the Township Court in the two cases had issued so-called injunctions restraining Ma Kyu Yin from withdrawing the amount on account of the applications made by the respective plaintiffs in the two suits in the Township Court The application in suit No 221 prayed that an attachment before judgment might be made for Rs 800 out of the aforesaid Rs. 1,500 whereas the application in suit No. 249 prayed for a temporary injunction restraining the defendant from withdrawing a sum of Rs 700 out of the aforesaid Rs. 1,500.

In spite of the wording of the prayer and the wording of the order issued by the Township Court to the Sub-Divisional Court, on these applications, the applications and the orders were in reality for attachment before judgment of the sum of Rs. 800 and 700 respectively which were claimed against the defendant in the two suits in the Township Court. The orders were clearly made under the provisions of O. 38, Civil P C , and not under O. 39. The bond executed by the appellant, Maung Ba Kin therefore was one executed in pursuance of the provisions of R 9, O 38 The ruling in *Manackjee* v. *Chettyar Firm* (1) is applicable to the case and the appellant's liability on the bond ceased as soon as the suit was dismissed by the trial Court. The order of the lower appellate Court is set aside, and that of the Township Court is restored with costs, advocate's fee in this Court to be two gold mohurs.

S.N./R K. *Order set aside*

(1) A.I.R. 1927 Rang. 310=5 Rang. 492.

A. I. R. 1929 Rangoon 95

PRATT AND OTTER, JJ

C. K. R. M. Kathirasan Chettyar—Appellant.

v

Ma Hta—Respondent.

Misc Appeal No. 21 of 1928, Decided on 17th December 1928, against order of Dist. Judge, Mandalay.

Limitation Act, Art. 182 (5) — Decree-holder applying to Court which passed decree to issue notice to judgment-debtor who was then outside that Court's jurisdiction—Application made bona fide for executing decree — Application is to proper Court and legal—It is step-in-aid of execution—Civil P. C. O 21, R. 10 and S. 38.

Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount, to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. And if such application is made in good faith for the purpose of executing the decree, it will be a step-in-aid within the meaning of Art 182 (5) : *A. I. R.* 1926 *All.* 95 ; *A. I. R.* 1922 *Cal.* 44 and 25 *Cal.* 594, *Rel. on.* [P 95 C 2]

Ko Ko Gyi and *Sanyal*—for Appellant

Razak—for Respondent.

Pratt, J—In Civil Suit No 224 of 1923 of the District Court of Mandalay. Maung Cho obtained a decree against C. K. R M. Chetty on 19th April 1924 In Execution Case No 65 of 1927, Ma Hta, successor of the decree-holder, applied to the District Court, Mandalay, on 4th April 1927 for notice to issue to judgment-debtor who was then resident in the Katha District, calling upon him to pay the decretal amount and costs.

A notice to show cause against execution of the decree was posted at the house of the judgment-debtor, while he was temporarily absent on 13th April 6 days before the decree was due to become time barred. The judgment-debtor did not attend Court or show cause and the execution proceedings were closed on 17th May 1927.

It was objected that a later application for execution was barred, it being contended that the proceedings in case No. 65 of 1927 were not bona fide. The District Court held that the application in case No. 65 was according to law and bona fide and held that the later application was not barred by limitation. Against that order the present appeal was filed. It is contended before us that the application in case No. 65 was not competent, that the correct course would have been to apply for transfer of the proceeding to the Katha Court in whose jurisdiction the judgment-debtor resided, since he had no property in the Mandalay District. The decree-holder did not, however, apply for execution against the property or person of the judgment-debtor, but merely for issue of a notice to the judgment-debtor to pay up the amount due on the decree with costs

She had only obtained a succession certificate and may well have thought issue of a notice, as a preliminary step, might be productive, since the judgment-debtor was a banker in business as such No authority has been cited for the illegality of issue of such a notice through another Court to a judgment-debtor, who has ceased to reside within the jurisdiction of the Court which granted the decree, and we are not prepared to say the notice was not competent. Until the decree-holder desired execution by arrest or attachment of property there was no necessity for transfer of the execution proceedings to the Katha Court.

We are of opinion it is impossible to hold that under the circumstances the application was merely colourable and made for the sole purpose of keeping the decree alive or with no intention of taking out execution or a step-in-aid The criterion in such cases as pointed out in the Allahabad Case of *Sheo Prasad* v. *Narain Bai* (1) is whether the application was made in good faith to secure execution, or to take a step-in-aid of execution, or was merely colourable with a view to give a fresh starting point for the period of limitation.

We consider the application for issue of notice was, as the District Court held, made in good faith, and, if it was not an application for execution, must yet be considered to have been a step-in-aid within the meaning of Art 182, Cl 5 of the schedule to the Limitation Act. The appeal is dismissed with costs. Advocate-fees 3 gold mohurs.

Otter, J—I agree. There is some authority for holding that an application such as was made in the present case may be an effective step-in-aid to save limitation: see *Sarayu Chandra* v *Paresh Nath* (2) and *Gopal Chandra* v. *Gosain Das* (3). I see no reason to think that an applica-

(1) A. I. R. 1926 All. 95=48 All. 108.
(2) A. I. R. 1922 Cal. 44.
(3) [1898] 25 Cal. 594=2 C. W. N. 556

tion for notice to issue which (as it turned out) had to be executed through another Court was not made in accordance with law and to the proper Court

But (apparently) we must be satisfied that the application was made bona fide for the purpose of obtaining execution: see *Sheo Prasad* v *Narain Bai* (1) and cases cited. I think it was so made in this case A succession certificate had to be obtained, and further application was made within a short time

S N./B K *Appeal dismissed*

A I R. 1929 Rangoon 96 (1)

CAR AND MAUNG BA, JJ

Ma Dan—Appellant

v.

Tan Chong San and *others*—Respdts.

Civil Misc Appeal No 5 of 1928, Decided on 23rd August 1928

Limitation Act, S. 12—Extension of time—Limitation Act S. 4.

Where the time for filing an appeal expires during vacation and the appellant applies for copies on the day the Court re-opens, an appeal filed on the day next after the issuing of the copies is within time 19 *All.* 342 and 25 *Bom.* 584, *Foll.* [P 96 C 1]

K C. Bose—for Appellant.

Choon Fong—for Respondent 1.

Facts—An order was made against the appellant on 7th December 1927 by the original side Judge. The period of 20 days for filing the appeal expired during the Xmas vacation when the Court was closed No application had been made till then for copies of the judgment and the decree. On 3rd January i. e. the day the Court reopened an application was made for copies of the judgment and decree and the appeal was filed on the day next after obtaining copies. The question was whether the appellant could claim the benefit of S. 12, Lim. Act. It being found convenient to dispose of the preliminary question first, the case was posted for 23rd August 1928 on which the Court passed the following order.

Order—Bose for appellant. Choon Fong for respondent Tan Chaung San Others absent. On the question of limitation we think, following the cases reported in *Siyadalunnissa* v. *Muhammad Mahmud* (1) and *Tukaram Gopal* v. *Pandurang* (2) that the appeal was in time. Appeal admitted.

D D. *Appeal admitted.*

(1) [1897] 19 All. 342=(1897) A. W. N. 76.
(2) [1901] 25 Bom. 584=3 Bom. L. R. 143.

A. I. R. 1929 Rangoon 96 (2)

MAUNG BA, J.

Maung Pan Gaing and *another*—Appellants.

v.

Maung Mo and *another*—Respondents.

Special Second Appeal No 401 of 1928, Decided on 18th February 1929, against decree of Addl. Dist Judge.

Civil P. C., O. 2, R. 2—Scope—Interest.

Covenant to pay interest unless distinct from and independent of claim for principal cannot be basis of suit. [P 96 C 2]

S Ganguli—for Appellants

Ba So—for Respondents

Judgment—Respondents brought a suit for recovery of the amount due on a promissory-note As the promissory-note was not duly stamped they were allowed to fall back upon the original cause of action Part of the consideration of the promissory-note was a sum of Rs. 210 due as arrears of interest on a mortgage-bond Township Judge was of opinion that the fact of the said arrears of interest being due should be proved by the respondents and holding that they had failed to prove the same disallowed that claim

The Additional District Judge thought that the other party should prove that they had paid the said arrears of interest and holding that they had failed to do so decreed that claim.

The learned Additional District Judge has failed to ascertain whether the original mortgage-deed contains a covenant to pay interest which is distinct from and independent of the claim of the mortgagees to recover the principal sum, so that a non-payment of interest may give rise to a separate cause of action. On referring to the mortgage-deed, I find that it does not contain such a covenant. The deed simply states that Rs 500 was borrowed at 2 p. c p m., on the security of a house and its site that the principal and interest should be paid on demand, and before such payment is made the secured property should not be alienated.

As there was no distinct cause of action in respect of interest the District Court was wrong in giving a decree for the arrears of interest The appeal is accepted and the decree of the District Court is set aside with costs throughout.

V.V. *Appeal allowed*

** A. I. R. 1929 Rangoon 97
Full Bench

RUTLEDGE, C. J., MAUNG BA AND BROWN, JJ.

U Po Hla—Applicant.

v.

Ko Po Shein—Respondent

Criminal Ref. No. 1 of 1929, Decided on 6th March 1929 in Criminal Revn No. 607-B of 1928, D/- 12th January 1929 against order of Dist. Magistrate, Pyapon

**** Criminal P. C., S. 520—Accused acquitted—Both District Magistrate and Sessions Judge can interfere with trial Court's order under S. 517—Accused convicted by First Class Magistrate—No appeal to Sessions—District Magistrate can interfere with his order under S. 517** : 6 *Rang.* 259=*A. I. R.* 1928 *Rang.* 240=111 *I. C.* 878, *Overruled.*

In the case of an acquittal by the trial Court, both the Sessions Judge and District Magistrate as a Court of revision have power, under S. 520, to interfere with the order of the trial Court passed under S. 517 regarding disposal of property in respect of which the offence was committed and in the case of a conviction by a First Class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under S 517 by the trial Court. **6 Rang. 259=A. I. R. 1928 Rang. 240=111 I. C. 878, Overruled**, *A. I. R.* 1923 *Rang.* 227, 3 *Cal.* 379 and 9 *Mad.* 448, *Approved.* [P 97 C 2, P 99 C 1]

Ba Thaung—for Applicant.

Order of Reference

Maung Ba, J.—In Criminal Regular Trial No 79 of 1928 of the Sub-Divisional Magistrate of Kyaiklat, the accused Ma Su was convicted of an offence under S. 406, I. P C. and the Magistrate, further under S. 517 (1), Criminal P C. ordered the exhibit property which consisted of certain loose diamonds to be returned to the complainant, one Maung Po Shein. The property was seized from the possession of three persons, Maung Hla Bu, Maung Po Hla, and Ma Ma Gale, and the two latter filed appeals against the order of the trying Magistrate, directing the return of the property to Maung Po Shein, before the District Magistrate, under S 520, Criminal P. C The District Magistrate in his order has upheld the order of the trying Magistrate.

Maung Po Hla has now applied to this Court for revision of the order of the District Magistrate and the question arises as to whether the District Magistrate had jurisdiction to pass the order complained of The Sub-Divisional Magistrate was a First Class Magistrate and in the case of *Emperor* v. *Nga Po Chit* (1), it was held by a Bench of this Court that in the absence of an appeal to the Sessions Court from a conviction by a First Class Magistrate, the District Magistrate had jurisdiction as a Court of revision to interfere with an order passed by the trial Court under S 517, Criminal P. C. On the other hand, in the case of *Maung Mra Tun* v. *Maung Kra Zoe Pru* (2), Das, J., has held that when the trial Court acquitted the accused on a charge of criminal misappropriation and passed an order under S. 517, Criminal P C. for the disposal of the exhibit property, the Sessions Judge had no jurisdiction to interfere with the order passed by the trial Court under S 517 These two decisions appear to be conflicting and in order to dispose of the matter now before me I consider that the following questions should be referred to a Full Bench for decision :

"(1) Whether, in the case of an acquittal by the trial Court, the Sessions Judge or District Magistrate as a Court of revision has power under S. 520, Criminal P. C. to interfere with the order of the trial Court passed under S. 517, Criminal P. C., regarding the disposal of the property in respect of which offence was committed ; and (2) Whether, in the case of a conviction by a First Class Magistrate the District Magistrate has, in the absence of an appeal to the Sessions Court, power to interfere with an order passed under S. 517, Criminal P. C. by the trial Court."

Opinion

Two questions have been referred to us in this reference : (The questions referred quoted as above). There are two conflicting decisions of this Court bearing on this point In the case of *Maung Mra Tun* v *Ma Kra Zoe Pru* (2) the trial Court had acquitted an accused on a charge of criminal misappropriation of a pair of diamond nagats, and ordered the nagats to be returned to the complainant. Das, J, held that, as the trial Court has acquitted the accused there could be no appeal to the Sessions Court and, therefore, the Sessions Court had no jurisdiction to interfere with the order passed by the trial Court, nor had it any revisional power in the matter.

The decision of a Bench of this Court in *Emperor* v *Nga Po Chit* (1), does not appear to have been brought to the notice

(1) A.I.R. 1923 Rang. 227=1 Rang. 199.
(2) A.I.R. 1928 Rang. 240=6 Rang. 259.

of the learned Judge in *Maung Mra Tun's* case. In that case Nga Po Chit had been convicted of criminal breach of trust in respect of three sewing machines by a First Class Magistrate Nga Po Chit did not appeal, but on application by the complainant the District Magistrate revised the order of the trial Magistrate as to the disposal of the sewing machines. It was held that the District Magistrate had jurisdiction to pass the order, although there had been no appeal and in any case no appeal would have lain to him

Section 520, Criminal P C , lays down that :

"any Court of appeal, confirmation, reference or revision may direct any order under S. 517, S. 518, or S. 519 passed by a Court subordinate thereto to be stayed pending consideration by the former Court, and may modify, alter, or annul such order and make any further orders that may be just."

Sections 517, 518 and 519 deal with orders as to the disposal of property before a criminal Court, or regarding which an offence appears to have been committed The meaning of S 520 was considered by a Bench of the Bombay High Court in *In Re Khema Rukhad* (3). In that case a First Class Magistrate had acquitted certain accused who were charged with theft of cattle and had directed the cattle to be given back to accused 1. On application, the Sessions Judge had modified the order as to the disposal of the cattle It was held that the Court of Sessions was not a Court of appeal within the meaning of S. 520, as an appeal from the order of acquittal would have lain in the High Court, and that it was not a Court of revision, as the Court of revision was also the High Court. This decision was followed by a single Judge of the High Court of Allahabad in the case of *Emperor* v. *Debi Ram* (4) and Das, J., followed these two rulings in *Maung Mra Tun's* case (2).

A different view of the law, however, been taken by the High Court of Allahabad in the earlier case of *Empress of India* v *Nilambar Babu* (5). Judgment in that case was delivered in 1879 when the present Code of Criminal Procedure was not in force. It was held under the old Code that when a Magistrate had discharged an accused person and passed orders as to the disposal of the property, the Sessions Judge was a Court of appeal and any one aggrieved by the order should have applied to him. This decision was followed by the High Court of Madras in the case of *Queen Empress* v. *Ahmed* (6). In that case the accused had been acquitted and Brandt, J., observed in his judgment :

". . . . It seems to me that the wording of the section is sufficient to show that the Sessions Court, as the Court to which appeals ordinarily lie from the decisions of the First Class Magistrate by whom this case was tried, had power to dispose of the question."

The Calcutta High Court took a similar view of the law in the case of *Emperor* v. *Joggeshu Mochi* (7) The section corresponding to S 520 of the Present Code, and the Code then in force was S 419, and Anslie, J., remarked :

"The words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order under S. 418 for the disposal of any property produced before the Court may in no way concern the convicted person, and we think it unreasonable to put such a construction on S. 419 as shall make the power of the Judge to modify, alter or annul a Magistrate's order affecting one, contingent on the accident whether person has or has not chosen to appeal."

It appears therefore, that the narrow interpretation of the terms of S 520 adopted in the recent rulings of the High Courts of Bombay and Allahabad is not the view that has been taken by the High Courts of Madras and Calcutta and that the decision of a Bench of this Court in *Nga Po Chit's* case (1) is supported by previous judicial decisions We agree generally with the reasoning of the late Ma Oung, J., in *Nga Po Chit's* case (1). We see nothing in the terms of S. 520 of the Code justifying the view that the words "Court of appeal" in that section mean only a Court to which either of the parties to the criminal case has appealed or could appeal. Without the section, when a party to a criminal case has appealed, the Court of appeal would have ample power to pass the necessary orders under S. 423 of the Code. Similarly it seems to us that the words "Court of revision" cannot be interpreted in the narrow sense suggested. The High Court in dealing with cases in revision has am-

(3) [1918] 42 Bom. 664=45 I.C. 501=20 Bom. L.R. 395.
(4) A.I.R. 1924 All. 675=46 All. 623.
(5) [1879] 2 All. 276.
(6) [1886] 9 Mad. 448.
(7) [1877] 3 Cal. 379.

ple power under the provisions of S. 439 to pass orders as to the disposal of property in cases which may come before it in revision and the provisions of S. 520 are unnecessary to give it this power.

All First Class Magistrates are subordinate to the District Magistrate of the District, and either the Sessions Judge or the District Magistrate can under S. 435 call for any proceedings of any inferior criminal Court in revision The Sessions Judge and the District Magistrate are therefore both "Courts of revision" with regard to the proceedings of a First Class Magistrate within their territorial jurisdiction Their jurisdiction is a concurrent one as it is in the case of revisional powers generally, and it does not seem to us that their jurisdiction in the matter is in any way dependent on the question whether an appeal has been filed or could be filed, against the original order of acquittal or conviction in the case concerned We therefore, answer both the questions referred in the affirmative.

D.D. *Questions answered*

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* A. I. R. 1929 Rangoon 99

RUTLEDGE, C J , AND BROWN, J.

T. R. Gopalaswamy Pillay—Appellant

v.

F. R Meenakshi Ammal and *another*—Respondents

Civil Misc. Appeal No 69 of 1928, Decided on 4th January 1929.

*** Succession Act (1925), S. 218—Member of joint Hindu family is not as such entitled under S. 218 to administration of estate of its deceased member—S. 250 has no application—Succession Act (1925), S. 250.**

A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases, and the whole beneficial interest in the estate belongs to the other members of the family. A member of a joint undivided Hindu family therefore is not as such a person entitled under S. 218 to an administration of the estate of a deceased member of the family *A. I. R.* 1923 *Pat.* 96; 56 *P. R.* 1919 and *A. I. R.* 1924 *Rang.* 329, *Rel. on*; S. 250 has also no application in such a case. [P 102 C 1, 2]

Aiyangar and *Tambi*—for Appellant.

Hay and *Sastri*—for Respondents

Judgment.—The property in dispute in the present case is the estate of one Tanjore Ramaswamy Massilamany Pillai, deceased. The appellant Tanjore Ramaswamy Gopalswamy Pillai applied on the original side of this Court for Letters of Administration to the estate of the deceased on the ground that he was the brother of the deceased, that they formed between them a joint undivided family under the Hindu law and that he was therefore the only heir and legal representative of the deceased. The deceased left surviving a wife, Meenakshi Ammal the first respondent and a daughter Padamabhai, the second respondent The two respondents opposed the application for Letters. They denied that the appellant and his brother formed a joint undivided Hindu family.

Issues were framed, and a large amount of evidence was recorded but the case was decided on a point of law. By consent of the parties a preliminary issue of law was fixed.

"Can Letters of Administration be granted to the surviving member of a joint Hindu family in respect of the property of that family"?

The learned trial Judge was of opinion that under the Mitakshara School of Hindu law, to which the parties belong, the property of a joint Hindu family passed on the death of one of the members not by succession, but by survivorship and that the surviving member of a family was not an heir to the deceased, and was therefore not a person to whom Letters of Administration could be granted.

The learned Judge did not deal in his judgment with special cases in which the general rule as to the grant of Letters is not followed His finding was merely to the effect that in such a case, the surviving member of a joint family was not a person to whom Letters could be granted, under the provisions of S 218, Succession Act The section lays down that:

"If the deceased has died intestate, administration of his estate may be granted to any person who according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

A large number of decided cases have been cited to us on the subject. The majority of these cases deal with the question of Court-fees payable on the grant of Probate or Letters of Administration and are not therefore directly applicable to the point at issue in the present case.

In *In the goods of Pokurmall Augurallah* (1), an application was made for probate of the will of a Hindu who was governed by the Mitakshara law. During his life, the testator had purchased certain property out of the income of the ancestral estate. It was held that, although the property vested in the members of the joint family as tenants-in-common it vested in them as trustees for all the coparceners and that all the property surviving in the estate of the deceased was property held by him in trust and therefore not liable to duty. *In the matter of Dasu Manavala Chetty* (2) a different view as to the payment of Court-fees was taken. In that case the deceased died intestate and Letters of Administration was applied for It was held that Court-fees must be paid on the share which the deceased was entitled to claim by survivorship. In the case of *Kashinath Parsharam* v. *Gouravabai* (3), an application was made for the will of a joint Hindu family and it was claimed that Court-fees were not payable It was held that what had to be looked at in such cases was the estate actually specified in the will and not the estate which could legally be disposed of by the will It was therefore held that the full Court-fees were payable. In *Keshavlal Punjalal* v. *Collector of Ahmedabad* (4) the question was whether Court-fees were payable on an application for Letters of Administration. In that case it was held that where an estate consists of a share of a Hindu joint family property no Court-fees were payable.

In all these cases the sole question for decision by the Court was as to whether Court-fees were or were not payable In no case had there been any opposition to the grant of Probate or Letters of Administration *In the matter of Dasu Manavala Chetty* (2) Miller, J., did state in his judgment:

"I have no doubt that the appellant is a person to whom Letters of Administration may be granted under S. 23, Probate and Administration Act."

But this point was not really a point for decision in the case and was dealt with very shortly.

We have been referred to the dictum of the Privy Council in the case of *Brij Narain* v. *Mangla Prasad* (5). At p 103 (*of* 46 *All.*) of the judgment in that case their Lordships averred:

"It is true that the point was not actually taken so far as appears in any of these cases but when a long series of cases extending over a long period of time, when parties were represented by eminent counsel are decided in a way, where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad."

It is suggested that, as in all these cases, which were decided under the Court fees Act, Probate or Letters of Administration were actually granted and no objection was raised to their grant, the cases are all in favour of the view that the grant of Probate or Letters could legally be made. We do not think that there is very much force in this suggestion In none of these cases cited, does it appear to us that there was any one interested in opposing the grant of Probate or Letters. In no case were the parties represented by eminent counsel, whose cases would have served by raising a plea that the grant of Letters or Probate could not be made. We do not therefore think that these cases are of very much assistance to us for the decision of the present case

A case which appears to us to be more relevant is that of the *Bank of Bombay* v *Ambalal Sarabhai* (6) In that case a suit was filed by the son of a deceased Hindu, with whom he was joint and undivided against the Bank of Bombay to have certain shares in the Bank transferred to his name, from that of his father as the sole surviving coparcener Under S. 23, Presidency Banks Act 1876, when by the death of any proprietor or shareholder his stock or shares shall devolve on his legal representative, the Bank shall not be bound to recognize any legal representative of such proprietor or shareholder, other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or Letters of Administration to the estate of the deceased. It was contended on behalf of the Bank that under this

(1) [1896] 23 Cal. 980=1 C. W. N. 91.
(2) [1910] 33 Mad. 93=4 I. C. 1064=19 M. L. J. 591.
(3) [1915] 39 Bom. 245=28 I.C. 473=17 Bom. L.R. 169.
(4) A I R. 1924 Bom. 228=48 Bom. 75 (F.B.).
(5) A. I. R. 1924 P.C. 50=46 All. 95=51 I. A. 129 (P.C.).
(6) [1900] 24 Bom. 350=2 Bom. L. R. 467.

section they were not bound to recognize the plaintiff, unless he took out Letters of Administration. The trial Judge held that the property of a joint undivided Hindu family did not on the death of a member of that family devolve on his legal representative, and that this section was therefore no bar to the bringing of the suit But on appeal this view of the law was held to be incorrect. In the course of the judgment in the appeal Court which was delivered by Jenkins, C J., the following passage occurs :

"It is said that inasmuch as the beneficial interest in the share passed by survivorship, the share would not according to the words of the section, vest in the executor or administrator. But this argument is founded on an obvious fallacy, it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived. We have not at present to consider in what way representation should be taken out or what duty should be paid ; it is sufficient to hold, as in my opinion we should, that the present is a case in which S. 23, Presidency Banks Act, applies, and that, if the Bank so requires, Probate or Letters of Administration must be produced."

There is no direct finding here on the question of law now before us. although difficulties might well arise out of this decision in the case of a joint Hindu undivided family, if the surviving members of the family were not competent to take out Letters of Administration. The difference here is pointed out between the legal title and the beneficial interest and it may be argued on behalf of the appellant that, although the beneficial interest in the property passes by survorship, the legal title vests in the legal representative of the deceased. It does not seem to us, however, that this would help the appellant in the present case. It may be a good argument in favour of the view that Letters of Administration can be taken out in respect of an undivided joint Hindu family estate, But it by no means necessarily follows that a surviving member of that joint family is one of the persons entitled to Letters.

Three cases have been cited to us, which directly supports the view of law taken by the trial Judge. In the case of *Kali Kumar* v *Mt. Munabati Kumari* (7) it was held that a member of a joint Hindu family could not apply for Letters of Administration to the estate of the deceased member of that family. The judgment of the Court in that case is very short and it does not seem to have been reported in an official report of the Court. A similar view was, however, taken by the original side of this Court in *Ramagiri Guruvaya Naidu* v. *Govindammah* (8) In the course of his judgment in that case Beasley, J remarks,

"In this case, according to Mr. Naidu the property is the property of the joint Hindu family and he is not claiming therefore any property of the deceased but is disputing his right to deal with his property as his own. He has not therefore such an interest in the estate of the deceased as entitles him either to oppose a grant of Letters of Administration to the alleged son or himself to ask for Letters of Administration."

And a similar view was taken by the Chief Court of the Punjab in the case of *Mt. Uttam Debi* v *Dina Nath* (9) It appears therefore that such direct authority as there is on the point before us for decision supports the view taken by the learned trial Judge.

The only person entitled to the grant of Letters under S 218, Succession Act, is one, who according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of the such deceased's estate and the question is whether the surviving member of a joint undivided Hindu family is entitled to any part of the estate of a deceased member of that family. The view taken by the Chief Court of the Punjab, and by Beasley, J of this Court in the two cases to which we have referred was that the surviving member would not be entitled to the whole or any part of the deceased's estate, because on the death of the deceased no estate in the joint family property remained in him at all, such estate as he had previously held passed at once to his survivors on his death

The general principles applicable in Hindu Law in such cases are explained in Mayne's Hindu Law, S 246 :

"There is no such thing as succession properly so-called, in an undivided Hindu family. The whole body of such family consisting of males and females, constitute a sort of corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabar and Canara, where partition is not

(7) A. I. R. 1923 Pat. 96.

(8) A. I. R. 1924 Rang. 329.

(9) [1919] 56 P. R. 1919=51 I. C. 651.

allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arise from his belonging to a family possessed of greater or less wealth. As he dies out his claim ceases, and as others are born their claim arises. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual, deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund, just as births may diminish their interest by increasing the number of claimants. But although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to. Now in every part of India where Mitakshara prevails the position of an undivided family is exactly the same, except that within certain limits each male member has a right to claim partition, if he likes. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession."

We do not understand the correctness of these principles to be questioned A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases, and the whole beneficial interest in the estate belongs to the other members of the family. There is no succession to the deceased's estate, because he has left nothing to succeed to No part of the joint family estate is therefore the deceased's estate within the meaning of S. 218, Succession Act, and it therefore seems to us to follow that a member of a joint undivided Hindu family is not as such a person entitled under S. 218 to an administration of the estate of a deceased member of the family It may be as suggested by the judgment of Jenkins, C J , in the case of *Bank of Bombay* v *Ambalal Sarabhai* (6) that there is no certain legal title of the deceased which remains in existence after his death and vests in his legal representatives But if that is so, it is not a member of the family estate who obtains that title as such but his heir, and we do not understand it to be disputed that for the purposes of the Succession Act the heir in the present case is the widow or his daughter and not the appellant If therefore there is a legal title still surviving, that is not property to which the appellant as a member of the joint undivided family is entitled, we are therefore of opinion that the general question has been correctly answered by the learned trial Judge

It has been suggested that even though we hold that the appellant is not entitled to Letters under S 218, his claim should nevertheless be considered under S. 250 or 254. S. 250 hardly seems to us to be applicable to a case of the present kind. It may be that the appellant could have made out a case for the grant of Letters of administration under S 254. It is pointed out to us on behalf of the respondents what the appellant really wants to claim is entirely opposed to the interests of the estate of the deceased He claims that the property is his and does not belong to the estate at all If that be so, there are obvious objections to his being made the legal representative of the deceased It is possible that circumstances might arise in which it would be necessary to override these objections and grant of Letters of Administration to the survivor of a joint family, but it does not seem that these questions properly arise in the present case.

The application for Letters was clearly filed under the provision of S. 218, Succession Act The appellant claimed to be entitled to administration of the estate as of right He did not claim that such special circumstances existed that the ordinary rule should not be followed and that S 254 should be applied The case in the trial Court appears to have been decided by consent on the issue of law, which was framed and we do not think that the appellant should be allowed to make out a fresh case for himself now.

The result is that we see no sufficient reason to interfere with the orders passed by the trial Court and we dismiss the appeal with costs.

R K. *Appeal dismissed.*

** A I. R 1929 Rangoon 102 Full Bench

ROUTLEDGE, C J., CARR AND BROWN, JJ.

Commissioner of Income-tax

v

Chan Lo Chwan—Assessee.

Civil Misc Application No 13 of 1928, Decided on 18th February 1929.

(a) Income-tax Act, (11 of 1922), S. 66—High Court cannot interfere with finding of

fact regarding completeness or genuineness of statement.

Whether a statement given by the accused is incomplete and fraudulent or not, is a question of fact for the determination of the Income-tax authorities and not a question on which High Court can interfere. [P 103 C 1,2]

**** (b) Income-tax Act (11 of 1922), S. 13 —Assessee not making honest statement—Random assessment can be made.**

If an assessee does not choose to make an honest statement of account, so that the amounts of profits may be strictly determined, he cannot complain if a random assessment is made upon him. *Macpherson* v. *Moore*, 6 *Tax Cases at* pp. 114, 115 *Rel. on.* [P 103 C 2]

**** (c) Income-Tax Act, (11 of 1922), S. 23 (2)—Income-tax officer not satisfied that statement is genuine or complete—Notice stating particulars and grounds of objections should ordinarily issue—Assessee persistently making false returns—Such notice is not obligatory.**

In an ordinary case, particulars in respect of which and the ground on which the Income-tax officer thinks that the statement was either not genuine or complete ought to be given in a notice, especially in cases where the objection is that the accounts are incomplete. But where the finding is that the accounts of the assessee in previous years as well as in the current year were not genuine but merely cooked for Income-tax purposes, the Income-tax officer is under no obligation either in law or in common fairness to set out all the reasons which led him to come to such a conclusion. [P 104 C 1]

Govt Advocate—for Commissioner

Cowasjee & Daniel—for Assessee

Judgment—In compliance with an order of this Bench, in Civil Miscellaneous Case No. 13 of 1928, the Commissioner of Income-Tax, Burma has stated a case on the following points of law.

Can an Income-Tax Officer having rejected the accounts of an assessee as not being genuine proceed to make an assessment (1) on insufficint material and (2) without giving notice of his dissatisfaction to the assessee under S. 23 (2) of the Act ?

In his statement of the case, the Commissioner reviews the circumstances attending the assessment of the present respondent, since the year 1922-23 From this, it appears that the accounts at any rate since the year 1924-25 have been rejected as incomplete and fraudulent and merely made up for Income-Tax purposes. The Commissioner sets out the grounds on which the Income-Tax authorities were satisfied that the statement of account was incomplete and fraudulent and we consider that they had good grounds for forming such an opinion. Whether the statement is incomplete and fraudulent or not is a question of fact for the determination of the Income-Tax authorities and not a question on which this bench can interfere and indeed from the wording of the reference this seems to be taken for granted as it assumes that the Income-Tax Officer was within his rights in rejecting the accounts as not being genuine.

The first question then is: Can he proceed to make an assessment on insufficient material ? We think on this point the quotations which the Commissioner has made from the case of *Macpherson & Co* v. *Moore* (1) are very much to the point. In that case, no doubt MacPherson & Co., had failed to make any return but we quite fail to see why a party who has made a false return should be in a better position than one who has failed to make any return. Mr. Cowasjee urges that S 13 only applies to the method and does not empower the Income-tax authority in any way. We cannot see any such limitation in the words of the proviso, which runs as follows :

" Provided that if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be detected therefrom, then the computation shall be made on such basis and in such manner as the Income-tax Officer may determine. "

In this case the Income-tax Officer clearly considered that the income, profits and gains could not properly be detected from the respondent's statement, since he decided that that statement was not genuine He was consequently entitled to adopt whatever method he thought best. Adapting the words of the Lord President in *Macpherson's* case already alluded to :

" If Chan Lo Chwan does not choose to make an honest statement of account, so that the amounts of profits may be strictly determined, he cannot complain if a random assessment is made upon him by the Crown. "

For years, according to the Commissioner the firm has made defective and dishonest returns for the purpose of income-tax, and it is to be hoped that it will at last dawn upon them that honesty is the best policy and that this Court will not aid them in reducing the administration of the Income-tax law to a nullity.

The second question in the reference is:

" Can the Income-tax Officer make an assessment without giving notice of his dissatisfaction to the assessee under S. 23 (2) of the Act?"

(1) [1919-16] 6 Tax Cases at pp. 114 & 115.

On this point the Commissioner states that two notices were issued under S 23 (2) and also an informal notice requiring the assessee's attendance. The assessee was examined on two occasions and his statements were recorded He admits that the assessee was not questioned on the specific points which form the grounds for the officer rejecting the accounts The controversy on this point seems to come to this . For the assessee it is urged that the Income-tax Officer should give him particulars in respect of which and the grounds on which he thinks that the statement was not genuine, or on which it is incomplete We may say that there is no such provision in the Act, and that the Government Advocate's observation that it was a matter for the legislature rather than the Court seems to be justified In an ordinary case, we have no hesitation in saying that such particulars ought to be given in a notice, especially in cases where the objection is that the accounts are incomplete Here, however where the finding is that the accounts of the assessee in previous years as well as in this year were not genuine but merely cooked for Income-tax purposes, we do not consider that the Income-tax Officer was under any obligation either in law or in common fairness to set out all the reasons which led him to come to such a conclusion We accordingly agree with the answers given by the Commissioner in respect of both questions and we order the respondent to pay the Commissioner's costs seven gold mohurs

M N /R K. *Reference answered*

A I R 1929 Rangoon 104

MAUNG BA, J.

Ma Than Yin and *another*—Appellants

v

Sena Mahomed—Respondent

Special Second Appeal No 412 of 1928, Decided on 20th February 1929.

Civil P. C., O 21, R 63—After applying for removal of attachment, O. 21, R. 63 applies for declaratory suit, and not Specific Relief Act, S. 42

Where a party has applied for removal of attachment from his share, the only remedy left is to file a declaratory suit under O 21, R 63 and not a suit under Specific Relief Act, S. 42 *A. I R* 1924 *Rang.* 42 and *A. I. R.* 1926 *Rang* 124, *Foll.* [P 104 C 2]

S T. Leong—for Appellants

P S Sen—for Respondents.

Judgment.—Appellant Ma Than Yin is the daughter of U. Tha Aung by his first wife Ma Yin Kywe, and appellant Ma Than Shwe is the daughter of U Tha Aung by his second wife Ma Thaing Chon married Ko Po Min.

Respondent Sena Mahomed obtained a decree against Ma Thaing Chon and her second husband Ko Po Min, and in execution of that decree attached a house and site Appellants claimed that the said house and site was the *hnapazone* of U Tha Aung and his first wife Ma Yin Kywe and in Civil Misc Nos 18 and 19 of 1926 applied for the releasing of their shares in that property from attachment. For Sena Mahomed it was contended that questions of title could not be gone into in such cases, but that the claimant's proper remedy was to file a declaratory suit By consent the applications were accordingly dismissed without costs on 26th July 1926 The two appellants did not file their declaratory suit (13 of 1928) till the 27th January 1928 No consequential relief was asked for An objection was raised on two grounds (1) that the suit was time barred under Art 11, Lim Act and (2) that the suit was not maintainable, as no consequential relief was asked for The Township Judge overruled both the objections. The Additional District Judge took a different view He held that the suit must be treated as one under O. 21, R. 63 Civil P C , and not one under S 42, Specific Relief Act, and that Art 11, Lim Act should be applied.

Had appellants not applied for removal of attachment from their shares, they would have been at liberty to bring a suit under S 42, Specific Relief Act, as they would then be claiming a declaration of their own right to property Since there had been a claim under O 21, R 58, Civil P C the only remedy left was to file a declaratory suit under R 63, of that order This view is supported by *Pya On Mg* v *Ma Hla Kyu* (1) and *K R N A Firm* v *Po Thein* (2).

The decision of the District Court was correct and this appeal is accordingly dismissed with costs

P D /R K *Appeal dismissed.*

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(1) A I. R. 1924 Rang. 42=1 Rang. 481.
(2) A. I. R. 1926 Rang. 124=4 Rang. 22.

* A. I. R. 1929 Rangoon 105

BROWN, J.

Lan Tin Ngan—Applicant.

v.

Ma Mya Kyin—Respondent.

Civil Revn. No. 152 of 1928, Decided on 6th February 1929, against order of Dist. Judge.

*** (a) Civil P. C., O. 43 (1) (w)—Appeal must be confined to grounds allowed under R. 7, O. 47.**

Although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 7, O. 47. *A. I. R.* 1927 *Lah.* 435, 41 *Cal.* 746; *A. I. R.* 1928 *Rang.* 177, *Foll.*

[P 106 C 1]

(b) Civil P. C., O. 47, R. 7—Scope—Allowing appeal on any other ground is acting without jurisdiction and is liable to be set aside in revision.

The contention that if the Court wrongly applies the provisions of R. 1, the Court has acted in contravention of the provisions of R. 4 cannot be upheld if after bearing in mind provisions of R. 1 the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of R. 4 even though the Court has taken a wrong view as to the meaning of R. 1. Order allowing appeal on any other ground is acting without jurisdiction and is liable to be set aside in revision.

[P 106 C 2; P 107 C 1]

P. B. Sen—for Applicant.

B K. B Naidu—for Respondent.

Judgment.—The petitioner Lan Tin Ngan brought a suit against the respondent as legal representative of her deceased husband Maung Po Tu for possession of certain property The suit was dismissed by the trial Court, and the petitioner then filed an application for review of judgment. This application was allowed by the trial Court. The respondent appealed to the District Court and that Court holding that no sufficient cause for review had been established set aside the order granting the review. The petitioner now seeks to have the District Judge's order set aside in revision, and the main ground taken is that the order was passed without jurisdiction.

Under the provisions of R 1 (w), O. 43, Civil P. C, an appeal lies from an order under R 4, O. 47 granting an application for review. But O. 47, R. 7 provides that an order granting an application may be objected to on the ground that the application was :

"(a) in contravention of the provisions of R. 2;

(b) in contravention of the provisions of R. 4, or

(c) after the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

It is contended on behalf of the petitioner that O 43, R. 1 (w), must be read with R. 7, O. 47, and that an appeal against an order granting an application for review only lies on one of the grounds set forth in R 7 The authorities are not unanimous on this point. But with the exception of the High Court of Bombay, the general consensus of opinion appears to be in favour of the view now urged on behalf of the petitioner.

A number of cases have been cited to me, but the case in which the matter has been most fully discussed is perhaps the case of *Sikandar Khan* v. *Baland Khan* (1). It was there pointed out that if an unrestricted right of appeal lay under O 43, the provisions of R. 7, as to the grounds on which an order granting a review could be objected to were unnecessary, and it was held that if the two rules were read together there was no necessary inconsistency. R. 7 lays down that the objections referred to therein may be taken either in an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit, and the presumption to be drawn from these provisions is that the legislature intended that in any case where such objection was not taken the order granting the review should be final. In the Code of 1882, there was no section corresponding to R 1 (w), O. 43 and had the legislature intended by the new Code of 1908, to modify the law as previously laid down in R. 4, O. 47, they could easily have done so, by amendment of that rule. The earlier rule in the present Code allows an appeal against an order granting the review, but the latter rule while still allowing an appeal lays down that in that appeal certain specific grounds may be taken. It does not seem to me that there is necessarily any inconsistency between these two rules. The restriction on the right of appeal contained in R. 7 applies not only to an appeal from the order granting the review application, but also to an appeal from the final decree or order

(1) A. I. R. 1927 Lah. 435=8 Lah. 617.

passed or made in the suit, and the effect of the rule is that subject to the specific grounds which may be taken by way of appeal under that rule the order granting the review application is final The appeal which is allowed in the earlier O. 43 must be treated as subject to this specific provision of this rule.

The same view of the law was taken by the High Court of Calcutta, in the case of *Hari Charan Saha* v. *Baran Khan* (2) and a number of other authorities to the same effect are quoted in *Sikandar Khan's* case (1) The High Courts of Madras, Allahabad, and Patna have decided in the same way and the decision of the Bombay High Court to the contrary does not appear to have been published in the official reports of that Court. My brother Carr expressed himself in favour of this view of the law in the case of *A T. K P L. M Muthu Pillay* v *Lakshiminarayan* (3) I am of opinion that the contention of the petitioner on this point must be upheld, and that although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R 7, O. 47, Civil P C.

It is suggested on behalf of the respondent that even if this view of the law be accepted, nevertheless the words in R 7 "in contravention of the provisions of R 4" are sufficiently wide to cover any objection taken under the provisions of R. 1. I find myself unable to accept this suggestion. No authority has been cited in favour of it, and it appears to me to be against the clear wording of the rule. R 4 (1) need not be considered, that merely deals with the rejection of an application. R. 4 (2) lays down that :

"where the Court is of opinion that the application for review should be granted, it shall grant the same, provided that

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear, and be heard in support of the decree or order, a review of which is applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

The suggestion is that, if the High Court wrongly applies the provisions of R. 1, the Court has acted in contravention of the provisions of R. 4. But I am unable to see how this contention can be upheld. Under R. 4 (2) if the Court is of opinion that the application for review should be granted, it is bound to grant the same In deciding whether the review should be granted, the Court must bear in mind the proviso of R. 1. But if after bearing in mind these provisions the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of R. 4, even though the Court has taken a wrong view as to the meaning of R 1. There can be no doubt in the present case, that the trial Court was of opinion that the application for review should be granted. There was therefore no contravention of the first part of Cl. 2, R. 4, and the only way in which the provisions of this rule could have been contravened would be by contravention of the provisions specificially laid down in the proviso to the rule

The other grounds under which objection may be taken are :

(a) that the application was in contravention of the provisions of R. 2,

that is to say, that if the application was made to a Judge other than the Judge who passed the order sought to be reviewed, it can be made only on certain restricted grounds The application in the present case was made to the Judge, who heard the case, and an objection on this ground could not have been taken, nor was there any suggestion that the application for review was made after the expiration of the period of limitation prescribed therefor The District Judge had therefore jurisdiction to entertain the appeal only on the ground that one of the provisions of R. 4 had been contravened

It is not suggested that proviso (a) has been contravened, or that the opposite party was not served with a notice of the application, nor was the application for review granted on the ground of discovery of new matter or evidence. One of the grounds on which review was asked for was that the applicant had been unable to produce a certain sale-deed at the hearing, but it was not on that ground that the application was granted. The learned Judge held that he had been in error in deciding the suit without considering the admission in argument on behalf of the defendant that the land had been adjudged in other litigation to be-

(2) [1914] 41 Cal. 746=25 I. C. 903.
(3) A. I. R. 1928 Rang. 177=6 Rang. 254.

long to the plaintiff. The learned Judge finally says :

"A review of judgment may be granted for the ends of justice, where there is an error of law on the face of the judgment, or whenever the Court considers that it is necessary to correct an evident error or omission whether on any ground urged at the original hearing of the suit or not. In the present case I do not think the applicant was given a fair chance to prove his case and in order to meet the ends of justice, I am of opinion that the application for review of judgment should be granted."

This may not have disclosed sufficient reason for granting a review under R. 1, but it is clear that it was not on the ground of discovary of new matter or evidence which the applicant alleged could not have been adduced by him when the original decree was passed, that the application was allowed. The District Court set aside the order granting the review, because it held that the reason for which the review was granted was not sufficient reason within the meaning of O 47, R. 1. In dealing with the appeal that Court was not considering any objection that could have been taken raised under the provisions of R 7 and the Court was therefore in my opinion acting without jurisdiction in setting aside the order granting the review.

I therefore set aside the decree of the lower appellate Court, and restore those of the trial Court granting the review. The respondent, Ma Mya Kyin, will pay the costs of the petitioner, Lun Tin Ngan in this Court and in the District Court. Advocate's fee in this Court to be two gold mohurs.

V V. *Revision allowed*

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* A. I. R. 1929 Rangoon 107

CHARI, J.

V. M. R. V. Chettyar Firm—Plaintiff.

v

Asha Bibi and *others*—Defendants.

Civil Suit No. 356 of 1928, Decided on 25th January 1929.

(a) Mahomedan Law—Heirs in possession only mortgaging deceased's property—Debts beneficial to estate—Mortgage would bind all heirs.

The heirs of a deceased Mahomedan actually in possession of his property can create a valid mortgage of the property which would bind all the heirs, if the money is borrowed for purposes necessary or beneficial to the estate. [P 107 C 2]

*** (b) Transfer of Property Act, S. 59—Title-deeds already in creditor's possession continuing to be held as security for further loan—Equitable mortgage is created by constructive delivery.**

Where title-deeds already in the possession of the creditor are agreed to be held by him as security for further advance, there was constructive delivery of the title-deeds which would be sufficient to create a valid equitable mortgage . 25 *Cal.* 611 and *Ex parte Kensington*, (1813) 2 *V. & B.* 83, *Rel. on.* [P 108 C 2]

Aiyanger—for Plaintiff.

Rauf and *Ganguli*—for Defendants.

Judgment.—This is a suit by the plaintiff Chettyar firm to enforce an equitable mortgage alleged to have been created by four persons one of whom is personally a party and the others, represented by their direct or indirect legal representatives of the persons who had executed the note, are Shaik Ali Mahomed, a paternal uncle of one Shaik Ismail, Ameerana Bibi, the mother of the said Ismail, Sahara Bibi, a widow of the said Ismail and Shaik Ahmed, another paternal uncle of the same person. These four persons are undoubtedly heirs of Ismail and entitled to a fairly large share in his estate.

Ismail died on 6th May 1923. On 2nd June 1923 all these persons executed a promissory note for Rs. 1,000 in favour of the Chettyar. The promissory note recites, what I have no doubt is, the fact that the amount was borrowed for the funeral and only the 40th day feeding expenses of Shaik Ismail.

It is alleged that there are certain other heirs who have not been made parties to the suit There are rulings both of this Court and of the Indian High Courts, which show that the heirs of a deceased Mahomedan actually in possession of his property could create a valid mortgage of the property, which would bind all the heirs, if the money was borrowed for purposes necessary or beneficial to the estate. If, therefore, the money had been borrowed for that purpose, the transaction would bind the other heirs ; but unfortunately they have not been made parties to this suit, and the learned advocate for the plaintiff does not want leave to amend the plaint or make them parties so as to bind their interest Their interest, whatever it might be, will, therefore, not be bound by the decree which will be passed in this suit.

The suit is defended by defendant 1, a daughter of Ameerana Bibi,

Abdul Rashid, son of Sabiran Bibi, Hajee Munshi Abdul Aziz, husband of the same lady. Abdul Rahman, the 2nd husband of Sahara Bibi, the widow of Ismail and Amina Bibi, minor daughter of the said Sahara Bibi. All the persons defending the suit are thus not persons who had executed the promissory note, but they are legal representatives. The parties were at issue on many points which were not correctly represented by the issues I had raised.

The execution of the promissory note and the creation of the equitable mortgage were not admitted The validity of the creation of an equitable mortgage was also denied and a question was also raised as to whether a sum of Rs. 15 was paid on 21st April 1926, as alleged by the plaintiff The significance of the last point is that I had raised an issue as to whether the plaintiff would be entitled to a money decree if I hold that there was no valid equitable mortgage A question was also raised as to, if I held that there was a valid equitable mortgage and if the security was found to be insufficient to discharge the debt what reliefs the plaintiff would be entitled to.

As regards the first point, I am satisfied that these four persons did execute the promissory note The evidence of Raman Chettyar, who was the agent of the firm at that time, is quite clear and I accept his evidence on this point ; and coupled as it is with the inherent probability I have no doubt that these four persons did execute the promissory note It will also be noticed that Shaik Ali Mohamed, one of the actual executant of the note had not defended the suit ; nor has he given any evidence.

As regards the creation of the equitable mortgage, there has been no deposit of title-deeds The title-deeds had already been deposited by Shaik Ismail in respect of a debt contracted by him. It is alleged by Raman Chettyar that these four persons agreed he should hold the title-deeds already deposited by Shaik Ismail as security for the sum of Rs 1,000, which was then being advanced. There can be no doubt that such an agreement was entered into. The entry in the Chattyar's books of that day's transaction in question clearly shows that he advanced them the money on the agreement that the title-deeds already deposited by Shaik Ismail should also be held as security for this further advance. I, therefore, hold that the four executants of the promissory note as a matter of fact agreed that the plaintiff should hold the title-deeds deposited by Shaik Ismail as security for the new debt

The real point for the consideration and about which there is some difficulty is as to the legal effect of such an agreement There has not been any actual deposit of title-deeds. The English cases which proceed on the theory that a deposit is a part performance of an agreement to mortgage are not very helpful in a case of this kind where there is a clear provision in the Act itself S 59, T P. Act, enacts that nothing in that section shall be deemed to render invalid mortgages made in certain towns by delivery to a creditor or to his agent of documents of title to immovable property, with intent to create a security therein. Three things are therefore, essential. There must be : (a) a delivery to a creditor ; (b) of documents of title, and (c) with intent to create a security If the word " delivery " is construed strictly, there has been no actual physical delivery in this case. But this is not necessary, because there may be constructive delivery. In the case of *Girendro Coormar Dutt* v. *Kumud Kumari Dasi* (1) where a mortgagor, who had executed a registered mortgage, agreed with the mortgagee that he should hold the title-deeds already handed to him as security for a further advance, Mr Justice Sale, after citing the English case of *ex-parte Kensington* (2), held that such an agreement would create a vaid equitable mortgage In such cases it may be assumed that the parties agreed to treat the title-deed as having been handed back to the mortgagor and re-handed to the mortgagee. It will be idle to go through purely a form when the agreement itself is quite clear. . I see no objection therefore to treat such an agreement as a constructive delivery of the title-deeds to the creditor The documents of title in this case however, are not the documents relating to the title of actual mortgagor but documents showing the title of their ancestor.

(1) [1898] 25 Cal. 611=2 C. W. N. 356.
(2) [1818] 2 V & B 89.

I had some difficulty as to whether a delivery of documents of title which do not show the title of the mortgagor could be deemed to create an equitable mortgage ; but in this case it is quite clear that the parties actually intended to create an equitable mortgage, which should affect the estate of Shaik Ismail The money was borrowed as is stated in the promissory note itself for his funeral expenses and their intention clearly was to create a mortgage which would be binding on the whole estate, so that though the document deposited is document showing the title of the deceased Shaik Ismail, it was within the competence of his legal representative to redeposit it constructively by entering into an agreement to create a security therein The intention to create a security is perfectly clear from the entry in the Chettyar's book itself.

The decree in the present suit cannot bind the interest of the heirs who are not parties, but as the transaction undoubtedly was intended to bind the shares of the actual executants of the promissory note along with the shares of the others, a decree can be made which will bind their share in the property.

As regards the payment of the sum of Rs. 15 the question does not directly arise now and will be only relevant when after the property having been sold it is found that the proceeds are insufficient to pay the decretal amount. But as all the evidence has been before me, I shall shortly give my finding on that point also.

It is alleged that on 21st April 1926 a sum of Rs. 15 was paid towards the promissory note. The plaint is vague. It does not say who paid this amount but in answer to the interrogatories administered, it is stated that Sabiran Bibi and Asha Bibi made the payment. It is alleged that the payment made to the Chettyar are entered in a small book and that this sum of Rs. 15 does not appear in that book. But that opens with payments of Rs. 68 made towards the debt of Ismail and was apparently confined to payments of that debt. The absence of any entry in that book in respect of this debt does not in any way derogate from the statement of the plaintiff that this sum was received. Asha Bibi has given evidence to the effect that she has not made any payment of Rs. 15 directly or indirectly. She admits, however, that her son used to go and make payments and that her son might have paid this amount on her behalf. If the payment was not actually made by Sabiran Bibi and Asha Bibi and if the Chettyar wanted to set up a false claim, he could easily have stated that the legal representatives of the other executants and the surviving executant also made the payment The sum of Rs. 15 is entered in the day book of the Chettyar firm. It is a matter of common knowledge that it is impossible to interpolate in the account books of the Chettyar firm except by re-writing the whole account books. If therefore this entry were made with fraudulent intention of saving limitation, it must have been made three years before the Chettyar firm actually filed the suit with an eye to the future. There is no reason to suppose that the Chettyar firm anticipated at that time that it might have to file a suit after the period of limitation.

The reasonable assumption is that the Chettyar firm waited to file the suit for some time because there was a payment which saved limitation. I therefore hold that the sum of Rs. 15 was paid towards interest by Sabiran Bibi and Asha Bibi. (The judgment here discusses evidence and holds that the sum of Rs. 15 was paid towards interest by Sabiran Bibi and Asha Bibi. It then proceeds.) The point whether this payment will bind the other executants or not need not be considered at this stage and can be disposed of when an application is made for a personal decree after the sale of the mortgaged property. There will therefore be the usual mortgage decree in favour of the plaintiff Chettyar firm with interest and costs Six month's time is allowed for redemption.

S N./R.K. *Suit decreed.*

A. I. R. 1929 Rangoon 109

OTTER AND PRATT, JJ.

U Po Hnit and *another*—Appellants.

v.

Mg. Bo Gyi and *others*—Respondents.

Civil Misc. Appeal No. 37 of 1928, Decided on 7th January 1929, against order of Dist Judge, Lower Chindwin, D/- 23rd June 1928.

Succession Act (39 of 1925), Ss. 299 and 292—Orders passed by District Judge under Succession Act (e.g. one under S. 292) are appealable—Civil P. C., S. 104.

Orders passed by the District Judge under the Succession Act (e.g. order under S. 292) are appealable to the High Court and such appeals are governed in procedure by the provisions of the Civil P. C. relating to appeals : 39 *Cal.* 563, *Doubted* and *Dist.*; *A.I.R.* 1924 *Rang.* 237, *Cons.* [P 110 C 1]

Sanyal—for Appellants.

Gyaw—for Respondents.

Judgment—This is an appeal against the order of the District Court, Monywa, assigning a security bond under S. 292, Succession Act. A preliminary objection has been taken that no appeal lies, relying on the Calcutta ruling in *Kulimuddin* v. *Meharui* (1), to the effect that no appeal lies against an order by a District Judge, assigning an administration bond under S. 79, Probate and Administration Act. This ruling was not accepted by this Court in *Haji Pu* v. *Tin Tin* (2) where it was held that an appeal lay from an order of a District Judge granting permission to an administrator to sell immovable property.

Even accepting the construction placed upon S 86, Probate and Administration Act in *Kulimuddin* v. *Meharui* (1), that the words

" under the Rules contained in the Code of Civil Procedure applicable to appeal "

mean that only such appeals lie as are provided for in the rules under the Civil Procedure Code, it has to be remembered that the wording of S. 299, Succession Act, is different. In that section it is laid down that every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provision of the Code of the Civil Procedure Code, 1908, applicable to appeals.

The clear meaning of this section is that appeals shall lie from the orders of District Judge passed under the Succession Act and that such appeals shall be governed in the procedure to be observed by the provisions of Civil Procedure Code . S 104 of the Code provides that an appeal shall lie from the orders set forth and from no others save as expressly provided in the body of the Code or by any law for the time being in force. The Succession Act is a law in force and, therefore, appeals provided for under S 299 are recognized by the Civil Procedure Code. There can be no question that the appeal lies. We overrule the preliminary objections (Here the judgment discussed facts and concluded.) We are of opinion that the bond had ceased to be operative and that the order for assignment was under the circumstances wrong The appeal will be allowed and the order set aside with costs in both Courts. Advocate's fee in this Court five gold mohurs.

S N./R K *Order set aside.*

(1) [1912] 39 Cal. 563=16 C.W.N. 662=13 I.C. 690=15 C.L.J. 332.

(2) A.I R. 1924 Rang. 237=2 Rang. 117.

A. I. R. 1929 Rangoon 110

HEALD, J.

R M Subhia Pillay—Appellant.

v.

K. R V. R K. R. Subramonian Chettyar—Respondent.

Special Civil Second Appeal No 455 of 1928, Decided on 12th February 1929.

Provincial Insolvency Act (1920), S. 54—Moveables sold to one creditor in preference to another—Others not injuriously affected—Sale cannot be set aside except under S. 54—Transfer of Property Act, S. 53.

So far as moveable property is concerned mere preference of one creditor at the expense of another if he is not injuriously affected will not make the transaction void or voidable under any law except Insolvency law: 30 *Mad.* 6, *Expl.* [P 111 C 1]

Ba Thin—for Appellant.

Kale—for Respondent.

Judgment—On 3rd December 1926, in Suit No 223 of 1926 of the Township Court of Thaton, respondent obtained a simple money decree against one Rajama, and in Execution Case No. 325 of 1926 of the same Court he attached a house and its site and a plot of paddy land belonging to Rajama together with the crops standing on that land in execution of that decree. Appellant applied for removal of the attachment on the crops on the ground that he had bought them from Rajama on 29th November 1926 and he succeeded in getting the attachment removed. Respondent then filed a suit under the provisions of O. 21, R 63, to establish his right to attach the crops. He alleged that the sale to appellant was fraudulent, was intended to delay or defeat his claim as a creditor, was collusive and without consideration, and was void by reason of the provisions of S. 53, T. P Act. The trial Court held that the sale was good, and dismissed the respondent's suit. Respondent appealed and the

lower appellate Court found that Rajama's intention in selling the crops to appellant was to delay or defeat respondent's claim, and that apppellant was a party to that intention. It held accordingly that no title to the crops passed by the sale and it declared that respondent had a right to attach the crops as belonging to Rajama, his judgment-debtor. Appellant appeals on the ground that his purchase of the crops was made in good faith and for consideration.

It is clear that the provisions of S. 53, T. P. Act, do not apply to the case, since those provisions apply only to transfers of immovable property and under S. 3 of that Act, immovable property does not include standing crops. But the lower appellate Court said that although S 53 did not apply nevertheless the principles laid down in that section in respect of immovable property are a useful guide to the Courts in dealing with the transfer of moveable property. The learned Judge was presumably following the decision of the High Court of Madras, in the case of *Chidambaram* v. *Sami Aiyar* (1) but assuming that the decision in that case is good law, I do not think that it warrants the learned Judge's decision in this case In the Madras case it was said that there is nothing in S 53, T. P. Act "to prevent a creditor (sic) giving a preference, provided nothing more is done by the transaction either with reference to the transferrer or transferee so as to injuriously affect the creditors of the former."

So far as moveable property is concerned there is nothing to prevent preference of one creditor at the expense of another, unless the provisions of the Insolvency law apply to the case, and creditors are left to protect themselves by means of the provisions of law for attachment before judgment. In the present case, there was clearly preference of appellant as a creditor, but mere preference is not sufficient to make the transaction void or voidable. On the question whether or not the transaction between appellant and Rajama affected respandent injuriously, otherwise than as being a preference of appellant, it may be noted that on appellant's own showing the property which he applied to attach for a debt which was ultimately found to be Rs. 373-6-0 consisted of a house, and its site which he himself valued at Rs. 1,000 and a holding of paddy land which he valued at Rs. 3,500 as well as crops in dispute which he valued at Rs. 950. It may be that these properties are subject of other charges, but respondent does not say so, and prima facie, it would appear that the sale of the crops to appellant did not prejudice his chances of recovering his debt of Rs. 373-6-0. Appellant's case was that Rajama owed him Rs. 678 on a promissory note and that he paid Rajama in cash the sum of Rs. 322 which was the balance of the sum of Rs. 1,000 for which he bought the crops, which are now in dispute, as well as four bullocks which he had himself sold to Rajama for Rs 300, two other bullocks belonging to Rajama, and two carts valued at Rs 40 or 50 each. Rajama herself said that she paid Rs. 35 for one of the bullocks belonging to her and Rs. 15 for the other and that the four bullocks which she returned to appellant were very thin when she returned them, the suggestion being of course that they were then worth less than Rs. 300 for which she had bought them The lower appellate Court said that appellant got for the Rs. 1,000 which he was alleged to have paid to Rajama property which was worth at least Rs 1,660 and that this fact was sufficient to show that the transaction between appellant and Rajama was fraudulent But even if appellant did obtain from Rajama more than value for his money, and if the decision in the case cited be correct, respondent could not get the transaction set aside unless he could show that he had been injuriously affected by it, and I am not satisfied that he showed that he was so affected. If he had any reason to believe that Rajama's immovable properties were insufficient to satisfy his claim he would naturally have applied for attachment of her moveable properties before judgment. He did not apply to attach them before judgment and so he left Rajama free to dispose of them to her other creditors or otherwise.

I see no reason to think that he is entitled to avoid the transfer of the crops to appellant, and therefore I set aside the judgment and decree of the lower appellate Court and restore the decree of the trial Court dismissing the suit. Respondent will pay appellant's costs in all the Courts. Advocate's fee in this Court to be 5 gold mohurs.

P.D./R K. *Decree set aside.*

(1) [1907] 30 Mad. (=1C M. L. J. 427.

A. I. R. 1929 Rangoon 112

MAUNG BA, J.

Maung Shwe Hta—Appellant.

v.

Maung An and *others*—Respondents

Second Appeal No. 189 of 1928, Decided on 20th February 1929.

(a) Buddhist Law (Burmese)—Husband and Wife—Neither can alienate joint property without other's consent.

In the case of Burmese Buddhists so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other : (1891) *S. J.* 578 and *A. I. R.* 1927 *Rang* 209, *Foll.* [P 112 C 2]

(b) Transfer of Property Act S. 41—Burmese husband and wife mortgaging joint property by registered deed—Husband sentenced to transporation—Within one month of his departure wife alone selling property for inadequate consideration — Vendee on his part mortgaging it to *S*—Husband on his return getting possession — *S* suing and having in execution himself purchased it taking out delivery-warrant against husband — Husband bringing present suit—*S* was not transferee without notice and there was no estoppel against husband—Evidence Act S. 115.

Property jointly belonging to Burmese husband and wife was mortgaged by them by means of a registered mortgage-deed. The husband thereafter was sentenced to transporation for 10 years and within a month of his departure the wife alone sold the property to the mortgagee for an inadequate consideration. The mortgagee vendee then mortgaged it to *S*. When the husband returned he somehow got possession of the property. *S* then sued on his mortgage, purchased the property in execution, and then took out delivery warrant against the husband who brought the present suit.

Held : that *S* could not be said to be transferee without notice. [P 113 C 1]

Held further : that as the husband was in possession there was no estoppel against him. [P 113 C 1]

Guha—for Appellant.

S. Ganguli and *N N. Burjorjee*—for Respondents.

Judgment.—This suit paddy land was the joint property of appellant, Maung Shwe Hta and his wife Ma Sin. On 28th March 1908, they mortgaged it without possession for Rs 600 by a registered deed to Daw Hmo, her son-in-law Maung, Tha Hlaing and her daughter, Ma Se Mi On 6th April 1911, Maung Shwe Hta was convicted of dacoity and sentenced to ten years' transporatation. On 1st may 1911 his wife was persuaded to transfer the land to Maung Tha Hlaing by a registered deed. In 1916, Daw Hmo, Maung Tha Hlaing and Ma Se Mi martgaged the said land along with other properties to respondent 9 U Min Din. In 1919 Shwe Hta returned from the Andamans. Somehow he has got back possession of his land and has been working it since. In 1923 U Min Din brought a mortgage suit on his mortgage to which Shwe Hta was not a party against the legal representatives of Daw Hmo, Tha Hlaing and Ma Se Mi as they were no longer alive and he obtained a decree. In due course the suit land was put up to auction, and U Min Din himself bought it on 7th November 1925. On 8th February 1926, U Min Din took out a delivery warrant. On 26th March 1926, Shwe Hta brought the present suit out of which this appeal has arisen.

U Min Din's title depends upon the title of Maung Tha Hlaing Both the Sub-Divisional Judge and the District Judge have held that the sale of the suit land effected by Shwe Hta's wife alone after his transportation in favour of Maung Tha Hlaing was valid. In my opinion this view is incorrect. Shwe Hta and Ma Sin are Burmese Buddists, and so long as marriage subsists the husband or wife cannot alienate their joint property without the consent of the other This principle was adopted as far back as 1891 in *Ma The* v. *Ma Bu* (1) and again affirmed in *Ma Paing* v *Maung Shwe Hpaw* (2). It was recited in the sale-deed that Ma Sin being in need of money to meet expenses in Shwe Ta's case and to pay off license-fees raised Rs. 280 by selling the property. Her sister's husband Tun Nyein, who also executed that sale-deed gave evidence supporting that recital ; Ma Sin has not given evidence, but in her written statement she supports her husband's version. That version is that the consideration of Rs. 280 simply represents the balance still due on the mortgage of 1908. But this dispute regarding the nature of the consideration seems to be immaterial. As propounded in *Ma Paing's* case (2) the joint property could only be made liable for the debt no matter whether it was an old debt or a new debt, but it could not be alienated by the husband or wife without the consent of the other. It therefore follows that the sale by Ma Sin to Tha

(1) [1891] S. J. 578.
(2) A. I. R. 1927 Rang. 209=5 Rang. 296 (F.B.).

Hlaing was invalid. Tha Hlaing thus acquired no title. Were U Min Din and Ma Sin transferees in good faith without notice? The answer must be in the negative. There was a registered mortgage-deed in 1908. It would show that the land did not belong to Ma Sin alone, but that it belonged to her husband Shwe Ta also. Without much trouble it could be found out that Shwe Ta was transported and that Ma Sin executed the sale-deed within a month for an inadequate consideration.

It is significant that as soon as Shwe Ta returned from the Andamans 8 years later, he worked the land and has continued to work it till now There is a conflict in the evidence as to how he came to re-occupy his land but the fact remains that he re-occupied it immediately after his return and has occupied it since. It is also significant that both the original mortgage-deed of 1908 as well as the sale-deed of 1911 have got back into the hands of Shwe Ta. There can be no question of estoppel. Shwe Ta had not slept over his rights. He got back the land from Tha Hlaing and also filed his suit promptly after U Min Din had taken out a delivery warrant against his property.

The appeal is allowed, the decree of the District Court is set aside and in its place a decree is now passed declaring that the mortgage decrees in C Reg Nos. 11 & 12 of 1923 of the District Court of Yemathin and the sale in execution of those decrees do not affect the suit land. Appellant is entitled to get his costs from respondents 9 and 10 in all Courts.

S.N./R K *Decree set aside.*

A. I. R. 1929 Rangoon 113

ORMISTON, J.

U Po Nyan—Applicant.

v.

Maung Kyan—Opposite Party.

Civil Revn. No 199 of 1928, Decided on 15th August 1928.

(a) Burma Co-operative Society's Act (1927), S. 47 (2) (b)—Order under—Civil P. C., S. 115.

An order passed by a civil Court, enforcing on application the order made by a liquidator under S. 47 (2) (b) is not revisable. [P 113 C 2]

(b) Burma Co operative Society's Act (1927), S. 47 (2) (b)—Amendment suggested.

Suggestion is made to the Local Government to provide for an appeal from the liquidator's order under S. 47 (2) (b) either to the civil Court or if that is not expedient to the Registrar of the Co-operative Societies. [P 114 C 2]

Hla Tun Pru—for Applicant.

Order.— The Paungde Co-operative Town Bank, Limited, which is a Co-operative Society governed by the Burma Co-operative Society's Act, 1927, having being ordered to be wound up the liquidator found the sum of Rs. 5,362-8-0 to be due to the Bank by Kyaw Yan (deceased), U Sein Po and U. Po Nyan, and made an order under S. 47 (2) (b) of the Act, that three named legal representatives of U Kyaw Yan, and U Sein and U Po Nyan should pay that sum together with Rs 402-3-0 (being liquidation fee) making in all Rs. 5,764-11-0. Compliance not having been made with that order the liquidator applied to the District Court of Prome for its execution by the arrest of U Po Nyan U Po Nyan filed objections stating that he was about to appeal from the order, claiming that under the instructions issued under the Act, he should have been granted eight months' time within which to pay and urging that his property should be attached rather than that he should be sent to jail. The District Court decided against him and issued a warrant for his arrest U Po Nyan has applied to this Court for revision of the order of the District Judge

It is quite clear that revision does not lie. By S 47 (5) of the Act, an order made by a liquidator under S. 47 (2) (b) shall on application be enforced by any civil Court having local jurisdiction in the same manner as a decree of such Court. The Court is precluded from making an enquiry into the merits or demerits of the order and has no option but to enforce it. It is impossible for me to hold that in acting as it did, the Court either exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally or with material irregularity. Revision does not lie and the appllcation must be dismissed.

The case, however, discloses such a curious state of affairs that I do not consider that I should be justified in dismissing the application without some further

observations. The applicant has filed an affidavit in this Court, in which he states that U Kyaw Yan borrowed Rs. 3,000 from the bank, he and Maung Po Sein Po standing as his sureties for the repayment of the loan, that U Kyaw Yan died about two years ago without paying principal or interest, that the debt had become barred by limitation two years ago, that no legal steps were ever taken to recover the amount either from U Kyaw Yan in his lifetime or after his death, and that the liquidator had made the order without a pretence of an enquiry or investigation into his case.

If the facts are as stated, the liquidator was seeking to recover a debt which at the date of the winding up was already timebarred and therefore not legally recoverable by ordinary civil procedure. It was only by making an order behind which the Court would not go that the liquidator was able to compel the Court to enforce payment of a debt which was not due.

By sub-S 4, S. 47, it is enacted that where an appeal from an order made by a liquidator under section is provided for by the rules, it shall lie to the District Judge, S. 50 empowers the Local Government to make rules inter alia by sub-Cl. (r) to determine in what cases an appeal shall lie from the order of the Registrar. Consequently unless an appeal is provided for by the rules, no appeal can lie and the order of the liquidator under S. 47 (2) (b) is final so far as civil Courts are concerned. No rules of any description have as yet been made under the present Act, but rules were made by the Financial Commissioner's Notification No 22, dated 10th February 1916, under S. 43. Co-operative Societies' Act, 1912 (now repealed) which contained provisions similar to those in the present Act to which I have referred. If they are in force, there is no provision for appeals to a civil Court from orders of a liquidator.

If Civil Regular No. 8-P of 1928 of the District Court of Prome (filed on 20th April 1928) the applicant and U Po Sein sued the liquidator for an injunction to restrain him from taking any action to recover the amount, the subject-matter of his order and for a declaration that the order was ultra vires In the plaint, the case of the applicant and U Po Sein was set out fully. The liquidator contented himself with a bare denial of the facts alleged, and rested his defence on legal grounds. The District Judge held that he had no jurisdiction to entertain the suit. He did not cite it, but no doubt he had in his mind S 49 of the Act, under which save as in the Act expressly provided no civil Court is to have any jurisdiction in respect of any matter connected with the winding up of a Co operative Society If the decision is correct, a person against whom a liquidator has made an order under S. 47 (2) (b) has no remedy in a civil Court, no matter how inequitous the order may be.

Nor would he appear to have any other remedy Under the revenue law elaborate provision is made for a series of appeals ending with the possibility of revison by the Financial Commissioner, under which a person aggrieved by an order of a subordinate authority can be pretty certain of obtaining a decision which if not necessarily based on the principles of law as administered by a civil Court is yet likely to be in accordance with substantial justice Under the Burma Co-operative Societies' Act, 1927 and under the rules passed under the Co-operative Societies' Act, 1912, on the other hand there is no provision for appeals from an order passed by a liquidator, or indeed of any sort of control over him Consequently every liquidator of society is a law unto himself and every member thereof is subject to his uncovenanted mercies.

I cannot help thinking that such a state of affairs has arisen from an oversight and am of opinion that the attention of the Local Government ought to be directed to it, with the view of providing an appeal from such an order of a liquidator as I have before me, either to the civil Court or if that be deemed inexpedient to the Registrar of Co-operative Societies.

With reference to the case before me if the facts are as the applicant states, it is obvious that he has suffered a very substantial injustice, and I venture to express a hope, that if they are so found to be, the Local Government will take such steps as possible to remedy it.

Where the truth lies it would be improper for me to express an opinion. I would only point out that the applicant is a second grade pleader of 26 years standing and that the liquidator's reply

to the applicant's clearly expressed contention in the suit that the debt was time barred at the time of the order was merely that it was not barred because the order was made under S. 47 (2) (b) of the Act. There is no provision in that Act or elsewhere which attributes to such an order the effect of reviving a debt which is already barred by time. I have no sufficient materials before me to say that the debt was barrred by limitation. The applicant, however, appears to have made out a prima facie case, that it was so barred.

A copy of this order will be sent to the Registrar of Co-operative Societies, Burma, for his information

S.N./R.K. *Revision dismissed.*

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* A. I. R. 1929 Rangoon 115

PRATT AND OTTER, JJ.

Mandalay Municipal Committee—Appellants.

v.

Maung It—Respondent.

Civil Misc. Appeal No. 40 of 1928, Decided on 20th December 1928

*** Land Acquisition Act, S. 20—Person for whom property is acquired is not "person interested"—No notice to him under S. 20 is necessary, although he can appear and adduce evidence.**

"Persons interested" in sub-S. (b) means persons interested by reason of their interest in the land acquired as owners, tenants and the like, and not persons interested as acquiring the land through the Secretary of State. Such a person is not entitled to separate notice under S. 20, though he has the right to appear and adduce evidence. [P 115 C 2]

A. C. Mukerjee—for Appellants.

Judgment.—A piece of land belonging to Maung It was acquired by the Collector under the Land Acquisition Act, on behalf of the Mandalay Municipal Committee

Maung It did not accept the Collector's award and claimed a reference to the civil Court under S. 18, Land Acquisition Act,

The Collector made a reference and the Court, after issue of notice to the claimant and the Collector, took evidence, and passed orders enhancing the compensation awarded to Maung It.

The Municipal Committee was not represented at the proceedings before the Court, and applied to the Court to set aside the award made ex parte and reopen the proceedings in order to give the Committee an opportunity of contesting Maung It's claim.

The Court held that the Municipal Committee was not a necessary party to the proceedings, and that their application to have the order set aside and to contest Maung It's claim on reference was not maintainable

The appeal has been argued before us almost entirely on the basis that the Committee is a person interested in the objection within the meaning of S. 20 (b) of the Act.

No direct authority has been cited on the point in dispute and we have been able to find none

It is common ground that no notice was issued to the Committee under S. 20.

Under that section the Court is bound to issue notice of the day, on which it proposes to determine the objection, and to direct the appearance of:

(a) the applicant,

(b) "all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded,"

and

(c) if the objection is in regard to the area or to the amount of the compensation—the Collector.

Reading sub-S. (b) as it stands the natural construction is that "persons interested" in sub-S. (b) means persons interested by reason of their interest in the land acquired as owners, tenants, and the like, and not persons interested as acquiring the land through the Secretary of State

This interpretation is confirmed by the definition in S 3, where it is laid down that the expression:

"person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act, and a person shall be deemed to be interested in land, if he is interested in an easement affecting the land."

It is apparent that this definition does not contemplate the case of the person in whose interest the property is acquired.

Had this been the intention, it would have been perfectly simple to include such persons in the definition

Moreover it is provided in S. 50 that no local authority or company, at whose cost the Act is put in motion, is entitled to demand a reference under S 18, although the local authority or company is allowed to appear and adduce evidence

for the purpose of determining the amount of compensation.

As the Judge of the District Court pointed out, the Municipal Committee is not a necessary party to the proceedings before the Court, though it has the right to appear and adduce evidence

In such a case the Municipality is represented by the Collector, who has acquired the property on its behalf, and if it is represented otherwise in Court, is there to assist the Collector.

The Municipal Committee is not entitled to separate notice, and if it wishes (in case reference to the Court is made under S. 19) to contest the claim, must make its own arrangements to ascertain, if a claim is made, and when the objection is fixed for hearing, in case the Collector fails to keep it *au fait* with events in Court subsequent to his award.

The appeal is dismissed.

R K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 116

BROWN, J.

Maung Po Kyaw—Applicant.

v.

Ma Lay and *others*—Opposite Party.

Civil Misc. Appln. No. 174 of 1928, Decided on 17th December 1928, for permission to appeal in forma pauperis.

(a) Limitation Act, S. 12—Date of judgment is date of decree—Time does not stop till decree is actually signed.

The date of a decree for the purposes of the Limitation Act is the date of the judgment and time can only be allowed as time requisite for obtaining copies if the applicant or appellant has actually made an application for a copy. The time requisite for obtaining the copy cannot stop to run until the decree is actually signed . 8 *L. B. R.* 62 (*F. B.*) *Rel. on.* [P 116 C 2]

*** (b) Limitation Act, S. 5—Pleader accepting Court clerk's statement that application for copy cannot be accepted until decree is signed—Mistake is not bona fide and time cannot be excused.**

No doubt a bona fide mistake on the part of a pleader is sufficient cause for admitting an appeal after time, but no mistake is bona fide unless made in spite of due care and attention. Time cannot be excused under S. 5 on the ground that the pleader accepted the statement of the clerk of the Court that an application for copy would not be accepted until decree was signed : 8 *L. B. R.* 566, *Rel. on.* [P 116 C 2, P 117 C 1]

Judgment.—The applicant, Maung Po Kyaw has applied for permission to appeal in forma pauperis. He wishes to appeal against the decree of the District Court, Tharrawaddy, and the judgment on which that decree is based is dated 11th October 1928. The period allowed for filing his application is 30 days after that date, or allowing eight days, the time he took to obtain a copy of the judgment and decree, 38 days The application was not filed until 4th December, 16 days after it was barred by limitation. I have been asked to excuse the delay for reasons given in an affidavit of the pleader of the petitioner. The pleader states that about three days after the judgment he applied for a copy of the judgment and decree but was told by the clerk of the Court that the application could not be accepted as the decree had not been drawn up. He made enquiries from time to time as to whether the decree was drawn up but was told that it was not. The decree was actually signed on 7th November and the application for the copy was made on the 8th. The affidavit goes on to state that the pleader advised his client that for purposes of limitation time would be computed from the date of the decree.

It was held by a Full Bench of the Chief Court of Lower Burma in 1905 in the case of *Maung Kin* v. *Maung Sa* (1), that the date of a decree for the purposes of the Limitation Act is the date of the judgment, and that time can only be allowed as time requisite for obtaining copies if the applicant or appellant has actually made an application for a copy. Now in this affidavit the pleader says that he applied for the copy, but it would appear from his affidavit that he accepted the statement of the clerk of the Court that such an application would not be accepted until the decree was signed. It does not seem to me that this was an effective application for the copy and the time requisite for obtaining the copy cannot begin to run until 8th November with the result that the application is actually barred by 16 days ; nor am I satisfied that sufficient reason has been made out for accepting this application under S. 5, Lim. Act

It was held in the case of *Ma Mai Gale* v. *Tun Win* (2), that a bona fide mistake on the part of a pleader may be sufficient

(1) [1905] 3 L. B. R. 62=11 Bur. L. R. 220 (F.B.).

(2) [1916] 8 L. B. R. 566=37 I. C. 815=10 Bur. L. T. 221.

cause for admitting an appeal after time, but that no mistake is bona fide unless made in spite of due care and attention. I cannot find anything here to justify the view that the pleader's advice to his client that limitation would be computed from the date of the decree was made with due care and attention. There is no explanation offered as to why the pleader was not aware of the law as laid down in *Maung Kin's* case (1), which has ever since been followed by the Courts in this Province. Copies were actually obtained on 15th November and there is no explanation, besides this incorrect legal advice, as to why there was a further delay of 19 days after filing the application In the application the applicant does mention his illness but it is only a vague mention and there is no affidavit in support of this allegation. I am not satisfied that the applicant had made out a case under the provisions of S 5, Lim. Act, and I must therefore hold that the present application is barred by limitation. It is accordingly rejected.

R K. *Application rejected.*

A. I. R. 1929 Rangoon 117

RUTLEDGE, C. J. AND BROWN, J.

K. V Galliara—Appellant.

v.

U. Thet—Respondent.

First Appeal No. 204 of 1928, Decided on 30th January 1929, from judgmont of High Court, Rangoon, original side, under Cl. 13 of Letters Patent.

(a) Transfer of Property Act, S. 41—Mortgagee not giving proper description of properties situate in Rangoon in accordance with provisions of Ss. 21 and 22—Properties not properly indexed in Registration office—Subsequent purchaser making ordinary search but not discovering mortgage—As failure to make proper entry in index was due to negligence of mortgagee, subsequent purchaser would be preferred to him—Registration Act, Ss. 21 and 22.

In a mortgage-deed presented for registration several different properties situate in Rangoon Town were given only one small description and the requirements of Ss. 21 and 22 were not complied with. The result was that the properties in question were not properly indexed; and as the index was not properly written up, the subsequent purchaser while making search in the ordinary way could not discover the mortgage.

Held: that as the failure to make a proper index in the registration office was primarily due to the negligence in giving proper description of the properties on the part of the mortgagee, the subsequent purchaser would be preferred to him. [P 119 C 2, P 120 C 1]

(b) Registration Act, S. 22 (3)—Description of property given in mortgage-deed not in compliance with terms of Ss. 21 and 22 but from careful study of document property could be indentified—Document is not disentitled for registration.

Where the description given of the mortgaged properties in the mortgage-deed is inadequately meagre and not in compliance with the terms of Ss. 21 and 22, the document can nevertheless be admitted for registration if the description given is not misleading and if from a very careful study of the document it would be possible to discover the property mortgaged 18 *Cal.* 556 (*F.B.*), *Dist.*

[P 118 C 1, P 119 C 1]

S. S Patkar—for Appellant.

E. W. Lambert—for Respondent

Judgment.—The respondent U Thet, brought a suit on a mortgage document against one U Tin and joined the appellant as a subsequent transferee There were various properties set forth as mortgaged in the mortgage-deed, but we are concerned in this appeal with only one of these properties, the property known as Lot No. 51, Block No. 10-I/2 in the Town of Rangoon.

The mortgage sued on is dated 25th June 1924 and the appellant bases his claim on a registered sale-deed, dated 9th February 1925. He claims that his title should be preferred to the title of the respondent, under the mortgage-deed, on the ground of gross negligence on the part of the respondent, whereby he was bona fide led to believe that the land was free from incumbrances, when he made his purchase The learned trial Judge has decided that the appellant has not established gross negligence on the part of U Thet, and has given a mortgage-decree against this property as well as against the other properties mortgaged. The appellant claims that the decree so far as this property is concerned is not justified. He raises a number of grounds in appeal, but the main ground is that the respondent U Thet was guilty of gross negligence and was therefore estopped from denying the validity of the appellant's title.

The body of the mortgage-deed simply sets forth the general terms of the mortgage and leaves the description of the properties mortgaged entirely to the schedule. In the schedule the properties are described serially:

Serial No. 1 is described as:

A piece of paddy land being holding No. 315 of 1922-23, situate in Kyaikasan Bautaw Kwin, Kambe Circle, Insein Township, Insein District, and measuring 13 acres

Serial No 2.

A piece of garden land being holding No. 316, 1922-23, measuring 4.28 acres. and situate in Kyaikasan Bautaw Kwin, Kambe Circle, Insein Township, Insein District.

Serial No. 3.

Leasehold land in Pazundaung Circle, in Blocks 9-K/2, 10. I, 10 I/2 being second class Lots Nos. 16, 17, 78 and 51 of the Rangoon Development Trust.

Serial No 4

All buildings, fixtures, trees and plants standing thereon.

Ths first two items consist of comparatively small properties, and are each of them described in great detail. Item No. 3, however, which contains no less than three entirely different pieces of property in Rangoon Town, contains one short description of all these pieces of property. The first piece of property mentioned therein is situate in Block No. K/2, whereas the other two pieces are in Blocks I, and I/2 respectively and the description does not show which lot number refers to which block numbers

It appears that registered documents in Rangoon are indexed in accordance with the Block numbers of the properties, to which they relate. Thus all properties in Block K/2 can ordinarily be traced in the index by referring to the entries in the Register under K/2 and similarly properties in Block I and I/2 can be traced by referring to entries under I, and I/2. But when the document in suit was registered no entry whatever was made in this index under Blocks I, and I/2. This omission was clearly due to the manner in which the schedule of the document was drawn up. A copy of the schedule taken from the copy of the document in the registration office makes that clear. There the property is shown as Blocks 9. K/2. 10-I and 10-I/2, second class Lots Nos. 16, 17, 78. and 51 "This clearly does not show any of the properties to be in Block I, or I/2 and the figure "1" having in each case been substituted for the letter "I" It is stated on behalf of the appellant that search was made in the index, before the appellant purchased the property and that the index did not disclose the present mortgage. This fact is not disputed, nor is it suggested that the appellant was in any way negligent in not making a further search

It is admitted, that the method employed in searching the registration records in the case was the method ordinarily employed by advocates and pleaders in Rangoon. It is true that there is another index which could have been searched, the personal index, but in view of the similarity of Burmese names, that would admittedly have been a very laborious process and is not the procedure which is ordinarily followed. Had the index been properly written up, it is clear that the appellant would have discovered existence of this mortgage before purchasing the property.

The learned trial Judge has found this to be the case, and he has also found that there has been negligence, but he holds the negligence to have been on the part of the office or clerks of the Registration office and not on the part of U Tin, the defendant, or his pleader.

Under S 21, Registration Act, no testamentary document relating to immovable property shall be accepted for registration, unless it contains a description of such property sufficient to identify the same and

"houses in towns shall be described as situate on the North or other side of the street or road (which should be specified) to which they front and by their existing and former occupancies and by their numbers if the houses in such street or road are numbered."

By rules issued by the Local Government under S 22 of the Act, the description of lands in towns must include the block, division and the holding number of the block.

So far as the description of the house is concerned in the present case, it is clear that the requirements of S. 21, Registration Act, have not been complied with. The numbers of the blocks were all classed together in one short description and all the buildings were given one comprehensive description as "buildings, fixtures, trees, and plants, standing thereon." It seems clear therefore that the requirements of the Registration Act were not properly complied with. This is not in itself sufficient to disentitle the document to be registered, as S. 22 provides that if the document is sufficient to iden-

tify the property the failure to comply with the provisions of Ss. 21 & 22 will not disentitle the document to be registered. Although the description given in the Schedule to the document is exceedingly meagre, from a very careful study of the document it would have been possible to discover that the property now in suit was mortgaged.

It has been urged on behalf of the appellant that on account of the faulty description we should hold that there has not really been any registration at all with regard to this property and that the mortgage as regards this property is therefore invalid, and we have been referred to the case of *Baij Nath Tewari* v. *Sheo Sahoy Bhagu* (1) In that case it was held that the registration of the document was invalid, but the facts of that case are not similar to the facts of the present case. It was not there merely a question of misdescription. The description given in the document in that case was directly misleading. We are not satisfied that the misdescription in the present case was so complete as to disentitle the document to be registered. It does not seem to us, however, that this certainly concludes the matter. There can be no doubt that the description of the property given in the document is not such a description as it is reasonable to expect in such documents, and it is also clear that the failure to give a more satisfactory description is responsible for the failure to enter the mortgage of this particular piece of land in the index under Block I-2 The description in schedule shows Four Second Class Lots Nos. 16, 17, 78, & 51, as being situate in Blocks 9-K/2 10-I/2 & 10-I/2 The learned trial Judge points out that the mistake was due in part to the fact that the letter "I" is used for denoting blocks in Rangoon, and that the letter "I" is exceedingly liable to be mistaken for the figure "1" as has actually happened in this case. But it is clear that the use of the letter "I" would have led to no mistake whatever, had the proper description been given in the schedule and had the word "Block" been used in front of "10-I/2", and of "10-I/2". The manner in which the schedule is drawn up suggests strongly that all the items of property shown in Serial No 3 comprised one piece of property, and no satisfactory explanation has been given as to why each of these pieces of property was not separately and fully described as was done in the case of Serial Nos. 1 & 2. It appears that at the time the mortgage document was executed, the mortgagor was in custody on a charge of murder, and it is suggested that that was why the document was drawn up in such an unsatisfactory fashion. The pleader who acted for the mortgagor, has given evidence, and admits that no title-deed was given to him, no explanation is offered as to why the title-deeds were not produced. We can see no reason why, even though the mortgagor was in custody it should have been impossible to draw up a description of the property in proper detail In fact it is alleged on behalf of the respondent that all the information required as to the property is actually in the document itself, and the fact that the mortgagor himself was in custody cannot explain away the negligence of the lawyer in not using the information at this command in such a way, as to make the matter intelligible to the ordinary reader of the document. The clerks in the registration office are not trained lawyers, and it is no part of their duty to study documents presented to them carefully for the purpose of considering what their legal meaning may be. It seems to us, that with a description such as is given in the schedule in the present case, mistakes such as have occured in the registration office, were only to be expected and in our opinion the failure to make a proper entry in the registration index was primarily due to the grossly careless way in which the deed was drawn up, and the property described.

It must be borne in mind that at the time this document was drawn up, the mortgagor produced no title-deeds whatsoever. At the time of their mortgage the deeds in question were with a previous mortgagee and it has been contended on behalf of the respondent that, however careless the plaintiff may have been in not requiring the production of title-deeds before accepting the mortgage, the title-deeds could not have been procured, even if they had been enquired after. That may be so, but in the absence of the taking of the ordinary precaution of seeing the possession of title-deeds when taking a mortgage of property it was obvi-

(1) [1891] 18 Cal. 556 (F.B.).

ously all the more incumbent on the mortgagee to see that the registered mortgage deed was properly drawn up in such a way that a third person making a search in the registration office for any transactions with regard to the property could not be misled. In the circumstances of the case, we are of opinion that the manner of drawing up the registered deed amounted to a gross negligence and that by this negligence on the part of the mortgagee, the mortgagor was enabled to hold himself out to the appellant as the ostensible owner of the property mortgaged.

It has not been suggested that the purchase by the appellant was not in good faith ; nor is it suggested that the appellant did not take reasonable care before making the purchase to satisfy himself as to the vendor's title. We are, therefore, of opinion that the principles laid down in S. 41, T. P. Act, apply to this case, and the transfer of the property to the appellant was a valid transfer and was not affected by the mortgage in favour of the respondent.

It is claimed on behalf of the appellant that in actual fact the money with which he bought the property was utilized for the purpose of redeeming a previous mortgage, and it is claimed that he would, in any case, be entitled to keep this mortgage alive for his protection. The chief difficulty in the way of this contention is that these facts were never pleaded in the trial Court. In view, however, of the conclusion we have come to on the main ground of appeal, it is not necessary to consider this point any further. We allow this appeal and alter the decree of the trial Judge, by omitting Lot No. 51, in Block 10-I/2 from the properties included in the mortgage decree, the respondent will pay the costs of the appellant in both Courts.

S.N./R.K. *Decree altered.*

A. I. R. 1929 Rangoon 120

CARR, J.

Emperor

v.

Aung Shan and *others*—Accused—Opponents.

Criminal Revn. Nos. 1031-A, 1033-A and 1037-A of 1928, Decided on 15th November 1928, against decision of Township Magistrate, Salin.

Burma Excise Act (5 of 1917), Ss. 30 and 5—Scope.

To prove an offence under the Act it is necessary to show that the place of possession or sale of tari is within five miles of a licensed tari shop. [P 102 C 2]

Judgment.—Two of these cases were tried by the Township Magistrate, Salin, and in them the accused were convicted of illicit possession of tari. The third case was tried by the Additional Magistrate of Pwinbyu, and in it the accused was convicted of illicit sale of tari. This case was carelessly tried and the evidence was inadequate.

In all three cases there is the serious defect that no offence has been either proved or admitted. By para. 1 (4) of Financial Department Notification No.72, dated 18th September 1917 (1), tari is exempted from all provisions of the Excise Act throughout Upper Burma, except in places within five miles of a licensed tari shop. It follows that except within such limits neither the possession nor the sale of tari is an offence. To prove an offence it is necessary to show that the place of possession or sale is within five miles of a licensed tari shop. No attempt was made to prove this in any of the three cases, nor was it in any of them stated in the particulars of the offence to which the accused was required to plead. All the convictions are therefore bad.

I set aside the convictions and sentences in all three cases and direct that each of the accused persons be acquitted and that the fine paid by him be refunded to him.

R.K. *Convictions set aside.*

A. I. R. 1929 Rangoon 121

MAUNG BA, J.

Shwe Kyo and *others*—Appellants.

v

Emperor—Opposite Party.

Criminal Appeals Nos. 1432, 1439 and 1450 of 1928, Decided on 3rd December 1928 against order of 1st Addl Magistrate, Rangoon

Opium Act, S. 9 (c)—Knowledge and control of opium must be conclusively proved.

The term "possession" implies knowledge on the part of the alleged possessor, and before the accused person is required to account for opium there must be proof that such opium has been in his possession or under his control: (1872-92) *L. B. R.* 573, *Foll.* [P 121 C 2]

Judgment.—Five persons were convicted of illegal possession of opium under S 9 (c), Opium Act and sentenced to various terms of imprisonment. In the case of two of them, a sentence of fine was added

The facts, as held proved by the prosecution, were briefly as follows: U Ko Ko, Court Prosecuting Officer of the First Additional Magistrate's Court, Rangoon, acting on information, went and waited in front of Kamayut Police-Station with two witnesses, Maung Kya Nyun and Maung Po Hmyin, at about 10 a. m. on 30th September 1928. A Dodge Car, No. RA8423, was then seen coming from Rangoon, and he stopped the car and made a search. He found a ball of opium in each pocket of the waterproof coat, which was folded The waterproof coat was in the pit in front of the rear seat. The appellant, Ba Kyin, was driving the car, and the appellant, Maung Han, sat next to him. The appellant, Swee Kyo, the appellant, Chan Mya, and one Lwang, were seated on the rear seat The two balls of opium weighed 58 ticals, and Ko Ko states that the opium balls were effectively concealed in the pockets of the waterproof. The raincoat fitted Lwang, and Lwang admitted that it belonged to him, but he pleaded that he did not know to whom the exhibit opium belonged. All the four appellants also denied knowledge of the opium.

The driver, Maung Ba Kyin, stated that, as the two Chinamen told his friend, Maung Han, that they wanted to go to Hmawbi, he was taking them there Chan Mya, the Burman, who was one of the three seated on the back seat, said that he was in the car because his friend, Ba Kyin, invited him in. Swee Kyo, who is 55, said that, while he was at a teashop, Lwang came in a car and invited him for a drive, so he got in and did not know anything about the opium. Lwang, who is 22 and who has not appealed, as already pointed out, denied knowledge of the opium, though he admitted to be the owner of the waterproof The car was not a taxi, and the record does not disclose who the owner was Among the appellants, only Swee Kyo examined two witnesses to support his defence. The learned Magistrate rejected their evidence and convicted all the five persons, holding that the three Burmans were helping the two Chinamen in removing the opium out of Rangoon.

The law laid down by Mr Fulton in *Queen-Empress* v *Chit Aung* (1), is still good law. The term "possession" implies knowledge on the part of the alleged possessor, and before an accused person is required to account for opium there must be proof that such opium has been in his possession or under his control. Mr Fulton quoted the following remarks of Cave, J., in *Reg* v. *Ashwell* (2). His Lordship said:

"If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not the possession of that of the existence of which he is unaware. A man cannot, without his consent, be made to incur the responsibilities towards the real owner which arise from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it."

The question is whether the four occupants of the car, besides Lwang in whose waterproof the opium balls were concealed, could be said to have knowledge of the existence of the opium. Has there been any proof that such opium was in their possession or under their control? It might be that Lwang was the owner of the opium, and that the others were simply helping him in taking it out of Rangoon, or it might be that Lwang concealed the existence of the opium from the knowledge of the other occupants and simply took them with him to avert suspicion.

(1) [1872-92] L. B. R. 573.
(2) [1886] 16 Q.B.D. 190=55 L.J.M.C. 65=50 J.P. 181=16 Cox.C.C. 1=34 W.R. 297=59 L.T. 773.

In the absence of circumstances from which it could be conclusively inferred that the four appellants had knowledge of the presence of the opium, and that such opium was under their control, it would not be safe to punish them on mere suspicion.

I am constrained to hold that the case against these four appellants is not free from reasonable doubt They are accordingly acquitted Bail bonds are cancelled.

R K. *Accused acquitted.*

A. I. R. 1929 Rangoon 122

CARR, J.

Emperor

v.

U Thin Ohn and *others* — Accused — Respondents.

Criminal Appeals No. 1064 to 1096 of 1928, Decided on 21st December 1928, against order of 6th Addl Magistrate, Rangoon.

Rangoon City Municipal Act (1922), S. 214 —To offence under S. 125 though continuing one if committed for more than six months, S. 214 applies.

Although the offence of keeping open a private market without a license, is a continuing offence, which is freshly committed every day, still if the offenders are committing the same for more than six months to the knowledge of the Municipality, S. 214 (2) is a valid defence. [P 122 C 2]

N. M. Cowasjee—for the Crown.

Judgment —These are appeals by the Local Government against the acquittal of the respondents by the Sixth Additional Magistrate of Rangoon.

The facts in all the cases are the same, and the point for decision is the same.

The Corporation of Rangoon some time in 1926 sold certain premises to the Commissioners for the Port of Rangoon. It appears that the Port Commissioners let stalls in these premises to the various accused and collected rent from them.

In June 1927, the Commissioner of the Rangoon Corporation took exception to this and entered into correspondence with the Chairman of the Port Commissioners. The final result of the negotiations was that the Port Commissioners agreed to remove the tenants from their stalls by the end of December 1927, and the Commissioner of the Corporation agreed to take no action until then.

It appears that the Port Commissioners gave notice to the respondents to leave their stalls by 31st December. The respondents did not comply with that notice and have continued occupying their stalls and selling at them. Thereupon the Rangoon Corporation instituted these prosecutions under S 125, City of Rangoon Municipal Act 1922, for keeping open a private market without a license All the respondents were finally acquitted by the Magistrate on the ground that the prosecution was barred under S. 214 (1) (b) of the same Act because the complaint had not been filed within three months of the date on which the commission of the offence was first brought to the notice of the Corporation. It is contended in these appeals that that decision is wrong

In my opinion the decision is quite correct The argument put forward by Mr. Cowasjee for the Corporation is that the offence in question is one which is freshly committed every day ; that he has not sought to prosecute the respondents for anything done prior to January 1928 ; and that, as these prosecutions were instituted in that month, the bar provided by S 214 does not apply.

I am unable to accept this contention. It is admitted by Mr. Cowasjee that licenses for private markets are issued, and that in the normal course such licenses are issued, for the Municipal year from 1st April to 31st March in the following year. He says also that licenses issued at any intermediate date would have effect only up to 31st March.

It seems to me, therefore, quite clear that the offence complained of in this case is one which comes within the scope of S 214 (2) of the Act, which provides that :

"failure to take out a license under this Act shall be deemed, for the purpose of sub S. (1), to be a continuing offence until the expiration of the period for which the license ought to have been taken out."

The respondents were committing the offence in June 1927 They continued to do so right up to the time when these prosecutions were instituted, and, since the Commissioner of the Corporation admittedly knew that they were committing the offence in June 1927, S. 214 (1) (b) clearly applies and prevents the Court from taking cognizance of the offence.

Mr. Cowasjee argues that the offence complained of is a continuing offence, which is freshly committed every day. I

agree with him on this point; but it seems to me that that is not in his favour, and that the effect of S. 214 (2) is to prevent of the Corporation from raising such an argument as this, and saying that they were not prosecuting for the offence committed in June but for an entirely fresh offence committed in January. If that is not the effect and the intention of sub-S. (2), S. 214, I am unable to find any meaning in it whatever.

I find, therefore, that the judgment of the Magistrate is correct, and I dismiss these appeals.

R.K. *Appeals dismissed*

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* A. I. R. 1929 Rangoon 123

MYA BU, J.

Maung Tun Hlaing—Appellant.

v.

U Tha Kha and *another*—Respondents.

Special Second Appeal No. 536 of 1928, Decided on 21st March 1929, against decree of Township Court, Yedashe, in Civil Regular Suit No. 136 of 1927.

*** Civil P. C., O. 21, Rr. 60 and 63—Order to be in favour of claim under R. 60 must be result of investigation unless investigation unnecessary—Claim preferred under R. 58 but notice not issued to attaching decree-holder—Decree-holder not appearing—Execution proceedings as also claim application closed—Neither order closing execution proceedings, nor that closing claim application, nor also their combined effect, is order under R. 60 or order against decree-holder within R. 63.**

An order under R. 60 in favour of a claim must be the result of an investigation arising on a claim being preferred under R. 58 except in cases where the investigation is unnecessary. [P 124 C 2]

In an execution proceeding, a claim was preferred under R. 58 but no notice of the claim application was given to the attaching decree-holder. On the day of hearing the execution proceeding itself was closed owing to the decree-holder's default of appearance and at the same time the claimant's application for removal of attachment was ordered to be closed.

Held: that as no notice of the claimant's application was given to the decree-holder, neither the order closing the execution proceedings, nor the order closing the claimant's application, nor even the combined effect of them both read together can be an order under R. 60 or an order against the decree-holder within the meaning of R. 63: *A. I. R.* 1924 *Rang.* 42; 41 *Mad.* 985 (*F.B.*); 45 *Cal.* 785; 41 *All.* 623, *Dist.*; *A. I. R.* 1928 *Mad.* 76, *Cons.* [P 125 C 2]

P. B. Sen—for Appellant.

S. Ganguli—for Respondents.

Judgment.—This appeal has arisen out of Civil Regular Suit No. 136 of 1927 of the Township Court of Yedashe, which was a suit for partition and possession of a quarter share in a piece of paddy land known as holdings Nos. 5 and 6 of 1926-27 of Kyetthay-Ahtay Kwin, Thagya Circle, Yedashe Township.

The plaintiff-respondents based their claim on a purchase of that share from Mahomed Moosa who has purchased the right, title and interest of Maung Tun Aung, (the brother of the defendant-appellant, and one of the four children of Ma Kha, deceased) in the land in the Court sale held in Civil Execution No. 12 of 1924 of the Township Court of Yedashi. This execution case was proceeding in which one U Min Din, who had obtained a decree against Maung Tun Aung in Civil Regular No 272 of 1917 of the Township Court of Pyinmana, had the decree executed and the right, title and interest of Maung Tun Aung in the land attached and sold.

It is common ground that the land was originally the property of Ma Kha during her lifetime, and that Ma Kha died leaving four children, two of whom are appellant Maung Tun Hlaing and the above named Maung Tun Aung. But the appellant's case was that he had obtained and received possession of the whole land from Ma Kha before her death by virtue of an oral sale by her in consideration of a sum of money paid by him to her. Before the Civil Execution No. 12 of 1924, he had taken out execution of the same decree in Civil Execution Case No. 224 of 1923 of the Township Court of Yedashe, in which the same land was attached, which led to the filing of an application for removal of attachment by the appellant on 2nd January 1924. This case, however, ended in a dismissal for default of the decree-holder's appearance on the day for the return of the warrant of attachment, namely 7th January 1924 and in a withdrawal of the attachment. In view of the withdrawal of the attachment the appellant's application for removal of attachment, being Civil Misc. No. 2 of 1924 was ordered to be closed at the same time. Two days thereafter the decree-holder filed his application in Civil Execution No. 12 of 1924, it should be noted that no notice was issued to the attaching decree-holder in Civil Misc. No. 2 of 1924.

It is not disputed that the plaint land was put up for sale in Civil Execution No. 12 of 1924, that Mahomed Moosa became the purchaser of the judgment-debtor's right, title and interest, and the sale was confirmed on 30th May 1924, and that the plaintiff-respondents have purchased the same right, title and interest from Mahomed Moosa.

On the facts, the applicant's defence was mainly that the whole land had become his own property on account of Ma Kha's oral sale to him with the consent of all the other heirs in consideration of his payment of Rs. 800 and his having received possession of the land in pursuance of that sale

The appellant also raised some legal defences to the effect that the plaintiffs, or their alleged predecessor-in-title, were not, and had never become the owners of the plaint land or any portion thereof, inasmuch as the alleged purchase by Mahomed Moosa of Tun Aung's alleged share in Civil Execution Case No. 12/24 did not pass any title in the suit land, the proceedings in the said execution case being void ab initio owing to the dismissal of the previous execution proceedings and the removal of attachment in that proceedings.

Both the Courts below have come to concurrent findings against the appellant on his defence on the facts, and I see no sufficient reason to disagree with them. This appeal has been laid under S 11, Burma Courts Act, merely because the lower appellate Court modified the decree of the trial Court The trial Court passed a decree as prayed for in the plaint, viz., for partition and for possession of one-fourth share of the land in suit in the plaintiff's favour; but the lower appellate Court refused to order partition and merely gave declaration of the plaintiff's title to a certain portion of the land.

The main legal question raised on appellant's behalf lies in the contention that the orders passed in Civil Execution No 224 of 1923 and Civil Misc No. 2 of 1924 on 7th January 1924, should be read together, and were tantamount to an order directing removal of attachment, under O. 21, R. 60, Civil P. C, which was conclusive, subject only to the result of a suit under O. 21, R. 63, and consequently barred the fresh application for attachment in Civil Execution No. 12/24 which was therefore illegal and void

A claim proceedings like the one in Civil Miscellaneous No 2/24 falls within the scope of O. 21, R. 58, which enacts that the Court shall proceed to investigate a claim unless it considers that it was designedly or unnecessarily delayed, whereupon such investigation the Court is satisfied of circumstances mentioned in R. 60, it shall make an order releasing the property wholly or to such extent as it thinks fit from attachment. To my mind, a comparison of these rules shows that an order under R. 60 in favour of a claim must be the result of an investigation arising on a claim being preferred under R 58, except in cases where the investigation is deemed unnecessary as for instance, where the attaching decree-holder declines to oppose the claim or consents to its being granted. Now the order passed in Civil Execution No 224/23 was passed in consequence of the decree-holder's default of appearance to prosecute that proceedings and it was in these terms:

"Called, warrant returned duly executed. Neither the decree-holder nor his agent present. Dismissed for default. Attachment withdrawn."

This order would have been passed all the same, even if there was no application for removal of attachment It was therefore, not an order passed in consequence of or as a result of the appellant's application for removal of attachment, because the Court had not even ordered the issue of notice of the appellants' application to the decree-holder, there is nothing to show that the decree-holder was even aware of the appellant's application, and it cannot be said that the decree-holder absented himself to evade an investigation There is thus no ground for reading the orders in the two cases together as if they are interdependent The order for withdrawal of attachment in Civil Execution No. 224/23 cannot in these circumstances be regarded as one under O. 21, R. 60, while the order closing the case in Civil Miscellaneous No. 2/24 in veiw of the dismissal of the execution proceedings and the withdrawal of attachment is by no means such an order or an order against the decree-holder within the meaning of O. 21, R 63. In my opinion the contention is untenable.

The learned advocate for the appellant cites *Maung Pya* v *Ma Hla Kyu* (1) in which Duckworth and Po Han, JJ., following the rulings in *Venkatratnam* v. *Ranganayakamma* (2); *Nogendra Lal* v. *Fani Bhusan* (3) and *Gulab* v. *Mutsaddi Lal* (4), held that an order on a removal of attachment application after no investigation of the claim comes within the category of an order made against that party in such a way as to render that order conclusive and thereby prohibit the institution of a suit to establish the same rights after the period of one year allowed by Art 11, Sch 1, Lim. Act, has expired. All these cases are distinguishable from the present case.

In estimating whether an order made on a removal of attachment application without investigation is of the description mentioned in R. 63, it is, in my opinion essential to distinguish an order against the applicant in a claim proceedings from an order against an attaching decree-holder, for, against a claimant an order may be made refusing to investigate the claim on the ground that the claim or objection was designedly or unnecessarily delayed, and the claim may also be dismissed on account of the claimant's default of appearance, or on account of non-prosecution, while it is inconceivable that an order should be made against an attaching decree-holder without having him before the Court except where the case is to be dealt with ex parte against him The order which was considered in *Maung Pya's* case (1) was an order dismissing the application for removal of attachment for want of prosecution, on the applicant's proposing to the Court that his application should be dismissed without costs

In the Full Bench case of *Venkataratnam* v *Ranganayakamma* (2) it was held that an order refusing to investigate a claim to attached property on the ground that there was delay in filing it is an order passed against the claimant within O. 21, R. 63, and that an order on a claim petition merely stating that as it was filed late it will be notified to the bidders is in effect an order rejecting the claim to which O. 21, R 63 will apply. This ruling was considered by Schwabe, C. J., in *Abdul Kader* v. *U. T M. Somasundaram Chettyar* (5), where a claim petition put in having been dismissed on the ground that the sale had taken place and that the Munsif had no power to pass an order as it was filed after one year from the date of the order, it was held that O. 21, R 63 had no application. The learned Chief Justice was inclined to treat the decision in *Venkatratnam's* case (2) as being confined to the facts of that particular case and to cases where the claim was dismissed as too late under the proviso to R 58.

In the case of *Nogendra Lal* v. *Fanis Bhusan* (3) it was held that the party against whom the order was made on a claim either allowing or rejecting the claim preferred under O. 21, R. 58, Civil P. C, may irrespective of whether any investigation took place or not bring a suit to establish his right under O. 21, R. 63. The order under consideration was an order dismissing the claim " for default on the ground of delay." The case of *Gulab* v *Mutsaddi Lal* (4), was one where a petition made to the attachment of property under R. 58 was disallowed because the objector did not appear on the date fixed. The case before me is quite distinguishable from *Maung Pya's* (1), and the cases which it followed In my opinion the order closing the case in Civil Misc. Case No. 2 of 1924 cannot be deemed to be an order against the attaching decree-holder and I do not think that the order in Civil Execution No. 224/23 should be read as an order made in a proceedings under R. 58. Even if the two orders are read together they cannot in my opinion be deemed to be an order made under R. 60.

For all these reasons, I overrule the appellant's learned advocate's contention There is no ground for interference with the judgment of the lower appellate Court, except where it refused to order partition. The decree of the lower appellate Court is, however, bad on account of this refusal I, therefore, set it aside and restore the decree of the Court of the first instance, but I consider that the appellant should pay the respondent's costs throughout.

S N./R K. *Decree modified.*

(1) A. I. R. 1924 Rang. 42=1 Rang. 481.
(2) [1918] 41 Mad. 985=35 M. L. J. 335=8 M. L. W. 292=48 I. C. 270=(1919) M.W. N. 599 (F.B.).
(3) [1918] 45 Cal. 785=44 I. C. 265=23 C. W. N. 375,
(4) [1919] 41 All. 623=50 I.C. 748=17 A.L.J. 674.
(5) A. I. R. 1923 Mad. 76=45 Mad. 827.

A. I. R. 1929 Rangoon 126

MYA BU AND HEALD, JJ.

Daw Ohn Bwin—Appellant.

v.

U. Bah and *another*—Respondents.

First Appeal No. 146 of 1929, Decided on 11th March 1929, against decree of Dist. Judge, Pyapon.

Civil P. C., S. 145—Remedy against immovable property given as security under a registered bond can be enforced without recourse to a suit.

In a case where a surety has offered certain specified properties as security for his obligations under the bond, and where because these properties are immovable properties it has been necessary to have the bond registered to make the security effective, the bond can be enforced against the properties without bringing a regular suit *A. I. R.* 1924 *All.* 105; 41 *Mad.* 327, *Foll.* [P 126 C 2, P 127 C 1]

Tha Kin—for Appellant.

E. Maung—for Respondents.

Judgment.—In suit No. 9 of 1926 of the District Court of Pyapon the present respondent sued Ma Seik Kaung for possession of certain property including a mill, on the strength of a registered conveyance of the properties given to them by Ma Seik Kaung. In connexion with that suit they applied for the appointment of a receiver of the properties and it was ordered that Ma Seik Kaung should be allowed to remain in possession of the mill on payment of a rent of Rs. 1,000 a month and on giving security for Rs. 7,000. The present appellant accordingly executed a security bond for Rs. 7,000 Subsequently further security of Rs. 3,000 was demanded by the Court and appellant executed a registered bond for Rs. 10,000 in favour of the Judge of the Court giving certain immovable properties belonging to her as security for Ma Seik Kaung's duly performing and satisfying any order which might be made against her.

Ma Seik Kaung failed to pay the rent which she had undertaken to pay and for the payment of which appellant had stood surety, and after respondents had obtained a decree in the suit they applied to the Court for the recovery of the arrears of rent from appellant as surety under the provisions of S. 145 (c), Civil P. C

The Court found that appellant was liable on the bond to the extent of Rs 10,000 in respect of the arrears of payable by Ma Seik Kaung and held that respondents were entitled to bring the properties which she had given as security to sale without filing a suit on the bond.

Appellant contends in appeal that the lower Court was wrong in holding that the properties could be sold without a suit on the bond and she says that there was no personal liability under the bond.

A reference to the terms of the bond shows that there is no basis for the latter of these grounds, and the only question which arises in the appeal is whether in a case where a surety has offered certain specified properties as security for her obligations under the bond, and where because these properties are immovable properties it has been necessary to have the bond registered to make the security effective, the bond can be enforced against the properties without bringing a regular suit.

In form the bond in the case did not effect a mortgage of the properties although it was admittedly intended to do so. It was to the following effect:

"I, Ma On Bwin, am hereby bound to the Judge of the District Court in the sum of Rs, 10,000 in the following circumstances. It has been ordered by the Court that Ma Seik Kaung shall be allowed to continue to work the rice mill in suit, on giving security and I have consented to be surety for Ma Seik Kaung for the due performance and satisfaction of any order which may be made against her. Now the condition of the obligation of this bond is that if Ma Seik Kaung shall duly perform and satisfy any order which may be made against her then there shall be no obligation under this bond, but in case of any default by Ma Seik Kaung I shall pay to the Judge of the District Court Rs. 10,000 or such sum as the said Judge shall order in or towards satisfaction of such order."

To that document is annexed a list of the properties which Ma On Bwin had in fact agreed to offer as security for her obligation under the bond, but there is no statement in the bond itself that those properties were offered as security or that they were mortgaged by Ma On Bwin.

It is not, however, the case of either side that the document did not in fact effect a mortgage of the properties mentioned therein, and we shall therefore deal with the matter on the assumption that there was such a mortgage.

The question whether the remedy against immovable property given as security under a registered bond can be enforced without recourse to a suit was considered in the case of *Subramanain Chettyar* v. *Raja of Ramnad* (1) where it was decided that such property can be sold by order of the Court without recourse to a suit. There is a similar decision in the case of *Mahalakshimi Bai* v. *Badan Singh* (2) and we see no reason to doubt that these decisions are in accordance with the intention of the legislature embodied in S 145 of the Code.

No question of the amount of arrears of rent has been raised in the appeal and therefore we assume that the arrears amount to at least Rs. 10,000.

We are of opinion that the lower Court's finding that the property could be brought to sale without a suit on the mortgage bond was correct and we dismiss the appeal with costs, Advocate's fee in this Court to be five gold mohurs

P.R./R K. *Appeal dismissed.*

(1) [1917] 41 Mad. 327=34 M. L. J. 84=6 M. L. W. 762=43 I. C. 187=(1917) M. W. N. 872.

(2) A I. R. 1924 All. 105=45 All. 649.

A I. R. 1929 Rangoon 127

HEALD AND OTTER, JJ.

S. A. S Chettiar Firm—Appellants.

v

U. Min Din and *others*—Respondents.

First Appeal No 199 of 1928, Decided on 19th March 1929.

(a) Civil P. C., S. 104—Scope—Civil P. C. S. 115.

Order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable.

[P 127 C 2]

(b) Mortgage—Sale proceeds lying in Court—Mortgagees cannot get interest on sale proceeds—Interest

The mortgagees are not entitled to any interest on the mortgage money after the mortgaged properties have been sold and the mortgage has come to an end and they cannot be allowed interest on the sale proceeds of the mortgaged properties while they are lying in the Court. [P 127 C 2]

Venkatram—for Appellants.

Soorma for *Burjorjee* and *Basu*—for Respondents.

Judgment—The first and second respondents, who are said to be brother and sister, obtained a number of mortgage decrees against the rest of the respondents, and under those decrees brought the mortgage properties to sale. The sale proceeds were more than sufficient to satisfy the mortgage debts and appellants, who had obtained a money decree for a very large amount against the same judgment-debtors claimed to execute their decree against the sale proceeds The first and second respondents claimed that they were entitled to interest on the mortgage money not only up to the time when the mortgaged properties were sold but also for the time during which the sale proceeds were lying in Court before payment out to them, and the Judge made an order for such interest.

Applicants filed an appeal against that order, but asked that if it should be found that no appeal lay, their memorandum of appeal should be treated as an application for revision We are of opinion that no appeal lies in such a case, but we have no doubt that we have power to deal with the case in revision.

Respondents' learned advocates cannot support the lower Court's order. All that they say is that interest is always in the discretion of the Court, which is of course not true. We see no reason to believe that the mortgagees, that is, respondents 1 and 2 were entitled to any interest on the mortgage money after the mortgaged properties had been sold and the mortgage had come to an end, or that there was any reason why they should be allowed interest on the sale .proceeds of the mortgaged properties while they were lying in the Court.

We, therefore, set aside the lower Court's order for payment of interest on the mortgage money after the date of the sale of the mortgaged properties and we direct the Court to make the necessary consequential alterations in its subsequent orders. Respondents 1 and 2 will pay applicant's costs in this Court, advocate's fee to be 5 gold mohurs.

S.N /R.K. *Order set aside*

A. I R 1929 Rangoon 128 (1)

OTTER, J.

Maung Tha Dun—Appellant

v.

Ma Mai Ein and *another*—Respondents.

Second Appeal No 523 of 1928, Decided on 6th March 1929, against decree of Dist. Judge, Thayetmyo, in Civil Appeal No. 41-T of 1928.

Civil P. C., O. 21, R. 63—Application for removal of attachment being unsuccessful—Applicants bringing regular suit praying for costs in application and for declaration that property was theirs—They can get decree for such costs.

Persons, who, having been unsuccessful in their application for removal of attachment levied on certain property bring a regular suit claiming costs paid by them in respect of such application and also a declaration that the property was theirs, can get a decree for costs on the previous application if they are successful in their suit. *A. I. R.* 1925 *Mad.* 233, *not Foll.*; 16 *Bom* 608; (1904-06) 2 *U. B. R.* 4, *Rel. on*; [*see also A. I. R.* 1928 *Rang.* 248, *Ed.*] [P 128 C 1]

Maung Tin—for Appellant.

Ba Thaung—for Respondents.

Judgment—In this case the respondents made an unsuccessful application for removal of an attachment levied by the appellant upon certain property. This application was dismissed with costs They brought a regular suit under the provisions of O. 21, R 63 claiming the costs paid by them in respect of this application for removal of attachment, and also a declaration that the property was theirs. In that case, they were successful, and got a decree for costs and got the declaration asked for This decision was upheld in the lower appellate Court

Before me the suggestion is that as a matter of law, no decree for the costs of the respondents' application for removal of attachment could have been granted. The wording of O. 21, R 63 is relied on, and the case of *Nambi Veettel Tarwad* v. *Athi Karath Valappil Tarwad* (1) is relied on for the appellant

Two cases are relied on for the respondents viz. *Sadu* v. *Ram* (2) and *Palaneappa Chetty* v. *Maung Shwe Ge* (3). In the former of the two cases, it was said that the Court ought to lean strongly against multiplicity of suits and the result of withholding consequential relief was pointed out. It is true this case and the case in the Upper Burma Rulings conflict with the Madras case relied on by the appellant, but it seems to me that the reasoning underlying the Bombay High Court is irresistible. Moreover in my view there is nothing in the actual wording of O 21, R. 63 which precludes the award of consequential relief in such a case. The appeal therefore must be dismissed with costs

S.N./R.K. *Appeal dismissed*

(1) A. I. R. 1925 Mad. 233.
(2) [1892] 16 Bom. 608.
(3) [1904-06] 2 U. B. R. 4.

A. I R 1929 Rangoon 128 (2)

MAUNG BA, J.

(*Maung*) *Pe Kye*—Applicant

v

(*Maung*) *Shwe Zin*—Respondent.

Civil Revn No. 281 of 1928, Decided on 14th March 1929, against judgment of Dist. Court, Bassein, in Civil Misc. Case No. 74 of 1928.

Civil P. C., O. 33, R. 5 (a) — Value for Court-fee wrongly calculated—Application must be dismissed—(*Obiter*) Right of fresh application may subsist.

Where an applicant has not calculated the Court-fee value in accordance with S. 7 (v) (b), Court-fees Act, his application for leave to sue as a pauper must be rejected. (*Obiter*) applicant appears to have still a right to present a fresh application. [P 129 C 1]

S. C. Das—for Applicant

N N Burjorjee—for Respondent.

Judgment — Appellant's application for permission to sue as a pauper was rejected by the District Judge of Bassein on the ground that the value for the purposes of Court-fees had been wrongly calculated.

Appellant claims the entire estate of U Tha Ko. According to the schedule filed, the estate consists largely of paddy holdings. There can be no doubt that the values of such holdings should have been calculated at five times the land revenue under Cl. (v) (b), S. 7, Court-fees Act So the valuation in the application is incorrect.

The question is whether such a wrong calculation offends Cl. (a), R (5), O. 33, Civil P. C. A Court shall reject an application for permission to sue as a pauper where it is not framed in the manner prescribed by R. 2. That rule lays down that such applications shall contain the particulars required in re-

gard to plaints in suits. R. (1), O. 7, enumerates such particulars and one of them is a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and Court-fees so far as the case admits. S. 7, Court-fees Act prescribes the mode of computing Court-fee value In the present case applicant has not calculated the Court-fee value in accordance with that section when such a defect occurs in an application for leave to sue as a pauper R 5, O. 33, leaves the Court no discretion, but it must reject the application. The District Court's order was justified. Applicant appears to have still a right to present a fresh application.

The present application for revision is accordingly dismissed with costs, two gold mohurs

M.N./R K *Application dismissed.*

A. I. R. 1929 Rangoon 129 (1)

RUTLEDGE, C. J.

Maung Ba Thein—Appellant.

v

Ma Than Kin—Respondent.

Civil Misc Appeal No. 15 of 1929, Decided on 20th March 1929, against order of Dist Judge, Henzada.

Guardians and Wards Act, S 25—Scope—Guardian and wards Act, S. 4(5).

An application under S 25 must be made to the Court where the minor ordinarily resides. [P 129 C 2]

P. K Basu for *J R. Chowdhury*—for Appellant

F. S. Doctor—for Respondent.

Judgment—This is an appeal from an order of the District Court of Henzada refusing to issue a warrant for the arrest of a minor. It appears that the appellant and the respondent were husband and wife at the time that the minor, a female child was born, about 7 years ago. A month or so after the birth the parties were divorced by mutual consent, and the minor has been living with her mother ever since, either at Mandalay or Sagaing The appellant it seems paid maintainance for the minor up to sometime last year when he applied to the District Court of Henzada under S. 25, Guardian and Wards Act, for possession of the minor. The mother did not appear in person in Henzada or give evidence and an ex parte order was passed in the appellant's favour. The present is an application to execute that order by issuing a warrant of arrest of the minor. This, the District Court has refused to do, on the ground that it has no jurisdiction. The objection in our opinion is well founded, and the appellant was not entitled in law to make this application originally in the District Court of Henzada at all.

The words of S. 4 (5), Guardian and Wards Act, are in our opinion clear "the Court" means

"in any matter relating to the person of the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides."

An application under S. 25 accordingly must be made to the Court where the minor ordinarily resides. This according to the evidence before us, would have been either the District Court of Mandalay or the District Court of Sagaing, but certainly not the District Court of Henzada. The District Court of Henzada accordingly had no jurisdiction to pass an ex parte order and it is accordingly a nullity and of no effect For these reasons the appeal fails and must be dismissed with costs 5 gold mohurs advocates' fee.

S N /R K *Appeal dismissed*

✻ A. I. R. 1929 Rangoon 129 (2)

Full Bench

RUTLEDGE, C. J., AND PRATT, OTTER, MAUNG BA, BROWN, HEALD, AND MYA BU, JJ

U Po O and *another*—Appellant.

v.

Ma Tok Gyi—Respondent

Civil Ref. No. 1 of 1929, Decided on 8th April 1929, from decree of Dist. Judge, lower Chindwin in Civil Reg. No. 1 of 1928, D/- 17th May 1928

✻ Buddhist Law (Burmese)—Gift of marriage joint property by husband without wife's consent is wholly void.

A deed of gift executed by a Burmese Buddhist husband without his wife's consent, express or implied, with reference to lands forming part of the joint property of the marriage is not valid even to the extent of his interest in the property, but is wholly void . 3 *L. B. R.* 66 ; (1893-1909) *L. B. R.* 403, *Held overruled*, *A. I. R.* 1927 *Rang.* 209 ; *A. I. R.* 1927 *Rang.* 274, *Rel. on.* [P 133 C 1]

S. Ganguli for *A C. Mukerjee*—for Appellants

Ko Ko Gyi Thein Mg. and *Ba Thaung*—for Respondent.

Order of Reference

Pratt, J —Plaintiff Ma Tok Gyi sued her husband U. Po O, Myothugyi of Monywa and Ma Ngwe Shin for cancellation of two deeds of gift of landed property by defendant 1 in favour of defendant 2, and was granted a decree

The defence was that there had been a divorce between plaintiff and defendant 1, that the suit was not maintainable in its present form and should have been for partition.

The District Judge held that there had been no divorce. It is perfectly clear that there was no formal divorce, and having regard to the social position of the parties it is obvious that a divorce would have been effected with some formality in the presence of witnesses.

We are also satisfied that there had been no desertion which would operate automatically as a divorce.

It is true that defendant 1 entered into an intrigue with defendant 2 and ended by living with her in a separate house some 12 years ago; but it is admitted by him that the income of the joint property was shared by him with the plaintiff and revenue on the land paid by each in turn in alternate years.

Defendant used to visit his wife's house each year on the occasion of annual pagoda festival and stay some four days He kept his gun, his official dah. and his appointment orders in his wife's house.

The fact that his wife did not speak to him from the time he left her house to live with defendant 2 only means that she was incensed with him. It cannot constitute desertion by the husband. It is also admitted that she occasionally sent him food, and it is clear that they must have communicated, through a third person or otherwise.

In the written statement there is no mention of desertion but defendant 1 alleged a divorce by mutual consent 12 years or so ago.

The conditions laid down in *Ma Nyun* v. *Maung San Thin* (1) as requisite for a divorce by desertion and lapse of time have obviously not been fulfilled.

The property covered by the deed of gift is joint, and the interest of defendant 1 therein is not determinable. It is contended, however, on behalf of the defendant-appellants that the deeds are valid at least to the extent of defendant 1's interest in the property covered thereby and should not be set aside Reliance is placed on the Full Bench Ruling of the Lower Burma Chief Court in *Ma Shwe U* v. *Ma Kyu* (2), which lays down categorically that a sale by a Burmese Buddhist of hnapazone property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold.

If this ruling remains sound law then it is good authority for the proposition that a gift of joint property would be valid to the extent of the donor's interest.

In the Privy Council case of *Ma Thaung* v. *Ma Than* (3) it was observed (at p 178 *of* 5 *Rang.*) that in the Burmese social and legal system the wife is, to all intents and purposes a partner.

In *Ma Paing* v. *Maung Shwe Hpaw* (4), by a Full Bench of this Court the doctrine of partnership as extended to a Burmese husband and wife was definitely formulated. It was held that husband and wife were partners and all the property of the marriage, whether payin or lettetpwa is partnership property. It was held that where the interest of a Burmese Buddhist husband in property which was either payin, brought, by him to the marriage or was jointly acquired, lettetpwa, is during the subsistence of the marriage sold in execution of a decree for a debt incurred by him in business carried on by him while he was living with his wife, the buyer of that interest does not acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it. It was held also that there is presumption that a suit brought against either of the partners is a suit against the partnership and that in such a suit a partner, who is not joined as a party is represented by the partner who is joined as a party, and a decree against either partner can ordinarily be executed against any partnership property, provided the decree was obtained against that spouse as representing the partnership.

The ruling in *Ma Shwe U* v. *Ma Kyu* (2) was not expressly dissented from.

(1) A. I. R. 1927 Rang. 294=5 Rang. 537 (F.B.).

(2) 3 L. B. R. 66 (F. B.).

(3) A. I. R. 1924 P. C. 88=5 Rang. 175=51 Cal. 374=51 I. A. 1 (P.C.)

(4) A.I.R. 1927 Rang. 209=5 Rang. 296(F.B.).

If the position remained where it was left by the Full Bench ruling, there would be no difficulty in holding that the gifts are good to the extent of the donor's interest in the property, subject to the reservation that the donee cannot claim partition or possession during the subsistence of the marriage between U Po O and Ma Tok Gyi. It is common ground that the property covered by the gift was joint, being partly acquired by inheritance and partly by the joint efforts of the partners.

Although the parties to the marriage are partners it is obvious that the partnership can only be applied with limitations. Under the partnership law an assignment by a partner of his share without the consent of the other partners is not wholly inoperative. It entitles the assignee to receive a share of the profits to which the assigning partner would otherwise be entitled, and, in case of dissolution of partnership, the share of the partnership assets to which the assigning partner is entitled (Lindley on Partnership, Edn. 8, pp. 423-28) A partner is at liberty to dispose of his interest in limine which is regarded as real property without reference to his co-owners.

In the present instance therefore the donee whilst having no interest or claim against the wife during the subsistence of the marriage with respect of the partnership property might conceivably be entitled to claim the income of his interest in the property from the donor.

In *Ma Paing* v. *Maung Shwe Hpan* (5) however, in applying the Full Bench ruling on the reference, the Bench held that the sale of the husband's interest in the joint property was void and set it aside.

It seems to me, the correctness of this conclusion is open to grave doubt, but, if it is correct, it would seem to follow that a gift of joint property by a husband or wife without the other's consent would be void as held by the District Court I consider the point is one which should be determined by a Full Bench.

I would, therefore, refer to a Full Bench the question whether a deed of gift executed by a husband, without his wife's consent, with reference to lands forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void.

(5) A. I. R. 1927 Rang. 274=5 Rang. 478.

Otter, J.—I concur, and I would observe that the sale of a share in partnership property may be subject to considerations different from those applicable to the facts of the present case. I would further point out that the law relating to a sale of such a share appears to be the same in India as it is in England see *Jaggut Chandra Dutt* v *Radha Nath Dhur* (6)

Opinion

Maung Ba, J.— The following question has been referred to a Full Bench :

"Whether a deed of gift executed by a husband, without his wife's consent with reference to lands, forming part of the joint property of the marriage is valid to the extent of his interest in the property or is wholly void."

This reference arose out of a suit brought by a Burmese Buddhist wife against her husband for the cancellation of two deeds of gift whereby the latter had given away valuable lands forming part of their joint property to a servant girl, who had become his lesser wife The old gentleman is Myothugyi at Monywa and the recipient of double decorations, K. I. H. and A. T. M. He is now 77, while his wife is 82, and they have been married nearly 60 years. The girl was the daughter of their syce and was employed in the house as a cook, Some years ago, improper intimacy between her and the old thugyi started and the thugyi's wife drove her out of the house. That measure failed to stop the intrigue. The thugyi bought a small house and went and lived there with the girl and some time later made these gifts to her.

The suit was decreed, and it has been contended that at least the gifts should be held good to the extent of the old thugyi's share and interest. The ruling in *Ma Shwe U* v. *Ma Kyu* (2) if it can be considered as still good law, would support that argument. There it was held that though a Burmese Buddhist husband cannot sell or alienate the hnapazone of himself and his wife without her consent or against her will, yet such a sale constitutes a valid transfer of the share of the husband or wife, which is partible even during the subsistence of marriage and is therefore saleable in execution of a decree. This view was dissented from in the later case of *Ma Paing* v. *Maung Shwe Hpaw* (4) where it was held that at Burmese Buddist

(6) [1884] 10 Cal. 889.

Law, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa is impartible and indeterminate so long as marriage subsists and is therefore not saleable in execution of a decree. This decision was based upon the principles laid down in the Full Bench case of *Ma Paing* v. *Maung Shwe Hpaw* (4) where it was held that 'at Burmese Buddhist law, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa is partnership property, that neither partner is entitled to separate possession of any share of the parnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce

The learned Judge who made this reference was, however, of opinion that the ruling in *Ma Shue U* v *Ma Kyu* (2) had not been expressly dissented from by the Full Bench and that the correctness of the decision in the latter case of *Ma Paing* v. *Maung Shwe Hpaw* (4) was open to grave doubt With great respect to that learned Judge, I venture to think that the Full Bench has overruled the ruling in *Ma Shwe U's* case (2) Heald, J. made a reference to that Full Bench because he considered the ruling in *Ma Shwe U's* case (2) to be incorrect In the course of his order of reference he observed:

"Most of the cases mentioned above were considered by a Full Bench of the Chief Court in the case of *Ma Shwe U* v. *Ma Kyu* (2) where it was held a Burmese Buddhist husband cannot sell or alienate the hnapazone (attetpa) property of himself and his wife without the consent of the wife, express or implied, or against her will, but that a sale by a Burmese Buddhist husband of such property without the consent of his wife constitutes a valid sale of his share and interest in the property sold. These two findings seem to be inconsistent and with all respect I venture to suggest that the latter part of this decision was mistaken."

In my judgment in the Full Bench case it is true that I did not quote *Ma Shwe U's* case (2) but I quoted an earlier case, viz. *Maung Po Sein* v. *Ma Pwa* (7) which had enunciated a similar principle. In the course of my judgment I observed:

"Where one of the Buddhist couple dealt with the joint property singly it has been held that, in the absence of express or implied consent of the other party, the alienation is not wholly void but is still valid so far as the alienator's share is concerned. Such a decision is to be found in *Maung Po Sein* v. *Ma Pwa* (7) decided by the learned Judicial Commissioner of Lower Burma in 1897, .. That property is lettetpwa and he has not been able to cite any authority from any of the Dhammathats for that view. He has evidently overlooked the main principle of Burmese Buddist Law, that while marriage subsists neither husband nor wife is entitled to alienate or claim separate possession of any property of the marriage.

I have also observed:

"If either husband or wife can dispose of his or her share without the consent of the other, it will no doubt undermine the foundation upon which joint property system of Burmese Buddhist couple has grown up."

Chari, J, in the course of his judgment observed

"It is settled law that no partner can alienate even his own interst in any individual partnership property. This follows from the liability of the whole of the partnership property for the partnership debts. Similarly, in the case of a Burmese Buddhist couple it is not open to either the husband or the wife to alienate his or her own interest in any particular property. To allow him or her to do so will be to throw the burden of the joint debts on to the party who has not disposed of his interest."

I think the above extracts would suffice to show that the previous law in *Ma Shwe U's* case (2) that a Burmese Buddhist husband or wife can alienate his or her own interest on their joint property without the consent of the other has as a matter of fact been overruled This may dispose of the reference. However, I should like to note that the partnership under the Burmese Buddhist Law is not exactly the same as an ordinary partnership founded upon contract. In the case of an ordinary partnership the assignment of a partner's share without the consent of the other partners brings about immediate dissolution. It cannot for a moment be conceded that such a consequence must follow if a Burmese Buddhist husband or wife, without the consent of the other assigns his or her share in joint property. The partnership under Burmese Buddhist law terminates only on the death of a partner or on divorce. Again under ordinary partnership law, the assignment is not wholly inoperative, but when dissolution results upon assignment without consent, the assignee has a right to sue not as a partner but as an assignee for an account and also for a distinct share. It has therefore been urged that in the case of a partnership under Buddhist law why

(7) [1893-1909] L. B. R. 403.

should not such a right be suspended till dissolution takes place and why should not the assignment be held good for that purpose. In my opinion it would be extremely dangerous and also against public policy to make such a concession. There would be great temptation to the third party to try and bring about death or divorce as the case might be. Besides the assignment of such a nature appears to be obnoxious to the provisions of Cl. (b), S 6, T. P. Act, which says that the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

For these reasons my answer to the question referred will be :

"A deed of gift executed by a Burmese Buddhist husband without the wife's consent, with reference to lands forming part of the joint property of the marriage is wholly void."

Rutledge, C J. — I will like to add one thing to the judgment of my brother Maung Ba, with whom I am in full agreement, so that it may not be misinterpreted to require in all cases, the consent of the other party in express terms to be proved. As was observed in *Ma Paing* v. *Maung Shwe Hpaw* (4) at *p.* 334 *of* 5 *Rang.*

"the partnership assets are liable in respect of all partnership debts and either partner can bind his co-partner in respect of any contract or agreement necessary for or usually done in connexion with such a partnership."

In the transactions before us it cannot be suggested that they were in the interest of the partnership

I agree that the case of *Ma Shwe U* v. *Ma Kyu* (2) has in fact been overruled by *Ma Paing's* case above mentioned.

Brown, J. — I agree that, in view of the decision of the Full Bench and the general principles approved in *Ma Paing's* case (4) the answer to the question referred must be that the deeds of gift are wholly void. The principles accepted in *Ma Paing's* case as I understand them, are that during the subsistence of the marriage, a Burmese Buddhist husband and wife have a joint interest in the whole estate of the marriage, but that neither party has a separate interest in any part of the estate. Whilst therefore in the present case the husband has a joint interest with his wife in the whole of the property of the marriage he has no separate interest in the particular part of the estate which he has attempted to transfer by way of gifts. To say that the gifts are valid to the extent of his share is meaningless, because that share is incapable of valuation. He has no definite claim to these particular pieces of properties, and on division he might not obtain any of these properties as his share. The property remains liable to all partnership debts. Even though the whole estate becomes his on the death of his wife, the particular property still remains liable for the debts of the partnership, and there is no guarantee that even in that eventuality he will obtain any rights in the properties. The analogy of the assignment of a share in a partnership by a partner under the ordinary partnership law does not seem to me sound What a partner assigns is not his share in a definite portion of the partnership property, but his share or a part of his share in the whole partnership. It is obvious that the consent of the wife cannnot be implied to the gifts in the present case. In fact it is clear that the gifts were against her wishes and that they were not made in the interests of or on behalf of the partnership I therefore agree in the answer proposed.

Heald, J. — I am of opinion that on the basis of the decision of the Full Bench in *Ma Paing's* case (4) we are bound to hold that the gift in this case, which was a gift of the property of the marriage made by the husband to a "lesser wife" or mistress without the consent and against the will of the wife was invalid.

It must be admitted that this decision is not in accordance with a passage in Book VIII, S. 3 of the Manugye. That passage says :

"If the husband without the knowledge of his wife made a gift of property which belongs to both he and his wife, and the person to whom the property is given be not the wife or lesser wife or a bought woman or a mistress, the person who receives the gift shall keep it according as it is given. The wife shall not say. "It is the property of both. I do not know of the gift. "The reason for this rule is that the husband is lord of the wife. But if the gift is given with the intention of making the person to whom it is given a lesser wife, a bought woman, or a mistress, then when the wife comes to know of the gift, if in fact it was made without the wife's knowledge half of the property given shall be restored to the wife. As for the other half, it is the share belonging to the husband. If the gift is the gift of property which the wife brought to the

marriage there is no right to give in any case whatever. The wife must have the whole of such property because she has to pay the debts which she brought to the marriage. But if the property which is given is property which the husband brought to marriage, the person to whom the property is given shall have the property according as it is given. The wife shall not have the right to say: "I did not know of the gift", because the husband has to pay the debts which he brought to the married. If the wife make a gift to a person, even a person who is not her paramour, without her husband's knowledge, she shall have no right to make the gift without her husband's knowledge. This is said of property which belongs equally to both. If the case arises between a married couple, who have been married before, and the wife without her husband's knowledge give property, which she brought to the marriage, to a person who is not her paramour, let her have the right to give it and let her husband not take it back. As for the penalty for a wife's giving without her husband's knowledge and without telling him, let the husband have the right to punish the wife. But even if the property given, if the property brought to the marriage by the wife, if the gift be to a paramour or to a person whom the husband suspects, let the wife not say: "It is property which I brought to the marriage. Since it is property given without knowledge of the husband, the wife has no right to give it. Let the husband get it all back."

It seems clear that the rules given in that passage belong to a period before the rights of the husband and wife in the property which the other brought to the marriage was recognized and since the section of Manugye in which these rules appear contains also rules for gifts to wives and children into slavery and gifts for lust, which apparently was not reprobated, if the woman to whom they were given were below the age of puberty or over the age of child bearing, it is clearly archaic and cannot be regarded as having force in the present state of civilisation. The adoption of the rules contained in that section regarding gifts by a husband would clearly defeat what we regard as a basic principle of the Burmese Buddhist Law namely that the property of the marriage of a Burmese Buddhist couple is impartible, except on death or divorce, since it would enable a husband by means of a gift of all the property of the marriage to his mistress to effect what was in fact a partition of the property as against the wife. Our judgment in *Ma Paing's* case (4) was an attempt to lay down the general principles of Burmese Buddhist law as to ownership of property by a Burmese husband and wife, now in force, and although there may be difficulty in applying the law to particular cases, e. g., to the cases of a fine inflicted on a husband for a criminal offence or damages given against a husband for a tort, or a husband's gambling losses or to cases where there are several wives, I see no difficulty in its application in the present case, and I have no hesitation in holding that the gift in this case should be regarded as invalid. Buddhist law does not of course apply to gifts as such, since gifts, as such, are not matters regarding succession, inheritance, marriage, or caste or any religious usage or institution and the particular gift in this case is certainly not such a matter It is not the gift as such that is invalid Its invalidity consists on the fact that the subject matter is something that the giver had no power to give. The defect is not in the gift itself, but in the capacity or title of the giver. We have held that a husband has no power to alienate property which is property of the marriage, without the wife's consent, express or implied, and in the present case no such consent can be imputed. I would therefore concur in the answer proposed to be given in respect of the question referred namely that the deeds of gift in question conveyed no title to the donee in respect of the property which they purported to convey

Mya Bu, J.—I agree in the answer proposed and have nothing to add to the judgments of my learned brothers.

S N./R K. *Reference answered.*

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* A I. R. 1929 Rangoon 134
Full Bench

RUTLEDGE, C. J, AND CARR, MAUNG BA, MYA BU AND BROWN, JJ.

U Pyinnya and *another* —Appellants.

v.

U Dipa—Respondent.

Civil Ref. No. 2 of 1929, Decided on 18th March 1929.

*** Court-fees Act, Sch. 2, Art. 17 (vi)—In suits for possession of Phongyi Kyaung, Court-fees are payable under Art. 17 (vi) and not ad valorem Court-fees on market value.**

In a suit for possession of a Phongyi Kyaung and its site, Court-fees payable are not ad valorem Court-fees on the market value of the Kyaung and the site, but they are payable under Art. 17 (vi) because the property having been dedicated in perpetuity to religion, it cannot be said to have any market

value: 25 *Cal.* 194(*P.C.*); *A. I. R.* 1924 *Mad.* 19, 13 *Bur. L. T.* 40 (1893-1900) *L. B. R.* 614, *Rel. on.*; 3 *U. B. R.* 236, *Diss. from.*[P 136 C 2]

Maung Kun—for Appellants.
Maung Mya Gaing—for Respondent.

Order of Reference

Rutledge, C J. and Brown, J.—The parties to this appeal are Burmese Buddhist monks. The appellant are trustees of the Thayettaw Kyaundaik in Rangoon, under a scheme settled by the late Chief Court of Lower Burma. They brought a suit for ejectment of the defendant from the Kyaundaik and for possession of the Hmanzin Kyaung. In para. 19 of their plaint they stated:

"that being religious property, the kyaung in suit has nas no market value, and the plaintiffs pay a Court-fee of Rs. 10.

This valuation was accepted by the officer whose duty was to see that the Court-fee was paid within the meaning of S. 5, Court-fees Act, and summons was issued to the respondent In the written statement the respondent stated that the Kyaung and its site were worth at least Rs. 15,000 and that Court-fee should have been paid on that amount.

It was finally agreed between the parties that, if Court-fees had to be paid on the value of the property, the value would be accepted as Rs. 5,000.

The learned trial Judge following a decision of the late Judicial Commissioner of Upper Burma, held that Court-fees had to be paid ad volorem and the appellants have contested the correctness of this finding on this appeal.

As no difference arose in the trial Court, between the officer whose duty it was to see that any fee was paid and the plaintiff, the provisions of S. 5, Court-fees Act, do not apply and we therefore think that the learned trial Judge had jurisdiction to pass the order which he did.

The question raised is of some importance and has been the subject of conflicting judicial decisions. In the Upper Burma case, which was followed by the learned trial Judge [the case of *Maung Meik* v. *U Kumara* (1),] it was held

"that the provisions of S. 7 (v) (c) Court-fees Act apply to the valuation of religions land and that its value must be deemed to be the amount at which the Court estimates it with reference to the value of similar "non-religious" lands in the neighbourhood."

A contrary view was taken by Regg, J., in *U Konma* v. *U Einda* (2). The question of the valuation of a Hindu temple was considered by a Full Bench of the High Court of Madras in the case of *Rajagopala Naidu* v. *Ramasubramania Ayyar* (3). It was held that a temple had to be dealt with as a matter not otherwise provided for in Sch. 2, Art. 17, Court-fees Act. This decision had reference to temple only, there was no decision by the Full Bench on the question of religious land, nor does it necessarily follow from their decision that a Phongyi Kyaung, which is not a temple but a building used for the residence of monks has no market value. But it is a matter for consideration how far the principles approved in that case would apply to the present case.

The matter is of some importance, and in view of the conflicting authorities, we think it desirable that the question should be referred to the decision of a Full Bench.

We, therefore, refer the following question:

"In a suit for possession of a Phongyi Kyaung and its site, are Court-fees payable ad volorem on the market value of the Kyaung and the site or are they payable under Art. 17 (vi), Sch. 2, Court-fees Act."

Opinion

Rutledge, C. J.—The following reference has been made for decision of this Full Bench:

"In a suit for possession of a Phongyi Kyaung and its site, are Court-fees payable ad valorem on the market value of the Kyaung and the site or are they payable under Art. 17 (vi), Sch. 2. Court-fees Act ?"

The reference arose in the following circumstances: The appellants, the trustees of the Thayettan Kyaungdaik in Civil Regular No. 225 of 1927 (original side, High Court) sued the respondent to evict them from a Kyaung in the said Kyaungdaik, and paid a Court-fee of Rs. 10 under Art. 17, Cl. (vi), Sch. 2, Court-fees Act. The plaint was accepted by the Deputy Registrar so that no difference arose which could be referred under S 5 for the decision of the Taxing Officer. But the defendant challenged the adequacy of the Court-fee and alleged that the plaint ought to be stamped under S. 7 (v) (c) The trial Judge (Ormiston, J.), following a decision of Heald, J., (then Judicial Commissioner, Upper Burma) in *Maung Meik* v. *U Ku-*

(1) 3 U. B. R. 236.

(2) [1920] 13 Bur. L. T. 40=57 I. C. 953.

(3) A. I. R. 1924 Mad. 19=46 Mad. 782 (F.B).

mara (1) upheld the defendant's contention and the plaint accordingly had to be stamped on an ad volorem basis. Heald, J., in the last mentioned case observes:

"The present case is clearly a suit for possession of land. In such suits the plaint must be stamped according to the value of the subject matter, and where the subject-matter is land which pays no revenue and has produced no profits during the year next before the date of presenting the plaint, the value must be deemed to be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood. The learned advocate argues that no other land in the neighbourhood can be similar to religious land, and that therefore S. 7 cannot apply. I cannot accept this argument. The difference between the land in suit and other land in the neighbourhood is merely a difference of ownership and that difference is merely accidental and not essential."

I am unable to accept the learned Judge's reasoning on this point, which seems to offend the principle laid down by their Lordships of the Privy Council in *Manmatha Nath Mitter* v. *Secy. of State* (4) In that case the claimants claimed compensation in respect of the subsoil of roadways which for a period of years had been dedicated to the public. Lord Hobhouse observes:

"By Ss. 13 and 24 (that is of the Land Acquisition Act) the market value of the land at the time of awarding compensation is to be taken into consideration. It is not suggested that there is any market value of these lands as roadways Mr. Graham argues that when compensation was awarded in this case, the roads had been broken up, and therefore the Subordinate Judge rightly valued the land as belonging absolutely to the plaintiffs free from the burden of the roads, and capable of being used for any purpose. In their Lordships' opinion that would be a very unreasonable construction of the Act . . . . . The time of awarding compensation must be construed as meaning the time of compensation, the time at which the right to compensation attaches. At that time these plots of lands were roadways, and the plaintiffs are claiming for a supposed loss of value which had no existence when the ownership of land was changed."

In other words the Court, in order to ascertain the market value has to take the land as it is, and not what it may become in future There is no question in the case before us, that the land has been dedicated to religious uses in perpetuity and so long as the Buddhist religion continues to be a religion of the Burmese people, is it imaginable that it would pass into secular ownership and so come under the operation of market value? By reason of its dedication at some indefinite period in the past to religious uses, it has, to use a phrase familiar in rating authorities, been "struck with sterility" to my mind, just as definitely as if a macadam road had been laid upon it and dedicated to public use.

In Civil Regular No. 299 of 1919, [*U Konma* v. *U Einda* (2)] not reported in authorized Law Reports, Rigg, J., observes:

"The property in dispute is a poggalika Kyaung, and the Phongyi to whom the dedication is made has a life-interest in the Kyaung entitling him to occupy as long as he remains a Phongyi, and entitling him also to put another Phongyi in possession of the Kyaung He is now, however, entitled to dispose of the Kyaung by sale or by mortgage or by gift to any layman It was held in *Maung On Gaing* v. *U. Pandisa* (5) that a gift made with a view to a future existence, whether Poggalika or Sangika always retains its religious character and cannot be claimed back for secular uses . . . . . If therefore the Kyaung cannot be transferred by a sale or by a mortgage or by a gift it is difficult to see in what way it can have any market value in the ordinary acceptance of that term."

A Full Bench of the Madras High Court in *Rajagopala Naidu* v *Ramasubramania Ayyar* (3), applying the principle laid down in *Manmatha Nath Mitter*'s case (4) above referred to that things have to be taken as they stand at the time in determining the market value of the property held that a temple which is devoted absolutely and in perpetuity to religious purposes can have no market value. I am unable, for the purposes of the present case, to distinguish between the case of a Hindu temple and a Phongyi Kyaung. Both have been dedicated in perpetuity to religious uses and the Full Bench in the *Madras* case (4) refrained from deciding whether the Hindu temple was or was not a house. For these reasons I consider the decision in *Naung Meik's* case (1) erroneous, and would answer the reference that in the suit for possession of a Phongyi Kyaung and its site, Court-fees are payable under Art 17 (vi), Sch. 2, Court-fees Act.

Carr, Maung Ba and Mya Bu, JJ. — We concur

Brown, J.—I agree with the answer proposed. So far as the Phongyi Kyaung is concerned, this directly followed from the decision of their Lordships of the Privy Council in the case of *Manmatha*

(4) [1898] 25 Cal. 194=24 I. A. 177=1 C. W. N. 698 (P.C.).

(5) [1898-1900] L. B. R. 614.

Nath Mitter v. *Secy. of State* (4) If S. 7, Court-fees Act, could be applied the computation of value would under S 7 (v) have to be according to the market value of the Kyaung, and that cannot be estimated.

As regards the site, if the suit were governed by S 7, Court-fees Act, the Court-fees would under S 7 (v) (c) have to be computed at the value estimated with reference to the value of similar land in the neighbourhood. The test here is not the market value of the site in suit, but the market value of similar land in the neighbourhood The question then is whether the site of a Phongyi Kyaung can be considered as being similar to the other land in the neighbourhood of secular nature I agree with the learned Chief Justice that by virtue of its dedication to religious purposes the land must be held to have been " struck with sterility " so far as maket value is concerned, and that the difference between it and other land in the neighbourhood is not merely a difference of ownership It is therefore impossible to estimate the market value of the site for the purpose of S 7, Court-fees Act

S.N./R.K. *Reference answered.*

A. I. R 1929 Rangoon 137

HEALD AND OTTER, JJ.

(Maung) Mya Din—Appellant.

v.

Maung Paik San—Respondent.

Civil Misc. Appeal No. 113 of 1923, Decided on 2nd April 1929.

Buddhist Law, Burmese—Inheritance.

Under the Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother and the fact that he had received from his step-grandmother the share of inheritance to which he became entitled on his grandfather's death does not debar him from being his step-grandmother's heir. 2 *U. B. R.* 66; *A. I. R.* 1925 *P. C.* 29; *Ring. F. A. No.* 106 *of* 1925, *Rel. on*; *A.I.R.* 1924 *P.C.* 88, *Dist.*

[P 138 C 2]

Ba Thaung—for Appellant.

S. Ganguli—for Respondent.

Heald, J.—Respondent who was a nephew of Ma. Ngwe Bwin, deceased, and claims to be one of her heirs, applied for Letters of Administration in respect of her estate. He mentioned in his application that Ma Ngwe Bwin had left an elder sister, and a younger brother still surviving as well as a niece and another nephew

Appellant a grandson of Ma Ngwe Bwin's husband Chit Tun, who predeceased her, opposed respondent's application for letters on the ground that he was Ma Ngwe Bwin's sole heir, but he did not himself apply for letters.

The lower Court held that respondent was the nearest relative of Ngwe Bwin, and appellant had no right or title to the estate and granted letters to respondent.

Appellant appeals on the ground that in Burmese Buddhist Law a step-grandchild excludes a nephew from inheritance in respect of the estate of the step-grandmother, and that therefore respondent, not being an heir was not entitled to letters.

Since *Ma Gun Bon* v. *Mg Po Kywe* (1) was decided over 30 years ago, it has been regarded as settled law, that step-children or step-grandchildren exclude collateral relatives as heirs of the step-grandparent, and this view of the law was affiirmed by their Lordships of the Privy Council in *Maung Dwe* v. *Khoo Haung Sein* (2) But it is contended in the present case that the fact that appellant made a claim against Ma Hnin Bwin, when his grandfather Chit Tun died debars him from being recognized as an heir of Ma Hnin Bwin. It is sought to found this contention on the decision of the Privy Council in the case of *Ma Thaung* v. *Ma Than* (3), but that was a case in which children who by reason of the death of their mother and in view of their father's remarriage had a right as against their father to claim a share of the property of the marriage of their parents and had exercised that right and received their share of the property, claimed again as against their step-mother on their father's death and the decision in that case is based on an express provision of the Buddhist Law which says that children who have claimed and taken their shares of inherit-

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(1) [1897—01] 2 U. B. R. 66.

(2) A. I. R. 1925 P. C. 29=3 Rang. 29=52 I. A. 73 (P. C.)

(3) A. I. R. 1924 P. C. 88=5 Rang. 175=51 Cal. 374=51 I. A. 1 (P. C.).

ance from the surviving parent in that parent's remarriage cannot on the death of that parent claim from the step-parent a share in the property of the second marriage. It is contended that this decision establishes a general rule that acceptance of a share of inheritance is in every case a bar to a subsequent claim to inherit, but it seems to me clear that it does not establish any such rule, because what is a bar to a claim as against the step-parent to a share of inheritance as heir of the deceased parent is not necessarily a bar to a claim to inherit as heir of the step-parent himself.

A similar question to that which arises in the present case was considered by a Bench of this Court in the case of *Po Saw* v. *Ma Gyi* (4) where the question was whether step-children who have received from their step-mother the share of inheritance to which they became entitled as against her by reason of the death of their father are entitled, as against the step-mother's nephews to inherit the step-mother's estate, in a case where there are no children or descendants of children of the marriage of their father with the step-mother. That case is exactly similar to the present case, except that in this case the claimant is a step-grandchild instead of a step-child or step-children, a difference which in view of the decision in *Ma Gun Bon's* case (1) is immaterial The contention in that case was the same as that in the present case, namely, the fact that the claimants had already received a share of inheritance barred any subsequent claim to inheritance on their part, and it was supported by the same reference to the Privy Council case of *Ma Thaung* v *Ma Than* (3) but the Bench decided that the step-children excluded the nephews. I know of no subsequent ruling which throws any doubt on the decision of that case and in further consideration of question in this case, I see no reason to believe that that decision was mistaken. It follows that if appellant in this case received from Ma Ngwe Bwin a share of inheritance to which he became entitled on the death of his grandfather that fact would not debar him from being his step-grandmother's heir, and therefore it is necessary to consider whether or not in fact he did become entitled to a share as against his step-grandmother on the death of his grandfather. He admittedly claimed and received certain property from Ma Ngwe Bwin, and although if at that time, he had in fact no right of inheritance as against her, the transfer of that property would be rather of the nature of gift than a transfer of property to which he had a right of inheritance, nevertheless even if it was a transfer of inheritance, it would not debar him from being Ma Ngwe Bwin's heir and from claiming inheritance as such heir, and since he is such an heir and as such heir excludes respondent from inheritance, respondent cannot be an heir, and has no right to Letters of Administration.

I would therefore set aside the order of the lower Court granting Letters of Administration to respondent and would direct that the Letters issued to him be withdrawn, and cancelled

I would also direct respondent to bear appellant's costs throughout

Otter, J.—The respondent is the nephew of one Ma Ngwe Bwin deceased and, appellant is her step-grandson The former obtained Letters of Administration to Ma Ngwe Bwin's estate, and the latter appeals against that order

There is no dispute upon the facts and the question is purely as to the respective rights of the parties under the Burmese Buddhist Law The law upon the question under review may be regarded as settled and it is necessary to refer to 2 decisions where the facts were almost identical with those in the present case viz, *Ma Gun Bon* v *Maung Po Kywe* (1) *Maung Dwe* v *Khoo Haung Shein* (2). The latter case is a decision of the Privy Council and this Court is of course bound by it It may be convenient, however, to set out the head note in the first of these two cases, for down to the year 1923 where it was explicitly approved by their Lordships of the Privy Council that case was regarded as the leading authority upon the matter The facts were identical with those in the present case and the material portion of the head note are as follows :—

"Held after an examination of all the available texts of Buddhist Law on the subject that collateral blood relations or ascendants can succeed to an inheritance only when there are no possible heirs in the descending line ; that step-children are treated as entitled to

(4) Rang. First Appeal No. 106 of 1925.

some share of inheritance, like descendants by blood ; and that in the absence of natural descendants, step-descendants are classed as heirs entitled to succeed, the bond of blood yeilding to the more important consideration of having a descendant heir and representative."

Held further that :

"where there are no children, but only grandchildren surviving, the latter succeed on the same footing as children, although their parent had died without reaching the inheritance or obtaining a vested interest, the principle of Buddhist Law on this point apparently being that this rule is requisite only where a distinction has to be made between the claims of different classes of heirs, and its application unnecessary when the nearest heirs all stand in the same degree of relationship to the deceased owner of the estate to be divided."

In approving of this decision the Privy Council says at p. 33 of the report of Maung Dwe's case :

"Once it is determined, that step-children are descendants they necessarily oust collaterals, for by Buddhist Law the property never ascends as long as it can descend. The learned appeal Judge in this case says :

"The point of view of the Buddhist Law is undoubtedly based on the community of interest between husband and wife. So strong is the bond between them that, in the absence of natural children the husband's or wife's children, as the case may be, rank as the children of the step-parent in the matter of inheritance to the exclusion of collateral blood relations."

"Their Lordships agree with this statement."

One further point may briefly be referred to. The appellants are the step-grandchildren of the deceased Their natural grandfather Ko Chit Tun died before his wife Ma Ngwe Bwin. There was evidence that during the last illness of the latter there was a partition of Ko Chit Tun's properties and that the deceased made over 35/- "3 baskets of seedling sown land" to the appellant The latter admits this, but it is not clear whether all Ko Chit Tun's property was partitioned. It is said that some such partition took place, the appellant lost any right he may have had to inherit the property of Ma Ngwe Bwin.

The case of *Ma Thaung* v *Ma Than* (3) is relied on by the respondent. In that case the Privy Council (upon the authority of one Dhammathat) held that where after the death of the wife husband partitioned the property and marries again; the children by the former marriage cannot claim to inherit

The reasoning underlying this claim was that as upon a second marriage, which he was about to contract, all his property would become the joint family property of himself and his proposed wife, it was natural that the husband should provide for his then children during his lifetime. It is only necessary to say that even assuming there was a partition of all Ko Chi Tun's property, the facts of the present case are different. Ma Ngwe Bwin did not marry again, nor is there any evidence that she ever contemplated doing so. The evidence rather is that she was a sick woman. The fact that there may have been some sort of partition is immaterial. I am satisfied on the other hand that under the Burmese Buddhist Law the respondent was not an heir of Ma Ngwe Bwin.

The letters granted to him must be withdrawn and the order granting letters to him is set aside with costs both hear and below

K.N./R K. *Appeal allowed*

A. I. R. 1929 Rangoon 139

RUTLEDGE, C. J., AND BROWN, J.

I. E. Moolla and *another*—Appellants

v.

Official Liquidator—Respondent

Civil Misc. Appeal No. 57 of 1928, Decided on 4th December 1928, against order on the original side in Civil Misc. No. 78 of 1927.

Companies Act, S. 235—Unsuccessful appeal by directors in winding-up proceeding—No order as to costs — Still directors can claim reasonable costs bona fide incurred for company and are not to that extent bound to make up company's amount in their hands.

When an order winding up a company is made, the petitioner and the company will ordinarily have their costs out of the estate, and the mere fact that no order was passed while dismissing company's appeal by the Court as to the costs incurred by the company, is not by itself necessarily an obstacle in the way of reasonable claim put forward by the directors for money bona fide expended by them in the interests of the company especially when they are not asking any sum from Official Liquidator but only claiming set off out of the money in their hands. [P 140 C 1, 2]

N. M. Cowasjee—for Appellants.

Clark—for Official Liquidator.

Judgment.—This appeal arises out of the liquidation proceedings of M E. Moolla & Sons, Ltd. An order was passed directing the winding up of the company under the Indian Companies Act on 21s

June 1927. The company appealed against this order and pending the hearing of the appeal asked for stay of the proceedings. At that time it appears that the directors of the company had in their hands a sum of something over a lakh of rupees belonging to the company. By consent an order was passed that the directors should pay over the sum of a lakh of rupees to the Official Liquidator and should give security for the payment of the balance of about eight thousand rupees, if the appeal failed, and the Court held that the company or its directors were not entitled to retain for use this sum for law costs in connexion with the liquidation. The appeal was subsequently dismissed and no orders were passed by the appellate Court as to the costs incurred by the company in the appeal. The total amount retained by the directors was Rs 9,158-0-9. The Official Liquidator called on the directors to refund this amount The directors claimed that they had spent the whole of the amount in expenses of litigation The Official Liquidator then applied to the Court for an order under S 235, Companies Act, calling upon the directors to refund the amount. The matter was heard ex parte so far as the directors were concerned and an order was passed directing them to refund. It is against this order that the present appeal is filed.

It is contended on behalf of the appellants that in a case such as the present the company is entitled to its costs in the liquidation proceedings out of the estate, and we have been referred to the case of *In re Humber Ironworks Co* (1) It was there held that, when an order winding up a company is made, the petitioner and the company will ordinarily have their costs out of the estate. In his original order directing the company to be wound up the learned Judge of the trial Court passed orders directing that the costs of the advocates of the company would come out of the estate. No such order was passed by the appellate Court, and it is contended on behalf of the respondent that it is not open to the directors now to make any claim in this connexion We are not satisfied that this by itself is necessarily an obstacle in the way of the claim now put forward The directors are not now asking that the Official Liquidator should make over any sum out of the estate They are claiming that certain sums of money have been bona fide expended by them in the interests of the estate and that they are not liable to pay those sums to the estate. The matter was not considered by the appellate Court at all, and we think it was open to the Official Liquidator under the directions of the Court to allow the payments claimed, if satisfied that they were made bona fide in the interests of the company The company lost in appeal, and the appeal must therefore be held not in fact to have been in the interests of the company. But it is difficult to hold that the directors did not bona fide at the time believe that they were acting in the interests of the company and we are therefore of opinion that a reasonable amount might have been allowed to them for their costs. We are quite unable to hold that the claim made by them was a reasonable one The claim included sum of Rs 2,000 or over for each of no less than four different advocates, and we are unable to hold that so large an expenditure of money was justified We do not, however, think that the learned trial Judge should have rejected the claim of the directors in its entirety We think that the directors might reasonably have been allowed one set of costs as taxed by the Taxing Master We therefore set aside the order of the trial Judge, and direct that the directors shall be allowed to deduct from the amount payable by them their costs of appeal in Civil Miscellaneous Appeal No 127 of 1927, the costs to be taxed by the Taxing Master as between advocate and client. We pass no order as to the costs of this appeal.

R K. *Order modified.*

(1) [1886] 2 Eq. 15=35 Beav. 346=14 L.T. 216=12 Jur. (n s.) 265.

A. I. R. 1929 Rangoon 140

RUTLEDGE, C. J., AND BROWN, J.

Official Assignee, Rangoon — Appellant

v.

R. M. P. V. M. Firm—Respondents.

First Appeal No. 222 of 1928, Decided on 4th January 1929, against judgment on original side in Civil Regular No. 478 of 1927.

Contract Act. S. 216—*A* mortgaging his Cinema theatre on a leasehold from *G* to *C* —Subsequent mortgage with power to sale in favour of *G*—*A* again mortgaging the property to *E* for one lac—*C* given management of Cinema with power to utilize profits in lieu of principal and interest—*G* selling the property in pursuance of his power of sale—*C* purchasing it and getting renewal of lease of Cinema site—*C* also getting assignment of *E*'s mortgage of one lac for 15 thousand—*A* was held not entitled to benefit of purchase by *C* or of the assignment from *E* by him.

In June 1919 *A* took a lease of certain land from *G* for ten years and built a Cinema Theatre. In September 1922 *A* mortgaged the Cinema to *G* for Rs. 45,000 out of which Rs. 15,000 were the balance due on a mortgage of January 1921. This Cinema, however, with other property was already mortgaged in June 1922 to *C*. In April 1923 *A* executed a further mortgage for one lac to one *E*, the property mortgaged being the one mortgaged to *C* and some other property. In September 1923 *A* under a deed handed over the management of the Cinema to *C* with power to utilize the profits for payment of principal, and interest due to him *G* then served notice on *A* to pay up the amount under his mortgage of September 1922 failing which he threatened to exercise his power of sale under the mortgage. The property was accordingly sold and purchased by *C* in June 1924. *C* in July 1924 obtained a new lease of the Cinema site for 16 years. In the same month *C* also got an assignment of the mortgage of one lac in favour of *E* for a sum of Rs. 15,000 only. *A* brought a suit claiming that *C* should be treated as his agent and that as such *A* was entitled to the benefit of the purchase of the Cinema and the subsequent lease and of the assignment of his mortgage by *E*.

Held: that *C*'s possession as mortgagee did not give him any peculiar means or facilities for making the purchase of the property brought to sale under a subsequent mortgage with which he had nothing whatever to do. In making the purchase *C* was in no way acting or purporting to act under his power as agent. The sale was effected not by *A* and not by *C* but by *G* who had acquired this power of sale long before *C* had been appointed agent. The principles of S. 216 did not apply to the case and *A* could not claim the advantages of the sale on behalf of the estate of *A*. *C* was also entitled to the full benefit of its purchase from *G* of the debt due to him. The general rule being that if one person buys the debts of another for less than their face value, he is entitled to claim for the whole debt.

[P 143 C 1, 2, P 144 C 1]

Leach—for Appellant.

Paget—for Respondents.

Judgment.—The appellant the Official Assignee brought a suit against the respondents, the R. M. P. V. M. Chettyar Firm, for a declaration that the insolvent's estate which the appellant represents is entitled to the benefit of certain transactions entered into by the defendants The insolvent is one Ahmed Ismail Hashim Atchia On 1st June 1919 he took a lease of certain land from the Goolam Ariff Estate Coy., Ltd, for a term of ten years, one condition in the lease being that he should erect thereon a substantial building costing not less than Rs. 50,000 to 75,000 Atchia erected buildings on the land at a cost of Rs. 1,31,000 and used the same for the purposes of a cinema known as "The Royal Cinema." In January 1921 Atchia mortgaged the Royal Cinema and his interests under the lease to the company for the sum of Rs 60,000. He subsequently repaid Rs 45,000 of this debt, but on 9th September 1922 he executed a further mortgage for the balance of Rs 15,000 due on the earlier mortgage and for a further sum of Rs 30,000. Meanwhile on 13th June 1922 Atchia had executed a mortgage in favour of the Chettyar Firm The property then mortgaged included the Royal Cinema, which had been previously mortgaged to the Company, and also the Cinema de Paris, another property of Atchia's

On 20th April 1923 Atchia executed a further mortgage for Rs. 1,00,000. This mortgage was in favour of his brother-in-law, Ebrahim Ismail Ghanchee and included the Royal Cinema, the Cinema de Paris and other assets of the film agency business and a printing press On 27th September 1923 Atchia executed a deed whereby he handed over the management of the Royal Cinema to the Chettyar Firm Ghanchee was a party to this deed. The Chettyar Firm was empowered to utilize the profits, first for the payment of interest due to them by Atchia, and secondly for payment of the principal sum due It gave the Chettyar Firm a general power to collect moneys due to Atchia and in the event of the bioscope shows not being profitable it gave the Chettyar Firm power to sell the same On the same date a deed was executed whereby Ghanchee agreed to treat the Chettyar Firm as co-mortgagees on his mortgage for Rs. 1,00,000 to secure Rs. 50,000 of the sum of Rs 70,000 due by Atchia to the Firm on unsecured debts. Atchia then left Rangoon about December 1923 for the Andaman Islands and save for one short interval did not return until July 1924

The management of the Royal Cinema was left entirely in the hands of the Firm. Before Atchia left for the Andamans he received a notice from the Goolam Ariff Estate Company calling upon him to pay up the principal sum of Rs. 45,000 due on the mortgage of 9th September 1922, failing payment of which the company would take steps to recover the amount. Atchia asked for further time but this was refused, the company stating that unless the money was paid they would take immediate steps to realize their securities. The company appear to have taken no further steps until about May 1924 when they advertised the properties for sale under the power given in their mortgage-deed of September 1922.

The Chettyar Firm advised Atchia both by letter and by telegram that the company were pressing for their money, urging him to come to Rangoon at once, or if that were impossible to empower some one to act on his behalf. Atchia did not come to Rangoon till the beginning of July or empower any one to act for him. In the meantime the Royal Cinema was sold by auction under the power of sale in the mortgage-deed on 21st June 1924 and purchased by the defendant firm for Rs. 65,000. Rs. 45,000 of this sum was paid to the company in settlement of their debts, and the balance after allowing for the costs of the sale was utilized towards the mortgage debt due to the Chettyar Firm.

On 17th July the Chettyar Firm obtained a new lease of the site of the Royal Cinema for a period of 16 years from the Company, and on 25th July they leased the Cinema to Madan Theatres, Ltd., at a monthly rental of Rs. 2,150. Meanwhile on 2nd July 1924 Ghanchee assigned to the defendant firm the whole of the debt of Rs. 1,00,000 due to him on his mortgage-deed for the sum of Rs. 15,000.

The plaintiff claims that in these circumstances the Chettyar Firm must be treated as Atchia's agents and that Atchia is entitled to the benefit both of the purchase of the Royal Cinema and of the assignment of his mortgage by Ghanchee. The claim is based in part on the fact that the Chettyar Firm were mortgagees in possession and in part on the fact that they were the agents of Atchia. The learned trial Judge held that the plaintiff had not established his case, and except with regard to a sum of Rs. 2,500 given by Atchia as a deposit on taking the lease from the Goolam Ariff Estate Co. in 1919 as to which there was no real dispute, he has dismissed the plaintiff's suit. The plaintiff has now appealed against his decision.

We have been referred to a number of English cases in which the acts of mortgagees in possession or of agents have been held to have been performed on behalf of their principal and to be acts for the benefit of which they were bound to account to their mortgagor or principal In the case of *Hobday* v. *Peters* (1), a solicitor's clerk had been giving a client his advice and with the help of the knowledge obtained by him in connexion with this advice he purchased the mortgage granted by the client for less than half the amount. It was held with regard to this purchase that he was a trustee for the benefit for the mortgagor. In the case of *White* v. *City of London Brewery Co.* (2), the mortgagees in possession of a public house let the premises with a restriction that the tenant should take beer of their brewing and none other. It was held that they must account for such additional rent as might have been got if the premises had been let without restriction. In the case of *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (3), the mortgagee had purchased after his mortgage certain encumbrances on the property mortgaged. It was held in the circumstances of that case that the mortgagor was entitled to redeem the whole estate on paying the original mortgage money plus the money used for the purchase of the encumbrances. The circumstances of that case were somewhat peculiar and not analogous to those of the case now before us The principle followed appears to have been that ,in that case the mortgagee by virtue of his possession had acquired a peculiar means of making the purchase, and in the course of their judgment their Lordships referred to cases in which purchases made by the mortgagee in possession might not be

(1) 84 E. R. 400.
(2) [1888] 39 Ch. D. 559=58 L.J.Ch. 98=36 W.R. 881=60 L.T. 19.
(3) [1880] 5 Cal. 193=6 I.A. 145=5 C.L.R. 218=4 Sar. 17 (P.C.).

held to be advantageous to the mortgagor. On p 153 of their judgment they remark:

"In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit."

In the case of *Mollet* v. *Robinson* (4), Willes, J., remarks at p. 655 of the judgment:

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal."

This general rule was approved in the case of *Bentley* v *Craven* (5). At p. 30 the Master of the Rolls remarked with regard to this rule:

"It is founded on this principle, that an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal, and it is the plain duty of every agent to do the best he can for his principal."

In the case of *Dally* v. *Wonham* (6) the purchase by an agent for inadequate price was set aside In that case the purchaser resided on the spot and was fully acquainted with the value of the property, whereas the vendor lived at a distance and had not seen the property for 20 years In the case of *Hesse* v. *Briant* (7), specific performance was refused of an agreement entered into to sell a property between two persons, where the same solicitor acted for both parties. In the case of *Barker* v. *Harrison* (8), an agent who had purchased lands of his principal, and who, previously to contract, had entered into a secret negotiation for a resale of part of the property at a profit, was declared a trustee for his principal to the extent of that profit.

None of these cases seems to us to be very similar to the case which we have to decide. The Chettyar Firm were in possession of the property which they purchased as mortgagees. But it seems to us impossible to hold that their possession as mortgagees gave them any peculiar means or facilities for making the purchase of the property brought to sale under a subsequent mortgage with which they had nothing whatever to do. They had, it is true, special means of knowing the nature of the property, but it does not appear that there were encumbrances on the property which any stranger with due diligence and due searching at the Registration Office might not have known. In informing Atchia of the intention of the Goolam Ariff Estate Company the Chettyar Firm said nothing whatever about the sale of the property under the power of sale in the mortgage-deed. But they did quite clearly urge Atchia to come to Rangoon without delay, and before he left for the Andamans Atchia had received full notice that the company were likely to exercise their power The sale of the property took place at a public auction, and presumably if the Chettyar Firm had not purchased it would have been purchased by somebody else at a still lower price.

The deed by which the company executed the conveyance in favour of the Chettyar Firm is a somewhat curious one. The sale was under the power of sale in the mortgage-deed subsequent to the date of the Chettyar's mortgage. Quite clearly, therefore, the sale could not affect the Chettyar's mortgage in any way and what was in fact sold was the equity of redemption of this mortgage from the Chettyar. Nevertheless the sale-deed says that Rs 20,000 should be utilized towards the settlement of this mortgage. Be that as it may, we do not think it can be held that in making the purchase under the power of sale the Chettyar Firm were making an unfair and special use of the knowledge acquired by them as mortgagees in possession. In actual fact they purchased only the equity of redemption of their own mortgage amounting to Rs. 50,000 and Rs. 65,000 was not so inadequate a price as it might at first sight appear The deed giving management of the Cinema to the Chettyar Firm not only put them as mortgagees in possession, but also empowered them as agents It gave them power in certain circumstances to sell the property. But we do not think that the cases cited to us are authorities for the contention that in these circumstances a sale by them must be held to have been for the benefit of their principal. The sales in all the cases cited were sales by or to the agent

(4) 5 P.C.O. 646.
(5) 52 E.R. 29.
(6) 55 E.R. 326.
(7) 42 E.R. 1375.
(8) 63 E.R. 854.

when he was clearly exercising the power of his agency. In the present case it is perfectly clear that on making the purchase the Chettyar Firm was in no way acting or purporting to act under their power as agents. The sale was effected not by Atchia and not by the Chettyar Firm, but by the Goolam Ariff Estate Company which had acquired this power of sale long before the Chettyar Firm had been appointed agents.

The principles of the English law on this subject are incorporated in Ss 215 and 216, Contract Act. S 216 lays down that if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction It seems to us impossible in the present case to hold that the Chettyar Firm in purchasing at a sale held under the power given to the Goolam Ariff Estate Company long before the firm became the agent was dealing in the business of the agency at all As agents they had no power either to make the sale under the power in the mortgage-deed or to stop it. It seems to us, therefore, that the principles of this section do not apply to the present case and that the appellant cannot claim the advantages of the sale on behalf of the estate of Atchia Nor can we see sufficient reason for holding that the Chettyar Firm is not entitled to the full benefit of its purchase from Ghanchee of the debt due to him. It is true that the Chettyar Firm was in a fiduciary position in regard to a part of the property to which the mortgage for Rs 1,00,000 referred But it does not seem to us that in purchasing this debt the Firm made any special use of the knowledge obtained thereon in such capacity. The general rule undoubtedly is that if one person buys the debts of another for less than their face value, he is entitled to claim for the whole debt. We are unable to see any sufficient circumstance in the present case to bring it outside the ordinary rule.

There are undoubtedly in this case many circumstances which strongly suggest collusion between the Chettyar Firm and the Goolam Ariff Estate Company. But, as pointed out by the learned trial Judge, there is no reference to collusion in the plaint, and we are not prepared in the circumstances to differ from his view that collusion is not established. The trial Court whilst dismissing the main part of the plaintiff's claim passed a decree in his favour for the sum of Rs 2,400 This was the sum originally deposited with the Goolam Ariff Estate Company by Atchia when taking out his original lease in 1919. By taking a fresh lease in their favour the Chettyar Firm obtained the advantage of this deposit and they are admittedly bound to account to the Official Assignee for this sum. No complaint can, therefore, be made as to the decree of the trial Court in favour of the plaintiff for this sum. The defendants, however, have filed a cross-objection on the matter of costs The trial Judge directed that the parties should respectively pay their own costs on the ground that the plaintiff had succeeded in part and failed in part. On this point it is urged that the amount of Rs. 2,400 for which a decree was passed in favour of the plaintiff was a small sum compared with the Rs 20,000 at which he valued his main claim ; and further that there never really was any dispute as regards this Rs. 2,400 and that, therefore, no litigation with regard to it was ever necessary There is some force in this contention ; but we are nevertheless not satisfied that there is sufficient ground for interfering with the discretion of the trial Court in the matter of costs We have held that the Official Assignee has not established the main part of his case. But the actions of the Chettyar Firm in dealing with the property and the debts have been of such a nature as necessarily to arouse doubt and suspicion in the mind of the Official Assignee, and we are of opinion that the Chettyar Firm must be held largely responsible for the bringing of this action The result is that we dismiss both the appeal and the cross-objection with costs.

R.K. *Appeal dismissed.*

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A. I. R. 1929 Rangoon 145

OTTER, J.

Fut Chong—Applicant

v.

Maung Po Cho—Respondent.

Civil Revn. No 296 of 1928, Decided on 6th March 1929, against decree of Dist. Court, Prome.

(a) Civil P. C., S. 115—On failure to take into account some legal proposition or material fact the Court's decision may be reversed.

Where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then although its decision may be erroneous, the error cannot be corrected on revision, but if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed : 2 *L. B. R.* 339, *Foll.* [P 146 C 1]

(b) Contract Act, S. 152—Pawn-broker issued pawn ticket containing clause exempting pawn-broker from liability in certain situation—Bailee could plead the contract as exempting him from liability.

Where a pawn broker issued a pawn ticket on certain jewellery being deposited with him, and the pawn ticket contained a clause exempting the pawn broker from all liability in case of destruction of property under certain circumstances, on a suit being brought by the owner for the recovery of price.

Held : a bailee can contract himself out of liability. It is not clearly deducible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility and that he cannot make a special contract reducing it : 32 *Mad.* 95 *Dist.*; 10 *L. B. R.* 292, *Foll.* [P 146 C 2, P 147 C 1]

Rafi—for Applicant.

Maung Ni—for Respondent.

Judgment.—The case raises a somewhat interesting point The matter comes before the Court by way of an appeal from a judgment and decree of the District Court of Prome Mr. Rafi, however, on behalf of the appellant agrees that no appeal lies to this Court for it is a small cause matter of the value of less than 500. He asked me, however, to treat the case as arising by way of revision and in the circumstances, I may do so. In this connexion I would point out that the course should only be taken in exceptional circumstances and where it is apparent that injustice might be done by refusing. The facts are simple. The applicant is a licensed pawn shop keeper and with him was deposited certain jewellery by the respondent. A pawn ticket was issued to which reference must later be made. Subsequently a robbery took place at the pawn shop and the property deposited together with other articles was stolen. The pawn ticket in question upon which appears the thumb impression of the respondent contains a clause exempting the pawn shop keeper from liability in the event of destruction of the property by the "five kinds of enemies, insects and mice." At the foot of the ticket appears a note :

"The following is regarded as acts of providence : destruction of vermin, rats, water, fire or robbery or theft."

There is no dispute between the parties that the respondent is prima facie bound by the terms of the pawn ticket and also that the contract purported to exempt the pawn shop keeper from liability in the case of robbery or theft. The respondent brought a suit in the Township Court of Paungde claiming the property or its value. The learned Township Judge decreed the suit in his favour being of opinion that the applicant was not protected by the terms of the contract. He took the view that bailees such as the applicant are protected only by Ss. 151 and 152, Contract Act, 1872, and that the liability therein provided for cannot be avoided by any special contract between the parties It should be stated that this question was clearly raised upon the pleadings and there is no doubt that the point was both argued before and considered by the Judge of the Township Court On appeal, however, to the District Court of Prome, the learned Additional District Judge makes no mention at all of this matter. He deals only with the question from the point of view of the liability imposed by the sections of Indian Contract Act, to which I have just referred and agrees with the view taken by the Township Judge, which was that the applicant did not take the amount of care laid down in S. 151 of the Act, and dismissed the appeal. So far as I can see from his order, the learned Additional District Judge did not apply his mind to what was the real point in issue.

The first question, therefore, for me is whether in the circumstances the applicant may be said to have brought himself within the provisions of S. 115, Civil P. C. It is suggested here that

the learned Additional District Judge acted in the exercise of his jurisdiction illegally or with material irregularity in that he omitted to decide what was the real question in the case. It should be observed that the question of the present case is one of law.

From among the numerous cases decided in the various Courts of India upon the point three were cited before me. They are *Venka Bai* v *Lakshman Venkoba* (1), *Zeya* v *Mi On Kra Zan* (2) *Kaliyaparama Padiyachi* v. *C. V. A. R. Chetty* (3). The second of these cases was decided by a Bench of the late Chief Court of this province and it will be convenient for me to set out a portion of the head note which is as follows :

"After consideration of the ruling of the Privy Council in the light of subsequent decisions of the High Courts that where the lower Court has applied its mind to the case and duly considered the facts and the law applicable, then although its decision may be erroneous, the error cannot be corrected on revision, but that if the lower Court has failed to take into account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed."

A very large body of authority was examined by the learned Judges in this case and after this full consideration their decision is well summarized in the portion of the head note set out above. Accepting this statement of the law as correct it is evident that this is a case where this Court could exercise its power of revision. The question next arising is whether the applicant is protected from liability by the terms of the clause in the pawn ticket. Apart from the provisions of Ss. 151 and 152, Contract Act, no ground was suggested and I know of none why he is not in this position. S. 151 is as follows :

"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

And S. 152 provides :

"that the bailee in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it as in S. 151."

The suggestion before me was that the special contract referred to in the latter section can in law increase but cannot decrease, the amount of liability of a bailee. Upon the face of it the argument lacks conviction, for if such had been the intention of the legislature it would have been a simple matter to give expression to it. Mr. Maung Ni who appeared for the respondent relies on a Full Bench decision of *Mahomed Rawthar* v. *The British India Steam Navigation Co. Ltd.* (4). In that case a bill of lading containing a clause exempting the Steamship Co. from liability in certain circumstances was under consideration and one of the majority members of the Court was of opinion that the carriers in India cannot exempt themselves by express contract from liability. It is to be observed that this case may be distinguished from the present case upon the facts. I need not, however, deal further with this authority, for the matter has been the subject of decision by a Full Bench of the late Chief Court of this province in the case of *B I S N. Co. Ltd.* v *Ali Bhai Mahomed* (5), In that case the question was whether a common carrier by sea can by the law of India, contract himself out of liability for neglect, and it was held that he can It will be sufficient for the purposes of the present case to quote two passages from the judgment of the members of the Court. At p 299 of the report, Mr. Justice Robinson, as he then was said this :

"Lastly I am quite unable to agree that a bailee cannot limit his liability under S 152 of the Act. That he can do so by making a special contract was pointed out in *Moothora Kant Shaw's* case. S. 151 lays down the ordinary duty of a bailee in all cases of bailment and S. 152 enacts that that degree of care is to be exacted from him in the absence of a special contract. To read it otherwise than as allowing him to reduce his liability is to hold that the legislature enacted an unnecessary provision and to give a forced meaning to the language used.

At p. 306 Twomey, C. J , said :

"It is not clearly deducible from the terms of S. 152 that a bailee may only make a special contract increasing his responsibility, and that he cannot make a special contract reducing it. This is a proposition curtailing the ordinary right of freedom of contract and we must hesitate to give effect to such a proposition on the strength of a mere inference and in the absence of express enactment "

(1) [1888] 12 Bom. 617.
(2) 2 L. B. R. 389.
(3) [1917] 11 Bur. L. T. 73=39 I. C. 154=9 L. B. R. 1.
(4) [1909] 32 Mad. 95=1 I. C. 977=18 M. L. J. 497.
(5) [1920] 10 L. B. R. 292=62 I. C. 378 (F. B.).

. So far as I know the authority of the last mentioned case has not been questioned in this province It is agreed on all hands that the only question for me is whether as a matter of law, the applicant cannot avail himself of the protection provided for in the pawn ticket. I must hold, therefore, in view of the case I have just referred to and in view of what I think is the meaning of the sections of the Contract Act in discussion that he can. The application must, therefore, be allowed.

As I have already stated the matter came before me by way of appeal. I am of opinion therefore that although this application is successful, the applicant ought not to receive his costs in this Court The application must be allowed without costs in this Court but the respondent will pay the applicant his costs in the two lower Courts.

P.R/R.K. *Application allowed.*

A I. R. 1929 Rangoon 147

BAGULEY, J.

Emperor

v.

Maung Po Sein—Non-Applicant.

Criminal Revn. No. 351-B of 1928, Decided on 11th July 1928.

Burma Habitual Offenders Restriction Act, S. 18 (1)—Scope—Burma Gambling Act, S. 17.

The Habitual Offenders Restriction Act does not apply to persons proceeded against under S. 17, Gambling Act *A. I. R.* 1926 *Rang.* 182 and *A. I. R.* 1927 *Rang.* 98, *Rel. on.* [P 147 C 2]

The facts are clear from the following report of the District Magistrate of Prome.

REPORT

Subject : — Validity of an order of restriction passed after prosecution under S. 17, Burma Gambling Act.

Under S. 438, Criminal P. C., I submit herewith Criminal Misc. No. 69 of 1926 of the Head Quarters Magistrate, Prome and Criminal Reg Trial No 121 of 1928 of the Township Magistrate, Thegon, for the orders of the Hon'ble Judges.

The facts are as follows :

On 1st March 1926 Nga Po Sein was prosecuted under S. 17, Burma Gambling Act in the Court of the Head Quarters Magistrate, Prome. An order under S. 7, Burma Habitual Offenders Restriction Act was finally passed on him, restricting his movements to a village tract in Padaung Township for a term of three years His restriction area has since been changed for reasons which are not on the record, but probably to give him a better opportunity to earn his own living.

In view of *I. L. R* 4 *Rang* 123 and 4 *Rang.* 455 it appears more than doubtful whether an order of restriction could legally be passed in a prosecution under S. 17, Burma Gambling Act, but the order did not evoke any comment at the time or when the ruling was published and there is no doubt that rightly or wrongly such orders were passed on several occasions in this district in 1926 and 1927, during a period when a large number of habitual thieves and other offenders were being dealt with under the preventive sections.

Nga Po Sein recently violated his restriction order and absented himself for nearly a month. He was prosecuted under S 18 (1) (a), Habitual Offenders Restriction Act, before the Township Magistrate, Thegon, who has reported the case for orders I am of opinion that the original order was ultra vires and will now have to be set aside and that no action can be taken against Nga Po Sein for his breach of the order It will also, in the event, be necessary to scrutinize the records of the large number of restricted offenders in the district to see if similar orders have been passed under S. 17, Burma Gambling Act. Nga Po Sein is on bail for the time being.

Judgment.—It has already been held in *Emperor* v. *Kyaw Hla* (1) that the Habitual Offenders Restriction Act does not apply to persons proceeded against under S. 3, Opium Law Amendment Act, and in *Nga Pa* v. *Emperor* (2) that it does not apply to persons proceeded against under S. 64-A, Burma Excise Act. There seems to be, as yet, no recorded case stating whether or not it applies to persons proceeded against under S. 17, Gambling Act.

In my opinion it does not. The wording of the relevant sections is, mutatis mutandis, exactly the same, and probably S. 17, Gambling Act, as the oldest of the

(1) A. I. R. 1926 Rang. 182=4 Rang. 123.
(2) A. I. R. 1927 Rang. 98=4 Rang. 455.

three, is the one from which the other two were copied.

There is no need for me to pass any orders in this case. The District Magistrate has powers under the Habitual Offenders Restriction Act to vary or cancel any order passed under it As regards the case from the Court of the Township Magistrate, Thegon, which started this matter, it appears to be in suspense, no orders have been passed under it, and probably the simplest way of dealing with it would be for the learned District Magistrate to arrange with the Public Prosecutor to have it withdrawn. Let the records be returned.

R.K. *Order accordingly.*

A I R. 1929 Rangoon 148 (1)

HEALD, J.

Maung Pe Sein and *others*—Appellants.

v.

Ma Thin Mya—Respondent.

Special Second Appeal No. 391 of 1928, Decided on 3rd January 1929, against order of Dist. Court, Thaton, in Civil Misc Appeal No. 169 of 1927.

Civil P. C., O. 21, R. 92—Order under—No second appeal lies—Provisions of S. 104, Civil P.C., are not affected by Burma Courts Act, S. 11.

The provisions of S. 11, Burma Courts Act, do not affect those of S. 104, Civil P. C., and no second appeal lies from an order setting aside sale under O. 21, R. 92. [P. 148 C 2]

Po Aye—for Appellants.

Judgment.—In Suit No. 106 of 1926, of the Township Court of Bilin the present respondent obtained a decree against Po Kyaw, now represented by the appellants, for partition and possession of a house and its site or for Rs. 650, as representing the value of her half share of the property.

In Execution Case No. 179 of 1926 of the same Court respondent applied for execution of that decree, and by consent the whole property was sold by Court auction, each party to be allowed to bid at the auction and the costs to be recovered from Po Kyaw's half share of the sale proceeds.

The property was brought in by respondent for Rs. 870.

Po Kyaw applied for the sale to be set aside under the provisions of O. 21, R. 89 on his paying into Court Rs. 870, the price paid for the property at the auction.

The Judge ordered that the sale should be set aside on Po Kyaw's depositing Rs. 43-8-0 as being five per cent. of the purchase money, together with Rs. 438, as being half the purchase money, only a half share of the property having in effect been sold, and Rs. 193-12-0 on account of costs. A sum of Rs. 672-4-0 was accordingly deposited by Po Kyaw and the sale was set aside.

Respondent appealed against the order setting aside the sale, and the lower appellate Court set aside that order.

Appellant comes to this Court in second appeal but it seems clear that no second appeal lies.

An appeal from an order under O. 21, R 92, lies under O. 43, R 1 (j), and under S. 104 (2) of the Code no further appeal lies from any order passed in such appeal. In my view the provisions of S 11, Burma Courts Act, do not affect those of S. 104 of the Code.

I, therefore, hold that the present appeal does not lie and I dismiss it.

R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 148 (2)

PRATT AND OTTER, JJ.

Ma On Myaing—Appellant.

v.

Ma Me San—Respondent.

First Appeal No. 12 of 1928, Decided on 7th January 1929, against the judgment of the Dist. Court, Lower Chindwin, in Civil Regular No. 2 of 1927

Buddhist Law (Burmese) — Succession — Minor dying joint with his mother and sister — Mother inherits in preference to sister.

On the death of a minor Burmese Buddhist, living jointly with his parent (mother) and sister, a parent (mother) is not debarred from inheriting his son's property by the fact that his sister (and her daughter) is alive. The rights of his mother in respect of any property belonging to him would have stood upon a different footing from any such rights had he attained his majority and separated himself from the parental roof : *A. I. R.* 1914 *P. C.* 97, *Dist.*; 8 *L. B. R.* 197, *Rel. on.* [P 150 C 1]

J. C. Day—for Appellant.

Ko Ko Gyi—for Respondent.

Judgment.—In this case the short facts are that in the year 1910-11 a man called U Tha Htu died leaving as descendants two grandchildren, who were then minors and of whom one is the plaintiff, and their mother, his daughter-in-law, Ma On Myaing the first and only defendant who need be considered.

The plaintiff claims the whole of her grandfather's property, her brother having died in 1921-22.

The defendant has all along been in possession of and looking after the property, and there was some suggestion that her claim was time barred. As, however, she is only twenty-three years of age now this cannot well be; and moreover, as the lower Court rightly held, defendant 1's possession has been adverse only since she refused to give up the property.

The other points taken in the lower Court were quite rightly not argued in this Court, for upon the facts that Court seems to have come to a correct decision, and indeed no such gift or promise on the part of U Tha Htu as was suggested could have the force of law.

It was said, however, that plaintiff must fail as to her brother's share in the inherited property; for as to that, by the Burmese Buddhist Law of Succession, since he was living with his mother at his death, the latter and not the plaintiff would inherit his share.

Reliance was placed upon three cases *Maung Shwe Bo* v *Maung Pyo* (1), *Ma Po Hmon* v. *Maung Kan* (2) and *Ma Hnin Bwin* v. *U Shwe Gon* (3), the last being a case decided by the Privy Council. It will be observed that the first two cases of these were decided apparently mainly upon the authority of *Maung Chit Kywe* v. *Maung Pyo* (4). In the first of these three cases, the following extract from *Chit Kywe's* case (4) was approved by the Court: see p. 527 of *Maung Shwe's* case:

" The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and, in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals."

(1) [1898-1900] L. B. R. 524.
(2) [1897-1901] 2 U. B. R. 157.
(3) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121, (P.C.).
(4) [1892-96] 2 U. B. R. 184.

Now, it is perfectly true that in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (3), their Lordships of the Privy Council expressed themselves as not satisfied with the reasons apparently underlying the decision in *Chit Kywe's* case (4). Indeed, they expressed themselves as satisfied with the authoritative character of the Dhammathats and in particular they at p. 12 of the report, quoted with approval a dictum of the Manukye, which is as follows:

" The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters his parents become his sole heirs."

The question in the case before the Committee was as to the respective rights of a sister on the one hand, and the father on the other, to the property of two deceased ladies who were respectively sisters and daughters of the rival claimants. These three ladies had lived apart from their father for many years, and it was, as we understand the case, for this reason that their Lordships of the Privy Council decided the matter at issue in their favour. At p. 4 of the report, their Lordships state:

" that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together "

Their Lordships go on to lay stress on the important rights of parents in Burma so far as their children are concerned.

In the present case it is admitted that the two minors lived in the house of their mother up till the time of the death of the respondent's brother. Respondent herself also lived on under her mother's roof until her marriage some five years ago. The case therefore upon the facts is different from the Privy Council case. So far as we know there is no reported authority exactly upon the point.

An examination, however, of May Oung's " Leading Cases on Buddhist, Law," second edition, pp. 302—308, makes it clear that it was the view of the learned author that in such a case a parent would succeed to the estate of his or her child in preference to a brother or sister of that child. He says at p. 308:

" The exclusion of parents by brothers and sisters when the family have ceased to live

together must be taken as an exception to the rules relating to nearness of relationship."

In this connexion it is evident that a mother stands in relationship nearer to her son than does her daughter by the same father We find, moreover, that the view contended for by the appellant receives the support of the learned author (U Tha Gywe) of "A Conflict of Authority in Buddhist Law." After a discussion of the matter he says, at p 326, that the rule laid down by thair Lordships of the Privy Council does not apply in a case where the family continues to live together. In support of his conclusion he cites the case of *Ma Ein* v. *Tin Nga* (5). In that case a Bench of the then Chief Court said:

"The ordinary rule of inheritance under the Buddhist Law is that the husband is sole heir to the wife and the wife sole heir to the husband, whether there be issue of the marriage or not. The texts cited above show that in certain cases the surviving parent of a childless son or daughter is allowed to share with the surviving wife or husband, while brothers and sisters do not come in at all"

It is true that the facts of this case and those dealt with by the text referred to were somewhat different from those in the present case. It appears to us, however, that the position is an analogous one; and although it is also true that the extract from the Dhammathats relied upon by their Lordships of the Privy Council in *Ma Hnin Bwin's* case (3) is entirely unqualified as it stands, yet we feel bound to hold that upon the facts of the present case, a parent is not debarred from inheriting her son's property by the fact that his sister (and her daughter) is alive.

In this view we are strengthened by what appears to have been in the minds of their Lordships when dealing with the rights of children living apart from their parents It must be borne in mind that the respondent's brother was apparently a minor and certainly quite young at his death. The rights therefore, of his mother in respect of any property belonging to him, may well be said to stand upon a different footing from any such right had he attained his majority and separated himself from the parental roof.

It may be that, in some cases it would be difficult to decide whether such separation as would deprive a parent of interest had taken place. In the present case, however, it is clear there was no separation

In all the circumstances, therefore, we feel bound to hold that the appellant is entitled to a half share in the property in dispute

There was no dispute as to the identity of the property in suit. The decree of the lower Court must be modified, and a decree for a half only of the suit property substituted (with the exception of item No. 8) and for Rs 300 by way of mesne profits.

In view of the fact that the point upon which we have decided this appeal is an entirely new point and was not argued in the lower Court, we do not propose to award costs to the appellant.

The appeal is therefore allowed but without costs, and the order of the lower Court as to costs is confirmed

R K. *Appeal allowed.*

(5) [1914] 8 L. B. R. 197=30 I. C. 594=8 Bur. L. T. 145.

A. I. R. 1929 Rangoon 150

CARR, J.

Emperor

v

Maung Ba Win and *others*—Accused.

Criminal Revns. Nos. 1160-A to 1177-A of 1928, Decided on 12th December 1928, against orders of First and Second Addl Mag Moulmeingyun

Burma Vaccination Act (1 of 1909), Ss. 4 and 13—Child above six months—Parent refusing to allow child to be vaccinated—Conviction under S. 13 is unsustainable—Procedure must be followed as laid down in Vaccination Act (13 of 1880), Ss. 17, 18 and 22

In Burma Act I of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and has been exposed to infection. There is nothing in Burma Act 1 of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated. In such cases S. 9, Vaccination Act (13 of 1880), would apply and then the procedure prescribed in Ss 17, 18 and 22 must be followed. Conviction of a person under S. 13 (1), Burma Vaccination Act, for refusing to allow his child to be vaccinated cannot be sustained. [P 151 C 2]

Judgment. — One judgment will suffice to dispose of Criminal Revisions Nos. 1160-A to 1177-A inclusive. They are concerned, respectively, with Criminal Regular Trials Nos. 128, 134, 135, 129, 133, 130, 132, 148, 149, 150, 153,

155 and 157 of the First Additional Magistrate, Moulmeingyun, and Nos 75, 76, 84, 85 and 86 of the Second Additional Magistrate, Moulmeingyun. In all these cases the accused were prosecuted by a vaccinator of the name of Maung Han for an offence alleged to be under S. 13 (1), Burma Vaccination Law (Amendment) Act, 1 of 1909, and the accused have all been convicted of an offence under that section of that Act, and fines of Rs 2 have been inflicted in the cases of each of sixteen accused, Rs 3, in one case, and Rs 5 in the remaining case. The complaints filed by Maung Han were all on a printed form in Burmese. The form states that the complaint is laid under S. 13 (1), Burma Act 1 of 1909, and alleges that the accused without cause refused to allow his child to be vaccinated by the vaccinator. In some cases Maung Han laid complaints against both parents, in others against one parent only In one case No. 75 of the Second Additional Magistrate, Maung Han actually prosecuted both parents and also the child, aged four years of age The complaint against the child was exactly the same as that against her parents, namely, that she refused to allow her child to be vaccinated This child was actually summoned to appear before the Court as an accused. The attention of the Magistrate is called to S. 82, I P. C I am glad to note that the child was not convicted. Although in some cases Maung Han instituted proceedings against both parents, in every case the Magistrate was satisfied with inflicting punishment on one parent, and acquitted the other without giving any valid grounds for his acquittal.

The First Additional Magistrate in his cases stated particulars of the offence as follows :

" Without any reason refused to allow his child to be vaccinated when asked by the complainant vaccinator, and thereby committed an offence punishable under S. 13 (1), Burma Vaccination Act. "

The Second Additional Magistrate in his cases stated particulars of offence as follows :

" That you ..... failed to submit your children to the vaccinator for vaccination when summoned, and thereby committed an offence punishable under S. 13 (1) Burma Act 1 of 1909. "

With one exception all the accused pleaded guilty, but it is obvious that they were pleading guilty to the fact that they had refused to allow their children to be vaccinated, and not to an offence under S. 13 (1), Burma Act 1 of 1909.

It is quite obvious that the Magistrate never referred to S 13 (1), Burma Act 1 of 1909, before accepting these complaints and convicting the accused. S. 13 (1) in the plainest terms relates to the refusal of a person to be vaccinated himself, and has nothing whatever to do with the refusal of parents to allow their children to be vaccinated. The law relating to vaccination in Burma is contained in the Indian Vaccination Act, 13 of 1880, the Burma Vaccination Law (Amendment) Act, 1 of 1909, and S 49, Burma Rural Self-Government Act, 4 of 1921. The provisions of the two former Acts have, under S. 49 of the latter Act, been extended to the Myaungmya District by Department of Public Health Notifications Nos. 112 and 113, dated 10th September 1924.

In Burma Act 1 of 1909, S. 4 is the only provision under which vaccination of a child can be ordered and that section applies only if the child is under six months of age and has been exposed to infection It is not alleged, much less proved, in any of these cases that either of these conditions existed. There is nothing in Burma Act 1 of 1909 to authorize any officer to require the parent of a child over six months of age to have it vaccinated, and for such a provision it is necessary to turn to S. 9, Act 13 of 1880, which requires the parent or guardian of a child who has attained the age of six months to have it vaccinated. S 9, Act 13 of 1880, would therefore seem to apply in the present case. But the proper procedure to be adopted in enforcing S. 9 is laid down in Ss. 17 and 18 of that Act. Under S. 17 a notice must be served on the parent, requiring him to attend at a time and place to be specified in the notice to have the child vaccinated, and then under S. 18, if that notice is not complied with, the Superintendent of Vaccination must report the matter to a Magistrate duly appointed in that behalf, who shall summon the parent and demand his explanation, and if such explanation is not satisfactory, make an order directing the parent to comply with the notice before a date

to be specified. It is only on the failure of the parent to obey the order of the Magistrate that he can be convicted of an offence, which offence will fall under S 22 of the Act. This procedure was not adopted in any of the present cases, and consequently, the convictions are all unsustainable. The convictions in all these 18 cases are set aside, and the fines must be refunded to the accused.

It is not known from what source the vaccinator, Maung Han obtained the printed forms of complaint which he filed in these cases These printed forms do not set out any offence whatever under the Vaccination Law, and they are entirely illegal. The District Magistrate, Myaungmya, should take steps to see that complaints of this type are not in future received by any Magistrate in his district. It is obvious that in the present cases all these complaints ought to have been dismissed under S. 203, Criminal P. C. It is most deplorable that ignorant villagers should be harassed by illegal complaints of this kind made against them by public authorities

R.K. *Convictions set aside.*

A. I. R. 1929 Rangoon 152

BROWN, J.

S. S. Somasundaram Chettyar — Applicant.

v.

Ma Shwe Thit and *others* — Respondents.

Civil Revn. No. 211 of 1928, Decided on 30th January 1929, against order of Sub-Divisional Court, Magwe, in Civil Misc. No. 7 of 1928.

(a) Civil P. C., O. 21, R. 59 — No enquiry as to decree-holder's right to execute decree can be made under R. 59.

It does not come within the scope of the enquiry under R. 59 to decide whether the attaching creditor had the right to execute the decree. The objectors should not be granted an order removing the attachment merely because the application in execution was time barred. [P 152 C 2, P 153 C 1]

(b) Limitation Act, Art. 182—Applications in execution need not necessarily be in writing—Time begins to run not from opening of execution proceedings but from applications or steps-in-aid of execution.

The opening of execution proceedings is not the same thing as the making of an application in execution, or the taking of some step-in-aid of execution and time begins to run not from the opening of execution proceedings but from the applications or steps-in-aid in execution. [P 153 C 2]

An application in execution was made on 25th January 1923, the second application was not made until 18th September 1926. But during the first execution proceedings on the 21st July and 3rd December applications were made for arrest of the judgment-debtor and attachment of his property the latter of which was granted but could not be effected.

Held : that the application dated 18th September 1926 was within time as further applications in execution which need not have been necessarily in writing were made, and that limitation was thereby saved : 10 *L. B. R.* 34, *Rel. on.* [P 153 C 1, 2]

Venketram—for Applicant.

Khin Maung Gyee—for Respondents.

Judgment.—The petitioner obtained a decree, and in execution of that decree attached certain property. The respondents, who were not parties to the decree, filed an application for removal of attachment, and one of the grounds taken by them was that the application for attachment was barred by limitation. The trial Court, without coming to any decision on the merits, held that this contention was correct and removed the attachment. The attaching creditor has now come to this Court in revision. Two main objections have been taken to the order passed by the trial Court. The first is that the respondents not being parties to the original decree were not entitled to question the right of the Chettyar Firm to attach under that decree, and the second objection is that the finding on the point of limitation is wrong.

The procedure to be followed when applications for removal of attachment are made is laid down in R. 58 and the following rules of O. 21, Civil P. C. Under R. 59:

"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached;"

and under R. 61:

"Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim."

It does not come within the scope of the enquiry to decide whether the attaching creditor had the right to execute the decree, and there is considerable force in

the contention that the respondents should not have been granted the order they asked for merely because the application in execution was time barred. But apart from this, it seems to me clear, on the face of the record, that the application in execution was not time barred at all. The trial Judge found that it was time barred because the first application in execution was made on 25th January 1923, and, according to him the second application was not made until 18th September 1926. He seems, however, entirely to have overlooked the fact that, although execution proceedings were opened on 25th January 1923, and no fresh proceedings were opened until September 1926, there were several applications made in the course of the earlier proceedings. The first attempt in those proceedings appears to have been infructuous.

On the 21st July a fresh application was made for arrest of the judgment-debtor. This arrest does not seem to have been effected, and on 26th November 1923, the diary of the proceedings shows that the decree-holder's advocate was heard as to whether the judgment-debtor should be arrested. On 3rd December 1923, the diary shows that the decree-holder again applied for arrest of the judgment-debtor and for attachment of certain property. The Judge refused to arrest the first judgment-debtor but issued a warrant of attachment against the property of the second judgment-debtor. On 26th January 1924, a sale proclamation was issued but the sale did not take place, as an application was made for removal of attachment.

Under the provisions of Art. 182 (5), Lim. Act, the period of three years runs: "where the application next hereinafter mentioned has been made, from the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

This article does not prescribe that the application must of necessity be in writing.

On 3rd December 1923, the decree-holder applied for the arrest of defendant 1 and for attachment of the house of defendant 2. The application was considered on its merits and was actually granted as regards the second prayer. It seems to me that this is a sufficient application within the meaning of the article.

In the case of *A. A. Adimuthu Pillai* v. *Adiappa* (1), it was held:

"that, even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose."

In this case the record shows clearly that an application was made, and I am of opinion that limitation was thereby saved.

It is only in rare cases that this Court will interfere in revision with orders passed on applications made for removal of attachment. The applicant is ordinarily referred to the remedy provided for him by R. 63, O. 21, Civil P. C. But there are special circumstances here which justify a departure from the ordinary rule. The Court has refused to adjudicate on the claim as to whether the property was attachable under the provisions of O. 21, R. 58 and the following rules, and in coming to its decision on the point of limitation, the Court has not really considered the law that is applicable. It has entirely overlooked that the opening of execution proceedings is not the same thing as the making of an application in execution, or the taking of some step-in-aid of execution, and has erroneously refused to exercise a jurisdiction vested in it by law. The petitioner will in the circumstances be put to quite unjustifiable hardship if he is compelled to resort to a regular suit. He is, in fact, being denied his right to have the matter adjudicated on by the executing Court I, therefore, set aside the orders passed by the trial Court and direct that the application for removal of attachment be dealt with on its merits. The respondents will pay the costs of the petitioner in this Court.

M.N./R.K. *Order set aside.*

(1) [1918] 10 L. B. R. 34=51 I. C. 656=12 Bur. L. T. 113.

A. I. R. 1929 Rangoon 153

BROWN, J.

U Maung Gyi—Appellant.

v.

Maung On Bwin and *another* — Respondents

Special Second Appeal No 529 of 1928, Decided on 11th January 1929, against judgment of District Court, Amherst, in Civil Appeal No. 139-A of 1928.

Limitation Act, Arts. 142 and 144—In suit under Art. 142 burden of proof lies on plaintiff and in suit under Art. 144 it lies on defendants — Suit for possession of land—But defendants proved to be owner at one time—Plaintiff in possession for last 15 or 20 years—Plaintiff claiming that defendant obtained possession from him — Suit falls under Art. 142 and so if defendant's possession is not proved to be permissive, plaintiff must prove that he was in possession within twelve years of suit.

Ordinarily in a suit under Art. 142 the burden of proof lies on the plaintiff and in a suit under Art. 144 it lies on the defendants.

[P 154 C 2]

Where in a suit for possession of land what is proved is that the plaintiff was at one time the owner but that for the last 15 or 20 years the defendants have been in possession, and the plaintiff claims that they obtained possession from him, the suit is one under Art. 142 and if the plaintiff fails to prove the permissive nature of the occupation, the burden would lie on the plaintiff to show that he had been in possession within 12 years of bringing the suit. 16 *Cal.* 473, *(P. C.), Rel. on.* [P 154 C 2, P 155 C 1]

Eunoose—for Appellant

Kirkwood—for Respondents

Judgment. — The plaintiff-appellant sued the defendant-respondents for possession of a certain piece of land. The plaintiff's case was that the land originally belonged to him and that about ten years ago he allowed the defendants to occupy the land temporarily. The defendants denied the plaintiff's title and denied that they came into possession with his leave or license. They said that they entered on the land 21 years ago and that they had been in peaceful and uninterrupted possession ever since. It has been found as a fact that the plaintiff did acquire title to the land in the year 1894 by the purchase at a Court auction sale, but that the defendants had been in possession for 15 years or more before the suit was brought, and that the plaintiff has failed to show that they entered into possession with his permission. On these facts the District Court held that the burden of proving that the defendants' possession was permissive and not adverse rested on the plaintiff and that as the plaintiff had failed to discharge that burden the suit must fail. The plaintiff has appealed on the ground that the burden has been wrongly placed.

It is urged that the suit is under Art. 144, Lim. Act, and that under that article the burden is on the defendants to prove that their possession was adverse. Both the lower Courts have discussed a number of authorities on the question of burden of proof in such cases. Ordinarily in a suit under Art. 142 the burden of proof would lie on the plaintiff and in a suit under Art. 144 it would lie on the defendants. It is contended on behalf of the appellant that this is not a suit under Art. 142 because the plaintiff was never in possession. It seems to me, however, that this contention is contradicted by the plaintiff's evidence.

The plaintiff quite clearly says that the defendants requested him to allow them to occupy the land and that he gave them permission. That seems to me tantamount to a statement that it was the plaintiff who put the defendants in possession and that the plaintiff was at that time at least in constructive possession of the land. In fact according to the plaint his possession continued through the defendants until recently when they set up an adverse claim on their own behalf.

In the case of *Mohima Chunder* v. *Mohesh Chunder* (1) their Lordships of the Privy Council observe :

" This is in reality what in England would be called an action for ejectment and in all actions for ejectment where the defendants are admittedly in possession, and a fortiori where as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874 and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed. "

If, in the present case, the plaintiff had proved the permissive occupation by the defendants, the burden would then clearly have rested on the defendants to show that they had acquired title by twelve years' adverse possession. But it has been found as a fact that the plaintiff has failed to prove this permissive occupation. All that has been proved is that the plaintiff was at

(1) [1888] 16 Cal. 473=16 I. A. 23=5 Sar. 321 (P. C.).

one time the owner, but that for the last 15 or 20 years the defendants have been in possession and it seems to me that the plaintiff's claim is that the defendants obtained possession from him. That being so, the suit was a suit under Art. 142, and on his failing to prove the permissive nature of the occupation the plaintiff could not succeed without at first showing that he had been in possession within twelve years of bringing the suit. For these reasons I am of opinion that this case was rightly decided by the District Court and I dismiss this appeal with costs.

S.N./R.K *Appeal dismissed.*

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* A. I R. 1929 Rangoon 155

RUTLEDGE, C. J., AND CARR, J.

Ma Shwe Yu and *others*—Appellants

v.

Ma Kin Nyun and *others* — Respondents.

First Appeal No. 254 of 1927, Decided on 11th March 1928, against judgment in Civil Misc. Appln. No. 54 of 1928.

(a) Buddhist Law (Burmese) — Partition—Father remarrying—Children entitled to half estate by partition.

Where a widower remarries his children by the first wife at once acquire a right to partition of the estate, and the share of the children collectively is one half, while the father takes one half : *A. I. R.* 1926 *Rang.* 211, *Foll.* [P 155 C 2]

*** (b) Buddhist Law (Burmese)—Partition—Death of either parent, surviving parent remarrying—Children are entitled to partition of property at the time of remarriage.**

When, after the death of one parent, the surviving parent remarries the children of the first marriage are entitled to partition of the estate held by surviving parent at the time of remarriage, unless of course there has already been a partition between the surviving parent and the children . *A. I. R.* 1926 *Rang.* 23 ; *A. I. R.* 1924 *P.C.* 88, *Rel. on*: 8 *L. B. R.* 501 ; *A. I. R.* 1927 *Rang.* 143, *Doubted.* [P 157 C 1]

Zeya, Tha Kin and *Po Aye*—for Appellants.

Thein Maung and *Ba Thaung*—for Respondents.

Judgment.—Throughout the hearing of this appeal it has been accepted as settled law that where a widower remarries his children by the first wife at once acquire a right to partition of the estate, and that the share of the children collectively is one half, while the father takes one half. That is the effect of the decision of a Bench of this Court in *Maung Po Kin* v. *Maung Tun Yin* (1) and we see no reason to question the correctness of that judgment in this respect It is true that in our former judgment, in this appeal we did not accept that judgment in its entirety but our doubt was only whether the eldest son as such is individually entitled to a fourth share even though he may not have attained the status of orasa. That question, as we said before, is not of practical importance in this case.

In our former judgment we assumed without discussing the question that the estate to be divided was the joint estate of the parents of the appellants, that is the estate as it was at the time of the death of the mother. The question now before us is whether it should not instead be held that the estate in which the children are entitled to share is the actual estate of the father at the time of his remarriage

We have been referred to a number of passages in the Dhammathats but after a careful consideration of these we are unable to find any very definite guidance in them. In no case does any Dhammathats say expressly what estate is to be divided and such indications as are to be found are in our opinion much too vague to form a safe foundation for any definite finding either way We think, therefore, that the question should be decided on considerations of equity having regard to such rules of law of inheritance as can definitely be laid down

In *Ma Sein Tun* v *Ma Son* (2), it was ruled by a Full Bench of the late Chief Court of Lower Burma that :

" Subject to any claim by the Orasa ....., a Burmese Buddhist widow has an absolute right of disposal of the whole of the joint property of herself and her late husband as against the children of their marriage."

The same rule of course is applicable to the widower This is now definitely settled law, but it is subject to the qualification that the rule applies only as long as the widow or widower does not remarry, and that on remarriage the children of the first marriage, become entitled to one half of the estate as laid down in *Maung Po Kin's* case (1).

(1) A. I. R. 1926 Rang. 211=4 Rang. 207.
(2) [1915] 8 L. B. R. 501 = 30 I. C. 588 = 8 Bur. L. T. 203.

On the analogy of the Privy Council judgment in *Tun Tha* v. *Ma Thit* (3), it must, we think be held that this right to partition vests in the children from the moment of remarriage of the parent.

Having regard to these rules, there seems to us to be a very strong case for holding that the estate to be divided is that existing at the time of the remarriage, that is, at the time of the vesting of the right to partition. The opposite view clearly brings the rules laid down in *Ma Sein Tun's* case (2) and *Maung Po Kin's* case (1) into conflict, for it is very possible that in the interval between the death of the first spouse and the remarriage the surving spouse may, in exercise of his absolute right of disposal have alienated some of the properties forming the joint estate of the first marriage. But such alienation must, we think, be held to be entirely valid and not contestable by the children of the first marriage. If, therefore, these children are bound by such alienation, it is also equitable that they should be entitled to share in any acquisition made by the surviving parent after the death of his first spouse and before his remarriage.

A case which is relied upon as supporting this view is *Maung Po San* v. *Maung Po Thet* (4) in which it was laid down that:

"What the Burmese Buddhist Law regards in its rules for partition is the family rather than individuals and so long as the family subsists all who are members of it are regarded as being entitled to partition on its dissolution. On the surviving parent's remarriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted."

On this principle which we accept, the proper conception would be that on the death of one parent the surviving parent and the children remain one family and the property is family property although its management is vested in the parent and the children cannot claim partition. A stepparent introduced into the family is a disintegrating element, whose influence may be detrimental to the interests of the children, and for that reason the right of claiming partition on remarriage of the parent is given.

The Privy Council judgment in *Ma Thaung* v. *Ma Than* (5) lends support to this view. It lays down that where there has been a partition on the remarriage of the parent, the children have no further claim to inherit on the death of the parent. In other words, from the time of the partition the family is broken up, and the parent and the stepparent form a new family. This conception is further exemplified in the accepted rule that when there has been no partition on remarriage, the children of the first marriage are entitled to divide the estate with the stepparent on the death of their own parent, but that even then if they do not claim partition they have a further right to inherit on the death of the stepparent. Having regard to all these rules, we think that on equitable considerations the estate to be divided is the estate as it is at the time of remarriage of the surviving parent.

There seems to be no strong grounds for holding this view to be wrong. It is true that in *Ma Sein Tun's* case (2) the learned Judges speak of the "joint estate of the parents" are liable to partition, thus implying that it is the estate as it stood at the death of the first parent that is so liable But this does not appear to be a considered decision on the question now before us, which in fact did not arise in that case And in *Maung Kyaw Za* v *U DeBi* (6) in which one Judge remarked that the share of the children on remarriage of the surviving parent is confined to property in question in that case was property acquired during the second marriage. And this also was quite evidently not a considered decision of the question before us.

It has also been urged that what the children take on the remarriage of the surviving parent is merely their deceased parent's share in the hnapazone estate, and that, therefore, it is that hnapazone estate that is to be partitioned. We are not satisfied of the correctness of this proposition. If it were a question merely of the disposal of the interest of deceased parent, there seems to be no reason why the surviving parent should not receive a share. And there seems to be no reason, why on that basis the children

(3) A. I. R. 1916 P. C. 145 = 44 Cal. 879 = 44 I. A. 42 (P.C.).
(4) A. I. R. 1926 Rang. 23=3 Rang. 433.
(5) A. I. R. 1924 P. C. 88 = 5 Rang. 175=51 Cal. 374=51 I. A. 1 (P.C.).
(6) A. I. R. 1927 Rang. 143=5 Rang. 125.

should have no further right to a share on the death of the surviving parent. We think that the more correct view of the matter is that the family is broken up and that it is the family estate that is partitioned We hold, therefore, that when, after the death of one parent, the surviving parent remarries the children of the first marriage are entitled to partition of the estate held by the surviving parent at the time of remarriage, unless of course there has already been a partition between the surviving parent and the children.

On this view of the law it will be necessary to return the case for further evidence The issue framed in the District Court related to debts of Maung Kya Yin and his first wife Ma On, at the time of the latter's death. He must now ascertain what were Kya Yin's debts at the time of his marriage to Ma E Hwi The proceedings are returned to the District Court for a trial of and the finding on the fresh issue :

" What were Maung Kya Yin's debts at the time of his marriage to Ma E Hwi."

This issue should be tried and the finding returned without delay

M.N /R.K. *Case remanded.*

A. I. R. 1929 Rangoon 157

PRATT, J.

Ban Gyi Maung—Appellant.

v.

Ma Ngwe Bon—Respondent.

Second Appeal No 122 of 1928, Decided on 23rd January 1929, against order of the Dist. Judge, Sagaing, in Civil Appeal No. 32 of 1928.

Civil P. C., S. 144—Decree-holder auction purchaser—Sale cannot stand if decree reversed or modified and judgment-debtor pays amount finally decreed.

Where the decree-holder himself is the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside or modified because the purchase is subject to the final result of litigation between the parties. The judgment-debtor seeking to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree and the decree-holder would have a charge on the property for the amount ultimately found due by the appellate Court on payment of which the judgment-debtor would be entitled under S. 144 to have the property restored to him on his depositing the decretal amount in Court: 27 *Mad.* 98, *Rel. on.* 27 *Cal.* 810 ; 10 *All.* 166 (*P.C.*), *Ref.*

[P 157 C 2, P 158 C 1]

Ko Ko Gyi—for Appellant.

Dey—for Respondent.

Judgment.—Ma Ngwe Bon obtained a decree for Rs. 550, which was confirmed in the District Court, against Maung Ban Gyi. In execution of her decree she attached land belonging to the judgment-debtor, which was sold by Court auction on 8th January 1927, the purchaser being the decree-holder herself. The sale was confirmed on 8th February 1927. On 28th March following the High Court modified the decree and reduced the amount decreed to Rs. 110. The judgment-debtor paid Rs. 115 into Court and demanded to be placed in possession of his property under S 144, Civil P. C Both Courts held that there was no ground for setting asid the sale.

In *Set Umedmal* v *Srinath Roy* (1) a Bench of the Calcutta High Court pointed out that the Privy Council case of *Zainul-ab-din Khan* v. *Muhammad Asghar Ali Khan* (2), is clear authority for the proposition that where the decree-holder himself is the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. It is true that in the present instance the decree was not set aside, but only modified The principle, however, remains the same. The rule as laid down in *Syed Nathadu Sahib* v. *Nallu Mudalay* (3), covers cases in which the decree is modified as well as reversed.

It is, that in the case of decree-holders purchasing at execution sales the purchase is subject to the final result of the litigation between them and their judgment-debtors I have no doubt as to the correctness of this statement of the law on the subject. The object of the rule is explained as being, so far as it relates to judgment-creditors, to prevent the interests of judgment-debtor suffering by sales of their property before their liability is finally determined, and to avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal.

It was pointed out further that in cases where the decree is not reversed but modified the view most favourable to a decree-holder purchaser in similar cir-

(1) [1900] 27 Cal. 810=4 C. W. N. 692.
(2) [1887] 10 All. 166=15 I. A. 12=5 Sar. 129 (P.C.).
(3) [1903] 27 Mad. 98.

cumstances would be that deducible from the case of *Baboo Gawree Boyjonath Pershad* v. *Jodha Singh* (4) that a judgment-debtor seeking as plaintiff to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree.

In other words the result would be that in the present instance the decree-holder would have a charge on the property for the amount ultimately found due by the High Court On this view the judgment-debtor was obviously entitled under S. 144 to have the land restored to him on his depositing the decretal amount in Court. There is no injustice to the decree-holder, who did not pay the purchase money into Court but set it off against the decree The appeal must be allowed, the orders of the District and Township Courts set aside, and the judgment-debtor given the relief sought with costs throughout. Advocate's fee five gold mohurs.

M.N./R.K. *Appeal allowed.*

(4) 19-W. R. 416.

A. I. R. 1929 Rangoon 158

RUTLEDGE, C. J., AND BROWN, J,

C. T A. M. Chettyar Firm — Appellants.

v.

Ko Yin Gyi and *another* — Respondents.

First Appeal No. 234 of 1925, Decided on 1st January 1929, against decree of Dist. Court, Tharrawaddy, in Civil Regular No. 24 of 1920.

Civil P. C., Ss. 151 and 152 — District Judge's decree by mistake making defendant against whom relief was not claimed, liable for decretal amount—On plaintiff's appeal High Court increasing decretal amount but not referring to question as to who were bound by decree—Defendant, wrongly made liable, applying for amendment of decree—As even in plaintiff's appeal High Court could have altered decree in favour of applicants under O. 41, R. 33, decree of District Judge merged in that of High Court and so High Court was proper Court to amend decree—It was necessary to order amendment in this case — To prevent abuse of Court's process it was necessary to refund Court-fee paid on review application although this case would not come under Court-fees Act, S. 15.

A decree of the District Judge, by an accidental mistake, made those defendants also against whom no relief was claimed, liable for the decretal amount. On plaintiff's appeal to the High Court, the decretal amount was increased but the question, as to who were bound by the decree, was not referred to in the judgment. Thereafter the defendants whose names were wrongly included in the decree applied to the High Court for the amendment of the decree.

Held : that as the High Court even in plaintiff's appeal could have under O. 41, R. 33, altered the decree and omitted the names of the applicants, the decree of the District Judge must be held to have merged in the decree of the High Court, and so the High Court was the only Court to grant the relief claimed. [P 159 C 2]

Held further that the High Court had power to interfere either under Ss. 151 or 152, and that it was necessary to meet the ends of justice to order the amendment of the decree.

Held further . that although S. 15, Court-fees Act, was not applicable to this case, as it could not be said that on the rehearing the Court reversed or modified its former decision on the ground of mistake of law or fact, still the Court-fee paid on the review application ought to be refunded for the ends of justice and to prevent the abuse of the process of the Court. [P 160 C 1]

K. C. Bose—for Appellants

Anklesaria—for Respondents.

Order —This application arises out of a suit filed by Ma Thet Pon, now deceased, in the District Court of Tharrawaddy in the year 1920 In that suit, she sued for possession of certain land and for mesne profits. The land had been in the possession of U Bauk and Ma Mwe Me, deceased, and the first two defendants were Ma Kyi Oh and Ma Ohn Kin, administrators of the estate of U Bauk and Ma Mwe Me. The present petitioners were joined as defendants because the land in dispute had been mortgaged to them by U Bauk and Ma Mwe Me. There were five other defendants joined for various reasons. In the plaint as finally amended the plaint asked for possession of the land and for mesne profits as against the estate of U Bauk and Ma Mwe Me alone. The suit went to trial and was finally dismissed by the District Court. Ma Thet Pon appealed to this Court and in September 1923 her appeal was allowed and a decree for possession passed in her favour. This decree has subsequently been confirmed on further appeal to the Privy Council.

The decree of this Court directed that the respondent-defendants should make over possession of the land in dispute to Ma Thet Pon, and it then proceeded to say :

"And it is further ordered that as to the rents claimed the case be remanded to the District

Court of Tharrawaddy for disposal on the following issues, and that the said District Court of Tharrawaddy do then pass a final decree for the amount due to the appellant-plaintiff :

(1) What quantity of paddy was received as rent by Ma Mwe Me and the administrators after U Bauk's death ?

(2) What was the market value of the paddy at the time of the harvest ?

(3) What sums were paid as land revenue ?"

As a result of this decree, the District Court held an enquiry on the question of mesne profits and passed final orders on 5th May 1925. In this enquiry, the administrators of the estate of U Bauk and Ma Mwe Me were the only contesting parties. The District Judge in his judgment found .

"The amount the plaintiff is entitled to receive from the defendants is therefore Rs. 9,808-7-7. There will be a decree with costs accordingly in favour of the plaintiff."

A decree was then drawn up and that decree includes all the original defendants as defendants and directs that the defendants jointly do pay the amount found due. Against this decree Ma Thet Pon filed an appeal in this Court claiming that she should have been allowed a larger sum. This appeal was decided by us in June 1927. We found that a small sum of Rs. 372 should have been allowed in excess of the amount decreed and the final order we passed was as follows :

"We direct that Rs 372 be added to the sum decreed as mesne profits by the District Court with proportionate costs, and for the rest we dismiss this appeal."

The question as to who were to be bound by the decree was not before us and was not referred to by us at all in our judgment. A decree was then drawn up which so far as the parties were concerned followed the decree of the District Court and directed that

"the decree of the District Court of Tharrawaddy be and the same is hereby modified by directing that respondents-defendants do pay to the appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits."

The date of our judgment was 14th June 1927. The application now before us is an application for amendment of this decree and is dated 4th May 1928. The delay in filing the application is explained in an affidavit filed by the petitioners. In that affidavit, Thiruvenkatam Pillay, clerk and sub-agent of the C. T. A. M. Firm, deposes that they engaged an advocate, Mr. Krishnaswami, to represent them in the appeal before us and that on our judgment being pronounced the Chettyar firm was informed by Mr. Krishnaswami that the appeal against them had been dismissed and a decree for the further sum of Rs 375 had been passed against respondents 1 and 2, and it was only on 16th April 1928, that the firm knew that there was any decree against them when they received notice to pay up the decretal amount. It is urged on behalf of the petitioners that it is quite clear that it was never the intention of any Court to pass a decree against them for mesne profits, that the inclusion of their names in the decree was entirely accidental and that this is a proper case for the interference by this Court under the provisions of S. 152, Civil P. C.

The decree in the first instance was a decree of the District Court and against this decree the petitioners never appealed. It is, however, contended on their behalf that although they did not appeal, it was open to this Court on the appeal of Ma Thet Pon to alter the decree in their favour under the provisions of R. 33, O. 41, Civil P. C. In these circumstances, although the original decree was that of the District Court that decree must now be held to be merged in the decree of this Court and this Court is therefore the only Court which can grant the relief now claimed.

We are of opinion that this contention is correct. There can in our opinion be no question whatever as to the merits of the present application. The respondent in her final plaint made no claim whatsoever against the applicants for mesne profits and it seems to us perfectly clear that the decree against the applicants on this point was entirely due to accident and that it was never the intention of the District Court or of any Court to direct the petitioners to pay the sum decreed. The only point which requires consideration is whether we have the power to interfere now. Mr. Anklesaria contends that the error can be traced back to the decree of this Court of September 1923. We are, however, unable to agree with this contention. That decree does direct all the defendants to deliver up possession, but it contains no order at all as to who is to pay the mesne profits and no order on that point was necessary as no claim on the point had ever been made except against the

first two defendants. In our opinion, it was not until the decree of the District Court of May 1925 that there was any order at all against the petitioners for payment of mesne profits As we have already said, that decree, in our opinion, now merges in the decree of this Court and that decree so far as it directs anyone but the first two defendants to pay mesne profits was clearly never in accordance with the intention of the judgment of the District Court, and it was certainly not in accordance with our intention when the case came before us on appeal. It would be a gross injustice to allow a decree for so large an amount to stand when based on no legal claim of any kind whatsoever, the decree being due entirely to a mistake on the part of the Court. We are of opinion that we have power to interfere either under the provisions of S. 152 or under the provisions of S 151, Civil P. C. The order we propose to make is quite clearly one which is necessary for the ends of justice and to prevent abuse of the process of the Court. The application before us has been made by the Chettyar defendants only, but it is clear that there has been a similar mistake as regards all the other defendants except the first and second.

We direct that the decree of this Court in Civil Appeal No. 234 of 1925 be amended into a decree directing that the first two respondent-defendants, the legal representatives of the estate of U Bauk and Ma Mwe Me, deceased, alone be directed to pay the appellant-plaintiff the sum of Rs. 10,180-7-7, being the amount of the mesne profits. There will be a similar modification of the decree as regards the payment of costs of the enquiry in the District Court. These costs will be borne by the first two defendants alone. The respondents will pay the costs of the petitioners in this application, advocate's fee seven gold mohurs.

(Mr. Bose, the appellants advocate, having applied for a refund of the Court-fee paid in the review application, the judgment proceeded). We have given Mr. Bose an opportunity to show that the Court has power to order a refund of the stamp duty payable upon the review application in this case, and he relies upon S. 15, Court-fees Act. We are not satisfied, however, that S. 15 by itself would give us power to make such an order in the present case. It is true that the application for review of judgment was admitted in the case, but it is not accurate that on the re-hearing the Court reversed or modified its former decision on the ground of mistake of law or fact. It granted, however, all the reliefs which the applicants asked for in a concurrent proceeding for the amendment of the decree under O. 41, R 33, Civil P. C.

On the facts of the case, however, we consider that this is a case where it is necessary, for the ends of justice or to prevent the abuse of the process of the Court, that we should apply the inherent powers of the Court referred to in S. 151, Civil P. C. It is no doubt only in rare and exceptional circumstances that this power can be invoked, but we consider that this is one of those exceptional cases.

The error referred to in our judgment in this case delivered yesterday shows that the error was one of the Court's in not specifying that it was only the contesting defendants-respondents who were liable for the mesne profits. In these circumstances an injustice was done to the applicants and an amount was decreed against them which had never been claimed.

In these circumstances they were quite justified in making alternate applications for relief, as it was difficult on the complicated proceedings to state which was their proper remedy. We are confirmed in the view we take by a decision of a Bench of the Patna High Court, of which the late Chief Justice was a member, in the case of *Chandradhari Singh* v. *Tippan Prasad Singh* (1), and also by a recent order of this Court in the case of *Ma Thein* v *Ma Mya* (2). We accordingly direct that the Court-fees paid on this application to review be refunded to the applicants.

S.N./R.K. *Decree amended.*

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(1) [1918] 3 Pat. L.J. 452=46 I.C. 271= (1918) P.H.C.C. 273.
(2) F. A. No. 147 of 1928.

A. I. R. 1929 Rangoon 161

PRATT, J.

Ramdas—Appellant.

v.

Kannamal—Respondent.

Second Appeal No. 99 of 1928, and Civil Revn No. 142 of 1928, Decided on 24th January 1929, against order of Dist. Judge, Mandalay, in Civil Appeal No 68 of 1928.

(a) Civil P. C., O 21, R. 22—Execution after one year—Notice to judgment-debtor essential unless reasons for not issuing notice are recorded—Failure to record reasons renders proceedings void.

When execution is taken out after one year from the date of the decree it is compulsory under O. 21, R. 22, to issue a notice to show cause to the judgment-debtor before ordering his arrest. If no such notice is issued, under Sub-S. (2) Court can issue process, for reasons to be recorded, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. But if Judge records no reasons for issuing process and overlooks the provisions of R. 22, the failure to issue notice to the judgment-debtor is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction 44 *Cal.* 954, *Foll.* [P 161 C 2]

(b) Civil P. C., S. 47—Order of committal to jail passed without jurisdiction—Objection to its legality not taken—No appeal lies—Civil P. C., S. 51.

An order committing a judgment-debtor to jail was passed without jurisdiction. But no objection was made to the committal to jail and the question of its legality was not then raised.

Held, that the order was not under S. 47 and, therefore, not appealable. [P 161 C 2]

(c) Civil P. C., S. 115—Non appealable order in execution without jurisdiction likely to cause judgment-debtor irremediable injury—High Court should interfere under S. 115—Civil P. C., S. 151.

Where the existence of a non-appealable order on execution, from which an appeal was filed may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution and the whole of the proceedings were without jurisdiction the case is one where the unusual course of interfering under the revisional powers conferred by S. 115 should be taken. [P 162 C 1]

Sanyal—for Appellant.

Tha Kyaw—for Respondent.

Judgment.—In Civil Execution Case No. 37 of 1928, of the Township Court, Amarapura, orders were passed on 26th March 1928, committing the judgment-debtor to jail. Execution was taken out over one year from the date of the decree and it was, therefore, compulsory under O. 21, R. 22 to issue a notice to show cause to the judgment-debtor before ordering his arrest. It is common ground that no such notice was issued.

The District Court on appeal held that the failure to issue notice was merely an irregularity which did not vitiate the subsequent arrest. Sub-S. (2) allows the Court to issue process for reasons to be recorded without first issuing notice, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. The Judge recorded no reasons for issuing process and obviously overlooked the provisions of R. 22, O. 21. Under the circumstances the failure to issue notice to the judgment-debtor was not a mere irregularity, but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction as was laid down in *Shayam Mandal* v *Satinath Banerjee* (1) There is a consensus of opinion on this point in the High Courts. There can be no doubt that the order for arrest of the judgment-debtor and all the proceedings in execution were void in consequence of the initial failure to issue notice.

For the decree-holder in this Court, however, the objection has been taken that no appeal lies against the order in question, which was passed under S. 51 and cannot be considered as a question arising between the parties to the suit in which the decree was passed relating to the execution or satisfaction of the decree. It is contended accordingly that no appeal lies. This contention must prevail. No question arose between the the parties for determination. No objection was made to the committal to jail and the question of its legality was not then raised.

Had the judgment-debtor at the time challenged the jurisdiction of the Judge to pass orders in execution, then the order deciding the question of jurisdiction would have been an order under S. 47 and would have been appealable. I hold, therefore, that no appeal lies and the appeal is dismissed, but as the point should have been taken in the District Court there will be no order for costs. It is conceivable, however, that the exis-

(1) [1917] 44 Cal. 954=24 C. L. J. 523=38 I. C. 493=21 C. W. N. 776.

tence of the order on execution may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution. As the whole of the proceedings were without jurisdiction the case is one where I feel bound to take the unusual course of interfering under the revisional powers conferred by S. 115. The order appealed against is, therefore, set aside. I notice, the decretal amount was subsequently paid into Court. By consent it will remain there for a reasonable time, say one month from receipt of this order, to enable the decree-holder to take fresh proceedings by way of execution, if he wishes to do so.

M N./R K. *Order set aside.*

A. I. R. 1929 Rangoon 162

BROWN, J.

Ma Shin—Appellant.

v.

Maung Han and *others*—Respondents.

Second Appeal No. 532 of 1928, Decided on 8th January 1929, against judgment of Dist Court, Bassein, in Civil Appeal No. 78 of 1928.

Civil P. C., S. 11, Expln. iv—Plaintiff and defendant in present suit being co-defendants in former suit—Plaintiff in former suit claiming partition on basis of agreement—Present plaintiff admitting his claim but suit dismissed on ground that other defendants in that suit treated land as their own and that agreement for partition was not proved—Plaintiff in present suit alleging that land was jointly owned by her husband and defendant 1 who transferred it with condition to repurchase—Defendant 1 repurchasing it — Plaintiff claiming half share on payment of half purchase money—Present suit was not barred by res judicata.

The plaintiff as well as defendants in the present suit was co-defendants in a former suit, in which the plaintiff sued for partition of land on the basis of an agreement to that effect. The plaintiff in the present suit admitted the claim of the plaintiff in that suit but the suit was eventually dismissed on the ground that the other defendants were dealing with the land as their own and that the contract of partition was not proved. The present plaintiff alleged in the present suit that the land really belonged to her husband and present defendant 1 but was transferred by them with a condition to purchase and claimed that as defendant 1 had purchased it, she was entitled to half share on payment of proportionate price money. The defendants contended that as this ground of defence was not raised by the plaintiff in the former suit, the present suit was barred by res judicata.

Held: that as the relief claimed by the plaintiff in the former suit was entirely independent of the present claim, the raising of which in the former suit would have made no difference to the decision in the former suit, and as also it was not necessary to decide in the former suit the question raised in the present suit, the present suit would not be barred by the principle of res judicata: *A. I. R.* 1925 *Rang.* 228, *Rel. on.*; and *A. I. R.* 1923 *Rang.* 233, *Expl* [P 163 C 2]

S C Das—for Appellant.

Thein Maung—for Respondents.

Judgment.—In Civil Regular No. 42 of 1927 of the Sub-Divisional Court of Kyonpyaw one Maung Aung Ban and two others sued the parties to the present appeal and one other for specific performance of a contract. Their allegation was that the land in suit had originally belonged to the parents of the plaintiffs and of all but one of the defendants. About 1914, the present respondent, Maung Han, and Maung Nge, the husband of the present appellant, Ma Shin, of on behalf of all the heirs made over the land in satisfaction of a mortgage debt, reserving the right of repurchase. About four years later, with the consent of all the heirs, Maung Han and Maung Nge repurchased the land on behalf of all these heirs, and it was agreed amongst the heirs, that, when the purchase money was repaid to Maung Han and Maung Nge the land would be divided amongst all the heirs. They, therefore, asked for a partition of the land on payment of their proportionate shares.

The present appellant, Ma Shin, admitted the plaintiffs' claim in that suit, but the suit was contested by the present respondents, Maung Han, Maung Myan and Po Hla. The suit was eventually dismissed. It was held that Maung Han and Maung Myan had been dealing with the land as their own. As regards the alleged promise to partition the land at the time of repurchase, the finding was somewhat vague; but apparently it was held that the contract was not proved. In the present case Ma Shin has sued the three respondents with regard to the same piece of land. She now says that the land in question was purchased by her husband, Maung Nge, and Maung Han from a Chettyar firm; and that, in 1914, Maung Nge and Maung Han mortgaged the land to Po Hla. Later on they transferred

the land outright to Po Hla with an option of repurchase.

In the year 1919 this option of repurchase was exercised by defendant 1, Maung Han. Maung Nge has since died and Ma Shin claims that Maung Han must be held to have repurchased for himself and for Maung Nge and she asks for half of the land on payment of half the purchase money Rs. 920.

The suit is contested by Maung Han and Maung Myan and has been dismissed on a preliminary point. The trial Court has held that the suit is barred by the principle of res judicata on account of Civil Regular No. 42 of 1927, and this decision has been upheld on appeal by the District Court. It is against this decision that the present appeal has been filed.

The learned District Judge was of opinion that the case now set up by the appellant was a case which ought to have been set up as a ground of defence in the earlier suit It is difficult to see how the present case would have been a good defence to the earlier suit. The question in that suit was whether the plaintiffs had the right to obtain a share in the land by virtue of a contract entered into by them and the other heirs. Ma Shin's present case is that the land actually belonged to her husband and to Maung Han, and it is on that ground that she is now claiming a share. But this case is not necessarily inconsistent with the case set up by the plaintiffs in the former suit. Even if the land were actually owned by Maung Nge and Maung Han only that fact would not necessarily negative the possibility of a contract. whereby they agreed to partition the land on payment of the proportionate shares by the other heirs. Further, the District Judge does not seem to have given sufficient attention to the fact that in the former suit the contesting parties were Maung Aung Bin and two others on one side and all the present defendants on the other :

The conditions requisite for an adjudication to be res judicata as between co-defendants were discussed in the case of *Ma Tok* v. *Ma Yin* (1). It was there laid down that the following conditions should be fulfilled before the principle of res judicata could apply:

(i) that there should be a conflict of interest between the co-defendants;

(ii) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit, and

(iii) that the judgment should contain a decision of the question raised as between the co-defendants.

Now, there is a conflict in the present case between the persons who were co-defendants in the earlier suit, but in that suit the relief claimed by the plaintiffs was based on an alleged contract which is entirely independent of the claim now put forward by Ma Shin. Their success depended on whether they could prove that contract. A decision on the points now raised by Ma Shin could have been of no avail whatsoever to them in that suit, and the raising of the present claim by Ma Shin could have made no difference whatsoever to the decision of the earlier case. It was not necessary to decide this point in the earlier suit; nor can the judgment either directly or impliedly be held to contain a decision of the question now raised.

I have been referred on behalf of the respondents to the case of *Maung No* v. *Maung Po Thein* (2). In that case the following observations by a Bench of the Calcutta High Court in an earlier case were quoted with approval with reference to Expln. 4, S. 11, Civil P. C. :

> A matter which ought to be raised but which as matter of fact is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of res judicata, for in that case it is obvious that Expln. 2 (of S. 13 of the former Code) would be meaningless. We must take it therefore that if the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must under S. 13 be deemed to have been finally decided against the person who ought to have raised it."

With these remarks I entirely agree. But they do not seem to me to be of any assistance to the respondents in the present case. The decision in the former suit was to the effect that the plaintiffs in that suit had failed to prove their rights as heirs on a contract to a share in the land. It is quite impossible to hold that this decision is necessarily inconsistent with the case now put forward by Ma Shin. It is true that when the claim

(1) A. I. R. 1925 Rang. 223=3 Rang. 77.

(2) A. I. R. 1928 Rang. 239=1 Rang. 369.

of res judicata is based on Expln. 4, S. 11 it is not necessary that there should have been any express decision on the 'matter which ought to have been made a ground of defence or attack. But for the provisions of the sections to be operative at all, the issue, or the matter in issue, must have been heard and finally decided in the earlier case; that is to say, the decision in the earlier case must have been such as to imply an adverse finding on the matter which ought to have been made a ground of defence or attack. These conditions are not fulfilled in the present case, and, in my opinion, the present suit is not barred as res judicata.

It has been suggested by the learned advocate that when Ma Shin was examined as a witness in the earlier case her statements were not entirely consistent with the case she now puts forward; but I am not now concerned with the merits of her present case. The sole question for decision at present is whether the suit is barred as res judicata, and on that point I must hold that the appellant is entitled to succeed. I, therefore, set aside the judgments and decrees of the lower Courts and direct that the suit be reopened and and tried on its merits by the trial Court. The appellant will be entitled to a refund of the Court-fees paid by her in this Court and in the District Court. The balance of her costs in the District Court and in this Court will be paid by the respondents.

S.N./R.K. *Suit remanded.*

A. I. R. 1929 Rangoon 164

RUTLEDGE, C. J., AND BROWN, J.

E. M. Joseph and *others*—Appellants.

v.

Samsunder and *others*—Respondents.

First Appeals Nos. 207 to 209 of 1928, Decided on 4th January 1929, against judgment of original side in Civil Regular Nos. 353, 398 and 399 of 1927

Registration Act, S. 17 (2) (v)—Landlord's letter to tenant informing him "As long as you occupy room we shall not ask you to vacate it" does not amount to lease or agreement to lease and is exempt from registration —Registration Act, S. 2.

In a suit for specific performance on the basis of an oral agreement to lease, the plaintiff filed a letter written to him by the landlord. The letter recited "This is to inform you that as long as you occupy the room. . . . . we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day."

He'd : that the letter did not operate as a lease or an agreement to lease. It was a unilateral letter which at the most gave right to obtain another document, the formal lease. It was therefore exempt from registration under S. 17 (2) (v), and so could be admitted in evidence though unregistered; *A. I. R.* 1927 *Rang.* 169; and *A.I.R.* 1925 *Cal.* 1087, *Dist.* [P 165 C 1]

Banerji—for Appellants

Paget—for Respondents

Judgment—The property in dispute in these three appeals consists of three rooms, Nos. 3, 4 and 5 of house No. 68, Fraser Street, Rangoon. The house in question is part of an estate of which the beneficial owners are the four appellants. The four appellants are brothers and appellant 1, E M. Joseph, is trustee for the management of the estate The rooms in question have for some years been occupied by the respondents as tenants. The respondent, Dwarka Prasad has occupied room No 3, Samsunder and Dwarka Prasad have occupied room No 4 and Samsunder has occupied room No. 5. Appellant 1 as trustee of the estate brought three ejectment suits in the Small Cause Court against the respondents.

It is alleged by the respondents that during the pendency of these suits an agreement was come to whereby they were to be permitted to continue in occupation for the rest of their lives on the payment of Rs 5 per day rent and of a lump sum of Rs 1,000 salami for each room This agreement was never reduced to the form of a legal document, and the respondents sued for specific performance of the agreement As a result the ejectment suits in the Small Cause Court were dismissed.

The appellants, whilst admitting that there was some discussion as to a settlement and admitting that the salami of Rs. 1,000 for each room was actually paid to them, deny that there was ever any definite agreement as to a lease. The trial Court has granted a decree for specific performance in each case and it is against these decrees that these three appeals are filed.

The first question for consideration in these appeals has reference to certain letters written by three out of the four appellants. That these three appellants signed those letters is admitted; but it is argued on their behalf that the letters contain on the face of them an agreement to lease, that they are, therefore, compul-

sorily registrable under the Registration Act and that as they have not been registered they cannot be accepted in evidence. The letter to Dwarka Prasad reads as follows:

"Sir, This is to inform you that as long as you occupy room No. 3 of house No. 68, Fraser Street, Rangoon, we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day from 1st February 1927. You are not to sub-let the premises."

The letter to Samsunder with regard to room No. 5 is couched in similar terms and the letters to Dwarka Prasad and Samsunder jointly with regard to room No. 4 is also similarly worded except that the last sentence "You are not to sublet the premises,' is omitted.

In accordance with the definition given in S. 2 (vii), Registration Act, the term "lease" includes an agreement to lease, and under S. 17 of the Act a lease of immovable property for any term exceeding one year requires registration. The letters in question state the amount of rent and also declare that the appellants do not propose to evict the respondents.

We have been referred on behalf of the appellants to the case of *Ramjoo Mahomad* v. *Haridas Mullick* (1). In that case the defendant had written to the plaintiff a letter in which he said that he agreed to take a certain house on lease and set forth the terms under which he agreed to accept the lease and the plaintiff in reply wrote a letter to the defendant in which he said that he confirmed the defendant's letter. As a result of these two letters the plaintiff occupied the premises and paid the rent agreed on. Some 18 months later a notice was served on him to quit and he then brought a suit for specific performance. It was held that the letters in question amounted to a present demise of the premises and were compulsorily registrable. We do not, however, think that that case is analogous to the case before us. In one letter in that case there was a definite statement of an agreement to take the premises on lease subject to definite terms set forth in the letter and in the letter in reply there was a definite acceptance of the offer and the parties had acted on the letters as creating a lease for 18 months after the letters were written. The letters in the present case do not show any mutual agreement. They do not on the face of them contain any agreement at all. The three plaintiffs merely state in them that they will not ask the respondents to vacate the rooms. There is no mention whatever in the letters of the payments of salami and the letters are entirely unilateral letters. It seems to us clear that the letters were never really intended in themselves to operate as a lease or an agreement to lease, but that they contemplated execution of a formal agreement at a late stage. Formal assent to a proposal is clearly required before there can be any binding agreement. That assent is not contained in the letters at all and if these letters can be said to create a right at all, it seems to us, that was merely a right to obtain another document which would, when executed, create a lessee's interest in the property and that, therefore, the letters were exempted from registration under the provisions of S. 17 (2) (v), Registration Act,

We have been referred also to a case of this Court *Maung Ba Sein* v. *Maung Htoon Shwe* (2). but there again the document which was held to be compulsorily registrable was a formal document which set forth definite agreements by both landlord and tenant. We are of opinion that the letters in question have rightly been admitted in evidence by the trial Judge. It remains then to be considered whether the plaintiffs did in fact establish that a definite contract to enter into a lease was made. (Here the judgment discussed evidence and concluded as below). The learned trial Judge appears to have given the decree in somewhat too vague terms but we consider that he was right in granting a decree for specific performance and the orders we are passing are substantially in favour of the respondents. They must therefore be allowed their costs. We alter the decree of the trial Judge in each case to a decree that the defendants or defendant 1 on their behalf shall execute a lease in favour of the several plaintiffs, the conditions of the lease to be that a rent of Rs. 5 a day be paid, that the lease shall continue for the lives of the plaintiffs, that the plaintiffs shall have no power to sublet the premises. The defendant-appellants shall pay the costs of the respondents in both Courts in all the 3 cases.

S.N./R.K. *Decree altered.*

(1) A. I. R. 1925 Cal 1097=52 Cal. 1035.

(2) A. I. R. 1927 Rang. 169=5 Rang. 95.

A I. R. 1929 Rangoon 166

BROWN, J.

Gunnu Meah—Appellant.

v.

A. Rahman—Respondent.

Second Appeal No. 434 of 1928, Decided on 30th January 1929, against judgment of Dist. Judge, Insein, in Civil Appeal No. 22 of 1928.

(a) Civil P. C., S. 100—Suit for enforcement of award praying also that award be filed — Second appeal lies — Civil P. C., Sch. 2, Para. 20.

Where a plaint was headed "Suit valued at Rs. 86 for enforcing an award" and ad valorem Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held: that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie: 7 *Bur. L. T.* 279, *Ref.* [P 166 C 2]

(b) Arbitration—Suit for enforcement of award—Signature of party may not estop him from disputing correctness—Civil P. C., Sch. 2, Para. 15.

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the ward: *A.I.R.* 1923 *Rang.* 187, *Dist.* [P 167 C 1]

N. N. Sen—for Appellant.

Bhattacharyya—for Respondent.

Judgment.—The appellant, Gunnu Meah, filed a suit in the Township Court of Insein for the enforcement of the terms of an award directing the defendant to convey a certain house to the plaintiff. The plaint set forth that the matter was referred to an arbitration consisting of Mahomedan elders of Insein and that an award was made by them on 25th August 1927. The defendant, while not denying that the matter had been referred to arbitration, pleaded that the award was invalid as it had not been signed by all the arbitrators and also that the award was bad on the ground of misconduct and corruption of the arbitrators. The written statement did not specify what the misconduct and corruption complained of were. Evidence was called to show that the arbitrators refused to examine two of the witnesses named by the defendant.

The trial Court held that the arbitrators to whom the matter was referred consisted of some 30 persons and that only 12 of these persons signed the award. The Court, further, held that the arbitrators had refused to examine witnesses named by the defendant. The suit was therefore dismissed. The findings of fact by the trial Court were accepted by the lower appellate Court, which dismissed the appeal; and the present appeal has been filed under the provisions of S. 100, Civil P. C.

A preliminary objection has been taken on the part of the respondent to the effect that no further appeal lies. It is contended that there was no suit to enforce an award but that in fact the matter before the Court was an application to file an award under the provisions of para 20, Sch. 2, Civil P. C. If that contention is correct, then no second appeal would lie; but I do not think that the contention can be upheld. The distinction between an application to file an award and a suit to enforce an award is pointed out in the case of *Nga Hla Gyaw* v. *Mi Ya Po* (1). In the present case the plaint is headed "Suit valued at Rs. 86 for enforcing an award" and ad valorem Court-fees have been paid accordingly. It is true that at the conclusion of the plaint there is a prayer that the award may be ordered to be filed; but the prayer goes on to ask that a decree be passed in accordance with its terms for the conveyance of the said house to the plaintiff. The plaint was accepted as a plaint in a suit and appears to have been treated as such throughout.

I am of opinion that there was a suit for the enforcement of the award before the trial Judge and that a second appeal does therefore lie. But in this second appeal questions of fact cannot be raised and it has not been contended before me that the findings that only some of the arbitrators signed the award and that the witnesses were not all examined can be challenged. The only point argued on behalf of the appellant is that the respondent signed the award himself and is therefore now estopped from challenging its validity.

I have been referred on behalf of the appellant to the case of *U Gunawa* v. *U Pyinnyadipa* (2). In that case there had been a reference to arbitration and there had been an irregularity in the proceedings in that at one of the sittings of

(1) [1914] 2 U. B. R. 26=27 I.C. 31=7 Bur. L. T. 279.

(2) A. I. R. 1923 Rang. 187=1 Rang. 15.

the arbitrators when witnesses were examined one of the arbitrators was absent. This was the second of the three sittings and no objection was taken at the time, nor was it raised in the pleadings of the case. It was held that by continuing the proceedings without objection to this irregularity, the parties must be held to have condoned the irregularity and could not seek to set aside the award on the ground of that irregularity. I do not think that that decision is very relevant to the present case.

The whole arbitration in the present case was conducted at one sitting. There was no evidence to show that the respondent condoned any irregularity during the course of the arbitration proceedings. It was when proceedings were all concluded and the award had been delivered, that his signature was appended to the award. It was stated in *U Gunawa's* case (2)

" a party having knowledge of an irregularity cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object. "

The signature of the respondent in the present case was appended when the terms of the award were known to him and there was no question therefore of his taking a chance that the award would be in his favour. His case is that he was practically compelled to sign the award. I am not satisfied that his mere signature of the award necessarily removes all objection to the irregularity in the award. The chief difficulty in the way of the plaintiff seems to me to be this, that there is no mention in the pleadings of the defendant having signed the award at all. The suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award. The question therefore of the acceptance of the award by the defendant was not in issue. If both parties to the award signed the award after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures; but this was not the case for the plaintiff here and I am not prepared to hold that the mere signature by a party to an award necessarily in all cases estops him from afterwards disputing the correctness of the award. In all the circumstances of the case I am not satisfied that there is sufficient ground for interference. I therefore dismiss this appeal with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 167

OTTER AND HEALD, JJ.

Thein Pe and *others*—Appellants.

v.

J. P. De Souza and *another*—Respondents.

Letters Patent Appeal No 111 of 1928, Decided on 25th February 1929, against Judgment of Doyle, J , in Special Second Appeal No. 95 of 1928.

Contract Act, S. 73—Person engaged as teacher by month—No provision for notice to leave—Contract can be terminated by one month's notice.

Where a person is engaged as a teacher by the month and there is nothing in the agreement, providing for notice to leave on either side, the contract would be terminated by a reasonable notice and one month's notice is reasonable : *Allen : In the matter of*, (1910) *K. B.* 397, 13 *Bur. L. T.* 168, *Rel. on.*

[P 168 C 1]

E. Maung—for Appellants.

Ba Thein—for Respondents.

Judgment.—This is an appeal under the Letters Patent which arises under the following circumstances. The plaintiff who is a school master brought a suit against the members of the National School Committee of Einme, claiming damages for wrongful dismissal. The learned Sub-Divisional Judge was of opinion that the plaintiff had been engaged on a month to month contract and awarded him one month's salary by way of damages. The District Judge, however seems to have agreed that the plaintiff was engaged upon a monthly basis, but he was of opinion that six months' salary would be a reasonable compensation for his dismissal. Upon appeal to this Court, the learned Judge appears to have agreed with the finding of the two lower Courts as to the terms upon which the plaintiff was engaged but he said that he was not prepared to disagree with the "opinion of the lower appellate Court that six months' salary in lieu of notice is not excessive " He subsequently granted a certificate enabling an appeal to be made to a Bench of this Court. The respondent entered into the service of the appellants

on or about 26th July 1926. On 15th October of that year, he received a letter terminating his employment, "within one month" from his date and offering to pay the sum of 225/- being as we understand it 150/- by way of salary for that month and the balance 75/- being in respect of fifteen days in October. The respondent refused to accept this offer and wrote on 22nd October claiming 3757/- and included in this sum was 3600/- as damages consequent upon his dismissal. The first question to be determined is · What was the agreement for the hiring of the respondent? We need say no more than that we agree that he was employed by the month at a salary of 150/- per month. It is clear that there was nothing in the agreement (which was a verbal one) provided for notice to leave on either side, nor was there any evidence at the trial of the existence of any custom in such a case As had been laid down, therefore, in a number of cases, the contract would be terminated by a reasonable notice Upon this point, we need only refer to the case of *In the matter of the African Association, Ltd.* and *Allen* (1) *A David* v. *St Anthony's High School* (2) a decision of the Chief Court of Lower Burma, apparently upon a somewhat similar facts In the latter case [following *M. E. Moola* v. *K. C. Bose* (3)] the learned Judge thought that thirty days wages was sufficient. In the present case, the respondent was engaged by the month, and in the absence of special agreement, it seems to us reasonable that he should be given one month's notice We observe he was not turned out forthwith. He had an opportunity while still keeping his appointment to look for other work We have no doubt that the committee have acted reasonably and the appeal is therefore allowed. As the appellants have been all along willing to pay 225/- mentioned in their notice respondent must pay the costs of the appellants in all Courts.

P.N /R.K. *Appeal allowed.*

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(1) [1910] 1 K. B. 397=79 L. J. K. B. 259=26 T. L. R. 234=102 L. T. 129.
(2) [1920] 13 Bur. L. T. 169
(3) [1916] 8 L. B. R. 420=33 I. C. 981=9 Bur. L. T. 63.

A. I. R. 1929 Rangoon 168

HEALD, AND MYA BU, JJ.

K P S. P. P. L. Firm—Appellants.

v.

C. A P. C. Firm—Respondents.

Civil Misc. Appeal No. 55 of 1928, Decided on 30th January 1929, against order of Dist. Court, Tharrawaddy, in Civil Misc. No. 99 of 1926.

(a) Provincial Insolvency Act (5 of 1920), S. 61—Discharge of insolvent does not affect Court's power of distributing assets.

The insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. The discharge of the insolvent does not put an end to the Court's power to give such directions : *A.I.R.* 1925 *Rang.* 105, *Rel. on.* [P 169 C 2]

(b) Provincial Insolvency Act (5 of 1920), S. 41—Proceedings do not necessarily end.

An order under S. 41 does not necessarily put an end to the proceedings in the insolvency . *A. I. R.* 1925 *Rang.* 105, *Foll.* [P 169 C 2]

(c) Provincial Insolvency Act (5 of 1920), S. 56 (2) b—No commission on realization by sale of mortgage money—Burma Courts Manual, Para. 307 (A) I.

In Burma the receiver is not entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property : *A. I. R.* 1928 *Rang.* 23, *Foll.* [P 170 C 1]

B. K. B. Naidu—for Appellants.

Venkatram—for Respondents.

Judgment.—The present parties are creditors of one Kyin Sein, who was adjudicated insolvent on his own petition in Civil Misc. Case No. 99 of 1926 of the District Court of Tharrawaddy. The insolvent possessed only the following properties :

(1) A house at Tharrawaddy.

(2) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Thanatpyit kwin, measuring together 37-67 acres

(3) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Tawyagon kwin, measuring together 22 99 acres.

(4) Two holdings of paddy land said to be Nos. 52 and 53 of 1925-26 of Ashe kwin, measuring together 29'00 acres.

The M. T. T. K. M. M. S. M. A. R. Chettyar Firm proved in respect of a first mortgage over the house for Rs. 8,152-15. The K. P. S. P. P. L. Firm, who are the present appellants, proved in respect of a second mortgage on the house and the lands in Thanatpyit kwin for Rs. 7,917. The M. L. M. R. M. Firm proved in res-

pect of a first mortgage on the lands in Thanatpyit kwin and a first mortgage on holding No. 52 in Ashe kwin for Rs. 7,307 4. The C. A. P. C. Firm, who are the present respondents, proved in respect of an only mortgage on the lands in Tawyagon kwin and on holding No. 52 in Ashe kwin, and a second mortgage on holding No. 52 in Ashe kwin for Rs. 6,557-8. There were other creditors whose debts were unsecured. By an oversight the C. A. P. C. Firm, that is the present respondents, were omitted from the schedule of creditors. The receiver sold all the properties free of mortgage, as shown below :

	Rs. a.p.
(1) The house for ...	8,635 0 0
(2) ,, Thanatpyit paddy lands for	10,900 0 0
(3) ,, Tawyagan ,, ,, ,,	620 0 0
(4) ,, Asho kwin ,, ,, ,,	1,150 0 0
	21,305 0 0

From this amount the receiver deducted Rs. 1,065-4 as his commission, leaving for distribution Rs. 20,239-12. That amount was divided among the creditors as follows :

	Rs. a.p.
To the M.T.T.K M.M.S.M.A.R. Firm	8,203 4 0
,, K.P.S P.P.L ,,	4,439 4 0
,, M.L.M.R.M. ,,	7,597 4 0
	20,239 12 0

The C. A. P. C. Firm, who received nothing, naturally complained and the Court said that because the lands which were mortgaged to them and were not mortgaged to any of the other creditors had been sold for Rs. 1,770, they were entitled to recover that amount from the K P. S. P. P. L Firm who had taken the money out of Court. The K. P. S P. P. L Firm appeals against that finding on grounds that the insolvency Court had no jurisdiction to decide in insolvency proceedings such a question as that arising between them and the C. A. P. C. Firm, that if it had such jurisdiction generally, it had no such jurisdiction at the time when the order was made because an order for the discharge of the insolvent had already been made, that the application of the C. A. P. C Firm was res judicata by reason of the rejection of similar applications made at earlier stages of the proceedings and that on the merits the C. A P C. Firm was not entitled to recover the sum of Rs.1770 from them.

There is clearly no force in the first of these grounds because the insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. Similarly, there is no force in the ground that the discharge of the insolvent put an and to the Court's power to give such directions. It was said in the case of *Rowe and Co. Ltd.* v. *Tan Thean Tark* (1) that :

"One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge,"

and we agree with the conclusion of the learned Judge in that case that an order under S. 41 of the Act does not necessarily put an end to tee proceedings in the insolvency. We have no doubt that in this case the Court still had power to make the order against which appellants appeal. There is clearly no question of res judicata. It is true that respondents had made various prior applications for the proceeds of the sale of the properties mortgaged to him, but there was no final order adjudicating on their claim before the order which is under appeal. As for the merits, it is clear that appellants' case has no merits of any sort. The sum of Rs 1,770 mentioned in the lower Court's order represents the sale proceeds of the Tawyagon lands aud of both the holdings in Ashe kwin. The Tawyagon lands were mortgaged only to respondents and as the sale proceeds of those lands were insufficient to satisfy respondents' mortgage respondents were clearly entitled to the whole of those sale proceeds, none of the other creditors having any interest of any sort in them. The amount of those sale proceeds was Rs. 620. As for the Ashe kwin lands respondents held a first mortgage over holding No. 53 and a second mortgage over holding No. 52, the M. L. M. R. M. Firm having a prior mortgage over holding No. 52 The M. L. M. R. M. Firm's first mortgage over holding No. 52 was satisfied by the sale of the Thanatpyit lands, which were also included in their mortgage, without recourse to the sale proceeds of holding No. 52 and therefore the sale proceeds of

(1) A. I. R. 1925 Rang. 105=2 Rang. 649.
(2) A. I. R. 1913 Rang. 28=5 Rang. 623.

holding No. 52 as well as those of holding No.53 were wholly available for satisfaction of respondents' mortgage debt. Appellants held no mortgage over any of the lands which were mortgaged to respondents and in respect of which respondents claim the sale proceeds, and since those sale proceeds were insufficient to satisfy respondents' mortgage debt, neither appellant nor any other creditor had any rights in respect of them.

The only matter in which the lower Court's order was mistaken is that it ordered appellants to pay the gross sale proceeds to respondents, disregarding the fact that the receiver had already taken his commission out of them. The order must therefore be varied by deducting from the sum of Rs. 1,770 the amount of the receiver's commission on the sale of these properties. That commission amounted to Rs. 88-8 and therefore the sum payable by appellants to respondents is Rs. 1,681-8.

The receiver had, however, no right to any commission : vide the ruling of this Court in the case of *R M. M. Chettyar Firm* v. *U Hla Bu* (2) and the rules contained in para. 307a (1) of the Burma Courts Manual, and therefore he must refund to respondents the sum of Rs 88-8 which he has wrongly taken. On application by any of the other creditors who are interested in the matter he should be made to refund the balance of his commission so far as such commission was not paid in respect of the surplus of sale proceeds over the mortgage debt due on the particular lands sold.

We note that the conduct of the insolvency proceedings in the lower Court reflects no credit on either the Court or the receiver. The Court clearly framed the schedule of creditors carelessly, since it omitted to notice that respondents had proved their mortgage debt and it failed to enter them in the schedule, and both the Court and the receiver seem to have been entirely ignorant of the provisions of S. 47, Insolvency Act, and of the fact that the receiver is not entitled to commission on the amount of the mortgaged money realized by the sale of the mortgaged property.

In the result the order of the lower Court is varied by the substitution of the amount Rs. 1,681-8 for Rs. 1,770 as payable by appellants to respondents and by the addition of an order for the payment of Rs. 88-8 by the receiver to respondents. In view of the fact that the grounds for the alteration of the order were not mentioned by appellants in the appeal, appellants will pay respondents' costs in this Court, advocate's fee to be five gold mohurs.

The respondents have filed a cross-objection claiming that the Court ought to have allowed them interest on the amount awarded. The learned Judge in the lower Court considered respondents' claim to interest and rejected it, and we are of opinion that in refusing interest he exercised a right discretion, because respondents were negligent in not seeing that they were brought on to the schedule of creditors. They were present at the sale and raised no objection to the sale of the properties, which were mortgaged to them, free of their mortgage. We therefore dismiss the cross-objection without orders for costs.

M.N./R.K. *Order varied.*

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* A. I. R. 1929 Rangoon 170

CHARI, J.

(*Maung*) *Ba Than* and *another*—Appellants.

v.

(*Maung*) *Sein Win* and *another*—Respondents.

Special Second Appeal No 548 of 1928, Decided on 25th April 1929.

(a) Adverse Possession—Defendant in possession of plot of land for nearly 15 years prior to its purchase by plaintiff—It will be assumed, in suit brought to eject defendant, that his possession was adverse till date of conveyance to plaintiff in absence of evidence that such possession was permissive.

Where the defendant was in possession of a plot of land for nearly 15 years prior to the purchase of the land including the plot by the plaintiff and where there was no evidence that the possession of the defendant was permissive, in a suit brought by the plaintiff after purchase to eject the defendant, it will be assumed that possession of the defendant was adverse till the date of the conveyance to the plaintiff : *Special Second Appeal No.* 121 *of* 1916, *Rel. on.* [P 171 C 2]

*** (b) Evidence Act, S. 116—Rights of vendors of plaintiff extinguished by adverse possession by defendant—Defendant, after purchase of land by plaintiff taking his permission to occupy land—He is not estopped from pleading acquisition of title by adverse possession.**

Where the rights of the vendors of the plaintiff had become extinguished by adverse pos-

session of plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot. [P 172 C 1]

E. Villa—for Appellants.

S. Ganguli—for Respondents.

Judgment.—The plaintiffs in the original suit sued to eject the defendants from a small portion of land, measuring. ·04 acre, forming part of a larger plot of land which they had purchased from Po Kyaw and Daw Hnit. The map shows that this portion of the land is abutting on the creek and is presumably used by the defendants as a dwelling site. The trial Judge gave a decree in favour of the plaintiffs in the suit, whose case was that after he had purchased the land, the defendants obtained their permission to occupy this land. The learned Township Judge believed the evidence on this point and though he was of opinion that the defendants had been living in the suit land for over 15 years, since it had been proved beyond all reasonable doubt that the defendants asked the plaintiff's permission, their subsequent possession would not be adverse to the plaintiffs, however long the defendants may be in possession He therefore held that the defendants could not claim adverse possession, even if they had been occupying the land for over 12 years. I am not sure what the learned Judge means exactly by these remarks, but in the result he gave a decree in favour of the plaintiffs, as I have stated above. The matter was taken up in appeal to the District Judge, who held that the defendants had been in possession of the land for over 15 years and that they could claim to have been in adverse possession, and, therefore the plaintiff's suit must fail. He therefore allowed the appeal and dismissed the plaintiff's suit. The plaintiffs come up to this Court in second appeal. Their evidence is not of a very high quality that the defendants did ask for permission from the plaintiffs to occupy the land. What really happened possibly is that the plaintiffs having bought the land told the defendants that they had become the owners of the land and wanted to remove their house, and the defendants possibly had replied that they would do so next year or so. I have doubts whether anything more transpired, but assuming that the evidence on this point is as found by the Township Judge, the question still remains whether the possession of the defendants is on that account permissive and whether their seeking permission of the plaintiffs estops them in denying the plaintiff's title and asserting their own title to the land. There is ample evidence and I am on this point in agreement with the District Judge that the defendants had been in possession of the land for nearly 18 years. That is for nearly 15 years prior to the purchase of the land by the plaintiffs. It is not alleged that their possession originally started permissively. Though the presumption of law is that every possession starts legally, where a plaintiff wants to establish that the defendant's original possession was permissive it is for him to prove this allegation and if he fails to do so, it will be presumed that the possession was adverse : see *Maung Gri* v. *U Shwe Gyo* (1). It must be therefore assmumed in the absence of any evidence to the contrary that the possession of the defendants was adverse till the date of the conveyance in favour of the plaintiffs. Ma Hnit, one of the persons who conveyed the land, states that the defendants built the house because the land was their own. This is possibly an error because the land clearly forms part of the holding sold by her and her husband to the plaintiffs, but the defendants themselves state what is probably true that they never asked anybody's permission when they built the house on the land.

It is in accordance with probability because in places like the place in question where the land is very cheap, no one ever thinks of asking anybody's permission when he builds a house on a portion of the land. If an objecting landlord takes steps to eject him from the land, he would be thought to be very unneighbourly. If the defendants had been in possession of the land prior to the purchase of the land by the plaintiffs for over 12 years, then the rights of the vendors of the plaintiffs whatever they were had become extinguished by operation of S. 28, Limitation Act. The result would be that at the time of the date of the sale, the vendors of the plaintiffs had no right, title or interest in the

(1) Special Second Appeal No. 121 of 1916, Decided by Maung Kin, J.

land. Any statement by the defendants, therefore must have been made based upon a mistake and misconception of the legal rights of the plaintiffs, and such an admission could not operate as an estoppel, nor could the permission if any by the plaintiffs to the defendants estop them under S. 116, Evidence Act, from denying the plaintiff's title. They would undoubtedly be licensees but they sought the license under a mistake. Therefore even assuming that the plaintiff's evidence on this point is true, it is still open to the defendants to plead that they acquired title by adverse possession, and on the evidence it must be held as the District Judge held that they had so acquired title to the land. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

A. I R. 1929 Rangoon 172

BROWN, J.

Ko Maung Nge—Appellant.

v.

Lalmaw—Respondent.

Special Second Appeal No. 585 of 1928, Decided on 8th May 1929.

Civil P. C., S. 11—Decree-holder applying for execution of preliminary mortgage-decree—Judgment-debtor not objecting to executability of decree and allowing it to be satisfied to certain extent—Judgment debtor cannot be said to admit that decree could be executed to any larger extent.

Although orders in execution proceedings operate as res judicata, nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree. [P 173 C 1]

Where a decree-holder applied for execution of a preliminary mortgage decree for a certain amount and the judgment-debtor did not raise objection that the decree was not executable at all and allowed it to be satisfied to a certain extent, it cannot be said that the judgment-debtor admitted that the decree could be executed to any larger amount so as to hold that the executability of the whole decree had been adjudicated upon. [P 173 C 1]

P. K. Basu—for Appellant.

S. Ganguli—for Respondent.

Judgment—In Suit No. 196 of 1925 of the Township Court of Toungoone U. Tha Maung sued for a decree for Rs. 572-8-0 with costs and interest against the respondent, Lalmaw. He set forth in his plaint that his debt was secured by a mortgage but that the mortgaged property had already been sold for default of payment of fishery revenue. He asked not for a mortgaged decree but for simple money decree. A written admission was filed on behalf of the defendant, and the Judge passed judgment to the effect that

"There will be a preliminary mortgage decree for Rs. 572-8-0 with costs and interest at the stipulated rate from the date of the suit till the date of payment, payable within six months from this date against the defendants."

An ordinary preliminary mortgage decree was drawn up. The amount payable under that decree was shown to be Rs. 500 as principal, Rs. 162-8-0 as interest and Rs. 63 as costs, and the total was stated to be Rs. 825-8-0 The date of the decree was 17th June 1925 On 19th June 1925 U Tha Maung filed an application for execution. In his application he stated the amount of the decree was Rs. 572 8-0 and the costs were Rs. 56-4 0. As a result of his application he realized a sum of Rs. 450 on 30th July 1925. Nothing further seems to have happened for over two years until on 10th September 1927, the present appellant Maung Nge filed an application for execution as transferee of the decree from U Tha Maung. In his application, he showed the amount due under the decree to be the same as on the previous application of U Tha Maung. This application was ultimately infructuous owing to the failure of both sides to appear on a day on which the case was fixed for hearing. On 3rd November 1927, the transferee of U Tha Maung filed another application for execution and in that application he showed the amount due as Rs. 662-8-0 for principal and interest and Rs. 63 costs. The judgment-debtor contended that the decree had been satisfied in full. The trial Court at first held in favour of the transferee. The judgment-debtor appealed to the District Court and that Court ordered further enquiry to be held. The Court held further enquiry and again passed orders that the decree had not been fully satisfied and was executable The judgment-debtor appealed again to the District Court and the learned Judge of that Court then for the first time discovered that the actual decree was not one which could be executed at all. That he was correct in this view, there can be no doubt.

The decree is not a decree for the payment of money, but merely an ordinary preliminary mortgage decree. It is clear

that it is incapable of execution. In view of this finding the District Court set aside the order of the trial Court directing execution against the judgment-debtor. Against this order the present appeal has been filed. It is not contended that the decree is in fact capable of execution but it is contended that in view of the previous proceedings and in accordance with the general principles of res judicata, the judgment-debtor cannot now raise this question. The provisions of S. 11, Civil P. C., do not specifically apply to execution proceedings, but it is settled law that the general principles of res judicata must be followed in dealing with such proceedings. The contention before me is that in the execution proceedings of 1925, the judgment-debtor might have opposed the execution on the ground that the decree was not executable at all, and that as he did not raise this contention and as the decree was actually executed it must be held that it had been finally decided by that Court that the decree was capable of execution. The difficulty in upholding this contention seems to me to lie in the interpretation of the effect of the previous order for execution In the 1925 proceedings the application shows that there was a money decree for Rs 634-4-0 But it is clear that the decree holder himself has not claimed that the Court decided that that was the amount to be executed. He himself now claims that the decree was for Rs. 725-8-0 and in the circumstances I do not see how it can be held that the effect of the previous decision was that the decree was executable for any specific amount. It was not in fact executable at all. The judgment-debtor by his action allowed it to be satisfied to the extent of Rs. 450 ; but it cannot be contended as a result of that that he admitted that it could be executed to any larger amount. If the principle of res judicata were applied at all, I think it is clear that the plaintiff would be limited to claiming Rs. 634-4-0 less the amount already executed.

There is authority for the view that although orders passed in execution operate as res judicata nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree, and the amount actually due under the decree in the present case is precisely nil. It does not seem to me that the previous proceedings really decided as between the parties anything more than that the sum of Rs. 450 could be realized under that decree. That being so, the question as to whether the decree is further executable has not been adjudicated either directly or impliedly, and I do not think that the principle of res judicata can be applied in this case. The appellant's remedy, if any, would appear to be to take steps to have a proper decree drawn up. I dismiss this appeal with costs.

P.N./R.K *Appeal dismissed.*

A. I. R. 1929 Rangoon 173

RUTLEDGE, C J , AND BROWN, J.

Ma On Kyi and *another*—Appellants.

v.

Ma Thaung May and *another* — Respondents

First Appeals Nos. 160 and 162 of 1928, Decided on 22nd May 1929.

(a) Buddhist Law (Burmese) — Adoption—Monk.

A Burmese Buddhist monk cannot adopt. [P 174 C 1]

(b) Buddhist Law (Burmese)—Adoption.

A mutual adoption by persons who have no bond either by relationship or in any other way is impossible [P 174 C 1]

Zeya—for Appellants.

Ba Maw—for Respondent.

Judgment—These are two appeals from a judgment of the Additional District Judge at Pyapon dismissing the plaintiff-appellants' suits. The plaintiffs minors claim certain property as theirs by reason of the fact that they were adopted with the right to inherit by one U Zawtipala, a rahan and Ma Thaik, deceased, by adoption deed. Appellants' advocate admits that the adoption of young children by a Burmese Buddhist monk is invalid but contends that the joint adoption by Ma Thaik is quite legal. The adoption deed (Ex. A) in the case of Ma On Kyi runs as follows :

" When monk U Wizaya of Rangoon said to monk U Zawtipala, resident of Bhamo Ywa Kyaung: It is very difficult for me alone to bring up the girl Ma On Kyi, whom I have in turn obtained outright and brought up I wish you to bring her up, jointly with Dayakamagyi Ma Thike, resident of Bhamo village, mutually adopt Ma On Kyi to inherit both good and bad inheritance and execute

the deed in the house of Ma Thike at Bhamo village."

(Sd.) U. Wizaya.

The other deed (Ex. B) runs as follows.

"This deed is executed on a Zayat in the compound of Obo Kyaung Thayettaw Taik, Rangoon in respect of a girl on the 8th Waning, Pyathe 1284, as follows: The surviving mother Ma Mai Mya after the death of her husband Maung Hmyin, says to Ko Po Kyin, the husband and Ma Hmen, the wife, residents of No. 57, 11th Street, Rangoon. "As it is too burdensome for me, who am a woman to bring up my natural daughter, please bring up the said child for good as your daughter. Having undertaken that hereafter there shall be nobody who will claim to take back the child. the child was delivered in the presence of local elder, Saya Ba and witnesses Ma Kwe Ma, Daw Ii, Ko Ba Thaw, Ko Po Myin, and Ma Hmon, those who had asked for the child for good, delivered the child to U Zawtipala, resident of Bhamo Ywa Kyaung, Moulmeingyun Town, Myaungmya District and Ma Thike resident of the same village, with consent for adoption with the right of inheriting. writer U Zawtipala.

The monk U. Zawtipala gave evidence at the trial. It appears that he had adopted a number of children, mostly females but they had died before reaching maturity. Ma Thaik was no relation of his but was a supporter and is referred to as a "Soon-ama." According to the evidence on behalf of the plaintiff U Zawtipala, though a Phongyi had inherited his share of family property, which was undivided and he was paid by other members of the family his share of the income of the property and at any rate in the latter years either brought paddy land in Ma Thaik's name on behalf of the minors or gave money to Ma Thaik with which to purchase land for the minors. We have already mentioned that Mr. Zeya admitted that it is impossible for a Burmese monk to adopt children. We agree that, bound as a monk is by the Vinaya, such a proceeding is quite impossible It is admitted that the two minor children were entrusted to Ma Thaik's care and lived with her. The adoption deeds have never been signed by Ma Thaik and the plaintiff's evidence represented her as having no property of her own and being maintained by U Zawptipala. The adoption from the deeds on the face of it looks as if it were a mutual adoption, but such a one would be impossible since there seems to have been no bond either by relationship or any other way between U Zawtipala and Ma Thaik. In fact, Ma Thaik seems to have been used by the Phongyi as an agent or servant. He could not keep the female children in his kyaung, or kyangdaik and according to his own statement he employed Ma Thaik and supported her as his agent or employee in looking after the two little girls. There is no evidence before us that Ma Thaik of her own volition ever wished to adopt the two girls as her daughters with a view to inherit In fact we have never come across a case, where two persons unconnected with each other either by relationship or marriage purported to adopt and became the parents of minor children. The only question argued before us was that of the adoption of the two minor appellants by the late Ma Thaik. An issue was framed namely: "was Ma Thaik a trustee or benamidar of the plaintiff?" This was not argued probably for the reasons given on p. 3 of the judgment appealed from, which shows that the appellants' advocate in the trial Court abandoned the plea that the properties in dispute belong to the minor appellants absolutely in their own right and that Ma Thaik was only their trustee or benamidar. The learned Judge goes on to say:

"He prays only for a declaration that the properties belong to the plaintiffs as the sole heirs of the deceased Ma Thaik, being her adoptive, daughters. There is therefore no necessity for us now to give a decision on the fourth issue."

The position then is that the plaintiffs have failed to establish that they were adopted with a right to inherit by Ma Thaik. It is also clear that while U Zawtipala purported to adopt them, in fact he could do nothing of the kind. That being the case, their suit was rightly dismissed by the trial Court. These appeals are dismissed with costs.

P.N./R.K. *Appeal dismissed.*

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A. I. R. 1929 Rangoon 175

RUTLEDGE, C. J., AND BROWN, J.

Abdur Rauf Chowdry—Appellant.

v

N. P. L. S. P. Chettyar Firm—Respondents.

First Appeal No. 236 of 1928, Decided on 30th January 1929, against the judgment of original side in Civil Regular No. 364 of 1926.

Rangoon Municipal Act (6 of 1922), S. 192—Mortgage not notified to corporation—Property sold for default in payment of property tax—Purchaser even after institution of suit on mortgage gets it free from mortgage—Lis pendens does not apply—Burma Land and Revenue Act (2 of 1876), S. 47—Transfer of Property Act, S. 52.

A mortgagee who had given no notice of his mortgage to the municipal corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47 by the corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction purchaser as defendant.

Held: that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally: *A. I. R.* 1927 *Rang.* 289, *Appr.* [P 176 C 1]

Held further: that the doctrine of lis pendens does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. [P 176 C 1]

K. C. Bose—for Appellant.

S. C. Das—for Respondents.

Judgment.—This is an appeal from the judgment and decree of the original side of this Court. The facts are as follows:

By a registered deed (Ex. B), dated 7th December 1922, one Ma Aye Nu alias Fatima Bi Bi mortgaged to the respondent firm for Rs. 3,000, premises known as No. 190, F Street, Tatmye Quarter, Rangoon. The mortgagee did not give any notice of his mortgage to the Rangoon Corporation. The mortgagor made default in paying the property-taxes from the second quarter of 1925 to the fourth quarter of 1926. After due notice to the mortgagor, the premises were proclaimed for sale by Ex. 2, dated 9th April 1927, which stated that the sale would take place on the spot on the morning of 26th April 1927. The proclamation is stated to be under S. 47, R. 95, Direction 175 of the Lower Burma Land and Revenue Act, 1876. The proclamation further stated that

"the right offered for sale will be free from all encumbrances created over it, and from all subordinate interests derived from it, except such as may be expressly reserved by me at the time of sale."

The bailiff of the corporation conducted the sale, which was knocked down to the appellant for Rs. 700 on 26th April.

We may here note that the respondent filed his mortgage suit against the mortgagor and her husband on 22nd July 1926. If he had made any enquiry he would have found that the taxes had not been paid on the mortgaged premises for over a year, and, by not having given notice of his mortgage to the corporation, the latter had no means of giving him notice of the mortgagor's default. After the sale the respondent amended his plaint, joined the auction-purchaser and pleaded fraud and collusion, while the auction-purchaser became the benamidar of the mortgagor.

The learned trial Judge makes an initial mistake in the beginning of his judgment by saying that the appellant "was the purchaser of the property at a Court auction sale." If this had been an ordinary Court auction sale, all that could be sold in execution was the right, title and interest of the judgment-debtor. On the face of the record, this was not a Court auction sale at all, but a sale under S. 47, Lower Burma Land and Revenue Act, which provides a summary method of proceeding against the land itself where the revenue officer finds that there exists any permanent, heritable, and transferable right of use and occupancy by selling it at a public auction. By S. 194 (1), Rangoon Municipal Act, 1922

"any arrears of tax or any fee or other money claimable by the corporation under this Act may be recovered as if they were arrears of land revenue."

Cases have arisen in which the Courts have refused to construe similar words as giving a local body or the income-tax authorities the right to resort to the summary method by the sale of immov-

able property for the recovery of dues of a personal nature.

On this question we have been referred to a lucid judgment of Chari, J., in the case of *R. M. V. V. M. Chettyar Firm* v. *M. Subramaniam* (1). On p. 466 (*of 5 Rang*) the learned Judge after reviewing a number of cases, observes:

"I am, therefore, of opinion that, so far as "property-taxes," as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and that, to a sale held under these sections the provisions of S. 48 of the Act will apply. I am strengthened in the conclusion I have arrived at by the fact, to which my attention has been drawn by the learned advocate for defendant 2, that the provisions of the Burma Municipal Act and the Burma Town and Village Lands Act whereby lands paying municipal taxes are exempted from land tax, in lieu of the capitation tax, show that the municipal "property-taxes" were meant as a kind of substitute for land tax, and that the legislature intended to put the municipal "property-taxes" in the same position as land taxes."

We are of opinion that the view is correct. The learned trial Judge bases his judgment in the main on the doctrine of lis pendens. We do not consider that the doctrine applies to this case at all. It would, indeed, be a dangerous extension of the doctrine to hold that neither Government nor a Local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. For the reasons already given we are of opinion that when as in this case the tax in respect of which the default is made is a property tax the corporation are entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which is quite independent of any remedy against the defaulter personally.

The only question remaining is: Has the respondent established fraud and collusion on the part of the auction-purchaser and the mortgagor? In our opinion he has completely failed. The only witness called on his behalf is his clerk, Shanmugam. In examination-in-chief he says:

"I think she, (the mortgagor), had purchased it in the name of defendant 4. I say this because defendant 4 is related to defendant 1."

In cross-examination he admits that he does not know personally how defendants 1 and 4 are related; that he has no personal knowledge about the sale of the house by the corporation; and that he has no witnesses to show that the house was purchased by defendant 1 in the name of defendant 4. The appellant denies that he is in any way related to the mortgagor or her husband. He admits that she occupies one of the rooms of the building and pays him Rs. 15 a month as tenant. The corporation bailiff, Maung Aung Hla, who held the auction sale, states that the house was an old house. worth about Rs. 1,000. Accepting this as the value of the house, Rs. 700, at an auction sale for non-payment of rates, seems to be a very fair price.

The appellant states that he went to Pazundaung on the morning of the auction casually and there saw a man beating a gaung. This is not very likely; and, if the respondent had had any evidence connecting the appellant with the mortgagor, this would be of some weight. But in the absence of any such evidence, and in view of a reasonable price having been paid, this admission is quite inadequate to base a finding of fraud and collusion There is no reason whatever for thinking that there had been collusion on the part of the officers of the corporation. They had been more than usually forbearing in respect of their unpaid taxes. The respondent's clerk admits that in other cases his firm had given the corporation notice of their mortgages, and, in our opinion, they have only themselves to blame for not doing so in this case and for not making any enquiry as to whether the rates were being paid. We accordingly allow the appeal and dismiss the suit, so far as the appellant is concerned, with costs in both Courts.

M.N./R K *Appeal allowed.*

(1) A. I. R. 1927 Rang. 289=5 Rang. 458.

** A. I. R. 1929 Rangoon 177
Full Bench

RUTLEDGE, C. J., AND MAUNG BA AND HEALD, JJ.

Emperor

v.

Chit Pon and *another*—Accused.

Criminal Revns. Nos. 334-A and 335-A of 1929, and Criminal Ref. No. 38 of 1929, Decided on 12th June 1929, against order of Sub-Divisional Mag. Taik Kyi, D/- 13th December 1928.

**** Criminal P. C., S. 423 (1) (b)—Substitution of 30 stripes for 3 months' rigorous imprisonment is enhancement—Burma Act 8 of 1927.**

Substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment or more or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more is not ordinarily an enhancement of sentence within the meaning of S. 423 (1) (b) and in the case of a person under 16 years of age the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more or a substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more is not ordinarily an enhancement of sentence.

But the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment is an enhancement and therefore an illegal sentence under S. 423 (1) (b), 2 *Weir* 487; 6 *B. L. R. Ap.* 95; *not Foll. Rat. Un. Cr. C.* 131; 17 *All* 57, 23 *Bom.* 439. 27 *Cal.* 175, 30 *Mad.* 103 (*F.B.*); 36 *All* 485, *Ref.*

[P 179 C 1, 2]

Govt Advocate—Amicus Curiæ

Opinion.—In Cr Trial No 155 of 1928 the Sub-Divisional Magistrate of Taik Kyi sentenced an offender to one year's rigorous imprisonment under S. 326, I. P. C., and on appeal the Sessions Judge altered the sentence to one of nine months' rigorous imprisonment and 30 stripes under the Whipping (Burma Amendment) Act of 1927. In Criminal Trial No. 179 of 1928 the same Magistrate sentenced an offender to one year's rigorous imprisonment under S 324, I. P. C. and on appeal the Sessions Judge altered the sentence to one of nine months' rigorous imprisonment and 30 stripes under the said Act Both the cases came before this Court in revision, and the learned Judge before whom they came raised the question whether the alteration of the sentences by the Sessions Judge amounted to an enhancement of the sentences within the meaning of S. 423 (1) (b) of the Code. That section empowers an appellate Court in an appeal from a conviction to alter the nature of the sentence "but . . . . . not so as to enhance the same."

The learned Judge referred the following questions:

(1) When an offence is punishable by whipping in addition to imprisonment can an appellate Court in face of the provisions of S. 423, Criminal P C, that a sentence, if altered must not be enhanced, commute the whole or any portion of a sentence of imprisonment into whipping?

(2) If it does so commute a portion of the imprisonment how many months' rigorous imprisonment shall be regarded as equivalent to 30 lashes?

The actual question which arises on the two cases is not quite so general as the questions referred, since it is only whether or not, a substitution of 30 stripes for three months' rigorous imprisonment amounts to an enhancement of the sentence. There is nothing in the Code of the Criminal Procedure or in the Whipping Act to show how many stripes are to be regarded as equivalent to a particular period of imprisonment, but S. 395 of the Code says that if a sentence of Whipping is wholly or partially prevented from being carried out, because the accused person is medically certified to be unfit to undergo the sentence or the remainder of the sentence of Whipping, the Court which passed the sentence may sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding 12 months in addition to any other punishment to which he may have been sentenced for the same offence. This provision of law suggests that the legislature regarded a sentence of 12 months' imprisonment as the maximum sentence of imprisonment which could be substituted for whipping.

In 1871 in the case of *Queen* v. *Banda Ali* (1) where an offender had been sentenced by a Magistrate to 6 months' rigorous imprisonment and to 20 stripes and the appellate Court finding that the sentence of whipping was illegal, substituted for it a sentence of 3 months' rigorous imprisonment in addition to the sentence of six months' rigorous impri-

(1) 6 Beng. L. R. Ap. 95.

sonment, a Bench of the High Court of Calcutta held that the alteration of the sentence of Whipping to a sentence of three months R. I. was illegal. A perusal of the Judgment shows that so far as the learned Judge who gave the reasons for the decision was concerned the ratio decidendi was not merely that the substitution of any sentence of imprisonment for a sentence of Whipping amounts to an enhancement of the sentence, but also that because the sentence of whipping passed in that particular case was illegal and was therefore in the opinion of the learned Judge "an absolute nullity," no sentence of any kind could be substituted for it without enhancing the original sentence On the question whether the substitution of imprisonment for a legal sentence of whipping amounted to an enhancement of sentence the learned Judge said that whipping and imprisonment are things dissimilar in nature and that things dissimilar in nature do not admit of any direct comparison with one another, and that if there is no fixed scale or standard by which the comparison can be made, the task must be given up as hopeless, and that because the legislature has not supplied us with any data from which the comparative severity of the two sentences can be determined it is impossible to say how many strokes of the cat-o'-nine tails would be equivalent to a sentence of rigorous imprisonment for a given period of time, so that it is impossible to say that the substitution of imprisonment for whipping is not an enhancement of sentence.

The next case cited *Queen Empress* v. *Tharekhan* (2) was decided in 1897. In that case the offender was sentenced to a fine of Rs 50 with 45 days' R. I in default. He appealed and the appellate Court sentenced him to 50 lashes in lieu of the remainder of the term of imprisonment which he was undergoing for default in payment of the fine. S 280 of the Act 10 of 1872, which was the Criminal Procedure Code, then in force allowed the appellate Court to enhance the sentence in an appeal from a conviction, and therefore the question whether the substitution of whipping for imprisonment involved an enhancement of the sentence does not arise. The Bench of the High Court of Bombay which dealt with the case said

> "The prisoner by appealing subjected himself to the risk . . . . to an alteration of the sentence under S. 279, even though that alteration should involve an enhanced punishment. . . . But in altering the sentence the District Magistrate was bound to substitute the whipping for the fine . . . . He could not legally award whipping in lieu of the remaining term of imprisonment, which itself was to be suffered only in default of payment of fine, thus becoming the liability of the punishment to a levy of the fine, which would constitute a double punishment."

That decision is of no help in deciding the present reference.

The only other case cited in the text books or before us is the case of *Appu* (3), which was before the High Court of Madras in 1897. In that case the appellate Court had set aside part of the sentence of imprisonment passed by the Magistrate, had then substituted a sentence of whipping for the part of the sentence of imprisonment which it set aside, and had subsequently passed a sentence of one week's imprisonment in lieu of whipping presumably because the offender was medically certified to be unfit to be whipped. The bench which dealt with the case said

> "The sentence of whipping is clearly illegal as it amounts to an enhancement of sentence. It follows that the imprisonment for a week in lieu of the whipping is also illegal. The sentences are accordingly set aside."

That was the whole of the Judgment and it suggests that a sentence of whipping passed by an appellate Court as such in substitution for a sentence of imprisonment always involves enhancement of the sentence. If that case and *Banda Ali's* case (1) were both rightly decided it would seem to follow that both the substitutions of whipping for imprisonment involve an enhancement of sentence. It would follow also that the power to alter the nature of the sentence, expressly given in general terms by S. 423 of the Code is so restricted that it cannot in any case be ever so as to alter a sentence of whipping to one of imprisonment or a sentence of imprisonment to one of whipping.

There is a large number of decisions whether the substitution of a sentence of fine for part of a sentence of imprisonment amounts to an enhancement of the original sentence but an examination of

(2) Rat. Un. Cr. C. 131.

(3) 2 Weir 487.

those cases e. g. *Queen Empress* v. *Ishri* (4), *Queen Empress* v *Chagan Jagannath* (5), *Rakhal Raja* v. *Khirode Prosad Dutt* (6), *Bhakthavatsalu Naidu* v. *Emperor* (7), *Emperor* v. *Mehar Chand* (8) seems to throw little light on the subject of the present reference. The learned Judges who decided *Appu's* case gave no reasons for their decision, and the only reasons given in *Banda Ali's* case (1) were that it is impossible to compare the severity of sentences of whipping and imprisonment and that because the legislature has not supplied any data for such comparison, the substitution of any sentence of imprisonment for any sentence of whipping must be regarded as an enhancement of the original sentence.

There is no express provision of law which prohibits an appellate Court from passing a sentence of whipping in appeal. There is nothing in the Whipping Act or in the Code apart from the provision against enhancement of sentence, which forbids it. It was said in *Chagan Jagannath's* case (5) that a sentence of fine is always considered lighter than a sentence of imprisonment and if it is possible to compare the severity of fine as a punishment with imprisonment as a punishment, and it may be noted most Magistrates make that comparison almost daily, there seems to be no reason why it should not be possible to compare the severity of whipping with that of imprisonment. The foundations of the reasonings in *Banda Ali's* case (1) would disappear if there were some scale or standard by which the comparison could be made. The only standard which the Legislature has provided is that given in S 395 of the Code, which says that a sentence of more than one year's imprisonment must not be substituted for a sentence of 30 stripes. But there is no reason, why we, as a Full Bench of the High Court, should not follow the analogy of that standard, and say for the information of the Judges of this Court and of the lower appellate Courts that in the case of adults we do not regard the substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more, or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment, or more, or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more, as being ordinarily an enhancement of sentence, within the meaning of S. 423 (1) (b), Criminal P. C, and that in the case of a person under 16 years of age we do not regard the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more, or the substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more, as being ordinarily an enhancement of the sentence. We do not consider it necessary to deal with sentences of less than 20 stripes in the case of adults, because the Court has already said that experience has shown that in this province the minimum sentence which is likely to be effective in the case of an adult is 20 stripes. We accordingly answer the question which arises on the reference by saying that we regard the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment as an enhancement and therefore as an illegal sentence under S. 423 (1) (b) of the Code.

P.N./R.K. *Reference answered.*

(4) [1894] 17 All. 67=(1894) A.W.N. 202.
(5) [1899] 23 Bom. 493.
(6) [1900] 27 Cal. 175.
(7) [1907] 30 Mad. 103 (F.B.).
(8) [1914] 36 All. 485=24 I.C. 607=12 A.L.J. 827.

A. I. R. 1929 Rangoon 179

HEALD, J.

Ma Thaing and *others*—Appellants.

v

Maung Chit On and *others* — Respondents

Special Second Appeal No. 266 of 1928, Decided on 4th February 1929, against judgment and decree of Dist. Judge, Magwe.

(a) Transfer of Property Act, Ss 59 and 60 —Suit for redemption must fail if mortgage cannot be proved being unregistered— Registration Act S. 49.

The basis of suit for redemption of a mortgage is the mortgage alleged and if by reason of some provision of law the mortgage cannot be proved the suit must fail.

Where it was clear that the mortgage which was alleged to be possessory could not be proved because there was no registered instrument, but the mortgagee who never obtained possession and had no interest in the property admitted it.

Held, that the mortgagor's suit for redemption of a possessory mortgage and for posses-

sion of the mortgaged property on the footing of redemption of that mortgage was bound to fail because they could not prove the mortgage. The admission of the mortgagee could not bind the other claimants and it was no admission of the alleged possessory mortgage 8 *L. B. R.* 334, *Rel. on.* [P 180 C 2, P 181 C 1]

(b) Civil P. C., O. 6, R. 17—Substitution of one cause of action for another is not allowed.

No power has yet been given to enable one distinct cause of action to be substituted for another by amendment of a plaint *A. I. R.* 1922 *P. C.*, 249, *Foll.* [P 181 C 1]

Kyaw Din—for Appellants.

Judgment — Appellants, as mortgagors of a piece of land, sued to redeem that land on an allegation that they had mortgaged it to respondent 1 for Rs. 143 on 28th May 1923. They said that the mortgage was possessory and that they put respondent 1 into possession of the land under the mortgage. They joined respondents 2 and 3 who seem to be husband and wife, as being persons to whom respondent 1 had sub-mortgaged the land by possessory mortgage, and they also joined respondent 4 as being a person to whom respondents 2 and 3 had similarly sub-mortgaged the land. They claimed to be entitled to redeem the land from the respondents for Rs. 143.

Respondent 1 admitted that appellants had mortgaged the land to him for Rupees 143 but said that he had never been put into possession of the land, and that at the time of the mortgage it was in the possession of respondent 2. Respondent 2 said that the land did not belong to appellants at all but belonged to one Ma Ngwe and her daughter Ma Sein who mortgaged to his parents for Rs. 143-8-0 on 12th February 1880 by a registered deed which he produced. He said further that he and his mother Ma Min Thon mortgaged the land to respondent 4 for Rs. 200 about 1921. Respondent 4 said that he received the land on mortgage with possession for Rs. 200 from respondents 2 and 3 and Ma Min Thon on 15th June 1921, but he does not seem to have produced any mortgage deed or documentary evidence of the mortgage or to have taken any further part in the litigation.

The trial Court said that because respondent 1 admitted appellant's mortgage it was unnecessary for appellant's to prove the mortgage and that it could be recognized by the Court in spite of the fact that the deed by which it was supposed to be effected was unregistered. The learned Judge found that the land in suit belonged to persons whom the appellants represented, that it was mortgaged by them to respondent 2 and his mother Ma Min Thon, that that mortgage was redeemed and on redemption, by reason of a partition of the estate to which it belonged, the land passed to the appellant Ma Le as owner, that Ma Le then remortgaged it to respondent 2 for Rs. 243 that two years later Ma Le redeemed it from respondent 2 and mortgaged it to the respondent 1 for Rs. 143 and that appellants were entitled to redeem it from the respondents and to recover possession of it from them for Rs. 143.

Respondents 2 and 3 appealed against that decision on the grounds that the lower Court ought not to have recognized appellant's mortgage which was admittedly not effected by registered deed, that the admission of the mortgage by respondent 1, who had admittedly never been in possession of the property, could not bind them or prejudice their rights, that there was no issue and no evidence that the land came to their possession from respondent 1 and that the evidence did not account for their having remained continuously in possession of the land for about 50 years The lower appellate Court said that in view of the fact that respondent 1 had never been in possession of the land although the mortgage to him was alleged to be possessory, his admission of the mortgage could not bind the other respondents, and that as against those other respondents-appellants could not be allowed to prove their mortgage because it was not registered, and accordingly dismissed appellant's suit.

Appellants appeal on grounds that the lower appellate Court was wrong in holding that they could not sue to redeem an unregistered mortgage and ought to have held that in equity they were entitled to redeem. The case is similar to the Full Bench case of *Ma Twe* v. *Maung Lun* (1) where the learned Chief Judge said:

"The basis of suit for redemption of a mortgage is the mortgage alleged and if by reason of some provision of law the mortgage cannot be proved it appears to me that the suit must fail."

In this case it is clear that the mortgage cannot be proved because there was no registered instrument. The admission of respondent 1, who has now no interest in the property, cannot bind the other

(1) [1916] 8 L. B. R. 334=33 I. C. 163=9 Bur. L. T. 114.

respondents, and in any case it was not an admission of the mortgage on which appellants sued since it is not an admission of a possessory mortgage The appellant's suit for redemption of a possessory mortgage and for possession of the mortgaged property on the footing of redemption of that mortgage was bound to fail because they could not prove the mortgage, and was rightly dismissed.

When the ruling mentioned above was brought to the notice of appellant's learned advocate, he claimed that he still ought even on second appeal, to be allowed to amend his plaint so as to convert his suit into a suit for possession on the strength of his legal title. The decision of their Lordships of the Privy Council in the case of *Ma Shewe Mya* v. *Mo Hnaung* (2) that

"no power has yet been given to enable one distinct cause of action to be substituted for another"

is sufficient answer to this claim. The appeal is dismissed.

M N/.R.K. *Appeal dismissed.*

(2) A. I. R. 1922 P. C. 249=48 Cal. 832=48 I. A. 214.

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* A. I. R. 1929 Rangoon 181

CHARI AND MYA BU, JJ

Ma Ngwe Hmon and *others*—Appellants.

v.

Maung San Yauk and *others*—Respondents

Civil Misc. Appeal No. 141 of 1929, Decided on 23rd April 1929, against decision of Dist. Court, Toungoo, in Civil Appeal No. 36 of 1928.

*** (a) Evidence Act, S. 63—Transaction in nature of relinquishment—Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost.**

Where the transaction is in the nature of a relinquishment and where it may be regarded as an agreement to relinquish on certain conditions by application of principles of part performance the document containing the transaction although unregistered is admissible in evidence to prove the agreement and the possession given under it and so when it is lost secondary evidence of its contents may be proved for the purpose : *A. I. R.* 1924 *Rang.* 214, *Ref.* [P 181 C 2]

(b) Part performance—Invalid agreement.

Where there is no valid and binding agreement, principles of part performance are of no avail. [P 181 C 2]

P B Sen—for Appellants.

Lambert—for Respondents.

Judgment—There is one point on which I do not agree with the learned District Judge and that is where he observed that the document, the terms of which defendants sought to prove and which was said to have been lost or destroyed by white ants being unregistered, its terms could not be proved by oral evidence The transaction alleged is in the nature of a relinquishment and it was compulsorily registrable. But the principles of part performance propounded in *Myat Tha Zan* v. *Ma Dun* (1) are applicable, and the transaction may be regarded as an agreement to relinquish on certain conditions. The document would be admissible to prove the agreement and the nature of the defendant's possession, and where the document is proved to have been lost or it cannot be found, secondary evidence of its con tents may be proved for the purpose. Save and except this, I think the decision of the learned District Judge appears to be correct According to Ma Ngwe Hmon those who relinquished were San Yauk, Po Ma, Po Byu, Hla Ma and Po Kyu. San Yauk and Po Ma are two of the plaintiffs. Hla Ma is the mother of the first three plaintiffs, while Po Byu and Po Kyu and the defendants. The agreement was of the most perfunctory nature Hla Ma was not an heir herself, and the learned advocate for the appellants admitted that the alleged transaction could not be binding on the first three plaintiffs, who are said to be minors at the time. There is no reason why Po U should have been left out of consideration except that he happened to be Po Kyu's elder brother There was no consideration for the benefits received by the defendants Po Ku and Po Byu, so in this case the principle of part performance could be of no avail. Further I agree with the learned District Judge that San Yauk and Po Ma were not consenting parties. In all the circumstances of the case, it is impossible to believe that there was a valid and binding agreement on the plaintiff's part.

What the defendants could in law rely on was an agreement to relinquish. None of the plaintiffs ever admitted

(1) A. I. R. 1924 Rang. 214=2 Rang. 285.

that there was a relinquishment or agreement to relinquish The fact that they sued shows that the plaintiffs would not acknowledge the existence of any agreement to relinquish or any relinquishment. There is nothing from which any admission on the part of any of the plaintiffs may be inferred either before or after the framing of issue. The trial Court was wrong in applying the provisions of S. 58, Evidence Act. There was nothing to relieve the defendants from the burden of proving the relinquishment or agreement to relinquish, till they called San Yauk and Po Ma as their witnesses, and even then San Yauk and Po Ma did not say that there was a valid agreement or relinquishment. The mere admission of their having signed the document is not an admission that there was in fact a relinquishment or agreement to relinquish I see no sufficient reason to interfere with the order under appeal. I therefore dismiss the appeal with costs Advocate's fee 3 Gold Mohurs

P N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 182

BROWN, J.

A. R. S. Subramanin Chettyar—Appellant.

v.

K. Moses—Respondent.

First Appeal No. 66 of 1929, Decided on 6th May 1929, against judgment of of Sm C. C. Judge, Rangoon, in Civil Suit No 4144 of 1927.

(a) Civil P. C , S. 11—Decree-holder making application for execution of decree for certain sum—That sum paid up—It is inequitable to allow him to make another application asking for further sum—In application made for execution of decree, interest inserted and scored out and deletion accepted by decree-holder—He is not entitled to make another application to execute decree for interest—Civil P. C., O. 21, R. 11 (2).

It is inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of a judgment-debtor under that application and when that amount is paid up to put in another application for a further sum.

Where in an application made for the execution of a decree, interest was inserted and then scored out and the deletion was accepted by the decree-holder, that amounts to waiver of the claim to interest and the decree-holder is not entitled to make another application to execute decree for interest. [P 183 C 1]

(b) Civil P. C., S. 11—Res judicata.

General Principle of res judicata applies to execution proceedings, apart from the provisions of S. 11. [P 183 C 1]

C. K. Tambe—for Appellant.

P. B. Sen—for Respondent.

Judgment.—On 2nd September 1927, the appellant Chettyar obtained a decree against the respondent for the sum of Rs 1,704-8-0 with costs. He received towards satisfaction of this decree a sum of 1800 by instalments paid out of Court. On 13th December 1928, he filed an application in execution for the arrest and imprisonment of the judgment-debtor. According to the statement of claim in that application filed by him, the amount still due under the decree was Rs. 165 8-0. This sum was paid into Court by the judgment-debtor, and the case was closed on 8th January. On 17th January, the appellant filed a further application again asking for the arrest and imprisonment of the judgment-debtor. In this application he claimed that a sum of Rs. 101-6-3 was due under the decree as interest accrued since the date of the decree. The trial Judge noted on this application :

"In former application, interest inserted and then scored out. That amounted to waiver. Judgment-debtor satisfied the full claim in that application. This application is dismissed. Let full satisfaction be entered up."

The appellant then filed a review application in the Small Cause Court, in which he stated that the scoring out of the interest was done by a clerk of the Court This application was rejected and he then came to this Court on appeal. He has filed an affidavit to the effect that when he filed the first application in execution he did ask the advocate's clerk to enter interest in the application. The clerk of the Small Cause Court, however, suggested that interest would not be allowed without a detailed statement and scored out the figures Rs. 101-6-3 put against interest. There was originally an entry of this interest on first application, but that was scored out and as finally presented the application showed the amounts decreed and costs. The whole of this was entered as Rs. 1,965-8-0. The decree was shown to have been satisfied in part to the extent of Rs. 1,800 and 165 8-0 was shown as the balance. It is admitted before me that when the application was filed, the figures for the total were entered. That

being so it is quite clear that the person, who drew up the statement finally, did not intend that interest should be entered therein, as the corrected figures do not allow anything for interest. It may or may not be the case that the claim for intetest was deleted at the suggestion of the Court clerk, but deleted it was, and the deletion was accepted by the petitioner. In accordance with the provisions of O. 21, R. 11, Cl. (2), Civil P.C. an application for the execution of a decree must show amongst other things the interest due under the decree The application is supposed to be a complete application It would quite clearly be very inequitable that a decree-holder should be able to put in an application stating that a certain sum was due under a decree and asking for the arrest of the judgment-debtor, under that application and when that amount is paid up, put in another application asking for a further sum. The general principle of res judicata applies to execution proceedings, apart from the provisions of S. 11, Civil P. C. If the decrre-holder wished to claim interest he clearly could have done so, in his first application. By failing to do so, he must be deemed to have waived his claim to interest. It is not his claim now that he did not know interest was due at the time. What he says now merely amounts to this :

"I did know the interest was due, but I had not immediately before me material for calculating it and I therefore preferred to file an application with the interest omitted."

This is an entirely unsatisfactory explanation The calculation of interest was a simple matter, which could be done very quickly, and certainly need not have taken the month which elapsed between the filing of the first application and the second application. I am of opinion that the application to execute the decree for interest has been rightly refused. I dismiss this appeal with costs.

P.N /R.K. *Appeal dismissed*

A. I. R. 1929 Rangoon 183

CHARI, J.

Ma Saw Tint and *others*—Appellants.

v.

Abdul Bari and *others*—Respondents.

Second Appeal No. 538 of 1928, Decided on 1st May 1929.

(a) Civil P. C., S. 11 — Findings on mortgage suit may be said to be binding on auction-purchaser though he is not party to mortgage suit—(Obiter).

Findings in a mortgage suit may be said to be binding on the auction purchaser purchasing property in execution of the mortgage decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims under the judgment-debtor : *A. I. R.* 1922 *Pat.* 63, *Rel. on.* [P 183 C 2]

(b) Evidence Act, S. 101 — Onus immaterial.

After all the evidence has been taken, no question of burden of proof remains.[P 184 C 1]

J. N. Surety—for Appellants.

S. Ganguli—for Respondents.

Judgment.—This is a second appeal from a suit in which appellants sought declaration that their house was not the house in respect of which there was a mortgage executed by one Abdul Bari in favour of Nilambar. The appellants were the purchasers of a house from Abdul Bari. The mortgagee Nilambar filed a suit on his mortgage and in that suit he made the purchasers defendants. In the written statement not a word was said about the property being different and the suit was defended on the assumption that the house purchased by the defendants was the house mortgaged to Nilambar. The first question which the learned Judge of the trial Court and the learned Judge of the lower appellate Court had to consider was whether the findings in the mortgage suit were res judicata in the present suit. The trial Judge held that there was no question of res judicata. The auction purchaser was not a party to the mortgage suit. The soundness of this finding was accepted by the learned Judge of the lower appellate Court. The decision is open to doubt, because the auction purchaser in a sense represents the mortgagee and the mortgagor. It may, therefore, be argued that he is claiming under the judgment-debtor, and that the decision in the previous case bound him in that capacity just as it binds the others who were personally parties to the suit The question did arise between an auction-purchaser in execution of a money decree and the landlord of a holding, and it has been held that such an auction-purchaser claimed under the judgment-debtor for the purpose of S. 11, Civil P. C., and that a finding between the judgment-debtor and another person as to the

area of the land is binding on the auction purchaser, see : *Kali Dayal* v. *Umesh Pershad* (1). Whether the finding of the lower Courts on the question of res judicata is right or wrong there can be no doubt that this appeal does not lie. There are concurrent findings of fact and the only point of law urged by the learned advocate for the appellants is that the burden of proof was wrongly placed. This ground was also urged before the lower appellate Court and the learned Judge of that Court rightly pointed out, that after all the evidence had been taken no question of burden remained. The other point urged is that the difference between the two houses is obvious on the face of the document. It may or may not be so, but the difference may be explainable by the fact that the persons whose names were given as the owners of the adjacent properties may be successors in title to the persons whose names are given in the other document and that the road on the Eastern side might have been made after the description was given. It is, however, unnecessary to consider all these points, because I have no doubt that on the materials before them both the lower Courts have come to the correct decision and as the decision is not contrary to law or any usage having the force of law the appeal is bound to fail. I, therefore, dismiss the appeal with costs in favour of respondents 2 and 3 The advocate for respondent 1 has withdrawn and even if he had not done so, respondent 1 would not be entitled to any costs.

P.N./R K. *Appeal dismissed.*

(1) A.I.R. 1922 Pat. 63=1 Pat. 171.

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* A. I. R 1929 Rangoon 184

RUTLEDGE, C. J , AND MAUNG BA, J.

Russa Engineering Works Ltd. and *others*—Plaintiffs—Appellants

v.

Wearne Brothers Ltd.—Defendant 1—Respondents.

First Appeal No. 86 of 1925, Decided on 22nd March 1926, against decree in Civil Regular Suit No. 405 of 1923, D/- 13th February 1925.

*** (a) Company—Agreement when Company not formed—Company is not bound by it.**

A company, not in existence when an agreement for it is entered into, cannot be bound by it. [P 185 C 1]

(b) Landlord and Tenant—Agreement to lease—Lessee assigning rights before taking possession or paying rent — Assignee not attorning to lessee but paying rent direct to lessor — Relation of landlord and tenant is not created between assignee and lessee.

Where a person makes an agreement to take a lease and assigns his rights to a third person before paying any rent or taking possession and the third person instead of paying rent to his assignor or attorning to him pays rent direct to the owner (original lessor) the relation of landlord and tenant cannot be said to have been created between the third person and his assignor. [P 185 C 2]

*** (c) Transfer of Property Act, S. 3 — Right to get lease executed is moveable property — Lessee becoming self constituted trustee — Trust is valid — Trusts Act, Ss. 5 and 6.**

The right to call upon the owner to execute a lease and on his failure to do so the right to sue him for specific performance is a chose in action and as such moveable property. The benefits of such an agreement can be subject of valid trust when the lessee becomes self constituted trustee. [P 185 C 2]

Ormiston—for Appellants.

Paget—for Respondents.

Judgment —This is an appeal from the judgment and decree of this Court on the original side dismissing the plaintiff-appellant company's suit

As the facts of the case are somewhat complicated, it seems desirable to set out in some detail the circumstances leading up to the present suit as we do not find ourselves in agreement with the learned trial Judge in the legal inferences which he draws from those facts.

Dodge and Seymour (India), Limited, of which Mr. J. L. Chidsey was the Managing Director, were the distributing agents of Ford Motors (Canada) Limited, for India, Burma and Ceylon.

In May 1920, a Calcutta firm named Kilburn and Company (the Managing Agents of the plaintiff-appellant company) entered into an agreement with Mr. Chidsey, whereby the selling agency for Burma was secured, and in pursuance of this agreement Kilburn and company caused a new private company called Ford Motors (Burma) Limited, to be incorporated of which Kilburn and company were the Managing Agents and held one share, all the other shares being held by the plaintiff-appellant company. Ford Motors (Burma) Limited were registered at Rangoon on 10th July 1920. As we have seen, it was the property of, and

completely controlled by, the plaintiff-appellant company through their Managing Agents Kilburn and Company. Prior to this, on 20th April 1920, the plaintiff-appellant company obtained an agreement for a lease for 20 years from Mr. N. M. Cowasjee of Rangoon of certain premises in Judah Ezekiel Street, Rangoon, and in consideration of an agreed rent, Mr. Cowasjee agreed to erect a building suitable for the motor business upon the premises.

Mr. Whitby of Kilburn and Company and Mr. Chidsey depose that it was a term of the agreement whereby the Burma Agency for the sale of Ford Motors was secured, that the Judah Ezekiel Street premises should be handed over to the new company, Ford Motors (Burma) Limited, for the purpose of their business, that the building when completed was handed over to the Ford Motors (Burma) Limited, who entered into possession in September 1920, paid the rent direct to Mr. Cowasjee, made extensive alterations in the building and remained in occupation of the premises till November 1923 ; and that by an oversight no assignment of the agreement for lease was ever made by the plaintiff-appellant company to the second respondents, Ford Motors (Burma) Limited. But the plaintiff-appellant company contend that they held the agreement as trustees for the second respondents. The oversight is easily understood as at this time the interests of the plaintiff-appellant company and second respondents were identical, both being artificial persons controlled by the same hand, namely, Kilburn and Company.

The learned trial Judge has, we consider, rightly held that as the company were not in existence in May 1920 when an agreement was entered into between the plaintiff-appellant company and Mr. Chidsey, they could not be bound by it, and that he could not presume subsequent ratification of the contract by the second respondents from their conduct. The learned trial Judge infers from the above facts that the plaintiff-appellant company could not in law be trustees for the second respondents and that the second respondents must be held to be monthly tenants of the plaintiff-appellant company by reason of S. 106, T. P. Act.

We can find nothing in the circumstances already set out to justify us in presuming that the relation of landlord and tenant was ever established between the plaintiff-appellant company and the second respondents and without such relationship the Court cannot presume that the second respondents are monthly tenants.

According to the evidence the plaintiff-appellant company never paid rent for the premises and never entered into possession of them. The second respondents never attorned tenants to the plaintiff-appellant company and never paid them rent. They entered into possession of the premises as soon as they were completed. They had them altered to their satisfaction and they paid the rent to the owner, Mr. Cowasjee, direct. It seems clear that the relation of landlord and tenant never subsisted between the plaintiff-appellant company and the second respondents.

With regard to the question whether the plaintiff-appellant company in law could be regarded as bare trustees on behalf of the second respondents, it cannot be suggested that the subject of the alleged trust was the Judah Ezekiel Street premises as the plaintiff-appellant company had no legal interest in these premises as they had no lease. All that they had got under their agreement was the right to call upon the owner to execute a lease and on his failure to do so the right to sue him for specific performance. This right was a chose in action and as such moveable property. This moveable property became vested in the plaintiff-appellant company as soon as the agreement with Mr. Cowasjee was signed on 20th April 1920 and was so vested when it became the self-constituted trustee. We are therefore of opinion that there is nothing in S. 5, Trusts Act, which would prevent the plaintiff-appellant company from holding the benefits of the agreement of 20th April 1920, in trust for the second respondents, and with respect to the agreement whereby the Ford Motors Agency for Burma was obtained in May 1920, we consider ourselves justified in holding that a trust was created within the meaning of S. 6, Trust Act.

We shall now consider the first respondents' position in the matter. They are a company incorporated and carrying on business at Sengapore. For the reasons set out in Mr. Chidsey's letter of

27th July 1921 the first respondents entered into negotiations with Kilburn and Company to take over the Burma Agency of Ford Motors from the plaintiff-appellant company. And Mr. T. J. B. Wearne, Managing Director of the first respondent company, after visiting Rangoon went to Calcutta to negotiate the transfer. On 27th August 1921, it appears from Ex. K that Mr. Smith, plaintiff-appellant company's manager, sent along with that letter certain enclosures amongst others "copies of two leases," and from Mr. Wearne's letter (Ex B) of the same date it would seem that these copies, wrongly termed leases, must have been the agreement for a lease of the Merchant Street properties which appears last in the file of the plaintiff-appellant company's exhibits, and Ex. J, the agreement with Mr. Cowasjee dated 20th April 1920. In Ex. B, Mr. Wearne states that :

"We are prepared to take over Ford Motors (Burma) Limited, Rangoon, as a going concern on the following terms,"

and he sets out 15 heads The seventh head is Merchant Street property and the eighth head is Judah Ezekiel Street property. From the copy supplied Mr. Wearne must be taken to have known at the time when he wrote this letter or shortly after that the agreement for leaae of the Judah Ezekiel Street propety was in the name of the plaintiff-appellant company and not in the name of the second respondents. Mr Wearne left Calcutta shortly after this and appointed Mr. Chidsey by a power of attorney to act for him. The plaintiff-appellant company's answer to Ex B is dated 2nd September 1921 (Ex. C). In it the plaintiff-appellant company states :

"It is necessary in the first place to record that the proposal is one to take over from the Russa Engineering Works, Limited, and from our firm the whole of the shares of the Private limited company Ford Motors (Burma) Limited, of which, in the event of the proposal being accepted, Messrs. Wearne Brothers, Limited, would then be the sole proprietors. The various terms enumerated constitute the method by which the value of such shares is to be ascertained,

"Messrs. Kilburn and Co. in the event of the deal going through, resign the Managing Agency of Ford Motors (Burma) Limited."

"It is undsrstood that the entity of Ford Motors (Burma) Limited, as a company will not be affected."

Of the various 15 heads set out in Mr. Wearne's letter (Ex. B), a large number including No. 8 the head referring to the Judah Ezekiel Street premises, has been confirmed, that is to say, in respect of these heads the parties had come to a definite agreement. With regard to other heads, negotiations went on for a considerable time ; but none of the subsequent correspondence indicates any attempt on the part of either party to resile from the position that the Merchant Street property and the Judah Ezekiel Street property were both to be items which were to pass from the management and control of the plaintiff-appellant company to the management and control of the first respondent company. (See the first respondent company's letter dated 17th September 1921, Ex. R). On considering the position of both parties at the end of August 1921, no other course was possible. The plaintiff-appellant company were anxious to sell their Burma Agency carried on through the second respondents ; and it would be in the last degree unlikely that while parting with the agency they would still retain their liability in respect of premises not occupied by themselves or of any use to them in their business , and it is also in the last degree unlikely that the first respondent company would take over the Burma Agency while the Merchant Street premises were still unbuilt, leaving it possible for the plaintiff-appellant company to turn them out at a short notice and so bring their business operations to a standstill.

A point of some importance is that Ex J. the agreement for lease of the premises in question, was in the first respondent's hands at the time when the dispute arose between the parties in 1923 and must have been handed over to them when Kilburn and Company relinquished the Managing Agency of the second respondents.

In these circumstances we cannot accept the evidence on the first respondents' behalf alleging that they thought that Ex. J. was in the second respondents' name. From the copy of the agreement sent to Mr. Wearne on 27th August 1921, the first respondents must have known that the agreement was in the plaintiff-appellant company's name, but they must have satisfied themselves that the plaintiff-appellant company held the benefits of that agreement in trust for the second respondents.

A further point to be considered is whether S. 130, T. P. Act, renders this transfer of the rights and liabilities under Ex. J. invalid. In our opinion there has been a valid assignment within the meaning of this section by Ex C read with Ex. B and by the delivery of Ex. J to the transferee, which is a clear indication that a transfer was intended.

For the purpose of our present decision we need only deal with 4th and 5th issues fixed by the learned trial Judge. We would answer the 4th issue in the affirmative.

In answer to the 5th issue we consider that Exs. B and C constitute an agreement whereby the first respondents agree with the plaintiff appellant company to take over the burden and benefit of the agreement for lease, Ex. J, and that in doing so they were not acting in the belief or on the representation of the plaintiff-appellant company that the second respondents were lessees of the premises in suit. We consider that the first respondents are bound by that agreement.

In these circumstances we allow the appeal and set aside the judgment and decree appealed from There will accordingly be a declaration that the first respondent-company should cause the plaintiff-appellant company to be indemnified against all liabilities under the agreement for lease. There will be a decree for the payment by the first respondents to the plaintiff-appellant company of Rs. 3,000 being rent paid for April, May and June 1923, and a declaration that the first respondents are liable to reimburse the plaintiff-appellant company all sums which the plaintiff-appellant company may thereafter have paid, or shall pay to the landlord Mr. N. M. Cowasjee under the agreement for lease or any lease entered into pursuant to the terms thereof. The plaintiff-appellant company are entitled to costs, both in this Court and in the trial Court against first respondent-company only. We allow 20 gold mohurs additional costs. Failing agreement appellants' costs of the Calcutta commission to be taxed.

R K. *Appeal allowed.*

A. I. R. 1929 Rangoon 187

HEALD, J.

Ma Kwi—Applicant.

v.

Ma On May and *another*—Respondents.

Civil Revn No. 27 of 1929, Decided on 23rd May 1929

(a) Contract Act, S. 137—*K* supplying goods to *M*'s employees and *M* being surety for employees—*K* making statement that he did not intend to file suit against employees—Such statement does not amount to waiver of his claim against them so as to discharge *M* from liability.

Where *K* supplied goods to employees of *M* being so authorized by him and *M* was a surety for his employees a statement by *K* that he did not intend to file a suit against the employees, does not amount to waiver of his claim against them so as to discharge *M* from liability nor does it take the case out of the provisions of S. 137 . 2 *U. B. R.* 308; 6 *Bur. L. T.* 62, *Dist.* [P 189 C 1]

(b) Civil P. C., S. 115—Revision does not lie only because Court made error in law.

The fact that the Court makes a mistake in law is not sufficient to warrant High Court's interference in revision. [P 188 C 2]

Maung Myint—for Applicant.

Wellington—for Respondents.

Judgment.—Applicant sued respondents to recover the price of goods sold and delivered. Her case was that respondents, who are husband and wife and were working a rice mill at Hlaingbwe asked applicant who was a shop keeper at Hlaingbwe to supply food stuffs to them, and to the employees at their mill and promised to pay for goods so supplied, and that she supplied certain goods accordingly, that accounts of the goods supplied were settled between her and the respondents in the presence of the employees and that at the settlement respondents agreed to pay the amount then found due. Respondents' defence was that they never authorized applicant to supply goods to their employees or promised to pay for goods so supplied, that they never bought any goods from applicant themselves, that there was no settlement of accounts, that applicant ought to sue the persons who took the goods and that the claim as against them was false.

The trial Court found on the evidence that respondents did direct applicant to supply goods on credit to their employees and undertook to pay any debt "due to them" (sic) and holding that

applicant's claim was proved gave her a decree against them for the full amount claimed. Respondents appealed on the ground that they were merely sureties for payments of the amounts due by their employees and that because applicant had waived her claim against the employees, they were discharged from liability. The point was not raised in the pleadings in the trial Court, but it was considered by the trial Judge who referred to the provisions of S. 137, Contract Act, which says that:

"mere forbearance on the part of the creditor to sue the principal debtor or to enforce any remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety."

The lower appellate Court said that because applicant had not only forborne from suing the principal debtor but had actually waived her claim against them, respondents as sureties were discharged from liability. In support of this decision the learned Judge cited the case of *Ah Pwin* v. *See Shong Foo* (1) and *Williams* v. *King* (2), and on the strength of these rulings dismissed applicant's suit No second appeal lies because the suit is of the nature cognizable by Courts of Small Causes, and the amount or value of the subject-matter does not exceed Rs 500, but applicant asks this Court to interfere in revision on the ground that the appellate Court made out for respondents a case which they had not pleaded or put in issue and that the matter was not one of suretyship at all At the hearing in this Court applicant's learned advocate says that even on the view taken by the appellate Court the contract would be one of indemnity rather than guarantee, meaning presumably that there was no promise to pay and no liability on the part of the respondent's employees who took the goods. I have read the record and heard the learned advocates on both sides and I have no doubt that the decision of the appellate Court was mistaken.

The case of *Ah Pwin* v. *See Shong Foo* (1) was a suit on documents, which the Court hold to be promissory notes, and the learned Judicial Commissioner dismissed the suit on the ground that the claim on the notes was timebarred. There was no application of the provisions of S. 137, Contract Act, but it was said that failure to sue the principal debtor within the period of limitation would ordinarily discharge the surety under S. 134 of the Act. That case was therefore no authority for the appellate Court's decision. The case of *William* v. *King* (2) was not officially reported and the report of it to which the Judge in the appellate Court referred was incorrect. It was Civil 1 Appeal No. 3 of 1911 of the Chief Court of Lower Burma. In that case suit was actually instituted against the principal and his sureties and the plaintiff's advocate in the course of the proceedings said that he would waive the claim against the principal debtor because he could not be found. It was contended that that waiver operated to discharge the sureties under S. 134, Contract Act. The learned Judge who wrote the judgment in that cases said

"The real point to be considered is whether the case should be deemed to come under the provisions of 137, Contract Act, and I am in accord with the decision given in the case of *Ranjit Singh* v. *Nanbat* (3). I do not think that the mere forbearance contemplated in S. 137 extends to actual waiver. It must mean something short of that, as actual waiver has the effect, the legal consequence of which is the discharge of the principal debtor, where as in this case, the claim was waived against him."

The learned Judge accordingly held that the case fell within the purview of S. 134, so that the sureties were discharged Neither of the cases to which the appellate Court referred is at all like the present case, but the fact that the Judge made a mistake in law would not be sufficient to warrant interference in revision. I think however in the present case the Judge was not only wrong on the facts and the law, but was also wrong in overlooking the fact that certain of the goods were alleged to be supplied to respondents themselves, so that so far as these goods were concerned there was no question of suretyship. On the evidence I have no doubt that respondent 1 did authorize applicant to supply goods to the employees at respondents' mill and that respondents also took goods from applicant themselves I think it probable that respondent 1 agreed to pay for goods so supplied to mill employees but even if respondents were in fact only sureties for these employees, I do not think that ap-

(1) [1892-96] 2 U. B. R. 308.
(2) 6 Bur. L. T. 62.
(3) [1902] 24 All. 504=(1902) A. W. N. 166.

plicant's statement that she did not intend to file a suit against the employees would amount to a waiver of her claim against them so as to discharge the respondents from liability or would take the case out of the provisions of S. 137, Contract Act. I, therefore, set aside the judgment and decree of the trial Court and restore the decree of the trial Court with costs for applicant throughout

P.K /R K. *Revision allowed.*

A. I. R. 1929 Rangoon 189

CHARI AND MYA BU, JJ.

Ashia Khatoon—Appellant.

v.

Abdul Hakim Maistry—Respondent.

Special Second Appeal No. 513 of 1928, Decided on 23rd April 1929

(a) Mahomedan law—Suit for restitution of conjugal rights cannot be dismissed on mere plea of non-payment of prompt dower.

The suit for restitution of conjugal rights brought by the husband cannot be dismissed on the mere plea of non-payment of prompt dower : 8 *All.* 149 ; 17 *Cal.* 670 ; 11 *Mad.* 327 ; 30 *Bom.* 122, *Rel. on.* [P 189 C 2 ; P 190 C 1]

(b) Mahomedan law—Text—Difference in opinion between Abu Hanifa and Abu Mahomed.

If Abu Hanifa does not agree with Mahomed, the opinion supported by Abu Usuf should prevail. [P 190 C 1]

M. A. Rauf—for Appellant.

S. J Ali—for Respondent.

Judgment.—This is an appeal against the judgment and decree of the lower appellate Court reversing the judgment and decree of the Court of the first instance, which dismissed the respondent's suit for restitution of conjugal rights against the appellant The parties who are Mahomedans became man and wife according to Mahomedan rights about seven years before the suit. At the marriage a marriage agreement was drawn up setting out certain mutual obligations. One of the terms of the agreement was for payment by the husband to the wife of prompt dowry to the value of Rs. 1,100 of which jewellery worth Rs. 600 was paid then and there and another was that if the wife's jewellery was broken or lost, the husband was to make good the damages or loss. The wife filed a suit for divorce, and resisted the husband's suit on various grounds. The pleadings gave rise to seven issues in all, of which one and two were mentioned for the purpose of this case, for except as to the question of law relating to relief the two Courts below arrived at concurrent findings of fact which are not challenged in this appeal. The fourth ground mentioned in the memorandum of appeal not being pressed, the two issues I refer to are the issue 2 and issue 6 in the list of issues, namely, whether the plaintiff failed to give the defendant her lost jewelleries and whether the defendant was entitled to refuse conjugal rights to the plaintiff until she was paid Rs. 500 The trial Court dismissed the plaintiff's suit on the ground that he was not entitled to restitution of conjugal rights as he had not paid the balance Rs. 500 of the prompt dower mentioned in the marriage agreement. The trial Court found other issues of fact in the plaintiff's favour. On the issue as to whether the plaintiff failed to give the defendant her lost jewelleries the trial Court found in the plaintiff's favour because the defendant admitted having received the sum of Rs. 400 This sum of Rs. 400 according to the plaintiff was one of the two payments towards the balance of prompt dower, the other payment being of a sum of Rs. 100.

As pointed out by the learned Additional District Judge there is not a tittle of evidence to prove that the jewelleries mentioned in the marriage agreement were lost. From this it necessarily follows that the payment of Rs. 400 could not have been for lost jewelleries, but must have been for the balance of prompt dower as alleged by the plaintiff. The learned counsel for the appellant contended that issue 6, implied an admission, on the part of the plaintiff that he had not paid the balance of dower. It is true that the wording of the issue is unsatisfactory, but I can find nothing on the record by which the plaintiff could be said to have admitted the alleged default. Because of the unsatisfactory nature of the issue, the learned counsel urged that the suit be remanded for trial on the issue as to whether the balance had been paid or not. He contends that the authorities relied on by the lower appellate Court to the effect that under the Mahomedan law the suit for restitution of conjugal rights brought by the husband cannot be dismissed on the mere plea of non-payment of prompt dowry are not sound. They are the cases of

Abdul Kadir v. *Salima* (1), *Hamidunnessa Bibi* v. *Zehiruddin Sheik* (2), *Kunhi* v. *Moidin* (3), *Bai Hansa* v *Abdulla Mustafa* (4). *Abdul Kadir's* case was a decision by a Full Bench of the Allahabad High Court and the other later cases followed it. The authority of *Abdul Kadir's* case is challenged on various grounds, one of them being the reference by Mahmood, J to Abu Hanifa and his two disciples as the three masters, and his statement that in the case of difference of opinion among the three, majority should prevail. Abu Hanifa's two disciples were Mahomed and Abu Usuf. In my opinion after consulting the various works of the learned commentators on the subject the general principle appears to be that if Abdul Hanifa did not agree with Mahomed, the opinion supported by Abu Usuf should prevail. Therefore it seems to me no substantial difference between the general statement made by Mahmood, J and the real basis upon which difference of opinion between two of the three should be settled. If the rulings in the cases relied on by the learned Additional District Judge be correct, there could be no doubt that the defendant had no defence, and I see no sufficient ground for not adopting the rulings quoted above In my opinion the appeal fails, and it is dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1886] 8 All. 149=(1886) A. W. N. 53.
(2) [1890] 17 Cal.670.
(3) [1888] 11 Mad. 327.
(4) [1906] 30 Bom. 122=7 Bom. L. R. 681.

A. I. R. 1929 Rangoon 190

HEALD AND MAUNG BA, JJ.

Madan Mohan and *another*—Applicants.

v.

Secretary of State and *another*—Respondents.

Civil Revn. No. 157 of 1928, Decided on 6th May 1929, against decree of Second Judge of Small Causes, Rangoon.

(a) Rangoon Small Cause Courts Act (1920), S. 35—Applicability.

Section 35 does not apply where the charge levelled against the bailiff is that he caused loss by neglecting to satisfy himself regarding the sufficiency of the security offered. [P 191 C 1]

(b) Rangoon Small Cause Courts Act, S. 14 (c)—So long as act done by bailiff is done under or by virtue of order of Court it is done in pursuance thereof though it is not in strict conformity of such order.

Where the Court intending to take a bond for restoration of certain amount sought to be withdrawn by one person ordered the bailiff to report as to the sufficiency of the security offered and where the bailiff took a wrong bond for appearance of the person, a suit brought against the bailiff and the Secretary of State for loss caused owing to neglect of bailiff to satisfy himself as to the sufficiency of the security falls under S. 14 (c) for though the act of the bailiff is not in strict compliance with the order of the Court, it is not an independent act of the bailiff but done in his capacity as bailiff and under or by virtue of the order of the Court. [P 191 C 2]

S. M. Bose—for Applicants

Gaunt—for Respondents.

Judgment.—This is an application to revise the decree of the Second Judge of the Court of Small Causes, Rangoon, dismissing applicant's suit against the Secretary of State for India in Council and the bailiff of that Court. Applicants sued one Gouri Sanker Tewari on a promissory note in the Small Cause Court and attached before judgment a sum of 464/4/- which was lying in deposit to Tewari's credit in Civil Regular Suit No. 8775 of 1924. Tewari then applied to the Court to allow him to withdraw the amount on furnishing security. He offered one Misser as security. On that application the Court wrote this order. "Bailiff for report as to the sufficiency of security" The bailiff then wrote his report on the same application. The report reads "Security furnished. Bond accepted. Paper with bond are herewith returned" The Court then passed this order "Granted". The bond was taken for appearance and not for satisfaction of the decree, nor for restitution of the amount withdrawn. About four months later applicants obtained a decree, but both Tewari and his security absconded Several attempts were made to recover the decretal amount by execution but without success. Consequently applicants sued the Secretary of State and the bailiff for 456-6-3 alleging

"that the bailiff knowing that the defendant and his surety had no property in Rangoon, accepted their security and allowed the amount to be withdrawn."

The learned Judge of the Small Cause Court was of opinion that S. 35 of the Rangoon Small Cause Court, 1920 provides a special remedy and bars such suit. That view is incorrect. That Section reads :

"If any bailiff, clerk or other inferior ministerial officer of the Court who is employed as such in the execution of any order or warrant loses, by neglect, connivance or omission, an opportunity of executing such order or warrant, he shall be liable, by order of the Chief Judge to pay to the person injured by such neglect, connivance or omission, such sum not exceeding in any case the sum for which the said order or warrant was issued, as, in the opinion of the Chief Judge, appears reasonable."

That section would apply only where the bailiff or other inferior ministerial officer of the Court, who is employed as such in the execution of any order or warrant loses, by neglect, connivance, or omission an opportunity of executing an order or warrant. Here the charge levelled against the bailiff was that he had caused loss by neglecting to satisfy himself regarding the sufficiency of the security offered The learned Judge has failed to notice that the suit is one excepted from the cognizance of the Small Cause Court under Cl. (c), S 14, Rangoon Small Cause Courts Act. That clause relates to

"Suits concerning any act ordered or done by any Judge or Judicial Officer in the execution of his office or by any person in pursuance of any judgment or order of any Court or any such Judge or Judicial Officer."

The appellants' advocate contends that the Court intended to take a bond for restoration of the amount which Tewari wanted to withdraw but that the bailiff took a wrong bond for appearance of Tewari and that consequently the act of the bailiff in paying out the amount to Tewari on a wrong bond could not be treated as an act done in pursuance of the order of the Court In his opinion unless an act is done in strict compliance with an order the act cannot be considered to be one done in pursuance thereof. We are unable to accept this argument. So long as the act is done "under or by virtue of" the order it is done in pursuance thereof. These words "under or by virtue of" are used ejusdem generis with the words "in pursuance of" in Stroud's Judicial Dictionary as well as in Maxwell's Interpretation of Statutes In the New Oxford Dictionary the chief current sense of "pursuance" is given as "prosecution, following out, carrying out." The act complained of in the present case was not an independent act of the Bailiff. It was done in his capacity as Bailiff, and under or by virtue of the order of the Court. The legislature does not intend Small Cause Courts, where procedure is summary, to try suits involving complicated questions of law, and so it has excluded many suits involving such questions from the jurisdiction of Small Cause Courts The present question involves complicated questions of law e. g., (1) Whether the bailiff could claim protection under the Indian Officers Protection Act (18 of 1850) and (2) Whether the Secretary of State can be held liable for the neglect of the bailiff We have no doubt that the present suit falls under Cl. (c), S. 14, Rangoon Small Cause Courts Act and that it has been decided without jurisdiction We confirm the dismissal of the suit but on different grounds and dismiss the present application for revision, with costs.

P N/R K. *Revision dismissed.*

A. I. R. 1929 Rangoon 191

BROWN, J.

U Shwe Yone—Applicant.

v.

Ma Yhal Ma and *another* — Respondents.

Civil Revn. No. 64 of 1929, Decided on 27th May 1929, against the judgment of Dist. Judge, Thaton, in Civil Appeal No. 82 of 1928.

Civil P. C., O. 20, R. 11 (2)—Order under R. 11 (2) is appealable being one under Civil P. C. S. 47.

Order passed by the Court, on application made under the provisions of O. 20, R. 11 (2) directing that the decretal amount should be paid by instalments, is appealable being one under S. 47. *A.I.R.* 1926 *R.* 192, *Rel.* [P 192 C 1]

Kin U—for Applicant.

S. G. Chowdhury—for Respondents

Judgment.—The respondents obtained a decree against the petitioner and applied for execution of that decree. The petitioner applied to the trial Court for an order directing that the decree should be payable by instalments, under the provisions of O. 20, R. 11 (2) The trial Judge passed order directing that the decretal amount should be paid by instalment of Rs. 60 a month. The respondents appealed to the District Court, and that Court set aside the trial Court's order. The petitioner has now come to this Court on the ground that the District Court had no power to pass the order it did, as no appeal lay from the orders of the trial Court. It is pointed out that an order under R 11 is not appealable either under S. 104, Civil P. C. or under the provisions of

O. 43 of the Code. That is no doubt the case, but the question remains whether the order comes under the provisions of S. 47 of the Code, and is therefore appealable, as a decree. It was decided definitely in the case of *Saya Hattie* v. *Ma Hwa Sa* (1) that such an order was appealable, and I see no reason for doubting the correctness of that decision. That being so, the appeal to the District Court lay, and this application must fail. I dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1926 Rang. 192=4 Rang. 247.

A. I. R. 1929 Rangoon 192

MAUNG BA, J.

U Tha Me and *others*—Appellants.

v.

Paungde Co-operative Town Bank—Respondent.

Second Appeals Nos 650 to 652 of 1928, Decided on 29th April 1929.

Burma Co-operative Societies Act (6 of 1927), Ss. 47 (4) and 49—Orders of Liquidator under S. 49 are final in absence of rules made under S. 50 (2) (s)—Liquidator purporting to act under S. 47 and issuing order to pay certain sums—It being alleged in some cases that debts were time barred and in one much less sum was due—Civil Court has no jurisdiction.

In the absence of rules made under S. 50 (2) (s), orders of a Liquidator under S. 49 are final and no appeal lies to the District Judge. [P 192 C 2]

Where a certain Co-operative Society had been ordered to be wound up and a Liquidator appointed, purporting to act under S. 47, issued orders to pay certain sums, and it was alleged in some cases that the debts were time barred and in one that much less sum was due, civil Court has no jurisdiction, orders of the Liquidator being within the powers conferred upon him by the Act: 44 *Bom.* 582, 40 *All.* 89, *Rel. on.* [P 192 C 2]

Thein Maung—for Appellants.

Leach—for Respondent.

Judgment.—All three appeals arise out of suits for a declaration that the orders of Liquidator appointed under the Burma Co-operative Societies Act are ultra vires Even at the outset it may be stated that no appeal lay either to the District Court nor a second appeal to this Court. Sub-S. 4 of S. 47 of the Act 6 of 1927, lays down that where an appeal from any of the orders made by a Liquidator under this section is provided by the rules, it shall lie to the Court of District Judge. S 50 (2) (s) empowers the Local Government to make rules prescribing the cases in which an appeal shall lie from the orders of the Liquidator. Such rules have not been framed yet, and the absence of such rules means that no appeal lay, and under S. 49 orders of a Liquidator are final and no civil Court has jurisdiction so long as the orders arise out of matters connected with the dissolution or winding up of a Co-operative Society.

The facts are that the Paungde Co-operative Society has been ordered to be wound up. The Liquidator appointed, purporting to act under S. 47, issued orders to appellants to pay up certain amounts. In three cases it was alleged that the debts had become time barred, and in the fourth case it was alleged that much less sum was due Mr. Thein Maung for the appellants has urged that in the first place those appeals depend upon a correct interpretation of S. 49. It reads:

"Save in so far as is here-in-before expressly provided no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution or winding up of a co-operative society under this Act."

In my humble opinion there is no difficulty in interpreting this section The legislature could hardly have expressed themselves with greater clearness It is only necessary to see whether the orders in question were outside the powers conferred by the Act upon the Liquidator. If they were within such powers, the civil Court would have no jurisdiction. In this view I have the support of the Bench of the Bombay High Court in *Ganpat Ramrao* v *Krishnadas Padmanabh* (1) and that of the Allahabad High Court in *Mathura Persad* v. *Shiobalak Ram* (2) The orders in question were made by the Liquidator within the powers conferred upon him by the Act. It follows that the civil Courts have no jurisdiction As the law now stands there appears to be no remedy and that the liquidator is a law to himself until such time as the Local Government may make rules under S. 50 (2) (s) This being my view of the law, it is needless to consider the grounds of appeal in detail. The appeals fail and are accordingly dismissed with costs.

P.N/R.K. *Appeal dismissed*

(1) [1920] 44 Bom. 582=57 I. C. 423=22 Bom. L R. 732.

(2) [1918] 40 All. 89=42 I. C. 968=15 A. L. J. 869.

* A. I. R. 1929 Rangoon 193

Special Bench

RUTLEDGE C. J. AND BROWN AND CHARI, JJ.

Commissioner of Income-tax—Applicant.

v.

Burma Corporation Ltd. — Respondent.

Civil Ref. No. 5 of 1929, Decided on 13th June 1929.

*** Income-tax Act (1922), S. 10 (2) (ix)—Provident Fund started by company—Part contributed by deductions of employee's salary—Part contributed by company—Provident Fund subsequently transferred to trustees—There was no obligation on the company to make periodical payments to the trustees—Deductions from salaries or contributions by company not actually paid to trustees — Trustees having power to call on the company to make up shortage of its liabilities—Company held not entitled to deduct from their income sums merely carried forward as a book liability in favour of employees or trustees—Cash payments however could be deducted—Actual payment to employee was not necessary—Actual payment to trustees so as to lose proprietary right of control was sufficient.**

A company started a Provident Fund for their employees. According to the rules of the Fund certain percentage from the monthly salaries was to be deducted and credited to the account of the Fund. The corporation also agreed to contribute a bonus equal to the amount deducted from the salary and sums were credited to a separate account. The company subsequently started in respect of the provident Fund. Three persons were made trustees and Government Securities equal to the amounts payable to the members were made over to them. There was no obligation on the company to make periodical payment of any sum whatever to the trustees. The deductions out of the salaries were not paid to them nor were the contributions of the company. The trustees however had power to call on the company whenever any security in the hands of the trustees was short of the liability of the company to supply that deficiency either by cash payment or by furnishing further security. It was contended on behalf of the company that the contributions of the company to the Provident Fund for a particular year were not assessable to Income-tax.

Held . that the object of the trust was not to create a fund in cash vested in trustees, over which the company had lost all control and proprietary rights but to create a body which would be able to secure for the members, satisfaction of the liability of the company.

Held further . that the company was entitled to deduct from the amount assessable to income-tax the actual cash payments made to the trustees. The company was not however entitled to any deductions in respect of the sums merely carried forward in the account as the mere creation of a book liability whether in favour of employees or trustees. It was not necessary that the amount payable to the employees had been paid to them. The company was entitled to deduct, if it had actually paid the amount or its yearly contributions to the trustees in such a way as to lose the proprietary right in and control over them.

[P 195 C 2 ; P 196 C 1]

Government Advocate—for Applicant.

Clifton—for Respondent.

Judgment.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act. The circumstances under which the reference is made are that the Burma Corporation Ltd., had started a Provident Fund for their employees. By the term of the rules of the Provident Fund which is controlled by the Directors of the Corporation it is provided that, in respect of the employees, who are divided into two classes, an amount equal to eight one-third per cent of the salary in the case of Class 1, and five per cent in the case of Class 2 should be debited monthly from the salary of the employees This amount was credited to an account which is called the "A" account, and the Corporation agreed to pay interest at the rate of five per cent per annum on the amouut so credited, which was added to the principal once every six months. The Corporation contributed a bonus equal to the amount deducted from his salary and this amount is credited in a separate account, called the "B" account, and interest was added to this sum in the same manner as in respect of the sums under the "A" account. There was also a "C" account which was another bonus credited to the employee proportioned on the dividend paid by the Corporation, and the amount of the salary of the employee.

It will thus be seen that while the money in "A" account was the employee's own money, the moneys in "B" and "C" accounts were the contributions made by the Corporation. Rule 13, Provident Fund Rules, provided that if any member was dismissed, he was entitled only to the amount standing to his credit in "A" account, and the interest which had accrued thereon, and that all the money credited to his "B" and "C" accounts should remain the property of the Corporation and R. 14 specifically provided that no member

acquired any right in or to the money standing to his credit in "B" and "C" accounts.

In November 1925 the Corporation started a trust in respect of the Provident Fund to the terms of which we shall refer more in detail later. On 31st December 1925 the liability of the Corporation in respect of the Provident Fund amounts to accounts payable to the members amounted to Rs. 12,58,782-4-11 By the Trust deed three persons mentioned therein were made Trustees and Government Securities of the nominal value of Rs. 14,25,000 and the actual value at market rate of Rs. 12,61,125 were made over to them. It will be seen that no money was entrusted to the trustees, but the transfer of the Securities to the trustees may be considered as a payment of the equivalent of the money to them in cash, and taken back by the Corporation as a loan on the Security of the Government Promissory notes.

The point for consideration on this reference is whether the contributions of the Burma Corporation to the Provident Fund for the year ending with June 1927 are assessable to income-tax and super-tax. The learned Commissioner in his reference, makes a statement with which we are in entire agreement that it is not clear whether the contributions for the year in question were actually paid to the trustees, but in order not to complicate matters, he is willing to assume that the sum representing the contribution of the Corporation was actually paid over to the Trustees. In making this concession, the Commissioner practically concedes the whole case, because in our opinion, the non-liability of the Corporation to assessment or otherwise depends entirely on whether the Corporation has or has not parted with the money. Fortunately the form of the question enables us to answer it, in such a way as to enable the Commissioner to make enquiries on this point, and adopt the course consonent with the result of his enquiries.

The contention of the Corporation seems to be that when the amounts are credited to the Trustees it is entitled to a deduction of this amount from the amount for which it is assessable to income-tax and super-tax. The Commissioner admits that the contributions to the Provident Fund under an irrevocable trust are not allowable except under S. 10 (2) (ix), Income-tax Act, and he contends that this section would apply only when there is an irrevocable trust and when the employer has finally parted with his contributions. He is of opinion on a construction of the trust deed that there is no question of any irrevocable trust, since there are many contingencies dependent on the will of the Corporation on the happening of any of which the Corporation can reduce their liability and recover their contribution. The Corporation, on the other hand, contends that the trust is none-the-less an irrevocable trust, simply because in certain contingencies the Corporation will be able to get back its contributions. In this contention, the learned advocate for the Corporation is in the right. Even without any express provision in the trust deed where the purposes, for which the trust is created have been fulfilled or failed there will be a resulting trust in favour of the author of the trust of any undisposed amount in the hands of the trustees. This does not however dispose of the matter, because the real point is a different one.

We shall now refer to a case which has been cited before us. In the *British Insulated and Helsby Cables Ltd* v. *Atherton* (1), the facts were somewhat similar to the facts of the present case. There a pension fund was created and was constituted by a trust deed. The company contributed a sum of £ 31,784 to form the nucleus of the fund and to provide for payment in respect of the past years of service of the employees. It was practically admitted in that case that this money must be deemed to have been wholly and exclusively laid out for the purpose of the trade and therefore deductible under the provisions of the English Income-tax Act, corresponding to those in our own Act, but it was contended that it was in the nature of a capital expenditure, and therefore the Company was not entitled to any deduction. The point actually decided was only in respect of the sum of £ 31,784, it being conceded that yearly payments by the Company equivalent to the deductions out of the salary of the members would be entitled to be deducted from the current year's income. It is not, for the purposes of the case before us, necessary

(1) [1926] A. C. 205.

to refer to more in this judgment than a significant passage in the judgment of Lord Atkinson.

At p 219 of the report he gives a summary of the terms of the trust deed created by the British Insulated and Helsby Cables. After setting out the important provisions of the deed he concludes as follows :

" The trust deed contains many other provisions supporting the conclusion that the company have once and for all parted with all proprietary rights in and all powers over this donation of £ 31,784. "

This ruling was relied upon by the learned advocate for the Corporation, as an authority which shows that payment to the Trustees of a Fund would enable a Company to claim deduction of the amount so paid in the same way as a payment to the employee direct but the concluding passage cited above clearly shows that the real test is whether the Corporation actually pays the money to the trustees and loses all its proprietary right in and all powers over the sum so paid. The mere fact that in some cases it may be entitled to get back a portion of the amount paid out makes no difference in the legal position.

Turning now to the trust deed before us, the powers of the trustees are contained in Cl. 2 of the Trust deed They are six in number.

Clause (a) makes it obligatory on the trustees to realise any portion of the Provident Fund represented by any security if the Corporation desire it to be so realised.

Clause (b) makes it obligatory on the trustees to re-invest the amount so realised in such other securities as the Corporation may direct

Clause (c) provides that whatever sum there may be in the hands of the trustees in excess of the liability of the corporation shall be held by them in trust for the Corporation, who may from time to time, recover such excess.

Clause (d) which is the most important clause, provides that the trustess shall stand possessed of the corpus and income of the Provident Fund on trust for the members for the time being of the Provident Fund and upon a winding up of Provident Fund or of the undertaking of the Corporation, upon trust to apply all monies in their hands in satisfaction of the claim arising under the rules and secondly in payment of the entire balance to the Corporation.

Clause (e) provides that the income of the Provident Fund if any, is subject to the trusts declared by sub-para. (8) payable to the Corporation.

Clause (f) provides that if the trustees shall at any time be unable lawfully to apply the Provident Trust Fund and the income thereof or any part of such Fund, then the trusts hereby created shall determine and the Provident Fund and the income thereof shall forthwith be made over to the Corporation.

Paragraph 3 provides that whenever on any of the accounting days it shall be ascertained that owing to market depreciation of the securities the corpus of the Provident Fund is less than the amount of the liability of the Corporation then the Corporation will pay to the Trustees a further such sum as will be necessary to make good the difference in cash or some security or securities, authorised by the law of British India for the investment of the trust funds or partly by one or partly by the other.

The noticeable feature of this trust deed is that there is no obligation on the Corporation to make periodical payments of any sum whatever to the trustees. The deductions out of the salary carried in "A" account is not paid to them, nor are the contributions of the Corporation carried on the "B" and "C" accounts.

It is true that the trustees have the power whenever any security they may have in their hands is short of the liability of the Corporation to call on the Corporation to supply that deficiency either by cash payment or by furnishing further security, but till the trustees think fit to act on this clause there is no obligation on the Corporation to make any payment The credit in the accounts in favour of the employees or the trustees makes no difference. The object of the trust, as far as one can see, is not to create a fund in cash vested in the trustees, over which the corporation have lost all control and proprietary rights, but to create a body which would be able to secure for the members satisfaction of the liability of the Corporation. As is seen from the remarks in Lord Atkinson's judgment, the real ground on which the Corporation can claim exemption from payment of the Income-tax is that they have actually parted with the money.

The transfer of a book debt, even assuming that as from the date of the trust deed, the trustees are the persons credited in the "A," "B," and "C" accounts on behalf of the members does not mean that the Corporation have either parted with the money or lost control over it.

In our opinion, therefore, the Corporation will be entitled to deduct from the amount assessable to income-tax the actual cash payments made to the trustees, either for the purpose of meeting liabilities of the retiring or deceased members as they arise or for the purpose of supplying any deficiency as contemplated by para. 3 of the trust deed. They are not entitled to any deduction in respect of the sums merely carried forward in the account as the mere creation of a book liability whether in favour of the employees or trustees as it is not equivalent to a payment.

The difference between the Corporation and the Commissioner was merely as to the point of time when the Corporation becomes entitled to a deduction for these amounts. The Commissioner in view of the provisions of the trust deed was of opinion that the Corporation is entitled to a deduction only when the amount payable to the employee has been paid to him. In this, he is wrong, because the Corporation notwithstanding the provisions of the deed, would be entitled to deducation if it has actually paid the amount of its yearly contributions to the trustees in such a way as to have lost the proprietary right in and control over them. The trustees will hold the money primarily as trustees for the employees though in certain cases, a portion of the money may become repayable to the Corporation. When the moneys are so repaid they will be an additional income of that year and as such assessable. The contention of the Corporation is not quite clear. If the position of the learned advocate of the Corporation is that by a mere credit in favour of the trustees, instead of the employees and a creation of a liability to the trustees for the payment of these contributions, the Corporation can deduct the amounts so credited from the assessable sum, notwithstanding they have full control over and unlimited use of the money represented by the credit, we cannot accept his contention.

Our answer to the reference therefore is that the contributions of the Burma Corporation Ltd. to its staff Provident Fund are not assessable to income-tax, if the money had actually been paid to the trustees and the Corporation has lost the control over and the use of the money.

In the circumstances we make no order as to costs

R.K. *Reference answered.*

A. I. R. 1929 Rangoon 196

HEALD, J.

Ma Me Hla—Appellant.

v.

Maung Po Thon—Respondent.

Special Second Appeal No. 402 of 1923 Decided on 3rd January 1929, against the Judgment of Dist. Court, Tharrawaddy, in Civil Appeal No. 51 of 1928.

Buddhist Law (Burmese)—Divorce—Marriage subsists unless dissolved by Court or by mutual consent in presence of elders or by desertion for certain period—Dismissal of wife for adultery cannot constitute divorce—Partition following upon divorce by mutual consent cannot be objected to on ground of misconduct.

Adultery on the part of the wife ipso facto does not put an end to the marriage. The Courts recognise the validity of a divorce by mutual consent effected in the presence of elders, and desertion for a certain period ipso facto puts an end to a marriage but the husband's more dismissal of the wife for adultery cannot constitute a valid divorce. The marriage subsists until it is dissolved by the Court, except in the above mentioned two cases and if a divorce by mutual consent is established it is not open to either party to object to the partition, which such a divorce involves on the ground of misconduct of the other party. [P 197 C 1]

So Nyun—for Appellant.

S. C. Das—for Respondent.

Judgment.—Appellant sued respondent for partition of property on the footing of a divorce by mutual consent already effected between them in the presence of elders. Respondent denied the alleged divorce by mutual consent and said that he had divorced appellant and was entitled to retain all the property by reason of her adultery with a servant of theirs. He also disputed the correctness of the lists of property in respect of which appellant claimed partition. The trial Court found that a divorce by mutual consent was proved and that the misconduct which respondent alleged was not proved, and accor-

dingly gave appellant a decree for partition.

Respondent appealed on the grounds that the divorce by mutual consent was not proved, that on a divorce for misconduct there is no right to partition, and that the decision of the trial Court as to the value of the properties to be divided was mistaken. The lower appellate Court found that adultery on appellant's part was proved, that there was a divorce for misconduct from the moment when respondent discarded appellant for that misconduct, and that appellant was not entitled to partition of the property. Appellant comes to this Court in second appeal on the ground that adultery was not proved.

I may say at once that I know of no authority for the lower appellate Court's view that adultery on the part of the wife ipso facto puts an end to the marriage. The Courts recognize the validity of a divorce by mutual consent effected in the presence of elders, and this Court has recently said that desertion for a certain period ipso facto puts an end to a marriage, but so far as I know it has not yet been held that the husband's mere dismissal of the wife for adultery constitutes a valid divorce. Adultery on the part of the wife is of course a ground for divorce, but I doubt whether proof of such adultery sufficient to satisfy village elders entitles those elders to effect divorce against the will of the wife. I think that as the law at present stands the marriage subsists until it is dissolved by the Court except in the two cases, mentioned above, in which the Courts have recognised the validity of a divorce effected otherwise than by the decree of a Court. I think further that if a divorce by mutual consent is established, it is not open to either party to object to the partition, which such a divorce involves on the ground of misconduct of the other party.

In the present case I am of opinion that a divorce by mutual consent was proved Respondent's own witness U. Pe Hlaw said that he attended before the elder U Sin because respondent had told him that his matter with appellant would be settled and respondent himself says that he told the elders to note that he had discarded appellant for misconduct and that from that day they would regard themselves as divorced. If there was a divorce at all at that time, it must, in my view of the law, have been a divorce by mutural consent, and such a divorce involves an equal division of property. But even if respondent can be regarded as having agreed to a divorce at that time under the misapprehension that he was still entitled to resist partition on the ground of his wife's misconduct, that is to say if the divorce before the elders can be regarded as a divorce which leaves open the question whether it is a divorce by mutual censent or a divorce for misconduct, and therefore leaves open the question of the right to partition as a result of that divorce. I think that respondent's defence would fail because I do not think that the evidence which he called was sufficient to establish the adultery which he alleged. He called the man with whom appellant was said to have committed adultery, but that man was a relation of his as well as his servant and it seems unlikely that if he believed that man had seduced his wife he would have kept him as his servant, and would have maintained friendly relations with him as he admittedly did.

The other evidence to prove the alleged adultery was equally worthless. The adultery is said to have taken place during respondent's absence in Mandalay when repondent's three children by an earlier wife as well as a relation of respondent's were sleeping in the same hut with appellant and the servant with whom oppellant is said to have committed adultery. The relation of respondent's a girl of 13, who had been invited to the house evidently to "play propriety" during respondent's absence, swore that the servant committed adultery with appellant while appellant was sleeping by her side. This story does not sound probable on the face of it, and when it is remembered that the girl is a relation of the respondent's to whom respondent had offered presents shortly before she gave evidence and that she is a daughter of another of respondent's witnesses Po Kyaing, who is a man of no substance, it is clear that her evidence carries little if any weight. Similar considerations affect the evidence of Po Kyaing who said that he once saw appellant and the servant disappear together among the growing paddy, while the evidence of Po Shin, who admits that

until recently he was an opium smoker, and that he owns no property of any sort is equally open to suspicion.

I agree with the Judge in the trial Court that the alleged adultery was not proved. I have no doubt that respondent suspected appellant of adultery, and that he was willing to agree to a divorce for that reason, but I do not think that he has proved that adultery so as to entitle him to resist her claim to partition, supposing that he is entitled to resist it on that ground.

I hold, therefore, that appellant was entitled to a ½ share of the property of the marriage.

It, therefore, thus becomes necessary to consider what that property was Appellant alleged that the kanwin property consisted of 2 buffaloes valued at 150,3 pairs of gold bangles valued at 100, a set of gold buttons valued at 15,2 boxes valued at 20, crockery valued at 2/2 a looking glass valued at 5 bedding including a mosquito net, valued at 39 and clothes valued at 23-8. Respondent said in his written statement that 2 buffaloes were not kanwin property, but in his evidence he said that he did not know whether they were or not, and that at the time of the negotiations for the marriage he agreed that they might be regarded as kanwin, if the elders thought that they ought to be. I think, therefore, that the judgment in the trial Court was right in regarding them as kanwin. Respondent said that the gold bangles and the buttons had been pledged with a Chettyar for a debt for which he and appellant would both be liable and he called the Chettyar's clerk to prove this. I hold, therefore, that the gold bangles and buttons should be disregarded. As for the rest of the things, which appellant alleged to be kanwins respondent said that they were old and were over-valued in the plaint and this is clearly probable, since it is unlikely that a cane box would be worth 10 or 5 cotton blankets would be worth 25. I think that if the value of these articles be taken at half the amount mentioned in the plaint justice will probably be done. I hold, therefore, that so far as the kanwin properties are concerned appellant is entitled to ½ the value of the buffaloes, that is to say 75 and ½ the value of the other properties excluding the gold bangles and buttons, that is to say to 244.

As for the properties acquired during the marriage I disregard the value of the paddy, which I am satisfied was paid in satisfaction of debts, and I allow appellant only ½ the value of the 150 baskets, which respondent admittedly retained. The value of this paddy at the rate claimed by appellant namely 180 per 100 baskets would be 270 and appellant's share would be 135. As for the clothing said to have been acquired during the marriage I think it fair to deal with it in the same way as the kanwin clothing and on this account I hold that appellant is entitled to 132.

I, therefore, set aside the judgments and decrees of the lower Court and give judgment for appellant for 247-6 with costs on that amount in all Courts Appellant will pay the respondent the difference between the Court-fees and advocate's fees on 900 and these fees on 247-6 in the lower appellate Court.

M.N /R.K. *Appeal allowed.*

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* A. I. R. 1929 Rangoon 198

HEALD, J.

M. T. T. K. M. M. N. Chettyar Firm —Appellants.

v.

K. P. A. N. M. Firm and *others*— Respondents.

Civil Revn. No 39 of 1929, Decided on 23rd May 1929, against judgment of Dist. Judge, Tharrawaddy, in Civil Misc. Appeal No. 164 of 1926.

(a) Civil P. C., S. 73—Scope.

Where each of the 3 decree holders of the same judgment-debtor took out execution of his decrees in the execution cases of the Sub-Divisional Court and also in execution cases of the Township Court and where one of them in execution case of the Sub-Divisional Court attached and brought to sale certain properties belonging to the common judgment-debtor and where the other decree-holders claimed rateable distribution in the Sub-Divisional Court the decree-holders are entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court : *A. I. R.* 1928 *Rang.* 157, *Rel. on.* [P 199 C 2]

(b) Civil P. C., S. 96—Meaning.

It does not follow that because an appeal lies under the Letters Patent there is similar appeal in the Code. The right of appeal is

a right conferred only by express provision and in cases under the Code, unless the right is given by the Code, there can be no appeal. [P 199 C 2]

*** (c) Civil P. C., S. 115—Appellate Court deciding correctly but without jurisdiction —High Court will not interfere in revision.**

Where the appellate Court has decided correctly but has decided without jurisdiction by holding that appeal lay where appeal did not lie, High Court will not interfere in revision. [P 200 C 1]

(d) Civil P. C., S. 73—Order under S. 73 is order in execution proceedings but is not decree within meaning of S. 47 and is not appealable.

An order under S. 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in S. 47 are present, and a question arising between rival decree-holders which does not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and so the decision of such question is not appealable. 42 *Cal.* 1, *Rel. on.* [P 200 C 1]

M. C. Naidu—for Appellants.

Bhattacharya—for Respondents.

Judgment.—All the present parties who are Chettyar firms hold decrees against one Tun Maung, and have taken out execution of his decree in Civil Execution 121 of 1928 in the Sub-Divisional Court, Tharrawaddy on 13th October 1928. Respondent 1 took out execution of his decree in Execution cases 87 and 93 of 1928 of the Sub-Divisional Court on 20th and 25th July 1928 respectively, and in execution case 188/28 of the Township Court on 14th July 1928. Respondent 2 took out execution of his decrees in Execution cases 101 and 111 of 1928 of the Sub-Divisional Court of 11th August 28 and 11th September 1928 respectively and in Execution case 276/28 of the Township Court on 20th September 1928. Respondent 3 took out execution of his decrees in Execution cases 92 and 106 of 1928, on 25th July 28, and 29th August 1928 respectively and in execution cases 259, 260, and 261 of 1928 of the Township Court on 8th September 1928. In execution case 93 of 1928 of the Sub-Divisional Court, Respondent 1 attached and brought to sale certain properties belonging to the common judgment-debtor Tun Maung, the sale being held on 29th October 1928.

The other parties claimed rateable distribution in the Sub-Divisional Court but the learned Judge following the decision of a single Judge of this Court in the case *Chettyar C. R. M. A. V. K. R. S.* v. *Chettyar* (1) held that rateable distribution could be had only in respect of decrees execution of which had been taken out in the Sub-Divisional Court. The learned Judge's attention was drawn to the decision of a bench of this Court in the case of *Kwai Tong Kee* v. *Lim Chaung Ghee* (2) but he said that in his opinion that decision neither overruled nor distinguished the earlier case and that it related merely to the procedure between the High Court and the Small Cause Court, Rangoon. Respondents appealed on the ground that the *C R.M A.* case (1) was overruled by the decision in *Kwai Tong Kee's* case (2). Applicant objected that no appeal lay but the appellate Court overruled that objection on the ground that the decision in *Kwai Tong Kee's* case (2) was a judgment of this Court in an appeal. The learned Judge following the decision in *Kwai Tong Kee's* case (2) held that respondents were entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court. Applicant applies for revision of that order on the ground that no appeal lay to the lower appellate Court, and that the holders of decrees which were being executed in Township Court were not entitled to rateable distribution.

As for the latter of those 2 grounds the decision in *Kwai Tong Kee's* case (2) is conclusive, and there is no room for doubt that the decision of the appellate Court on this point is correct.

On the question whether or not an appeal lay, the appellate Court over looked the fact that *Kwai Tong Kee's* case (2) was an appeal under the Letters Patent in which there is no provision for revision, and not under the Code and that it does not follow that because an appeal lies under the Letters Patent, there is similar appeal under the Code The right of appeal is a right conferred only by express provision of law, and in cases under the Code, unless the right is given by the Code, there can be no appeal. In the case of *Balmer Lawries & Co.* v. *Jadunath* (3), a bench of the

(1) A. I. R. 1928 Rang. 96=5 Rang. 757.
(2) A. I. R. 1928 Rang. 157=3 Rang. 131.
(3) [1915] 42 Cal. 1 = 27 I. C. 644 = 19 C.W.N. 1202.

High Court of Calcutta said that an order made under S. 73 of the Code is an order in execution proceedings but is not a decree unless all the conditions enumerated in S. 47, are present, that a question arising between rival decree-holders, which did not affect or interest the judgment-debtor is not a question which arises between the parties to the suit in which the decree under execution was passed and that, therefore, the decision of such a question is not appealable. That decision was accepted by a bench of the High Court of Madras in the case of *Venkataperumal* v *Venkata Reddi* (4) and I have no doubt that it is good law.

The question then arises whether in a case where the appellate Court has decided correctly, but has decided without jurisdiction, this Court ought to interfere in revision. Interference in revision is always a matter of discretion, since as S. 115 of the Code says that "the High Court may make such order in the case as it thinks fit." In this case since the effect of the District Court's order was to direct the doing of what according to law ought to be done, I see no reason to interfere in revision and I dismiss the application. In the circumstances of the case the parties will bear their own costs in this Court.

P.N /R K. *Revision dismissed.*

(4) [1915] 39 Mad. 570=29 M. L. J. 96 = 29 I. C. 231=(1915) M. W. N. 334.

A I. R. 1929 Rangoon 200

HEALD AND MAUNG BA, JJ.

Ma Mon Tha and *others*—Applicants.

v

Ma San and *others*—Respond ents.

Civil Revn. No 316 of 1928, Decided on 17th May 1929, against decision of Dist. Judge, Myingzan, in Civil Appeal No. 39 of 1928.

Provincial Small Cause Courts Act, Art. 4 — Growing palm tree is immovable property—Burma General Clauses Act.

The definition of immovable property given in the Burma General Clauses Act applies to the Provincial Small Cause Courts Act and as growing palm tree is immovable property for the purposes of the former Act, it is also immovable property for the purposes of the latter Act: 24 *Bom.* 31; 23 *All.* 291; *A. I. R.* 1927 *Pat.* 1; *A. I. R.* 1928 *Pat.* 652; 38 *Mad.* 883; *A. I. R.* 1927 *Rang.* 94; *Cons.* and *Dist.* 19 *Bom.* 207; 3 *M. H. C.* 237, *Con.*

[P 203 C 1]

S. Gunguli—for Applicants.

P. K. Basu—for Respondents.

Heald, J.—The parties to this litigation are descendants of a common ancestor, Shwe Ban, applicants being the widow and children of Maung Tun, a son of Shwe Pan's son Tha Dun Aung, while respondents are Tha Dung Aung's half brothers and sisters, being children of Shwe Pan by a wife other than Tha Dun Aung's mother. They are litigating about a poddy palm grove valued at Rs 300. Applicants are in possession of the grove and they allege that it belonged to Tha Dun Aung who gave it to his son Maung Tun from whom they inherited it. Respondents on the other hand say that they received it as their share of the estate of Shwe Pan, as a result of arbitration proceedings between them, and Tha Dun Aung's widow Ma Pyu, and that applicants are merely tenants of Ma Pyu. It is to be noted that the litigation relates only to the growing trees and not to the lands on which they stand, the separate ownership of growing palm trees and the land on which they stand being recognized in this province where such trees and land are separately assessed to revenue. The trial Court dismissed respondent's suit, but the District Court on appeal gave them a decree for possession of the trees. Applicants have now filed an application in revision against the decision of the District Court, but under S. 115 of the Code, no revision lies if the decree is appealable. The decree is appealable under S. 100 of the Code if the suit is not of the nature cognizable by Courts of Small Causes, and it is appealable under S. 11, Burma Courts Act if it is not a suit of the nature cognizable by a Court of Small Causes, under the Provincial Small Cause Courts Act, but is a suit relating to immovable property or to any right or interest in immovable property or is a suit in which it is necessary to decide any question relating to succession, or inheritance. So far as both the Code and the Act are concerned, the question whether the suit is one of the nature cognizable by Courts of the Small Causes arises, and so far as the Act is concerned the further question might arise as to whether or not it is a suit in which it is necessary to decide a question relating to succession or inheritance. It is not suggested that that

further question arises in this case but it has been assumed that the suit is one of the nature cognizable by Courts of Small Causes on the ground that growing palm trees are not immovable property and therefore a suit for possession of them is not within the purview of Art. 4 of the Sch. 2 to the Provincial Small Cause Courts Act.

In Upper Burma suits for possession of palm groves or growing palm trees have for many years been regarded as suits for immovable property probably on the strength of the ruling in the case of *Po Thein* v. *Maung To* (1), where it was held that growing palm trees are not "standing timber" within the meaning of these words in S. 3 of the Upper Burma Registration Regulation so as to be excluded from the definition of immovable property for the purpose of that Regulation But in the case of *Maung Kywe* v. *Maung Kala* (2) a learned Judge of this Court, following the case of *Natesa* v *Tengavelu* (3) held that a lease of growing palm trees was not a lease of immovable property within the meaning of definition of immovable property given in the Transfer of Property Act, and that the rent reserved by such a lease did not fall within the definition of rent given in that Act, and that therefore a suit for such rent was not a suit for "rent" within the meaning of Art 8, Sch. 2, Provincial Small Cause Courts Act, but was a suit of the nature cognizable by Courts of Small Causes. In support of the view that growing trees are immovable property the following cases have been cited namely *Kishnarao* v. *Babaji* (4), *Muhammad Sadiq* v. *Laute Ram* (5), *Bodha Gandheri* v. *Ashleke Singh* (6) and *Lalaji Singh* v. *Nawab Chowdhury* (7). On the other side besides the Rangoon case, only the case of *Natesa* v. *Tangavelu* (3) mentioned therein has been cited. The decision in *Kishnarao* v. *Babaji* (4) related to the question, whether a growing mango tree was immovable property far the purpose of S. 3, Registration Act of 1866, which like the present Registration Act excluded a "standing timber" from the definition of immovable property and the learned Judges said that "timber" meant properly such trees only as are fit to be used on building and repairing houses and that a mango tree, which is primarily a fruit tree might not always come within the term. They decided, however, on the strength of the statement of the Judge in the trial Court that a mango tree though a fruit bearing one, may be classed as a timber tree, especially in this part of the country (Ratnagiri) where its wood is often used for building houses," that the tree in that case should be regarded as moveable property for the purposes of the Registration Act. The case of *Mahomed Sidiq* v. *Laute Ram* (5) did not really raise or decide the question whether or not growing trees are immovable property. The question raised in that case was whether on partition by a Revenue Court, which had statutory jurisdiction to partition "land," the trees growing on the land passed by such partition and it was held that they did pass as being part of the land.

The case of *Bodhi Gandheri* v. *Ashleke Singh* (6) was a suit for possession of growing mango trees which was alleged to have been transferred by an unregistered deed of gift. The question was raised whether growing mango trees were "standing timber" within the meaning of S. 3, present Transfer of Property Act, which like the Registration Act excludes "standing timber" from the definition of immovable property. The learned Judges expressed an opinion that in the peculiar circumstances of that case and having regard to the fact that the tree in suit was not intended to be used as timber but was intended and was in fact used for the purpose of enjoying the fruits from it, the tree must be regarded as "immovable property" and not moveable property for the purpose of the Transfer of Property Act. The case of *Lalji Singh* v. *Nawab Chowdry* (7) related to the definition of "immovable property" in the Registration Act and the following passage occures in the Judgment

"The question, therefore, is whether fruit trees such as mango trees are to be regarded as standing timber or not. In my opinion they clearly are not standing timbers. They are not intended for use as timber at all, they

(1) [1902-03] 2 U. B. R. 1.
(2) A. I. R. 1927 Rang. 94=4 Rang. 503.
(3) [1914] 38 Mad. 883=23 I. C. 102=(1914) M. W. N. 327.
(4) [1899] 24 Bom. 31=1 Bom. L. R. 489.
(5) [1900] 23 All. 291=(1901) A. W. N. 86 (F.B.).
(6) A. I. R. 1927 Pat. 1=5 Pat. 765.
(7) A. I. R. 1928 Pat. 652=7 Pat. 646.

are in the ordinary course used merely as fruit trees, that is to say, they are there for the purpose of yielding fruit and not for the purpose of being cut down in order to be converted into furniture or parts of houses or for any other purpose for which timber is ordinarily used. It may be that occasionally mango wood is used for the same purpose as ordinary timber, but if so it must be very exceptional. The wood of the mango tree is not in my experience of such a nature that it can be said to be used generally as timber. In the result the learned Judges held that for the purpose of the Registration Act growing mango trees are not " standing timber " and are therefore "immovable property. "

In the Case of *Natesa* v *Tangavelu* (3) a written lease of certain palm trees had been given, and the question arose whether that lease needed to be registered. The learned Judge found that the interest conveyed by the document which was the right to take toddy and fruit from the trees for two years was not for the purposes of the Registration Act an interest in immovable property since it proceeded to some extent on a consideration of the fact that fruit upon and juice in trees are moveable properties. It will have to be noticed that in all these cases in so far as they dealt with the question whether or not growing trees are to be regarded as immovable properties dealt with that question in relation to either the Transfer of Property Act or the Registration Act. But the definitions of " immovable property " given in those Acts do not apply to the Code or to the Burma Courts Act, or to the Provincial Small Causes Courts Act.

The definition of " immovable property " which applies to the Code is that given in the General Clauses Act 1897, which says that in all of the Governor General in Council Acts and Regulations made after the commencement of that Act, unless there is anything repugnant in subject of contexts "immovable property" shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth but so far as the Code is concerned that definition is modified by the statement in the Code itself that moveable property includes growing crops. The definition which applies to the Burma Courts Act is that given in the Burma General Clauses Act, which is the same as that given in the General Clauses Act of 1897. There is no definition of immovable property which by law applies to the Provincial Small Cause Courts Act, because that Act was passed before the General Clauses Act of 1897 came into force and the earlier General Clauses Act contained no definition of immovable property, but I think that in the absence of anything repugnant in the subject or context the definition given in the General Clauses Act which is the same as that given in the General Clauses Act 1897, certainly applies to the Provincial Small Cause Courts Act. There seems to be little case law on the Subject of the meaning of immovable property in the Code, but in the case of *Sakharam* v. *Vishram* (8) the High Court of Bombay held that a suit for possession of a growing Jack fruit tree was a suit for immovable property.

As for the Small Cause Courts Act, the High Court of Madras in the case of *Shanti* v *Vepa* (9) which does not seem to have been officially reported said that a Small Cause Court cannot entertain a suit for possession of a growing Jack fruit tree, which is certainly immovable property.

If growing palm or fruit trees are immovable properties for the purpose of the Transfer of Property Act and the Registration Act, which exclude " standing timber " from the definition of " immovable property " then a fortiori they would be immovable property for the purposes of the General Clauses Acts which say that immovable property included things " attached to the earth, " the words " attached to the earth " having already been defined in the Transfer of Property Act as meaning among other things " rooted in the earth as immovable properties in the cases of trees and shrubs" In the Upper Burma case already cited, reference is made to the definition of timber given in Wharton's Law Lexicon, and Strued's Judicial Dictionary and it may be useful to refer to the definition given in the New English Dictionary. There " timber " is said to be building material generally wood, used for the building of houses ships, etc., for the use of carpenter, joiner, or other artisan, wood in general as a material especially after it has been suitably trimmed and squared into logs or further adapted to constructive uses.

(8) [1895] 19 Bom. 207.
(9) 3 M. H. C. 237.

The word is said to be applied to the wood of growing trees capable of being used for structural purposes and hence collectively to the trees themselves as a " Standing timber " and in English law to embrace generally the oak, ash, and elm of the age of 20 years or more and in the particular districts by local custom including other trees such as birch, in the county of York and beech in the county of Buckingham. The Dictionary cites Blackstone as saying that Oak, Ash and Elm are timber in all places, and in some particular Counties by local custom where other trees are generally used for building, they are therefore considered as timber. It is probable that the framers of the Transfer of Property Act and the Registration Act were familiar with the meaning of the word " timber " in England and used this word instead of the word " trees " intending to include only trees ordinarily used as material for buildings, ships, furniture and the like, and to exclude trees, not so used. The view that " standing timber " on the Registration Act means trees " intended for early conversion into timber " has been adopted by Government of Burma in Direction 24 of the Burma Registration of deeds, Directions, and it is clear that there is judicial authority for that view. I think therefore that growing toddy palm trees are ordinarily immovable property under the Transfer of Property Act, the Registration Act, and that there are certainly immovable properties within the definition of the General Clauses Acts and are therefore " immovable properties " for the purposes of the Code, and the Burma Courts Act, and I see no reason to believe that they are not immovable properties for the purposes of the Small Cause Courts Act I would therefore hold that the present suit being a suit for possession of immovable property is not a suit of the nature cognizable by Courts of Small Causes, and that therefore a second appeal lies, and that the application for revision is incompetent.

Maung Ba, J.—I concur.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 203
Full Bench

RUTLEDGE, C. J., AND MAUNG BA AND HEALD, JJ.

Emperor—Applicant.

v.

Maung Pu Kai and *another*—Accused.

Criminal Revn. No. 319-A of 1929 and Criminal Ref. 39 of 1929, Decided on 12th June 1929, against order of Special Power Magistrate of Yamethin, D/- 17th December 1928.

(a) Penal Code, S. 114—Person punishable under particular section of Code read with S. 114 is punishable as principal and is guilty of substantive offence.

A person, who is punishable under the particular section of the Code read with S. 114, is punishable not as an abetter but as a principal and is guilty of the substantive offence and not merely of abet ment of that offence : 10 *Bom. L. R.* 26 *Discussed* and *Doubted.* [P 206 C 2]

(b) Penal Code, S 114—If person is convicted of offence under particular section of Code read with S. 114 and if that offence renders him liable to whipping in lieu of or in addition to other punishment either under Whipping Act or Burma (Amendment) Act 18 of 1927, he is so punishable.

If a person is convicted of an offence under a particular section of the Code read with S. 114 and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma (Amendment) Act (8 of 1927), the person so convicted is punishable with whipping in lieu of or in addition to any other punishment ; 7 *L. B. R.* 63, *Appr.* and *Dist.* [P 207 C 1]

(c) Penal Code, S. 109—Court is not justified in saying that words 'punishment provided for offence' in S. 109 mean punishment for offence either in Penal Code or in some special or local law—Interpretation of Statutes. (*Per Baguley, J.*' *In the order of Reference*).

Although a Penal law must be interpreted as far as possible in favour of the subject still the Court is not justified in adding at the end of the section a qualifying or explanatory phrase which is not to be found in the section itself. That being so the Court is not justified in saying that the words "punishment provided for the offence" in S. 109 mean punishment provided for the offence either in the Penal Code or in some special or local law : 7 *L. B. R.* 63, *Discussed* and *not Appr.* [P 204 C 2]

(d) Penal Code, S. 40—Scope.

(*Per Baguley, J.—In the order of reference*).—S. 10 refers to the definition of the word "offence" and it in no way refers to the punishment of the offence. [P 205 C 1]

Order of Reference.

Baguley, J—One of the accused in this case, Maung Hmen, alias, Hmon Gyi has been convicted under S. 326,

I. P. C., read with S. 114 and sentenced to two and half years rigorous imprisonment and 30 lashes. He appealed to the Sessions Judge, Yamethin, but the appeal was dismissed The case has been sent for by this Court to consider the legality of the sentence of whipping in addition to imprisonment in the case of a conviction under Penal Code, S. 326 read with S. 114. It appears from a perusal of the judgment that the offence really was punishable under S. 326, I. P. C., read with S. 109. The legality of sentences of whipping in cases of abetments is not very clear and there seems to have been some divergence of opinion in this Court as to whether abetment of an offence mentioned in S. 3, Burma Act 8 of 1927 can be punished with whipping in lieu of or in addition to any other punishment to which the offender may be liable under the Penal Code. In view of this divergence of opinion and of the importance of the point (for at present moment Magistrates are being urged on the one hand to pass sentences of whipping, whenever they can be legally passed and appear suitable, and on the other hand are being severally dealt with when they pass illegal sentences of whipping) I refer the matter to a Bench or a Full Bench as may commend itself to the Honorable Chief Justice. The only recorded case that I can find on this point is a ruling of the late Chief Judge of the Chief Court of Lower Burma, then Twemey, J., recorded as *King Emperor* v. *Po Han* (1). The head-note of this ruling is:

"Persons (other than juvenile offenders) convicted of abetment of theft (or of any other offence specified in S. 3, Whipping Act 1909) cannot be punished with whipping under the provisions of that section."

This case was apparently not argued in Court and the gist of the judgment is as follows:

"The words punishment provided for the offence in S. 109, I. P. C. mean the punishment provided for the offence either in the Penal Code or in some special or local law: (see Ss. 40 and 41)."

The Judge then goes on to point out that the Whipping Act is not a Special or a local law within the meaning of Ss 40 or 41 and that therefore the offence of abetment of an offence mentioned in S. 3, Whipping Act, 1909 cannot be punished with whipping. S. 109 is quite clear in its phraseology. It runs as follows:

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

The addition made by Twemey, J., of the words "either in the Penal Code or in some special or local law" do not appear in S. 109 and I see no ground for supposing they were ever intended to be there. Words when perfectly plain and clear must be given their natural meaning and although I fully recognize that a Penal law must be interpreted as far as possible in favour of the subject, I do not think that a Court is justified in adding at the end of a section a qualifying or explanatory phrase, which is not to be found in the section itself. It appears to me that one reason why this clause has been added and has found favour in the eyes of some Judges is that the Whipping Act of 1909 in certain cases mentions abetments in relation to certain offences, but does not mention the word "abetments" in relation to other offences. For instance S. 4 (a) makes whipping specially applicable to the offences of abetment, commission or attempt to commit rape, while in S. 5 which relates to juvenile offenders, abetments, commission, and attempts at commission of certain offences are made punishable by whipping. In my opinion, however, the fact that abetments are mentioned in some places and not in others is not a conclusive proof that it was the intention of the legislature to make all other abetments not punishable with whipping. The offence of abetment is punishable in various ways, according to the form in which the abetment takes place. S. 109 makes one form of abetment, which has certain results punishable with the same punishment provided for the offence itself. S. 110 relates to another form of abetment with other consequences. S. 111 is the same, so are Ss. 112, 113, 115, 116 and 117. When abetment of a certain offence is specially made punishable with whipping I take it that abetment of that offence coming under any section from S. 109 to 117 would be punishable with whipping, but at the moment I am only concerned with abetments punishable under Ss. 109 and 114. With regard to abetments punishable under S 114 it seems to me personally that there can be no possible doubt. S. 114 says that a per-

(1) [1914] 7 L. B. R. 63=22 I. C. 147=7 Bur. L. T. 99.

son who is punishable under that section read with some substantive section

" shall be deemed to have committed such act or offence, that is, the act or offence mentioned in the substantial section."

When a man is deemed to have committed an offence, I take it that that means that in the eyes of the law he is to be treated as though he had committed the offence and is liable to all the pains and penalties which the commission of the offence may bring upon him. If the commission of an offence makes the man, who commits it liable to whipping, he must also be regarded as liable to whipping if he is deemed to have committed the offence, for in the eyes of law he has committed the offence and is liable to all the consequences entailed thereby.

With regard to S 109, the Code says that the man who abets an offence for which he is liable under S. 109 read with some substantive section shall be punished with the punishment provided for the offence mentioned in the substantive section and does not specify in what way the punishment may be prescribed. The reference to S. 40 is in my opinion inapt. S. 40 refers to the definition of the word "offence" and it in no way refers to the punishment for the offence. The offence contemplated in this order of reference are offences under the Indian Penal Code which are punishable either under the Code or under another Act. When the Code says that they shall be punished with the punishment provided for the offence, I see no limit in the words which would restrict the punishment to the punishment prescribed under the Indian Penal Code.

I would therefore refer the following questions :

(1) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under S. 114 read with the section of the Indian Penal Code applicable to the offence and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927 and is the person so convicted punishable with whipping in lieu of or in addition to any other punishment ?

(2) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under S. 109 read with the section of the Indian Penal Code applicable to the offence and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act 8 of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment ?

Heald, J —In his Criminal Reg. Trial No. 83 of 1928, the Special Power Magistrate, Yamethin, convicted an offender under S. 326 read with S. 114, I. P. C., and sentenced him to 2½ years rigorous imprisonment and 30 stripes whipping under S. 326 of the Code and S. 3 of the Whipping (Burma Amendment) Act 1927.

The learned Judge of this Court before whom the case came in revision suggested that S. 109 should have been applied to the case instead of S. 114 and raised the question of the legality of a sentence of whipping in a case to which either S. 114 or S. 109 applies. He has accordingly referred the following questions :

(1) If a person convicted of abatement..... other punishment ?

(2) If a person is convicted..... ..to any other punishment ?

It is clear that on the case only the former of these 2 questions arises. S. 3, Whipping (Burma Act 1927), renders

" any person who commits an offence under S. 326, I. P. C. punishable with whipping in lieu of or in addition to any other punishment under S. 4, Whipping Act."

Section 4, Whipping Act says that whoever abets, commits or attempts to commit rape or "commits" certain other offences may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence, abetment or attempt be liable under the Indian Penal Code. S 114, I. P. C. says that whenever any person, who if absent would be liable to be punished as an abetter, is present when the act or offence for which he would be punishable in consequence of the abetment is committed he "shall be deemed" to have committed such act or offence, while S. 109 of the same Code says that whoever abets an offence shall, if the offence is committed in consequence and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. There is so far as I know no case law bearing directly on the question whether or not a person who under S 114 of the Code "is deemed to have committed" an offence is punishable whith whipping under Ss. 3 or 4,

Whipping Act, if the offence is one of those mentioned in these sections other than rape, the abetment of which is specifically mentioned in S. 4 Whipping Act.

In the case of *Emperor* v. *Kashia Antoo* (2) which was decided by a single Judge of the High Court of Bombay, an offender was convicted of theft under S. 379 read with S. 114 of the Code, and the question was raised whether or not the provisions of S. 75 of the Code could be applied to the case, that is to say, whether or not he was guilty of the offence of theft. The learned Judge said

"It seems to me that nothing could have been easier for the legislature, had it intended the abetment of an offence ..... to be included under S. 75 than to have said so."

He went on to say that S 114 of the Code does not say

"he shall have committed such act or offence but he shall be deemed to have committed such act or offence."

In other words he is to be treated in the same way as if he had committed the offence. That is not the same thing to my mind as saying he has committed the offence ..... Mr. J. Chandavarker has recently put a construction under the words "shall be deemed" when used by the legislature as follows

"when one thing is not the same as another thing, but the legislature says that it shall be deemed to be

the same thing, it creates a legal fiction, and in that case,

"the Court is entitled and bound to ascertain for what purposes and between what persons the statutory function is to be resorted to, per James, L. J. in *Ex parte Walton* (3). And fictions creted by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted. *Mostyn* v. *Fabrigas* (4), *Emperor* v. *Atmaram* (5). It appears to me that this is the a correct construction to be put upon these words. The effect of S. 114, therefore, is that if a man is present at a commission of an offence he is to be deemed to have committed it not that he has committed it."

With all respect for the opinion of the learned Judge, I suggest that the legal fiction in this case was created by the legislature between the Court and the offender for the purpose of enabling the Court to punish the offender for the substantive offence, and that as the learned Judge says, for that purpose he is to be treated in the same way as if he had committed the offence, that is to say, he must be regarded by the Court as having committed the offence. In my opinion a person who is convicted of an offence under a particular section of the Indian Penal Code read with S. 114 of that Code is not convicted of abetment but is convicted of the substantive offence. S. 114 deals expressly with "a person who if absent would be liable to punishment as an abetter," and provides that such person if present when the offence for which he would be punishable "in consequence of the abetment" is committed, he shall be deemed to have committed the offence. I cannot read that section otherwise than as meaning that such a person is more than an abetter, and that he is in fact what is called in English law a principal in the second degree. It is true that that section is included in the chapter of the Code which deals with "abetment" but that chapter deals in Ss. 118, 119, and 120 with matters which it does not call 'abetment' and which in particular cases might possibly not fall within the definition of abetment and it was obviously a matter of convenience to include in the chapter which deals with abetment, a section which deals with the circumstances in which a person, who has in fact abetted an offence, and who even as as an abetter might be punished for the offence committed, is to be regarded as more than an abetter and is "to be deemed to have committed the offence."

For these reasons I am of opinion that the decision of the learned Judge who decided *Kashia Antoo's* case (2) was mistaken, and I would hold that a person, who is punishable under a particular section of the Indian Penal Code read with S. 114, is punishable not as an abetter but as a principal and is guilty of the substantive offence and not merely of abetment of that offence I entirely agree with the view taken by learned Judge of the Chief Court of lower Burma in the case of *Emperor* v. *Po Han* (1), that the wording of the Whipping Act is inconsistent with the view that abetment of the offences which are mentioned in that Act (or to which that Act is made applicable by the Whipping (Burma Amendment Act 1927), is punishable with whipping except in cases where abetment is expressly made so punishable, but I regard cases in which S. 114

(2) [1908] 10 Bom. L. R. 26.
(3) [1881] 17 Ch. D. 746.
(4) [1774] 1 Cowp. 161, 177.
(5) [1907] 31 Bom. 480=9 Bom. L. R. 661.

is applied not as cases of abetment, but as cases where the offender is punishable for the substantive offence as principal. I would accordingly answer the question which arises on the reference as follows :

"If a person is convicted of an offence under a particular section of the Indian Penal Code read with S. 114 of that Code, and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or addition to any other punishment either under the Whipping Act, or under Burma Amendment Act (8 of 1927) the person so convicted is punishable with whipping in lieu of or in addition to any other punishment."

Maung Ba, J.—I concur.

Rutledge, C. J.—I concur.

P.N./R.K. *Reference answered.*

A. I R. 1929 Rangoon 207

CUNLIFFE, J.

J. R. Baroni—Plaintiff

v.

Secy. of State—Defendant.

Original Civil Regular Case No. 75 of 1929, Decided on 6th May 1929.

Government of India Act (1919), S. 96-B—Rules under R. 14—Person occupying position of Extra Assistant Commissioner dismissed—He bringing suit against Crown in damages for wrongful dismissal on ground that provisions of R. 14 and Circular G. No. 18 of 1926 issued by Government of Burma were not followed—Though he cannot rely on alleged breach of procedure in Circular G. No. 18, he is not precluded from bringing suit and decision of case will depend on alleged breach of formalities in R. 14.

Where a person, who occupied the position of E. A. C. was dismissed from his appointment and he brought a suit against the Secretary for State for India in Council in damages for wrongful dismissal on the ground that the provisions of R. 14 and the Circular G. No. 18 of 28th April 1926 issued by the Government of Burma, Central Department were not followed, though he cannot rely on the alleged breach of the procedure laid down in Circular G. No. 18 as such order is purely an executive one, he is not precluded from bringing his action and decision of the case will depend on the consideration of the alleged breach of the formalities laid down in R. 14. *Gould* v. *Stewart*, (1896) *A. C.* 575, *Appl. A.I.R.* 1927 *Cal.* 911, *Rel. on.* [P 203 C 2]

Plaintiff in person.

Govt. Advocate—for Defendant.

Judgment.—The plaintiff in this action is one J. R. Baroni, who formerly occupied the position of Extra Assistant Commissioner in the Burma Civil Service. His plaint alleges that on 9th January 1927, he was suspended from office, and on 30th April 1927, he was dismissed from his appointment by the order of the Local Government. He now sues the Secretary of State for India in Council in damages for wrongful dismissal. The suit is brought in forma pauperis. The reply of the Crown is in the form of a demurrer. It is contended on behalf of the Secretary of State that in the circumstances no action lies. S. 96-B. Government of India Act 1919, in its particulars, material to this case, runs as follows:

(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State for India in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person thus appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may without prejudice to any other right of redress, complain to the Governor of the province in order to obtain justice and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorize the Indian legislatures to make laws regulating the public services.

Under this subsection rules were made regarding the Civil Services of India by the Secretary of State. R. 14 is in these terms:

"Without prejudice to the provisions of the public Servants Inquiries Act, 1850 in all cases in which the dismissal removal or reduction of any officer is ordered, the order shall except when it is based on facts or conclusions established at a Judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be proceeded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused the evidence in support of it and any evidence

which he may adduce in his defence shall be recorded in his presence, and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded in each charge."

On 28th April 1926, the Government of Burma, general department issued a Circular G No. 18 of 1926. This circular dealt exhaustively with departmental enquiries, particularly those which involved the dismissal or removal of public servants. Elaborate directions were given as to conduct of those enquiries and any appeals which might be preferred against orders passed in relation to removal or dismissal. The plaintiff alleges inter alia that the provisions of R. 14 and Circular G No 18 have not been followed in his case. S. 32, Government of India Act (on which some reliance was also placed by the plaintiff) as far as sub-S. (1) and (2) are concerned is in this form:

"(1) The Secretary of State in Council may sue and be sued upon by the name of the Secretary in Council as a body corporate."

(2) Every person shall have the same remedies against the Secretary of State in Council, as he might have had against the East India Company, if the Government of India Act 1858, and this Act had not been passed."

I may say at once that S. 75 of 3 and 4 William 4 Chap. 85. lays down that:

"Nothing in this Act shall take away the power of the said Court of directors to remove or dismiss any of the officers or servants of the said company, but that the said Court shall and may at all times have full liberty to remove or dismiss any such officer or servants at their will and pleasure."

I have been unable to discover any later statute dealing with the same power of the Court of Directors of the Old East India Company, and therefore am of opinion that as far as S. 32, Government of India Act is concerned this section does not assist the plaintiff's claim. It is now well established law that, apart from some special statutory safe-guard, no action will lie against the Crown for the wrongful dismissal of a servant of Government. This rule of law is based upon public policy and a prerogative right of the Sovereign. In certain cases however, it has been held that a statute dealing with Governmental employment has by its provisions qualified and restricted the right of the Crown in this regard. Such was the view held by the Privy Council in *Gould* v. *Stewart* (1). There the construction of a New South Wales Statute, the Civil Service Act of 1884 was under consideration. Apparently the Act in question did not contain the words during his Majesty's pleasure or any similar words referring to the prerogative of the Crown. It was contended however, that such words must be implied or imported into any Act of this nature. The Privy Council were of opinion that that was so, in all ordinary cases, following the decisions on *Dunn* v. *Reg* (2) and *De Doshe* v. *Reg* (3), but they held that this particular Act of Parliament in Part 3 thereof contain special provisions for the protection of Government servants, which restricted the unlimited power of the Crown to dismiss them. In principle I am unable to distinguish the case before me now, from the decision in *Gould* v. *Stewart* (1). To my mind, the meaning of the words.

"Subject to the provisions of the Act, and of the rules made thereunder, every person in the civil service of the Crown in India, holds office during His Majesty's pleasure"

read together with R. 14, is quite clear. They indicate that certain formalities must be observed before a civil servant can be dismissed, and so far as these formalities are alleged not to have been followed, the plaintiff is not precluded from bringing his action. I am fortified in my opinion by a similar view expressed by Buckland, J. in the very analogous case of *Satis Chandra Das* v. *Secretary of State* (4). I do not consider however that any alleged breach of the procedure laid down in Circular G No. 18 of 1926, can be relied on by the plaintiff as I regard this order as purely executive one, and not flowing directly from the Statute. The plea of demurrer is therefore dismissed. The case will therefore proceed in the restricted line I have indicated, and will be confined to a decision on the alleged breach of the formalities laid down in R. 14. Costs will be in the cause.

P.N./R.K. *Order accordingly.*

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(1) [1896] A. C. 575=35 L. J. P. C. 62=75 L. T. 110.

(2) [1896] 1 Q. B. 116=65 L. J. Q. B. 279=60 J. P. 117=44 W. R. 243=73 L. T. 695.

(3) [1896] 1 Q.B. 117.

(4) A. I. R. 1927 Cal. 311=54 Cal. 44.

A. I. R. 1929 Rangoon 209 (1)

OHARI, J.

U. Maung Gyi—Applicant.

v.

Naungbo Co-operative Credit Society—Respondent.

Civil Revn. No. 47 of 1929, Decided on 8th May 1929, for leave to sue in forma pauperis.

Civil P. C., O. 33, R. 5—Court cannot dismiss application for leave to sue as pauper by going beyond allegations therein.

Where the allegations made in the application for leave to sue as a pauper show a cause of action, the Court cannot dismiss the application by going beyond the allegations and taking into consideration the evidence of the defendant to the suit. [P 209 C 2]

A. Loo Nee—for Respondent.

Judgment.—The petitioner in this Court U Maung Gyi filed an application for leave to sue in forma pauperis. He alleged that he cultivated his land measuring 120 acres forming part of the Naungbo Athin land, that the paddy the produce of the land valued at about Rs. 7,000 was taken away by the respondent society the Naungbo Co-operative Credit Society by its chairman U. Aung Myat and that the petitioner U. Maung Gyi asked for the return of his paddy or its value and not having got either the one or the other the petitioner filed the present suit. He has filed a schedule showing the property of which he is now possessed, which according to him is of the value of Rs. 58-10-0. The learned Additional District Judge on the application for leave to sue in forma pauperis stated that he doubted the claim, and that he would like to examine the applicant under O. 33, Civil P. C. R. 4, O. 33, allows such a procedure. The petitioner was examined presumably under the power given in O. 33, R. 4, but the Additional District Judge did not stop there and went further and examined U. Aung Myat, the defendant, who naturally denied plaintiff's claim. U. Aung Myat is a Karen Christian, who was made to swear on the Kyanza* and, his evidence must, therefore, be rejected as not having been taken in accordance with the provisions of law. But even if it had been properly taken it should not be taken into consideration in passing an order under O. 33, R. 5.

So far as the record goes there is nothing to show that the statement of U Maung Gyi is false, and that of U Aung Myat is true. The learned Judge of District Court dismissed the application purporting to do so under O. 33, R. 5, Cl. (d). That clause provides that where the allegations do not show a cause of action the application for permission to sue as a pauper shall be rejected. The allegations in the petition do show a cause of action and it is by going beyond the allegations and considering the statement of U. Aung Myat which the Additional District Judge has no business to do that the Judge concluded that the statement of claim in the petition is not true. The procedure of the Additional District Judge is misconceived and his order is wrong There has been no enquiry into the pauperism of the partitioner. The order of the District Judge is set aside and the matter is remanded for enquiry into pauperism and disposal according to law. There will be no order as to costs since neither party is responsible for the order of the District Judge

P N/R K. *Case remanded.*

* "Kyanza" is a book of imprecation on which oaths are generally administered to Burman Buddhists (for its text see p. 57. Burma Courts Manual Vol. 1—Ed.)

A. I. R. 1929 Rangoon 209 (2)

MAUNG BA, J.

Emperor

v.

Po Thin Gyi—Accused.

Criminal Revn No. 1281-A of 1928, Decided on 3rd December 1928.

Criminal P. C., S. 236—Alternative charges cannot be combined under one charge—S. 236 applies when the law applicable and not facts are in doubt—Conviction in the alternative is bad when distinct finding as to facts is not arrived at.

Alternative charges under two sections cannot be combined together in one head of charge. If the Magistrate desires to charge the accused in the alternative he must frame two separate alternative charges. Section 236 does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to a certain set of facts which have been proved. While the facts are in doubt there is no objection to the Magistrate framing alternative charges, but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, and then only if the law applicable to the facts which he considers to have

been proved is doubtful, he may convict in the alternative. [P 210 C 1]

Judgment.—The accused in this case has been convicted, in the alternative, either of having committed the offence of theft of two cart wheels, under S. 379, I. P. C., or of having committed the offence of having taken a gratification of Rs. 5 for the restoration of the said cart wheels without taking any steps to cause the thief to be apprehended, under S. 215, I. P. C. The case has been very badly tried. Alternative charges under two sections cannot be combined together in one head of charge. If the Magistrate desires to charge the accused in the alternative, he must frame two separate alternative charges. Moreover, the facts stated in the charge do not comprise the essential ingredients of an offence under S. 215. Furthermore the conviction in the alternative is bad. Section 236, Criminal P. C., does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to a certain set of facts which have been proved. While the facts are in doubt there is no objection to the Magistrate framing alternative charges, but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, and then only if the law applicable to the facts which he considers to have been proved is doubtful, he may convict in the alternative.

In the present case there was no doubt whatever as to the facts, or as to the law applicable thereto. There was no evidence whatever to connect the accused with the theft of the cart wheels, and the facts proved were that the accused obtained a gratification of Rs. 5 to restore the stolen cart wheels, and then took no steps either to recover the wheels or to cause the apprehension of the theft. The offence committed by the accused was undoubtedly one under S. 215. The alternative conviction is therefore set aside, and the accused is convicted of an offence under S. 215, I. P. C. In view of the previous convictions proved against the accused the sentence of 18 months' rigorous imprisonment was suitable and will stand.

M.N./R.T. *Order accordingly.*

A. I. R. 1929 Rangoon 210

BROWN, J.

U San Win—Applicant.

v.

U Yan Nyein—Respondent.

Civil Revn. No. 74 of 1929, Decided on 28th May 1929, against judgment and decree of Dist. Judge, Pyapon, in Civil Appeal No. 100 of 1928.

(a) Burma Rural Self-Government Act, S. 28 (1) (c)—Scope.

The District Council has no power to give authority to a lessee to collect fees which are not authorised by legislative authority. [P 211 C 1]

(b) Burma Rural Self-Government Act, Ss. 28 (1) (c) and 52 — Court interpreting words " on roads or streets within half mile of public or private market " in Ss. 28 and 52 as not necessarily meaning edge of either side of or part of roads or streets—High Court will interfere in revision—Civil P. C., S. 115.

Where the Court interpreted the words " on roads or streets within half a mile of a public or private market " appearing in Ss. 28 and 52 as not necessarily meaning the edge of either side of, or part of roads or streets, the error of the Court is more than an error in law for he has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject and so the High Court will interfere in revision. [P 211 C 1, 2]

Wellington—for Applicant.

Zeya—for Respondent.

Judgment.— The facts of the case are admitted. The respondent U Yan Nyein has purchased from the District Council of Begale the right to collect fees from the day and night bazaar at Begale for a period of one year The petitioner U San Win is occupying a piece of land and keeps thereon bamboos, and myaws for sale. The respondent claims that as licensee he is entitled to demand fees from the petitioner, and he has brought a suit in the Township Court for the amount he claims to be due. The Township Court has dismissed his suit but on appeal to the District Court, he has been given a decree, and the petitioner has now come to this Court in revision. Accordiug to the license he obtained from the District Council the respondent is entitled to levy fees

" from those persons who expose goods of any kind for sale outside residential building within half a mile from the main bazaar buildings X X X X From the sellers of earthern jars, bamboos, myaws, posts, along the bank the lessee shall levy Rs. 0-4-0 a day. "

It is admitted that the place where the petitioner is selling bamboos and myaws is, within half a mile of the main bazaar buildings and it is apparently outside any residential buildings. The respondent's claim therefore is clearly covered by his license, but the District Council have no power to give authority to a lessee to collect fees which are not authorized by legislative authority. The section of the Burma Rural Self-Government Act 1921 which deals with these powers, is S. 28, read with S. 52, and it is not contended that any part of S 28, except Cl. (1) (c) or any other section of this or any other Act, gives them the power claimed. S. 28 (1) (c) reads as follows:

"With the previous sanction of the Commissioner a District Council may levy a toll or fee for the right to expose goods or live stock for sale on roads or streets within half a mile of a public or private market within the area over which its jurisdiction extends."

Section 52 so far as it is applicable to the present case is similarly worded. The land on which petitioner sells his goods, is apparently Government waste land which at one time petitioner occupied under a license from the Deputy Commissioner which he has since continued to occupy without such license. The place where the goods are exposed for sale is said to be 80 feet from the Strand Road. The learned District Judge in his judgment says:

"The words "on roads or streets within half a mile of a public or private market" which appear in Ss. 28 and 52 of the Act do not necessarily mean the edge of either side of or part of roads or streets."

I do not know what his authority for this statement is The meaning of the words seems to me to be plain.

It is not contended that the goods in this case were exposed for sale on a road or street. It is a well known cannon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject. The learned District Judge in the present case has entirely overlooked this rule, and has read into the provisions of Ss. 28 and 52 a meaning which the plain meaning of these sections cannot to my mind possibly bear. I am clearly of opinion that the trial Judge was right and the District Judge was wrong in his findings in this case. The matter is before me in revision only. But I think the error of the District Judge is more than a mere error in law. He has entirely overlooked the elementary principle of interpretation of statutes and has interpreted certain words in the Burma Rural Self-Government Act in an entirely arbitrary manner giving them a meaning which they cannot possibly bear. I am of opinion that the facts in this case justify an interference in revision. I set aside the decree of the District Court and restore that of the trial Court, dismissing the plaintiff's suit. The plaintiff-respondent will pay the costs of the defendant-applicant in all three Courts.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 211

PRATT, J.

Ma Fatima and *others*—Appellants.

v.

Momin Bibi and *others*—Respondents,

Special Second Appeal No. 69 of 1928. Decided on 4th February 1929, against judgment of Dist. Court, Mandalay, in Civil Appeal No. 122 of 1927.

(a) Suits Valuation Act (7 of 1887), S. 8—Partition Suit—Plaintiffs' share determines jurisdiction and court-fee—Court-fees Act, S. 7 (iv) f.

In partition suit valuation both for the purpose of court-fee and jurisdiction is the amount at which the plaintiff values his share and not the value of the entire partible estate: *A. I. R* 1925 *Cal.* 320; *A. I. R.* 1923 *Pat.* 342, *Dist*, 20 *Mad.* 289, *Ref.*, 24 *All.* 381, *Foll.* [P 212 C 2]

(b) Civil P. C., O. 13, R. 4—Document admitted by Commissioner—No endorsement by trial Court—Document is admissible in evidence and forms part of the record.

A document, which is duly proved and accepted by the commissioners appointed to take evidence, is duly endorsed, initialled and dated by the commissioner and is received by the Court without endorsement and without any objection by a party, becomes part of the record and is evidence notwithstanding the fact that the trial Court did not endorse it as required by O. 13, R. 4: *A. I. R.* 1916 *P. C.* 27, *Ref.* [P 213 C 1]

Sanyal and *S. Mukerjee*—for Appellants.

A. C Mukerjee and *Lutter*—for Respondents.

Judgment.—Plaintiff Mariam Bibi sued for partition, accounts, and her share of the estate of her deceased grandfather Khoda Bux Khan. The suit was valued at Rs. 2,000 for the purposes of

court-fees, being the estimated value of her share, but for purposes of jurisdiction at Rs 22,000 being the value of the whole estate.

The District Judge, to whom the plaint was presented, returned it for presentation to the Sub-Divisional Court, and the suit was tried in that Court

It is now contended that the Subdivisional Court had no jurisdiction and that the value for the purposes of jurisdiction is the value of the whole estate.

Reliance is placed upon the Calcutta case of *Rajani Kanta Bag* v. *Rajabala Dasi* (1), where it is definitely laid down that ordinarily a suit for partition is triable by the Court which is competent to try a suit valued at the entire value of the property and not the subject-matter of the share, which is to be partitioned.

This ruling, however, was referring to partition suits by Hindus, who are entitled to joint possession, as is clear from the sentence

"But it seems to us that in the present case the plaintiff had to establish his title and had to establish his right to joint possession, which was denied, before he could seek partition of the property in suit."

The parties in the present appeal are Mahomedans and the suit is not strictly a suit for partition of an undivided family estate, but in reality is a suit for a share of inheritance.

I would also remark that an important part of the Calcutta ruling dealing with the case shown by the vakil showing cause is apparently incorrectly reported and I find it unintelligible.

The Patna case of *Ranjit Sahi* v. *Muhammad Qasim* (2) cited by the advocate for appellants is against his contention, for it is there laid down, that there is a distinction between suits for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suit where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case it is the plaintiff's share, which will determine the jurisdiction of the Court and not the value of the entire property.

In *Velu Goundan* v. *Kumaravelu Goundan* (3), a Bench of the Madras High Court took the view that in a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share the value of the suit for purposes of jurisdiction is the amount at which the plaintiff values his share.

A similar view was taken by a Bench of the Allahabad High Court in *Wajih-ud-din* v. *Waliullah* (4).

Section 8, Suits Valuation Act, provides that wherein in suits other than those referred to in the Court-fees Act, 1870, S. 7, para. 5, 6 and 9 and para. 10, Cl (d), Court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same.

In the present suit court-fees are payable ad valorem and the suit is not of any of the classes referred to in the paragraphs of S. 7, Court-fees Act, mentioned.

The value of the suit for purposes of jurisdiction must therefore be taken to be Rs. 2,000 and the suit was rightly instituted in the Sub-Divisional Court.

On the merits it is argued that the District Court's finding that the children's claim to the masonry building was not barred by limitation, was wrong, that the mortgage-deed executed by Khoda Bux and Rahamat Bibi in favour of Mr. Chatterjee was not legally admitted as an exhibit and should not have been treated as evidence, and that the Court was not justified in holding that the building in question belonged to Rahamat Bibi, wife of Khoda Bux.

Both Courts have relied upon the recital in the mortgage deed referred to (filed at p. 105 of the trial record and marked Ex. I) as proving that the building belonged to Rahamat Bibi.

The particulars required by O. 13, R. 4 have not been endorsed on the document in question and it has not been signed or initialled by the Judge.

It is contended accordingly on the authority of *Sadik Husain Khan* v. *Hashim Ali Khan* (5) that this Court ought to refuse to read the document or allow it to be treated as evidence.

(1) A. I. R. 1925 Cal. 320=52 Cal. 128.
(2) A. I. R. 1923 Pat. 342=2 Pat. 432.
(3) [1896] 20 Mad. 289=7 M. L. J. 30.
(4) [1902] 24 All. 381=(1902) A.W.N. 88.
(5) A. I. R. 1916 P. C. 27=38 All. 627=43 I. A. 212 (P.C.).

In the case cited their Lordships of the Privy Council laid down that in future, in order to prevent injustice, they would be obliged on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Apart from the obvious comment that their Lordships were laying down a rule of procedure to be observed in appeals before them, it has been overlooked entirely that the mortgage-deed in question was put in as an exhibit before the commissioner appointed to take the evidence of Mr Chatterjee, that Mr. Chatterjee proved the document and that it was endorsed by the commissioner as Ex. I, initialled and dated by him on the date on which Mr. Chatterjee was examined.

Under O. 26, R. 7, when a commission has been duly executed and returned, the commission and the return thereto and the evidence taken under it "shall" form part of the record of the suit.

The document was not objected to before the commissioner and apparently not at all in either of the Courts below It is therefore part of the record of the suit rightly and, having been duly proved, is evidence.

The mere fact that the trial Judge omitted to have the endorsement required by O. 13, R 4 made cannot in the circumstances render a document proved before the commissioner, marked by him as an exhibit, initialled and dated, inadmissible as evidence.

The document clearly proves that Rahamat Bibi was the owner of the building in dispute.

The trial Court held that, as Khoda Bux had the building in his possession for 20 years after his first wife's death, and there was no evidence to show that he held it on behalf of the co-heirs, the claim of the other heirs to shares was barred by limitation.

On appeal the learned District Judge, in an able and lucid judgment, held that there was nothing to indicate that Khoda Bux's possession of the building was adverse to his children by Rahamat Bibi and that the natural presumption was that he was in possession on their behalf as well as his own.

I have no doubt that the case of *Hari Pru* v *Mi Aung Kraw Zan* (6) remains sound law and that where a co-owner is in possession of undivided property under the circumstances in evidence there is a presumption that he is in possession on behalf of all the co-heirs

Consequently it would be necessary to prove an overt claim to exclusive ownership by Khoda Bux more than 12 years prior to the suit in order to escape from the effects of the presumption No such claim was proved.

The District Court was on this view right in holding that the claim to the building was not barred by limitation.

The appeal therefore fails and will be dismissed with costs.

V.B./R K *Appeal dismissed.*

(6) [1919] 10 L. B. R. 45=52 I. C. 649=12 Bur. L. T. 129.

A. I R 1929 Rangoon 213

BROWN, J.

(*Maung*) *Aung Ban* and *others*—Defendants—Appellants.

v.

Maung Nge and *others*—Plaintiffs—Respondents.

Special Second Appeal No 25 of 1929, Decided on 21st June 1929, from judgment of Dist Judge, Thaton, in Civil Appeal No. 96 of 1928.

(a) Burmese Law (Buddhist) — Burmese wife transferring property inherited from parents by contract of sale under such circumstances as to raise strong presumption that she was acting on behalf of marriage partnership—Such transfer is binding both on husband and wife though husband is not active party.

Where a person obtained possession under a contract of sale made by a Burmese wife of property inherited from her parents and she disposed of the property under such circumstances as to raise a strong presumption that she was acting on behalf of the marriage partnership, the transfer is a good transfer binding both husband and wife, though the husband may not be an active party to the transfer *A. I. R.* 1927 *Rang.* 203, *Rel. on.* [P 214 C 1,2]

(b) Civil P. C., S 100—Finding of facts not questioned in first appeal cannot be raised in second appeal.

If finding of fact by the trial Court is not questioned in the first appeal, no objection can be allowed to be raised against it on second appeal to the High Court. [P 214 C 2]

P. K Basu—for Appellants

Ba Thein (2)—for Respondents.

Judgment — Respondents 1 and 5 brought a suit against the appellants and respondent 6 in the Sub-Divisional

Court of Pa-an for possession of certain land. Respondent 1 Maung Nge was married to one Nan Pun and respondents 2 to 5 are his children by Nan Pun. The plaint sets forth that the land in suit was the property of Maung Nge and Nan Pun, and that the defendants are in wrongful possession thereof. It does not state how the defendants came into possession. The defendants pleaded that possession of the land was given by Nan Pun during her lifetime under a contract of sale, and that the sum of 900 was paid as consideration Plaintiff 1 when examined stated that he did not know of his own knowledge about this alleged transaction, but that his wife told him that she had mortgaged the land to the respondents, Aung Bin and Ma Tun.

The defendants called evidence to prove that they obtained possession under a contract of sale, and their evidence on this point was believed by the trial Judge. Maung Nge himself was admittedly not an active party to the transfer but in accordance with the principle approved in the case of *Ma Paing* v. *Maung Shwe Hpaw* (1), the trial Court held that the transfer by Ma Nan Pun was a good transfer, binding both husband and wife. The plaintiff's suit was therefore dismissed.

The plaintiffs appealed and the District Court modified the decree by directing that one-third of the land be given to the plaintiffs Against this decree the defendants have appealed, and the plaintiffs have filed cross-objections. The land in question was admittedly inherited by Ma Nan Pun from her parents, and in my opinion the trial Court was right in following the principles laid down in *Ma Paing's* case The District Judge appears to have thought that those principles would not be applicable because the transfer had taken place before the decision in *Ma Paing's* case. But there is nothing in the judgment in that case to justify any such interpretation of its meaning. In so far as the finding in that case differs from earlier decisions, it interpreted the law in a different manner from previous interpretations, but no Court has the power to make a fresh law, nor did the Full Bench which decided *Ma Paing's* case purport to do so. The principles approved in that case were held to be principles underlying Burmese Buddhist Law, and if the decision is correct, they were applicable in 1917 no less than in 1927

In the present case, it is admitted that the money which Ma Nan Pun obtained was used to pay off the family debts. The property had been inherited by her, and the circumstances are such as to raise a strong presumption that in disposing of the property she was acting on behalf of the marriage partnership. The District Judge was therefore in my opinion in error in holding that the plaintiffs were entitled to a third share in the land. In the cross-objection one of the grounds is that there is no satisfactory oral evidence as to the alleged transfer. On this point, there was a definite finding by the trial Judge against the respondents, and although the respondents appealed against the trial Court's judgment they did not in their appeal to the District Court question the correctness of the trial Court's finding of fact. They cannot therefore be allowed to raise this point now In my opinion the case was rightly decided by the trial Court. I set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondents. The plaintiff-respondents will pay the costs of the defendant-appellants in all three Courts.

P.N./R.K. *Decree set aside.*

(1) A. I. R. 1927 Rang. 209=5 Rang. 296 (F.B.).

A I. R. 1929 Rangoon 214

RUTLEDGE, C J , AND BROWN, J.

Daw Phaw—Plaintiff—Appellant.

v.

Ma Tin Nu and *another*—Defendants—Respondents.

First Appeal No 215 of 1928, Decided on 18th February 1929, from judgment of Original Side in Civil Regular No 287 of 1927.

Religious Endowments — Shwe Dagon Pagoda—Under scheme framed by late Court of Recorder of Rangoon in Civil Regular Suit No 139 of 1884 property within precincts of Pagoda grant is vested in trustees and they have sole right to repair buildings such as Zayats.

Under a scheme framed by the late Court of the Recorder of Rangoon in the Civil Regular Suit No. 139 of 1884, the property within the precincts of the Pagoda grant is vested in the

trustees and they have the sole right to repair buildings such as zayats, and although bye-law of the trustees mentions that a register shall be kept by them for the purpose of requesting the original donor and his representatives and descendants to undertake the repairs, the maintaining of such register is purely a matter of grace on the part of the trustees and the High Court has no power to act as a Court of appeal or revision from any decision which the trustees might make as to what name should be entered in the register.

[P 215 C 2]

Halkar—for Appellant.

E. Maung—for Respondents

Judgment.—This is an appeal from a judgment of the Original Side of this Court, dismissing the plaintiff-appellant's suit, which was for a declaration that she had the sole right to do repairs to the zayat situated at the southern slope of the Shwe Dagon Pagoda now registered wrongly in the name of Daw Kyin as against the defendant-respondents. The defence set up in para 10 of the written statement stated:

"That the zayat, being property subject to a charitable trust under a scheme framed by the late Court of the Recorder of Rangoon in Civil Regular Suit No. 139 of 1884, the trustees of the Shwe Dagon Pagoda appointed under the said scheme have full legal title to and control over the zayat in suit, and that the plaintiff is not entitled to maintain this suit against the defendants."

A reference to the scheme shows that amongst the duties of the trustees are enumerated the following :

"(i) They shall, out of the trust funds, keep in repair the said pagoda, and the pagoda, zayats, and other buildings connected therewith, and the platform thereof, and the steps leading thereto.

(ii) They shall control the erection of new pagodas, zayats, spiral sheds, altars, idols, flag-poles, and bells on the above * * *.

They shall have control over all offerings made at the said pagoda and all other property held in trust for the purposes of the said pagoda."

Though, in the scheme, no paragraph specifically vests the property in the trustees, the decree in the said suit—Civil Regular No. 139 of 1884—has the following paragraph :

"And it is further ordered and decreed that all the funds and property now held for the purposes of the said decree shall be, and the same is, hereby vested in the abovementioned persons as trustees of the same for the purposes of the said pagoda."

We are satisfied that the property within the precincts of the Pagoda grant is vested in the trustees, and that they —and they only—have the right to repair buildings, such as zayats. This has not been disputed by the appellant and the trustees have not been joined as parties to the present suit.

The Rules and Regulations of the Shwe Dagon Pagoda Trust (Ex A), set out this very clearly :

"* * * All the kuthodaws built and standing on the Sacred Hill shall be repaired, decorated and maintained only by the pagoda trustees according to their will and pleasure * * *."

The trustees in the exercise of their will and pleasure may request the original donor or his or her representative or descendants to undertake the repairs, and their bye-law goes on to mention that for this purpose a register shall be kept by them, and the names of such descendants may be changed as may be necessary through death or migration elsewhere. But the reading of this bye-law as a whole makes it clear that the maintaining of such a register is purely an act of grace on the part of the trustees, and entries on such register are matters with which they (the trustees), are only concerned

In effect the appellant is asking this Court to act as a Court of appeal or revision from the acts of the trustees. Our simple answer is that we have no such power From any decision which the trustees might make as to what name should be entered on this register, there is no appeal to this Court. They are in a much better position to come to a right decision than we are, and it is clear that they were acting within their powers. The appeal accordingly fails and must be dismissed with costs, seven gold mohurs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 215

CHARI AND BROWN, JJ.

Maung Ba Thein and *another*—Defendants—Appellants.

v.

U Po Min—Plaintiff—Respondent.

First Appeal No. 6 of 1929, Decided on 19th June 1929, from a decree of Dist. Judge, Yamathin.

Civil P. C., O. 17, R. 1 (1)—On day fixed for hearing, case not called until 2 p.m.—Six witnesses for plaintiff examined and 40 witnesses for defendant present — Defendant's advocate appearing in other Court and defendant applying for adjournment but Court

refusing—Though defendant has not shown sufficient cause for not being ready with his case, Court should use its discretion in allowing adjournment.

On the day fixed for hearing the case was not called until 2 p. m., and 6 witnesses for the plaintiff were examined and 40 witnesses for the defendant were present. The defendant asked for adjournment on the ground that his advocate was appearing in some other suit and the Court refused the application.

Held that although the defendant had not shown sufficient cause for not being ready with his case, the Court should exercise its discretion in allowing an adjournment for even if the defendant's advocate had been present it would have been impossible to proceed very far with the defence case on the day. [P 216 C 2]

Aiyangar—for Appellants.

Po Aye—for Respondent.

Judgment.—The respondent brought a suit in the District Court of Yamethin for possession of 146 67 acres of land. The case was originally fixed for hearing of witnesses on 2nd and 3rd November 1928. On 3rd November 1928, the plaintiff was examined and an adjournment was then allowed owing to the absence of certain maps. The case was then fixed for hearing on 14th November 1928. The diary entry of that date reads as follows :

" Called. Plaintiff and defendants present. Pleader for plaintiff present. Defendant 1 says he and his witnesses will be examined when his pleader appears Six prosecution witnesses examined. Plaintiff closes his case. Defendant 1 states he will not examine his witnesses as his pleader is absent. Judgment on 17th November 1928, parties warned. All defence witnesses present."

On 28th November 1928, an application supported by affidavit was filed asking that the defendants might be allowed to examine their witnesses before judgment was delivered. The Judge passed orders on this application, the next day refusing to allow it, and delivered judgment the same day. The present appeal is filed on the ground that the defendants should under the circumstances have been given an opportunity of examining their witnesses. Affidavits have been filed in which it is stated that the case was not called on 14th until 2 p. m and that when the defendants asked for an adjournment on the ground that their advocate was appearing in the Sessions Court at Pyinmana, the application was refused.

No counter affidavits have been filed, and we may accept these statements as correct. Six witnesses were examined for the plaintiff on 14th November 1928, and it must, therefore, have been getting very late in the afternoon when the plaintiff closed his case. It appears that some 40 witnesses for the defendants were present The defendant had not perhaps shown sufficient reason for not being ready with their case ; but in the special circumstances we think that the trial Court should have exercised his discretion in allowing an adjournment on the payment of costs. Even had the defendant's advocate been there, it would have been impossible to proceed very far with the defence case on 14th November 1928. We accordingly set aside the decree of the trial Court and remand the case to that Court for the defendants to be allowed to produce their evidence on their first paying to the plaintiff the costs of the adjournment, advocate's fee, 3 gold mohurs. Appellants will be entitled to a refund of the court-fees paid in this appeal, but will pay the respondent, his costs in this appeal 2 gold mohurs

P N/R.K *Case remanded.*

** A. I R 1929 Rangoon 216

Special Bench

RUTLEDGE, C J AND MAUNG BA AND BROWN, JJ.

E W. Blackmore

v

Blackmore Nora and *another.*

Civil Ref No. 8 of 1928, Decided on 5th March 1929 for confirmation of a decree passed by Dist Judge, Mandalay.

**** Divorce Act, S. 14—Condonation of past matrimonial offences is impliedly conditioned upon future good behaviour of offending spouse and so if after condonation offences are repeated, right to make condoned offence ground for divorce revives—Wife committing adultery—Then husband and wife living together for some months—Wife again deserting husband—Subsequent desertion is sufficient ground for making previous adultery ground for divorce and husband is entitled to decree for divorce.**

Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse and so if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives ; to constitute revival of the condoned offence, the offending spouse need not be guilty of offences of the same character as that condoned : any mis-

conduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied. [P 218 C 1]

N and *K* were married and had three children. *K* then committed adultery and had a child After this again both *N* and *K* lived together for some months when *K* left *N* taking her children with her

Held that though there was condonation of the matrimonial offences, the subsequent desertion was a sufficient ground for making the previous adultery a ground for divorce and *N* was entitled to a decree for divorce : 47 *Cal.* 1068, *Rel. on.* [P 218 C 1]

(b) Divorce Act, S. 2—Domicile illustrated.

Husband and wife were residing in India since their marriage in 1918. Husband said that he was domiciled in India and had no intention of returning to England. Wife also said that she intended settling in India and did not mean to go back to England.

Held, that there was no reason not to accept their statements that they had made India their domicile. [P 217 C 1]

Judgment. — The District Judge, Mandalay, has passed a decree for dissolution of marriage in favour of one Earnest Walker Blackmore against Mrs. Nora Blackmore, and has referred the proceedings to this Court for confirmation. The proceedings were taken under the Divorce Act and by S. 2 of that Act as amended by Act 25 of 1926 the District Court only has jurisdiction in cases where the parties to the marriage are domiciled in India at the time when the petition is presented. Of the parties to the marriage in this case, the petitioner was born in England and the respondent at Allahabad. The petitioner says that he has been with the Indian Army since 1913 that is, for some 15 years, that he is domiciled in India and that he has no intention of returning to England, and the respondent also says that she intends settling in India and does not mean to go back to Ireland or Britain The parties have certainly been residing in India ever since their marriage in the year 1918, and we see no reason why we should not accept their statements that they have made India their domicile The District Court therefore had jurisdiction in the matter.

The petition filed by the petitioner sets forth that the parties were married in 1918 and have three children. A fourth child was born to the respondent but the paternity of that child is denied by the petitioner. In December 1927 the respondent left the petitioner who was then in Rangoon and went to Mandalay. She has admitted committing adultory there with a person unnamed. Later on the petitioner was transferred to Mandalay and the parties lived together again from 19th April 1928. They remained under the same roof until the 8th July when the respondent left the petitioner taking her children with her. The petition further sets forth that the petitioner has reason to suspect the respondent's relations with the co-respondent, but he makes no definite allegation of adultery with him

The respondent in her written statement denies the charge of adultery. She has since, however, admitted that the fourth child is not by her husband. The District Judge has held that adultery with the co-respondent has not been proved but that it is clear that she had previously committed adultery with others in India and that she has subsequently been unfaithful in Mandalay. Although there was a temporary condonation of these matrimonial offences, the subsequent desertion revived the offences and he therefore gave a decree for divorce.

The learned District Judge has dealt with the facts at some length in his judgment and we agree with him generally thereon. There is certainly no proof of adultery with the co-respondent. It is admitted, however, that the fourth child who was born in Bombay in about June 1927 is not the petitioner's child and in a letter, Ex. H, dated 16th April 1928 the respondent wrote :

" Since leaving you on the 24th December I have been unfaithful to you, having committed adultory with a certain person. This took place in January, while living at the Grand Hotel."

The petitioner has also given oral evidence as to alleged admission by the respondent to him. The respondent says that she wrote this letter because at that time she wished him to divorce her, and that the statement in it as to her committing adultery is not true, But this does not sound very convincing and we accept the District Judge's conclusion that adultery with some persons unknown in Mandalay was proved.

The respondent left the petitioner four days before he filed his petition and has lived apart from him ever since. This does not seem to have been with the consent of the petitioner. In the

case of *Constance Catherine Moreuo* v. *Henry William Bunn Moreno* (1), at p. 1075 Mukerji, J., remarks:

"We may then treat it as well settled that condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives to constitute revival of the condoned offences, the offending spouse need not, however, be guilty of offences of the same character as that condoned: any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied."

We agree that in the present case the desertion was a sufficient ground for making the previous allegation of adultery a ground for making the previous allegation of adultery a ground for divorce Neither of these adulterers has been joined as co-respondents in the case, but with regard to the offence in Mandalay, it is clear that the name of the adulterer is unknown to the petitioner, and cannot be found out by him. That being so, the petitioner has a good ground for being excused by the Court under S. 11 of the Act from naming this adulterer. There is no suggestion of collusion in this case and we think the decree for divorce is justified. We accordingly confirm the decree.

P.N/R.K. *Decree confirmed.*

(1) [1920] 47 Cal. 1068=57 I. C. 216=31 C. L. J. 435.

A I R. 1929 Rangoon 218

RUTLEDGE, C J, AND BROWN, J

Ma Thein—Appellant

v

Ma Mya and *another*—Respondents.

First Appeal No. 147 of 1928, Decided on 13th February 1929, from judgment of Original Side in Civil Regular No. 408 of 1923.

(a) Burmese Law (Buddhist) — Kanitha children.

Kanitha children can sue for partition after the death of one parent on the remarriage of the surviving parent. *A. I. R.* 1926 *Rang.* 211 and 2 *L. B. R.* 235, *Rel. on*, *A. I. R.* 1921 *L. B.* 68, *Cons.* 2 *U. B. R.* 46, *not Foll*, *A. I. R.* 1914 *P. C.* 97, *Ref.* [P 220 C 1]

(b) Burmese Law (Buddhist)—Right of kanitha child to claim partition after death of one parent on the remarriage of survivor can be claimed by keiktima child.

A keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children. That being so, the right of kanitha child to claim partition after the death of one parent on the remarriage of the survivor can be claimed by a keiktima child, *A. I. R.* 1926 *Rang.* 148, *Rel. on.* [P 220 C 2]

K. C. Bose—for Appellant.

Hay—for Respondents

Judgment.—The appellant in this case, Ma Thein, claims to be the adopted daughter of U Maung Maung and his wife, Ma Pwa, deceased. After the death of Ma Pwa, U Maung Maung married Ma Mya, the respondent, who is a sister of Ma Pwa, and the appellant claims that she was again adopted by U Maung Maung and Ma Mya U Maung Maung died in 1914, and in 1918 Ma Mya married one Ba Than. The appellant claims partition of property on the ground that her surviving adoptive parent has married again. The suit has been dismissed on the preliminary ground that such a suit does not lie. Two questions arose for decision. It was contended in the first instance that under Burmese Buddhist Law, when one parent died and the surviving parent remarried, the kanitha children of the first marriage had no right to claim partition of property as against the surviving parent, and, secondly, it was claimed that, even if the kanitha children were entitled to claim, an adopted child would have no such right.

On the first point the learned trial Judge held that he was bound by the ruling of a Bench of this Court in the case of *Maung Po Kin* v *Maung Tun Yin* (1). But on the second point he held in favour of the defendants, and, therefore, dismissed the suit. The appellant, while, of course, supporting the finding of the trial Judge on the first point contends that he was wrong on the second point, and that an adopted child has the same right as natural children to claim partition on remarriage of the surviving parent. That a keiktima child is not in every respect, so far as inheritance is concerned, in the same position as natural children was decided in the case of *Maung Po An* v. *Ma Dwe* (2), where it was held that a keiktima adopted son could not claim from the adoptive mother her auratha son's quarter share of the estate on the death

(1) A. I. R. 1926 Rang. 211=4 Rang. 207.
(2) A. I. R. 1926 Rang. 148=4 Rang. 184 (F.B.).

of the adoptive father, and the learned trial Judge has held that on the same analogy an adopted child cannot claim partition on remarriage

We think that it will be more convenient in this appeal to deal with the first question raised before the trial Court first. It is argued before us on behalf of the respondents that, while the trial Court was perfectly right in holding that the adopted child cannot claim partition on remarriage, the decision in *Maung Po Kin's* case (1) was wrong. If we agree with him on this point, the second question raised does not arise; and, if we do not agree with the contention on this point, it will still be necessary to consider the principles on which *Maung Po Kin's* case (1) was decided to enable us to come to a decision as to whether the general rights of kanitha children in this respect is a right shared also by adopted children. Before *Maung Po Kin's* case (1) was decided there were two directly contrary decisions bearing on this point. In the case of *Ma Thin* v. *Ma Wa Yon* (3) it was held that a daughter, being an only child, is entitled to claim a one-fourth share of her parents' joint estate from her mother, when the latter remarries after the father's death. The question then decided had reference only to the case of an eldest daughter, but the learned Judges who decided the case were clearly of opinion that the children generally were entitled to claim partition on remarriage

A directly contrary view of the law was taken in Upper Burma in the case of *Mi The O* v. *Mi Swe* (4). In that case the late Mr. McColl held that on the remarriage of her mother, the eldest daughter could not make a general claim on the estate; and, if he is right in this contention, clearly the kanitha children could make no such claim. There is no direct reference to *Mi The O's* case (4) in the judgment in the case of *Maung Po Kin* (1). There is, however, a reference to an earlier case, that of *Maung Shwe Ywet* v *Maung Tun Shein* (5) in which *Mi The O's* case was referred to. The correctness of the decision in *Mi The O's* case (4) was not then directly in question, but Heald, J. in his judgment expressed a doubt as to whether the decision was good law. The Bench decision of this Court in *Maung Po Kin's* case (1) is admittedly not founded on any texts in the Manugye Dhammathat and admittedly the Manugye Dhammathat is binding on us if its provisions are clear on the point. That was definitely decided by their Lordships of the Privy Council in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (6). It is to be noted that *Mi The O's* case (4) appears to have been decided before the decision of the Privy Council in *Ma Hnin Bwin's* case (6) but Mr. McColl nevertheless based his decision in that case in part on the Manugye. He does not, however, deal with the provisions of the Manugye Dhammathat on the point in any detail.

In *Ma Thin's* case (3), from the decision in which he was dissenting, Birks, J., remarked:

"* * * the Manugye, Manu, Amwebon seem to say that the eldest daughter is merely entitled to a one-fourth share of the father's clothes and ornaments."

The provisions of the Manugye Dhammathat were exhaustively discussed by Heald, J., in *Maung Shwe Ywet's* case (5) and he came to the definite conclusion that the provisions of this Dhammathat on the question whether an eldest child other than the auratha, can claim partition on the remarriage of the surviving parent were by no means clear. That view was impliedly adopted by a Bench of this Court in *Maung Po Kin's* case (1), which was only a development of *Maung Shwe Ywet's* case (5). Admittedly the point is one on which the Dhammathats themselves are in conflict and it is possible to cite texts from them in support of either view.

After a consideration of the case, a Bench of this Court has definitely held that, on the remarriage of the surviving parent, the eldest child, if he or she has not already taken a quarter share in the joint estate as auratha, becomes entitled to a quarter share in the estate; and also that the children, other than the eldest child, become entitled to a quarter share of the joint estate On a point on which the Dhammathats are so divided in opinion, we are not prepared to differ from this finding. We accept the decision in *Maung Po Kin's* case

(3) [1903-04] 2 L. B. R. 255.
(4) [1914] 2 U. B. R. 46=28 I. C. 821.
(5) A. I. R. 1921 L. B. 63=11 L. B. R. 193.
(6) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121 (P.C.).

that kanitha children can sue for partition after the death of one parent on the remarriage of the surviving parent.

That being so, it remains for us to decide whether this right to claim partition can be exercised by the keiktima child. The learned trial Judge has answered this question in the negative. It was held by a Full Bench of this Court in the case of *Maung Po An* v *Ma Dwe* (2), that a keiktima adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father, the auratha son's quarter share of the estate of the adoptive parents. The learned Judge was unable to see the distinction between the case of a keiktima child claiming partition on the death of the parent on the strength of his being auratha, and that of a keiktima child claiming partition on the remarriage of the surviving parent. Heald, J, who referred the question in *Maung Po An's* case (2) for reference to the Full Bench, remarks in his referring judgment at p. 195 as follows :

"But even if the obscure passage cited above from Ch. 26th of the 10th Book of Manugye be read as meaning that the keiktima child takes its place according to its age among the own children of his adoptive parents, then, although under the modern rule it would share equally with the other children, it does not seem to me to follow that if it was the eldest child of the family it would necessarily acquire the special rights of the auratha or eldest-born child either on the death of one parent or on the remarriage of the survivor. On the contrary I am strongly of opinion, as I have suggested above, that any Burman jurist who was familiar with the Dhammathats and with the constant opposition in meaning between auratha and keiktima, would have regarded the proposition that the keiktima could ever be auratha as a contradiction in terms."

The Full Bench answered the reference as follows

"A keiktima adopted son is not entitled to claim from an adoptive mother on the death of the adoptive father the auratha son's quarter share of the estate of the adoptive parents."

And at p. 200 of their judgment, the following passage occurs :

"We are satisfied that according to the Dhammathats the position of the keiktima child in respect of inheritance was inferior to that of own children, but in view of the judicial decisions which for many years have recognized the right of the keiktima child to share equally with the own children we are of opinion that that right should not now be questioned. But, apart from the recent case of *Ma Thein* v. *Ma Mya* (7), mentioned in the order of reference, there seems to be no case in which it has been expressly decided that an only or eldest keiktima child can be auratha or that if it fulfils the conditions which would entitle an own child to be auratha, it can on the death of one parent claim from the surviving parent the auratha child's share of the jointly-acquired property of the parents..... The special right of the auratha is an exception to the general rule of equal partition among children which is now settled law and in the absence of any authority in the Dhammathats or of any long course of judicial decisions extending that right to the keiktima child, we are of opinion that it should not be so extended."

It is clear, therefore, that it must now be regarded as settled law that a keiktima child is in all ordinary circumstances entitled to equal partition of inheritance with the natural children That being so, we are unable to see how the right of a natural child to claim inheritance after one parent has died on the remarriage of the surviving parent can be denied to a keiktima child The rights of an auratha are very special rights that are not shared by the younger children, and the refusal to recognize the claims of a keiktima to these special rights in no way conflicts with his rights to equal partition with the other children. The learned trial Judge speaks of the right to partition in this eventuality as a special right to which the ordinary rules do not apply. But, if a natural born child can claim his rights and the keiktima child cannot, it does not seem to us that the rights of partition are equal. The ordinary children are given the right of severing themselves from the family of their natural parent on his or her remarriage and claiming their share in the family property. They are not bound to make that claim, and, if they do not do so, they can then claim a different share on the death of the surviving parent.

In the case of a natural child, the disadvantages in awaiting the death of the surviving parent are at least no greater than in the case of a keiktima child. It is obvious that the longer a keiktima child awaits to make his claim, the more difficult it will be for him to establish it, and it is at least as likely that a natural child would elect to continue in the family of his natural parent after remarriage as that a keiktima child would elect to live with his adoptive

(7) A. I. R. 1926 Rang. 146.

parent on a change of circumstances. In the case before us, there are no natural children, but, if the decision of the trial Judge is correct, the same rule applies if there are both keiktima children and natural children. And we should then have the anomalous position that of different children, who all have precisely the same rights of partition, some could claim to exercise that right while the others would be debarred from doing so.

Whatever may have been the intention of the ancient law givers, we are of opinion that it is impossible, consistently with the principles of equal partition definitely accepted in *Maung Po An's* case, to hold that the right of a kanitha child to claim partition after the death of one parent on the remarriage of the survivor cannot be claimed by a keiktima child We are of opinion that the learned trial Judge was wrong in rejecting her claim on the preliminary point We, therefore, set aside the decision of the trial Judge and remand the case to the trial Court for a decision on the merits. The respondents will pay the costs of the appellant in this appeal, advocate's fee five gold mohurs.

P N./R.K. *Case remanded.*

A. I. R. 1929 Rangoon 221

HEALD AND MAUNG BA, JJ.

D. R Saklat and *others*—Appellants.

v.

J Hormasjee—Respondent.

First Appeals Nos. 95 and 96 of 1929, Decided on 12th June 1929.

(a) Civil P. C., S 100—Scope—Matter of discretion.

An appellate Court is always reluctant to interfere with the decision in a matter of discretion. [P 222 C 1]

(b) Religious Endowments — Intention of scheme framed by Chief Court of Lower Burma in Civil Miscellaneous Case No. 186 of 1919 indicated.

Scheme framed by Chief Court of Lower Burma in Civil Misc. Case No. 186 of 1919 provides for the filing of affidavits of the Parsi inhabitants who desire to support a particular candidate for appointment as trustee and so it is the intention of the scheme that the information conveyed by those affidavits should be part of the material used by the Court in deciding which candidate to appoint [P 222 C 2]

(c) Religious Endowments—Unless there is cogent reason to contrary, person having support from majority of community ought to be appointed as trustee for Parsi Fire Temple in preference to one having no such support and fact that trustees ought not to be related to each other is not sufficient to disregard such wishes.

In the case of an appointment of a trustee for the Parsi Fire Temple, the wishes of the community ought to be considered unless there is some cogent reason to the contrary, the person who has the support of the majority of the community ought to be appointed in preference to one who has no support from the community and the fact that the trustees ought not to be related to each other is not sufficient to warrant disregarding the wishes of the community. [P 223 C 1]

Leach and *Doctor*—for Appellants.

Vakheria—for Respondent.

Heald, J.—Mr B Cowasjee, who was a life trustee of the Parsi Fire temple at Rangoon, under a scheme framed by the Chief Court of Lower Burma in Civil Miscellaneous Case No 186 of 1919, died about the 2nd February last and under Cl. 26 of the scheme it was the duty of the remaining trustees or either of them within one month to apply to this Court on its original side to appoint a person or persons to fill the vacancy Neither of the trustees applied to the Court within the month, possibly because they did not agree as to whom they should nominate, but on 11th March a number of members of the Parsi community, who are the appellants in one of the two appeals, with which this order deals, namely C. I. appeal No. 95 of 1929, filed an application to the Court, submitting the name of Mr. A. B. Mehta, who is the appellant in the other appeal, with which this order deals, as the name of a person considered suitable to fill the vacancy Next day, Mr. N. M. Cowasjee, one of the two remaining trustees filed an application setting out the name of Dr. J. Hormasjee, the respondent in these appeals, as that of a person considered suitable to fill the vacancy. On 15th March, Mr. N. N. Burjorjee, the other trustee, filed an application again setting out the name of Mr. A. B Mehta. The Court fixed 8th April for the hearing of the applications and gave public notice of the date so fixed. On 6th April Dr. N. N. Parekh, one of the present appellants, filed an application supporting the recommendation of Mr. A. B. Mehta as suitable for the vacancy and stating that Mr. Mehta had the support of 92 out of the 117 male adult members of the Parsi community in Rangoon.

On 8th April, that is the day fixed for hearing of the applications, affidavits supporting the recommendation of Mr. A. B Mehta were filed by Messrs. B. N. Burjorjee, J. C Batlivala, D R. Saklat, Manchershah Manekjee, Lt. Col. Tarapore, Messrs. Manek Manekjee, D J. Contractor, S B. Nariman, N. B. Behramferam, P. H. Judge, K. M. Setna, A. Hirjee, D. Hormasjee, and D J. Kolapore A number of other applications supporting Mr. Mehta's candidature and containing the signatures of about 100 members of the Parsi community verified by affidavits were also filed No affidavits accompanied or were filed in support of Mr. Cowasjee's nomination of Dr. Hormasjee. When the matter came before the Court on 8th April, the supporters of Mr Mehta applied for an adjournment, but the learned advocate who appeared on the other side opposed it, and it was refused

After hearing the parties, the learned Judge made an order which is now under appeal. He said that Mr. Cowasjee had nominated Dr. Hormasjee and Mr. Burjoriee had nominated Mr. Mehta, that the original 3 trustees were related to each other Mr. N. M Cowasjee, being a nephew of Mr B. Cowasjee, and a cousin of Mr. Burjorjee, that Mr. Mehta was a brother-in-law of Mr. Burjorjee, that he did not think it desirable that the trustees should be related to each other, that it was necessary in the interest of the community that the new trustee should be a stranger to the families of the present trustees, and that for that reason he appointed Dr. Hormasjee to be the third trustee in the place of Mr. B. Cowasjee. Mr Mehta and his supporters appeal against that decision on grounds that the learned Judge's exercise of the discretion given by the scheme was arbitrary and not judicial, that there was no good reason for disregarding the wishes of a majority of the community, and that there was nothing on the record to support the learned Judge's opinion that it was necessary in the interests of the Parsi community that the new trustee should not be related to either of the present trustees An appellate Court is always reluctant to interfere with the decision in a matter of discretion, but it is difficult to see how we can refuse to interfere in this case.

It was said by Lord Halsbury, L. C. in the case of *Sharp* v. *Wakefield* (1) to which we have been referred, that :

"discretion means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be no arbitrary, vague, and fanciful, but legal and regular."

In this case the learned Judge undoubtedly had a discretion, since under the scheme he was entitled to appoint such person as he deemed fit. But the scheme itself provides for the filing of affidavits of the Parsi inhabitants of Rangoon who desire to support a particular candidate for appointment, and it was obviously the intention of the scheme that the information conveyed by these affidavits should be part of the material used by the Court in deciding which candidate to appoint

In his judgment in this case, the learned Judge made no reference to the fact that the recommendation of one candidate was supported by a large number of affidavits and that the other by none and he made no reference to the contents of the affidavits. The sole reason which the learned Judge gave for his decision was his personal opinion that all the trustees ought not to be related to each other, and that it was necessary in the interest of the community that a stranger should be appointed trustee. There is no affidavit suggesting or supporting that view, and although it was doubtless pressed at the hearing and the learned Judge was entitled to consider it, it seems to us to be an insufficient reason for rejecting what was clearly the opinion of a considerable majority of the members of the community and for appointing a candidate whose candidature was not supported by any affidavits rather than a candidate whose recommendation was supported by a large number.

Respondent's learned advocate asked us to admit at the hearing of the appeal affidavits in support of his candidature, but we are of opinion that such affidavits should have been filed before the date fixed for hearing on the original side of the Court, and that in view of the fact that respondent opposed the adjourn-

(1) [1891] A C. 173=60 L. J. M. C. 73=55 J. P. 197=39 W. R. 551=64 L. T. 180.

ment which would have given him and his friends a further opportunity for the filing of such affidavits, sufficient reason for the admission of such further evidence at the hearing of the appeal has not been shown We have accordingly refused to admit any further affidavits.

It is not seriously suggested that respondent is personally otherwise than suitable to fill the vacancy, and we dispose of the matter on the assumption that personally both candidates are equally suitable. We are of opinion that in the case of such an appointment, the wishes of the community ought to be considered and that unless there is some cogent reason to the contrary the person who has the support of the majority of the community ought to be appointed. We do not consider that the learned Judge's opinion that the trustees ought to not to be related to each other was sufficient in the circumstances of this case to warrant his disregarding the wishes of the community, for the explanation of expression of which the scheme itself provides

We are therefore constrained to set aside the order of the learned Judge appointing respondent to be trustee and we appoint Mr. A. B. Mehta to be trustee in the vacancy caused by the death of Mr. B. Cowasjee.

We see no reason why either the trust or the respondent should be made liable for the costs of these proceedings and accordingly we direct that the parties do bear their own costs

P.N./R K *Order set aside.*

A. I. R. 1929 Rangoon 223

CHARI, J.

Maung San—Appellant

v.

Ma Kha and *others*—Respondents

Special Second Appeal No 661 of 1928, Decided on 16th May 1929, against judgment of Dist. Judge, Henzada, in Civil Appeal No. 73 of 1928.

Buddhist Law (Burmese)—Husband and wife are liable for debts contracted during coverture but decree passed against one after divorce cannot bind other unless made party to it.

So long as a Burmese Buddhist couple remains as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one without making the other a party cannot be binding on the person who has not been made a party. A decree passed against the husband is held to bind a wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent wife in the suit. If his authority to represent the wife has determined, as by divorce, no such presumption can be made and the wife can be bound by decree only when she is actually a party in suit. [P 224 C 1]

E. Maung—for Appellant.

P. K. Basu—for Respondents.

Judgment.—Ma Kha and Maung Aung Baw, the first and second respondents in this appeal were husband and wife. They divorced in 1922, and it has been found by the lower appellate Court that there was a partition of property at the divorce. The finding of that Court is not challenged by the learned advocate for the appellant. A decree was obtained by the appellant in this suit in which Maung Aung Baw only was a party The suit was instituted after the divorce but it is alleged and it may be held established though it was denied by Ma Kha, that the debt in respect of which the suit was filed was a debt contracted during the coverture, which would have bound both the husband and wife.

It is alleged by the learned advocate for the appellant that the decree passed in these circumstances binds the wife and her share in the property and he relies upon the ruling in *V. R. M. A. L. Chettyar Firm* v *Man Han* (1). In that case there was a money decree. As single appellate Judge, I, for reasons given in my judgment held. that Ma Han's share was not bound A Bench following the ruling in *Ma Paing* v. *Maung Shwe Hpaw* (2), held that the share was bound and the part of the judgment which applies is at p 447, where the learned Judge says:

> "The conclusion which I draw from the judgments in that case is that ordinarily a decree against either husband or wife who are subject to the Burmese Buddhist law of marriage, and are consequently partners, can be executed against any part of the partnership property, that is, the property of the marriage."

It will thus be seen that though in that case as a matter of fact the suit was

(1) A. I. R. 1927 Rang. 293=5 Rang. 443.

(2) A. I. R. 1927 Rang. 209=5 Rang. 206 (F.B.).

instituted after the divorce, the particular point was hot considered by the learned Judge on the analogy of a partnership after the dissolution no partner has a right in a suit to represent any other partner, and even though the debt may be a partnership debt, and binding on all the partners, a decree passed against some of them only will not bind the other partners The simple reason for this is that after dissolution, the right of a partner to represent another partner in a suit has terminated. So long as a Burmese Buddhist couple remains as husband and wife, a decree passed against the husband alone or the wife alone during the coverture may be held to be binding on both, on the analogy of a partnership, but after divorce the right of the husband or the wife to represent the other in a suit has terminated and though the original debt may be binding on both, a decree against one, without making the other a party cannot be binding on the person who has not been made a party A decree passed against a husband is held to bind the wife so as to enable the decree-holder to proceed against the joint property on a presumption that the husband in effect represented the wife in the suit. Such a presumption can be made only when the husband could represent the wife in the suit. If his authority to represent the wife, had determined, as by divorce, no such presumption can be made or inference drawn, and the wife can be bound by a decree only when she is actually a party in the suit It is an elementary proposition that no one can be bound by a decree unless he was actually a party to the suit or effectively represented therein. Any other conclusion would lead to anamolous results, and I am sure that my brother Heald never intended to decide that a decree obtained against one of the couple after divorce, could bind the other

As this is the only point argued in the appeal, the appeal is dismissed with costs

After the judgment is dictated, Mr E. Maung for the appellant applies for leave to file a Letters Patent appeal. As the point involved fs a point of law, and the case a fit one, I grant leave to appeal against my judgment.

V.B./R K. *Appeal dismissed.*

* A. I. R. 1929 Rangoon 224

MAUNG BA, J.

S. K. S. Krishnappa Chettyar—Plaintiff—Applicant.

v.

Jhanda and *another*—Defendants—Respondents.

Civil Revn. No. 138 of 1929, Decided on 25th June 1929.

*** (a) Civil P. C., O. 9, R. 9—"Sufficient cause."**

Where a party's agent attended Court and after disposing of some work went away under a bona fide belief that he had no more cases in the Court and where his suit was dismissed for non-appearance, such bona fide mistake would amount to "sufficient cause."

[P 224 C 2]

(b) Civil P. C., O. 9, R. 9—Person alleging false cause for non-appearance—Court can refuse to restore his suit.

If a person alleges a cause for his non-appearance which is false, the Court is justified in refusing to restore his suit for a person cannot expect to obtain justice on perjury.

[P 224 C 2]

S. Ganguli—for Applicant.

Judgment — S. K. S. Krishnappa Chettyar brought a mortgage suit against Jhanda and another in the Township Court of Myingyan. When the case was called for settlement of issues the plaintiff was absent but the defendants were present and pleaded limitation. The suit was accordingly dismissed with costs. The plaintiff then applied to have the suit restored but the application was dismissed He appealed to the District Court of Myingyan and there again his appeal was dismissed So he has come up in revision. The evidence shows that his agent did attend the Township Court on that day, that after his execution cases had been disposed of he went away under a bona fide belief that he had no more cases in that Court.

Under O. 9, R. 9, Civil P. C., the Chetty is precluded from bringing a fresh suit but he can have the case restored by satisfying the Court that there was sufficient cause for his non-appearance. In my opinion the bona fide mistake would amount to "sufficient cause." But the chettyar foolishly alleged a cause which was false Though it may prove hard I am constrained to hold that in these circumstances the Courts below were justified in refusing to restore the suit. The applicant cannot expect to obtain justice on perjury. The present application for revision is therefore dismissed.

P.N./R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 225 (1)

BROWN, J.

Maung Po Maung—Applicant.

v.

Maung Jha and *others*—Respondents.

Civil Revn. No. 19 of 1929, Decided on 22nd May 1929, against decree of Dist. Judge, Yamethin, in Civil Appeal No. 41A of 1928.

Civil P. C., S. 115—*M* agreeing to give property to *G* on *M's* marriage with *G's* daughter— *M* marrying *G's* daughter and possession given to *G*—*M* suing *G* for possession of property—Gift to *G* being complete High Court will not interfere in revision.

M sued *G* for possession of a cart and two bullocks. He had agreed to give this property to *G* on his agreeing to *M's* marriage with his daughter. He had married the daughter and the possession of the property was with *G*. *M* contended that the agreement to give the property was void as being in the nature of a marriage brocage contract;

Held: that there was no sufficient ground to interfere in revision as the matter had gone beyond the agreement stage and the gift to *G* was complete. [P 525 C 1, 2]

P. K. Basu—for Applicant.

Zeya—for Respondents.

Judgment.—The petitioner Maung Po Maung sued the four respondents and one Maung Thin for possession of a cart and two bullocks. His suit was decreed by the trial Court, but was dismissed by the District Court an appeal. No further appeal lies, and the petitioner has come to this Court in revision on two grounds. The first ground is that the defendants are relying on a void contract. According to the plaint, the property was first made over to Maung Thin to be hired out, and later the plaintiff agreed that defendants 2 and 3 should take over the property temporarily. Defendants 4 and 5 Maung Paw I and Ma Shin are joined because they are said to be in possession of the property.

The defence was that the plaintiff agreed to give the properties in dispute to defendants 4 and 5 on their agreeing to his marriage with their daughter. The District Court has found this defence to be proved. It is contended on behalf of the petitioner that the agreement to give the property is void as being in the nature of a marriage brocage contract. Whether that contention is well-founded or not, the matter has gone beyond the agreement stage. The gift of the properties to the defendants is complete and possession is with the defendants. The defendants are not suing on the contract, but relying on a completed gift. It is admitted that the petitioner has married the daughter of the respondents, Maung Paw I and Ma Shin. I do not think that there is any good ground for interference in revision here. The next ground taken is that the District Court was not justified in interfering with the orders of the trial Court without the defendant Maung Thin being added as a party to the appeal. I have been referred to the case of *Chokalingum Chetty* v. *Singaram Chetty* (1). The circumstances of that case are entirely different from the circumstances of the present case. It is not anybody's case here that Maung Thin has or had any title to the property. The respondents merely asked the District Court to set aside a decree which had been passed against them in favour of the present petitioner. They did not ask for any order prejudicial to Maung Thin. I can see no force in this objection. I dismiss the application with costs.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1925 Rang. 108=2 Rang. 541.

A. I. R. 1929 Rangoon 225 (2)

OTTER AND BROWN, JJ.

Maung Tun Lin and *another*—Appellants.

v.

Maung Tun Win—Respondents.

Civil Misc. Appeal No. 166 of 1928, Decided on 12th February 1929, against order of Dist. Court, Pyapon, in Civil Regular No. 27 of 1927.

Civil P. C., Sch. 2, Para. 16—Two chosen arbitrators enlisting services of two additional arbitrators, they having no such powers under terms of reference—Award made and signed by two chosen arbitrators alone—Decree in consequence of such award is not appealable.

Two chosen arbitrators enlisted the services of two additional arbitrators, though under the terms of reference they had no power to do this. But the award was made and signed only by the two arbitrators originally referred to. These gentlemen were given very wide powers:

Held: even if they called in two other persons to assist them, their award could not be attacked on the ground that it was no award at all, and the case was subject to the ordinary rule, which is that a decree in conse-

quence of an award, to which para. 16, Sch. 2 applies, is not appealable *A. I. R* 1923 *P. C.* 66, *Rel. on.* 18 *All.* 422 (*F.B.*), *Dist.* [P 226 C 1]

Leong—for Appellants.

Judgment.—We think no appeal lies in this case The judgment and decree were passed according to an award made in arbitration proceedings to which para. 16, Sch. 2, Civil P. C. apply. The wording of the two sub-paragraphs of this paragraph is plain, and as was pointed out by the Judicial Committee of the Privy Council in the case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (1), they preclude any appeal We were referred to *Ibrahim Ali* v. *Mohsin Ali* (2). It is true that in that case the Court expressed the opinion that there were certain exceptions to the rule that decrees upon such awards are not appealable. One such was said to be where the award was not an award at all. It was said that in the present case the two chosen arbitrators enlisted the services of two additional arbitrators, and that as under the terms of reference they had no power to do this, their award was no award in law. But it was admitted that the award was made and signed only by the two arbitrators originally referred to. These gentlemen were given very wide powers, and even if they called in two other persons to assist them, their award could not be attacked on the ground that it was no award at all. This case therefore differs from that contemplated by the Allahabad High Court, and is subject to the ordinary rule, which is that a decree in consequence of an award, to which the above quoted paragraph to Sch. 2, Civil P. C. applies, is not appealable. The appeal is therefore dismissed under O. 41, R 11.

R.K *Appeal dismissed*

(1) A. I. R, 1923 P. C. 66=47 Bom. 578=50 I. A. 324 (P C.).
(2) [1896] 18 All. 422=(1896) A. W. N. 137 (F B.).

✻ A I. R 1929 Rangoon 226

BROWN, J.

Ma Yin Hu and *another*— Appellants

v

Ma Chit May and *others* — Respondents.

Second Appeal No. 607 of 1928, Decided on 26th February 1929.

✻ Transfer of Property Act, S. 126—Person executing deed of gift— On same day donee executing another registered deed agreeing not to transfer the property without donor's consent and in case he did so he would return property to donor — The case comes within the provisions of S. 126 and such agreement does not contravene provisions of S. 10—T. P. Act, S. 10.

A person executed a deed of gift in favour of another and on the same day the donee executed another registered deed by which he agreed not to make a gift or transfer, sell or mortgage the property without the knowledge, consent and permission of the donor a id that if he did so, he would return the property to the donor

Held that though the gift and promise were made on separate documents, they must be treated as forming part of one transaction as they were made at the same time and that the gift of the property was consideration for the promise made. [P 227 C 1]

Held further, that the case fell within the provisions of S. 126 as at the time of making the gift it was agreed by the donee that gift would be revoked on the donee's transferring or mortgaging the property without the donor's consent, that is, on the happening of any specified event which did not depend on the will of the donor and that the agreement did not contravene the provisions of S. 10 inasmuch as there was promise to the donor personally and it was only the donor in his lifetime who could revoke the gift: 7 *All.* 516; *A. I. R*, 1923 *All.* 514, *Dist.*; 4 *A. L. J.* 708, *Appr.* [P 228 C 1]

Thein Maung—for Appellants

Ba Thein—for Respondents

Judgment —U Chan Nyein, now deceased, brought a suit against the appellant Ma Yin Hu and Limma and one S. T. Chokalingam Chettyar for cancellation of a deed of gift and possession of a certain house and its site. The plaintiff's case was that on 3rd December 1923 he had executed an outright deed of gift in favour of appellant 1 who was his sister, but that on the same day appellant 1 executed another registered deed whereby she undertook not to make a gift of, transfer, sell or mortgage the property without the knowledge, consent and permission of the donor, and that, if she did so, she would transfer and return the property to the donor. On 10th July 1925, the appellants executed a mortgage of the property in favour of defendant 3, Chokalingam Chettyar, for Rs. 1,000. The plaintiff claimed that this mortgage was effected without his consent an c that he was therefore entitled under the terms of the agreement to have the property reconveyed to him. As against Chokalingam Chettyar the case has been dismissed

and the validity of the mortgage so far as he is concerned is not now in question as there is no appeal aganist this order of dismissal. The trial Court, however, gave a decree in favour of the plaintiff against the two appellants. This decree was confirmed on appeal to the District Court and the appellants now come in second appeal to this Court.

Certain allegations were made as to undue influence at the time the gift was made and it was also contended that U Chan Nyein had given his consent to the mortgage, but on these points the decision of the two lower Courts is against the appellants and they have not been urged in this appeal. U Chan Nyein died during the pendency of the suit in the trial Court and is now represented by his widow Ma Chit May.

The contention now put forward on behalf of the appellants is that the promise not to transfer without the donor's consent is void. It is contended that, if the gift and the promise be considered as forming one transaction, then the provisions of S. 10, T. P. Act, are operative, and that if the promise is treated as a separate transaction, then it must be held to be void as being opposed to public policy and without consideration. I do not think the claim as to consideration can be substantiated. It is clear that two registered documents were executed on the same day, and that the gift of the property was consideration for the promise made. The gift and the promise were made on separate registered documents but it is clear that they were made at the same time and it seems to me that they must be treated as forming part of one transaction. S. 10, T. P. Act, lays down that where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void. I have been referred to two Allahabad cases on this subject.

In the case of *Bhairo* v. *Parmeshri Dayal* (1), by a compromise between the parties it was agreed that one of the parties should hold possession of certain property generation by generation and would not alienate the property. It was held that this condition restraining the power of alienation was void as contravening the provisions of S. 10, T. P. Act. Apart from the provisions of S. 126, T. P. Act, which I shall refer to later, *Bhairo's* case differs considerably from the present case. In that case the transferee was to hold possession generation by generation and the condition restraining the powers of alienation was apparently to be in force for ever. In the present case there is no absolute condition that is to last for ever. As regards the property here the condition merely is that the donee will not transfer it without the consent of the donor. There is no provision in the deed restraining the power of transfer after the donor's death.

Another case referred to on behalf of the appellants is the case of *Gopi Ram* v. *Jeot Ram* (2), In that case there was a covenant in a deed of sale that, if the vendee, his heirs or representatives desired to sell the house purchased, they should in such a case first ask the executant, his heirs or representatives for the time being, to purchase it. It was held that this condition was void as offending against the law of perpetuities. But here again the condition was applicable not only to the parties but to their heirs and representatives.

These are the only two official reports to which I have been referred on behalf of the appellants. The trial Judge in his judgment referred to the case of *Makund Prasad* v. *Rajrup Singh* (3). This is an unauthorised report and therefore cannct be cited as an authority. But it seems to me that the arguments in that case are sound. In that case as here there was a gift of certain immovable property subject to a condition that the land would be taken back in the event of the donee transferring it.

It was pointed out that S. 126, T. P. Act, recognizes the validity of a power of revocation. That section lays down that the donor and donee may agree that, on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. That appears to me to be the effect of the two documents in the present case when read together. At the time of the gift it was agreed by the donee that the gift would be revoked on the donee's transferring or mortgaging the property without the donor's consent, that is to

(1) [1884] 7 All. 516=(1885) A.W.N. 136.

(2) A. I. R. 1923 All. 514=45 All. 478.

(3) [1907] 4 A.L.J. 703=(1907) A. W. N. 278.

say, on the happening of any specified event which does not depend on the will of the donor Looked at in this light the agreement does not seem to me contravene the provisions of S. 10. There is only a promise to the donor personally and it is only the donor, during his lifetime who could revoke the gift. There is no absolute restraint on the transferee or any person claiming under him from alienating the property I am of opinion therefore that the provisions of S. 10, T. P. Act do not apply to the present case and that the promise made by appellant is not void as being opposed to public policy. The appellants are bound by their promise and their appeal must therefore fail I dismiss this appeal with costs

P.N./R K. *Appeal dismissed.*

A. I R 1929 Rangoon 228

BROWN, J.

V S. Aiyar—Appellant.

v.

Maung Nyun and *another*—Respondents

Second Appeal No 649 of 1928 Decided on 29th May 1929, against judgment of Dist. Court, Magwe, in C. A. No 16 of 1928

(a) Civil P C, O 21, R. 63—Orders made against person applying for removal of attachment—Under O. 21, R. 63 he can sue though attachment is subsequently withdrawn.

Where orders have been passed against a person on his application for removal of attachment O 21, R. 63 gives him a right to file a suit even though the attachment is withdrawn by the decree-holder. 9 *L. B. R.* 47, *Dist.* [P 228 C 2]

(b) Jurisdiction—Objection once decided—Second objection cannot be entertained

Where, after question of jurisdiction has been already dealt with and decided, objection is taken to it, the Court is justified in refusing to go into it again [P 229 C 1]

(c) Suits Valuation Act, S 11 (2)—Scope.

Under S. 11 (2) even if objection to jurisdiction was taken at an early stage in the trial Court, the appellate Court is required to dispose of the appeal as if there had been no defect of jurisdiction, unless it is satisfied that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits [P 229 C 2]

B. K. B. Naidu—for Appellant.

S Ganguli—for Respondent 1.

Judgment.—The respondent Maung Nyun brought a suit in the Township Court, Magwe, against the appellant Mr. V. S Aiyar, and respondent 2 Maung Po Sein. The suit was in regard to a certain piece of land which Maung Nyun claimed to be his. This land had been attached by the appellant in execution of a decree he had obtained against the respondent Po Sein. Maung Nyun made an unsuccessful application for removal of attachment He then brought the suit out of which this appeal has arisen. He has joined the appellant and defendant 2, respondent, as defendants. So far as the appellant is concerned, he required a declaration under the provisions of R 63, O. 21, Civil P C Against Po Sein he sued for possession, alleging that Po Sein had since the attachment trespassed upon the land which was in his possession

It seems to me open to doubt whether even supposing the provisions of R. 3, O. 7 were sufficiently wide to make it permissible to join the two causes of action in the one suit, it would not have been more satisfactory if the claim against the two defendants had not been made in separate suits. But no objections have been raised now to the decision of the lower Courts on this score. The trial Court held that the plaintiff had proved his claim and gave him a declaratory decree and a decree for possession of the land. The order of the Township Court was confirmed by the District Court on appeal Maung Po Sein has not appealed against the order of the District Court. This appeal has been filed by the other defendant Mr. Aiyar.

The first contention on his behalf laid before me is that he had withdrawn the attachment and therefore no suit against him lay. The provisions of R. 63, O. 21 are quite clear It is admitted that orders had been passed against the plaintiff in the miscellaneous proceedings on his application for removal of attachment. R 63, therefore, gave him a clear right to file a suit. The case of *Raman Chetty* v. *Ma Hmu* (1) has been cited on behalf of the appellant, but it does not seem to me to help. In that case it was held that a judgment creditor could not bring a declaratory suit when the judgment-debtor had become insolvent as he then no longer has a right to attach the judgment-debtor's

(1) [1917] 9 L. B. R. 47=37 I. C. 803=10 Bur. L. T. 116.

property. I do not understand the appellant's claim to be that he had no longer the right to attach the judgment-debtor's property. In my opinion there is no force at all in this objection.

The other objection which had been taken in this appeal is that the trial Court had no jurisdiction to try the suit. It is somewhat difficult to unravel from the mass of plaints and written statements in the trial proceedings what exactly was the course of the litigation in that Court. The present appellant at any rate does not seem to have raised the question of jurisdiction although Po Sein did raise the point, but when issues were framed it was agreed that before deciding the case on the merits the Court should try the first four issues. There are various issues connected with the framing of the suit and include an issue whether the Court had jurisdiction to entertain the suit. On this issue the Court held that as the suit was then framed it had no jurisdiction because in addition to the other reliefs the plaintiff asked for his costs in the miscellaneous proceedings This defect was rectified by the plaintiff amending his plaint and waiving his costs and so far as can be found from the record it was only then that the defendants seriously raised the question as to the value of the property being more than 1,000 and before the decision of the preliminary issue no evidence was adduced by either side to show that this valuation was wrong. It is subsequently to the passing of orders on the preliminary issue that question of the valuation of the property was definitely raised. In view of the fact that the jurisdiction question had already been dealt with and decided I think the trial Court was justified in refusing to go into it any further. Rs. 1,000 was the actual price according to the sale deed for which the land was brought by the plaintiff.

Another objection on the ground of jurisdiction has been raised and that is that there were two distinct causes of action, one against the defendant Po Sein for possession and the other against the appellant Aiyar for a declaration and that for this reason the total value of the suit for purposes of jurisdiction is over 1,000. Reliance is placed on O. 2 R. 3, Cl. (2), Civil P. C. That rule refers primarily to cases of joinder of causes of action against different defendants and it seems to me very doubtful whether it can be maintained that the value of the aggregate subject-matter of the causes of action in the present case is more than the value of the land. But however this may be, I am of opinion that the case is sufficiently covered by the provisions of S. 11, Suits Valuation Act. Under Cl. (2) of that section even if objection to jurisdiction was taken at an early stage in the trial Court, the appellate Court is required to dispose of the appeal as if there had been no defect of jurisdiction, unless it is satisfied that the over-valuation or undervaluation has prejudicially affected the disposal of the suit or appeal on its merits The District Court was of opinion that if there were an under-valuation, it had no prejudicial effect on the disposal of the suit on its merits. The evidence was recorded at considerable length and a careful judgment was written by the Judge of the trial Court. If the suit had been beyond the jurisdiction of the Township Court, it would have been triable by the Sub-Divisional Court, and the appeal from that Court would also have gone to the District Court. I see no reason for supposing that any undervaluation that may have been made has prejudicially affected the disposal of the suit on its merits. I am not therefore satisfied that there is sufficient reason for interference on this ground. It has been suggested in argument that full costs of this suit should not have been awarded against the appellant. This ground is not raised in the memorandum of appeal, and I am not satisfied that there is any ground for interference on question of costs alone. The appellant undoubtedly contested the suit on the merits. and denied the plaintiff's title I dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 229

ORMISTON, J.

In the matter of L. W. Nasse, an insolvent Mansuklal Dolatchand & Co.—Applicants.

Insolvency Case No. 70 of 1923, Decided on 4th May 1928.

(a) Presidency Towns Insolvency Act, S. 8 (1)—S. 8(1) gives Court unlimited power

to review, rescind or vary and S. 90 (1) cannot act to limit it—Presidency Towns Insolvency Act, S. 90 (1).

Section 8 (1) gives the Court an unlimited power to review, rescind or vary and S. 90 (1) of Act cannot act to limit that power by importing the provisions of Civil P. C, O 47, R. 1. [P 232 C 1]

(b) Limitation Act, Art. 162—Review of judgment in Art. 162 refers to review under Civil P. C., O. 47, R. 1

The review of judgment referred to in Art. 162 is the review of judgment mentioned in O. 47, R. 1, Civil P. C. [P 232 C 1]

(c) Limitation Act, Art. 162—Application under insolvency jurisdiction is not governed by Art. 162—Presidency Towns Insolvency Act, S 8 (1).

An application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is not governed by Art 162. [P 232 C 2]

(d) Limitation Act, Art. 173—Scope.

Article 173 is restricted to applications for review under Civil P. C. [P 232 C 2]

(e) Presidency Towns Insolvency Act, S. 17 Proviso—Person by agreement with his creditors authorizing them to withdraw money to his credit—He adjudicated insolvent and on next day creditors suing him on strength of agreement to have lien on money to insolvent's credit and obtaining decree—Suit instituted without leave of Court— Leave being necessary decree obtained is not binding on Official Assignee or estate of insolvent.

The words of the proviso to S. 17 can be amply satisfied by confining its operation to cases where the mortgagee can realize his security without the institution of the suit. [P 233 C 2]

A person by an agreement with his creditors authorized them to withdraw all sums then and thereafter to his credit and for the purpose gave them a general power of attorney. The person was adjudicated insolvent and on the next day the creditors brought a suit against him on the strength of the agreement to have a lien on money to his credit. No leave to institute the suit was obtained. The creditors got decrees declaring that they had lien on sums of money lying at the credit of insolvent.

Held . that leave of the Court was necessary and no leave having been obtained the decree was not binding on the Official Assignee or the estate of the insolvent . 38 *Bom.* 350, *not Foll.* . *White* v. *Simmons*, (1871) 6 *Ch.* 555, *Expl.* [P 233 C 2]

(f) Presidency Towns Insolvency Act, S. 17 —Unless Official Assignee is party to suit decreeing lien on estate of insolvent, he is not bound by it.

Unless the Official Assignee is a party to the suit by creditors in which a decree is passed declaring a lien against the estate of an insolvent, he is not bound by it and he cannot be deemed to be party merely because he is given an opportunity to defend the suit and he elects not to do so . *A. I. R.* 1927 *P. C.* 108, *Rel. on.* [P 234 C 1]

(g) Civil P. C., S. 64—Assignment of debt involves transfer of interest in it.

It cannot be held that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund . *Rodick* v. *Gandell* 42 *Ch.* 749, *Rel. on.* [P 234 C 2]

(h) Civil P. C., S. 64—If attachment is validly withdrawn though under misapprehension subsequent attachment does not relate back to date of 1st attachment and cannot have such effect against person taking transfer during interval.

Where an attachment is validly withdrawn, though under misapprehension, the second attachment does not relate back to the date of the first attachment and does not have such effect as against a person taking transfer from the judgment-debtor in the interval. The Court does not have power to pass such an order having retrospective effect although if fraud and collusion is alleged and proved between a judgment-debtor and transferee, a transfer obtained in the interval can be set aside 23 *Cal.* 829 , *A. I. R* 1924 *Cal.* 744, 34 *All.* 490, *Dist.* ; 42 *All.* 30, *Dist.* and *Discussed.* [P 237 C 2]

* **(i) Presidency Towns Insolvency Act, S. 56 (1)—Charge on estate few days prior to insolvency if created in due course of business is not fraudulent.**

Although a charge is created on the estate by a person a few days before he becomes insolvent, creation of such charge cannot be held to be fraudulent if it is shown that it was created in the ordinary course of business and with the object of carrying it on and passing safely through the period of danger : *In re Cohen* (1894) 2 *Ch.* 505 *Rel. on.* [P 239 C 1].

Janab Ali, *Tambe* and *Joseph*—for Creditors Nos 2, 8 and 9.

Judgment—(*4th May* 1928)—This is an application under S. 8, Presidency Towns Insolvency Act, 1909, to review an order passed by Otter, J , on 2nd June 1927. The learned Judge, after admitting the application, went on leave, and I have been directed to dispose of the matter. The application is opposed by creditors 2, 7 and 9. L. W. Nasse had a contract with the Public Works Department under which he would in the ordinary course be due to receive a considerable sum of money and he was also in debt to the applicants On 28th February 1923, he entered into an agreement with them which is on the file of C. R. No. 158 of 1923 of this Court. The agreement after reciting that he was indebted to the applicants to the extent of about Rs 60,000, and that :

" he has now and will hereafter have sums to his credit on bills in the hands of the Executive Engineer, Mingaladon Cantonment Division and elsewhere in the Public Works. Department,"

goes on to provide

" The said L. W. Nasse hereby agrees and authorizes the said firm of Mansuklal Dolat-

chand & Co. to withdraw all such sums now to his credit or may hereafter be to his credit from the Public Works Department till all the debts due to them are fully satisfied. That for such purpose he has this day granted them a general power of attorney. Should the said L. W. Nasse after this agreement either withdraw the said sums himself or prevent in any way the firm of Mansuklal Dolatchand & Co. from withdrawing the same, then the said L. W. Nasse will be liable to either civil or criminal action as the firm of Mansuklal Dolatchand may think fit."

The power-of-attorney to which reference is made is dated 2nd March 1923, and is in the same record After giving the applicants authority to withdraw moneys from the Public Works Department in language similar to that employed in the agreement, Nasse gave them specific authority to give receipts therefor and to institute suits in respect thereof. On 28th March 1923, Nasse was adjudicated insolvent On 29th March 1923, the applicants, apparently being unaware of the adjudication, instituted two suits Civil Regular Nos 158 and 159 of 1923 of this Court against the insolvent for the recovery of sums of money aggregating about Rs. 66,000, in which they claimed, on the strength of the agreement above set out, to have a lien on sums of money lying to the credit of defendant 1 in the office of the Executive Engineer, Mingaladon Cantonment Divisin and elsewhere in the Public Works Department and asked for a declaration to that effect.

On 8th April 1923, the Court was informed on the fact of the insolvency. Subsequently notice was issued to the Official Assignee to report to the Court whether he would defend the suit. He summoned a meeting of creditors to ascertain their views on the subject and on 10th July 1923, he filed his report. From this report, it appears that the creditors, before making up their minds wished to find out what moneys were due to the insolvent, and therefore, it had been arranged that on the 13th July the Official Assignee and the insolvent should meet the Executive Engineer, Mingaladon Circle. Further time was asked for until the 31st July. On that date the Official Assignee by his advocate informed the Court that he would not defend the suit on behalf of the insolvent And on 10th August 1923 decrees were passed in favour of the applicants in C. R. 158 for Rs. 50,000, interest and costs, and in C. R. 159 for Rs. 12,500. interest and costs In each case it was declared that the applicants had a lien on sums of money lying to the credit of the insolvent in the office of the Executive Engineer, Mingaladon Cantonment Division, Rangoon, and elsewhere in the Public Works Department.

The differences between the estate of the insolvent and the Public Works Department as to the amount due to the estate were referred to arbitration, and the arbitrator whose award is filed in C M. No. 131 of 1925, found that Rs. 33,752-5-3 was due to the insolvent's estate. This sum was paid to the Official Assignee and the applicants applied that it be paid to them claiming that they had a lien, first on the ground that the lien had been declared by the decress in C R. suits 158 and 159 of 1923, and, secondly, that, independently of those decrees, they had a lien of virtue of the documents to which reference has been made above. Otter, J., by his order of 2nd June 1927, held that the Official Assignee was not bound by the decrees in the suits because the suits were filed after the insolvency without the sanction of the Court and that the documents were inoperative to confer a lien. It is this order which I am asked to review.

I will first deal with two preliminary points which were raised. The present application is under S 8 (1), Presidency Towns Insolvency Act, which gives the Court power to " review, rescind or vary an order made by it under its insolvency jurisdiction " It was urged by the objecting creditors that sitting as a Judge in insolvency my powers are no greater than if application were made to me for review of judgment under O. 47, R (1), Civil P. C. and Mr. Burjorjee conceded that, if the provisions of that rule were applicable, he would be out of Court. S. 90 (1) of the Act is recited to me in support of this contention The subsection enacts that in proceedings under the Act, the Court is to have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction. But there is a proviso that the subsection is not in anyway to limit the jurisdiction conferred on the Court by the Act. S. 8 (1) gives the Court an unlimited

power to review, rescind or vary and S. 90 (1) cannot operate to limit that power by importing the provisions of O. 47, R. (1) of the Code. Moreover, what I am in substance asked to do is to vary the order of 2nd June 1927, by holding that the applicants have a lien and if I am of the opinion that the order was wrong I am bound to vary it

It is next urged that the application is out of time, because the period of limitation for an application for review of an order under S. 8 (1) is Art. 162, Sch. A, Lim Act, 1908 or in the alternative Art. 173. Mr. Burjorjee concedes that if either of these articles is applicable, his application is time-barred, but says that the case is governed by Art. 181, which provides for applications for which no period of limitation is provided elsewhere in the schedule or by S 48, Civil P C Art 162 provides in the case of a review of judgment by the High Court in the exercise of its original jurisdiction a period of 20 days from the date of the decree or order. As a matter of construction I should hold that the review of judgment referred to in the article was the review of judgment mentioned in O. 47, R (1), Civil P. C. Mr Tambe, however, contends that " original jurisdiction includes insolvency jurisdiction " and cites a note in Rustomji's Law of Limitation (edn 1927) at p 901, to this effect. The case cited by the learned author, namely, the decision of the Privy Council in *In the matter of Candas Narrondas* v *C. A Turner* (1) by no means bears out this sweeping generalisation. In that case judgment had been entered up under S. 86 of Statutes 11 and 12 Victoria Cap 81 (which at the time governed insolvency in British India) in favour of the Official Assignee against the insolvent for the amount of his scheduled debts Eighteen years later the Official Assignee sought to execute the judgment. Under Art 180, Sch. 2, Lim Act, 1877, the period of limitation for an application to enforce a judgment of a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction was 12 years from the time when a present right to enforce the judgment accrued to some person capable of releasing the right. It was held that although a Court under the provisions of Statute 11 and 12 Vic. Cap. 21 determines the substance of questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. Consequently, the judgment which was entered up was a judgment of the High Court in its ordinary original civil jurisdiction. The case is not, therefore, an authority for the proposition that an application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is governed by Art. 162 of the present Lim Act.

Article 173 deals with a review of judgment except in the cases provided for by Arts. 161 and 162, and provides a period of 90 days from the date of the decree or order. Mr. Tambe contends that this article is not restricted to applications for review under the Civil Procedure Code, and cites in support of his contention a passage on p. 921 of the same learned author, based on a decision reported in 3 *Mysore Law Journal* 124 I disagree with his contention. In my view, therefore, the present application is not barred by limitation.

Mr. Burjorjee then dealt with the two points on which Otter, J., had held against him. At the conclusion of his argument, counsel for the opposing creditors admitted that the agreement on which Mr. Burjorjee relied was effectual to create a charge, but contended that the matter was not concluded by the decrees passed in C. R Suits 158 and 159 of 1923, and submitted that the charge purporting to be thereby created was void, first because at the time it was created the debt was under attachment, and secondly, because it amounted to a fraudulent preference They further urged that the applicants had other securities for their debts and that these should be exhausted before recourse was had to the property in respect of which they claimed a charge. Mr. Burjorjee agreed that the applicants would first realize their other securities and give credit for the net amount realized before seeking to enforce their charge.

I heard counsel first on the question whether the matter was concluded by the decrees in question. Under S. 17, Presidency Towns Insolvency Act, on the making of an order of adjudication, the property of the insolvent vests in the Official Assignee and becomes divisible

(1) [1889] 13 Bom. 520=16 I. A. 156 (P. C.).

amongst his creditors, and thereafter except as directed by the Act no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall

"have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

There is a proviso that the section is not to affect the powers of any secured creditor to realize or otherwise deal with his security in the same manner as if the section had not been passed. In the present instance the suits were instituted the day after the adjudication and leave to institute them was not previously obtained. Mr. Burjorjee conceded that, if S. 17 applies, and the case is not within the proviso, leave must be granted before the institution of the suit. But he argued that a mortgagee in instituting a suit to realize his security is within the proviso; in other words, that he is free to realize his security either without the intervention of the Court, as by sale, or by the institution of a suit. In support of this proposition he cited *Lang* v. *Haptullabhai* (2), a decision of a Bench of the Bombay High Court, which was cited, but not discussed in *Ramchand* v. *Bank of Upper India, Limited, Delhi* (3), a case dealing with an entirely different point. In the Bombay case the Official Assignee was in the position of a mortgagor and the mortgagee brought a suit against him to realize his security. It was held affirming the judgment of Beaman, J., and differing from a decision of Davar, J., set out in a footnote to the report, that no leave was necessary, inasmuch as the proviso to S. 17 covered a suit by a mortgagee to realize his security, the principle being that a suit is one of the recognized methods of realization of mortgage securities, and that if S. 17 had not been passed, the mortgagee could have realized his security in the ordinary way by means of a suit. Reliance was placed on a passage in the judgment in *White* v. *Simmons* (4), where Lord Hatherlay declined to hold that where was

"an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security."

The learned Judges say that Lord Hatherlay was dealing with a proviso in the same words as the proviso to S. 17, Presidency Towns Insolvency Act. The proviso with which Lord Hatherlay was dealing was the proviso to S. 12, Bankruptcy Act, 1869. But S. 13 merely enacts that

"where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt except in manner directed by this Act."

It will be noted that there is no provision forbidding the institution of a suit without leave. This provision appears in S. 9, Bankruptcy Act, 1883 and in S. 7 (1), Bankruptcy Act 1914, which are similar to S. 17, Presidency Towns Insolvency Act. No English authority since the Act of 1883 came into force was cited in the Bombay cases, and none has been cited to me. I am of the opinion that the English cases decided under the Act of 1869 are not authorities for holding that under S. 17 the leave of the Court is not required for the institution of a suit by a mortgagee to realize his security. I am further of the opinion that the law was deliberately changed by the Act of 1883 with the object of closing the loop hole which those cases had left open. The words of the proviso can be amply satisfied by confining its operation to cases where the mortgagee can realize his security without the institution of a suit. I hold, therefore, that the leave of the Court was necessary for the institution of C. R. Suits 158 and 159 of 1923, and that that leave not having been obtained, the decrees in those suits were not binding on the Official Assignee or the estate of the insolvent. This concludes the matter. On the assumption that the view I hold is erroneous, and that leave was not necessary, unless the Official Assignee was a party to the suit he could not be bound by the decrees passed in them. This was so held by the Privy Council in *Kala Chand Banerjee* v. *Jagannath Marwari* (5). That was a decision under S. 16, Provincial Insolvency Act, 1907, the provisions of which, so far as material are similar to those of S. 17, Presidency

(2) [1914] 38 Bom. 359=21 I.C. 714=15 Bom. L.R. 939.
(3) A.I.R. 1922 Lah. 281=3 Lah. 59.
(4) [1871] 6 Ch. 555=19 W.R. 939=40 L.J. Ch. 689.
(5) A. I. R. 1927 P. C. 103=54 Cal. 595=54 I. A. 190 (P. C.).

Towns Insolvency Act Mr. Burjorjee argued that the Official Assignee must be deemed to have been a party because he was given an opportunity to defend the suits and elected not to do so. The procedure which was followed in the suits would have been correct if the insolvency had supervened after the institution of the suits But at the date of their institution Nasse had been adjudicated and the equity of redemption in the debt had devolved on the Official Assignee He was a necessary party, and should have been sued in the first instance, not having been sued in the first instance he should have been placed on the record as a defendant The case is analogous to that of a suit brought against a man who was dead at the time of its institution. In such a case it would be incumbent on the plaintiff not merely to write to the legal representatives enquiring whether they wished to defend the suit, but to place them on the record. In the case to which reference was last made *Kala Chand* v *Jagannath* (5), a contention somewhat similar to that made by Mr Burjorjee was put forward and rejected by their Lordships of the Privy Council On this ground also I hold that the Official Assignee is not bound by the decrees in C. R Suits Nos 158 and 159 of 1923.

The next question is whether the charge purporting to be created was void because at the time it was created the debt was under attachment. The point is one of considerable importance and was not taken in the objections of the opposing creditors which were before Otter, J I, therefore, allowed an adjournment so that the matter might be fully argued Under S 64, Civil P. C. when an attachment has been made, any private transfer or delivery of property attached, or of any interest therein, is void as against all claims enforceable under the attachment. I may first refer to a suggestion made by Mr. Burjoree, that the charge on which he relies was made by an agreement, and that it did not involve a transfer of an interest in property within the meaning of the section. In *Rodick* v. *Gandell* (6), at p. 754 Lord Truro, L. C., says that

"an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

(6) 42 Ch. 749.

And it seems impossible to hold that an assignment of a debt or fund, equitable or legal, does not involve a transfer of an interest in that debt or fund.

I will now narrate briefly the facts relevant to this portion of the argument.

Civil Regular No 39 of 1923 of this Court was a suit instituted on 20th January 1923, by V. S. R M. Chettiar (creditor No 2 in these proceedings) against Nasse and others for the recovery of Rs. 20,000 and interest due on a promissory note. On 27th January 1923, on an application by creditor No 2 for an attachment before judgment of the debts due to Nasse by the Executive Engineer, P. W D. Cantonment Division, Rutledge, J. (as he then was) directed a prohibitory order to issue, and it was served on 30th January. On 2nd February Nasse filed an application, supported by an affidavit asking that his personal security might be accepted and the attachment removed. It should be noted that in the affidavit he emphasized the fact that it was his personal security which he was offering On the same day Rutledge, J., passed the following order :

"On defendant giving security to the satisfaction of the bailiff for the amount of claim and costs prohibitory order to be withdrawn."

On this, on the same day, the Deputy Registrar asked the bailiff to report and the bailiff endorsed on the petition "Petitioner Mr. L. W. Nasse is good for Rs 21,560." The bailiff had originally written "surety" but scratched it out and substituted "petitioner." On the same day the Deputy Registrar endorsed on the petition "Let the surety be accepted," and there is a note in the diary:

"On the defendant's application dated 2nd February 1923 tendering his personal security, order passed as prayed."

Under this are initials, not apparently those of the Deputy Registrar. On 3rd February, Nasse executed in the presence of the Deputy Registrar a bond giving personal security. On 5th February there is an entry in the diary, followed by what appears to be the same initials:

"Security bond having been filed 3rd February 1923, attachment is removed."

On the same day a notice was served on the Executive Engineer informing him that the attachment had been removed. On or about 17th February creditor No. 2 filed an application (dated 13th February) complaining that O 38, R 5 (b) of the Code, under which the order of 2nd February had been made, did not contemplate or authorize the acceptance of personal security, and asking for cancellation of the order "accepting the surety" and that Nasse be ordered to furnish proper and sufficient security in terms of the Court's order and on failure to do so "that he be ordered to pay into Court all moneys withdrawn by him to the extent of Rs. 21,500 from the P. W. D. and for such purpose all necessary orders may be given."

Notice was ordered to issue to Nasse and was served on him on 21st, on which date he was given time to file objections until 26th. On 26th he was given further time for this purpose until 2nd March. On 3rd March he filed objections and the matter was directed to be placed before the Court on 5th March. Meanwhile Nasse had executed his charge in favour of the present applicants on 28th February and given them the power of attorney to collect the moneys from the P W. D. on 2nd March. The matter came before the Court on 5th March and Rutledge, J., said that his order of 2nd February never contemplated that the bailiff should be satisfied with Nasse's personal security and had he meant merely personal security, he would have so stated. He continued :

"Such being the case, the prohibitory order must be re-issued and it will only be withdrawn on the defendant furnishing adequate and independent security to the satisfaction of the bailiff."

On 8th March it is stated that the attachment was re-issued. The actual prohibitory order, which was issued on that date, and served on 12th March, says nothing about a re-issue and is in form an entirely fresh prohibitory order. On 22nd March a decree was passed in favour of creditor No. 2. As I have said before, Nasse was adjudicated insolvent on 28th March, and the applicants filed their suits to establish their security on the next day.

It is Mr Burjorjee's case that on the date on which the charge was created, there was no subsisting attachment. To this Mr. Janab Ali replied that, inasmuch as the attachment was removed under a misapprehension by the Deputy Registrar and was immediately restored by the Judge, the attachment ordered to issue on 5th March related back to the date when the prior attachment was first issued, and that the charge must be deemed to have been given while the attachment was subsisting and is therefore void. I may say that before the argument proceeded the record of C R. 39 of 1923 was carefully inspected by counsel on both sides, my attention was not drawn to the peculiarities in the endorsement of the petition of 2nd February and in the diary entries of 2nd and 5th March which I have indicated, and Mr Janab Ali was satisfied that the order removing the attachment was the order of the Deputy Registrar and conceded that he had power to make such an order. In support of his contention Mr Janab Ali cited a number of authorities all of which with two exceptions, are cases of removal of attachment followed by a declaratory suit in which the attaching creditor established his claim Mr. Burjorjee says that this class of cases is distinguishable and that, of the exceptions, one has no bearing and the other was erroneously decided. I will now deal with the authorities.

In *Bonomali Rai* v. *Prosuno Narain Chowdhury* (7), a decree-holder attached the property of certain of the defendants who then obtained an order of release under S. 280 of the Code of 1882 (corresponding to O 21, R. 60 of the present Code), and subsequently mortgaged the property. The attaching creditor thereupon sued for and obtained under S. 283 (corresponding to O 21, R. 63), a declaration that the mortgaged property was nevertheless liable to be sold under his attachment. A few days after obtaining the decree he again attached the judgment-debtor's property. The mortgagees then sued on their mortgage and obtained a decree for sale. The sale in execution of the attaching creditor's decree and that ordered by the decree in favour of the mortgagees were both advertised for the same day. The plaintiff purchased at the sale under the attaching creditor's decree and then sued for a declaration that the property was not liable to be sold in execution of the mortgage decree, the reason being that the judgment-creditor's at-

(7) [1896] 23 Cal. 820.

tachment was restored by the decree under S 283 of the Code, and that the mortgage executed by the judgment-debtors was invalid as against the plaintiff, the purchaser at the execution sale. It was held that the plaintiff was entitled to the decree sought. The ground of the decision was that the order for release at the instance of the claimant:

"was not final but provisional, as S 283 declares it to be subject to the result of any suit which the attaching creditor may bring to establish the right which he claims to the property in dispute. That right was to do what he had already done "viz., attach it and to do what he wanted to do, but was prevented by the order from doing, to sell it in pursuance of his attachment. The only remedy given to the attaching creditor is by a suit which must be brought within one year from the date of the order, and the object of the suit is to maintain the attachment and get rid of the order. Although, therefore, an order under S. 280 operates to prevent the attaching creditor from proceeding to sell the attached property, it does not operate so as at once to remove the attachment and leave the judgment-debtors free to deal with the property as they like. If they do deal with it, they and those with whom they deal do so subject to the result of the suit as to the attachment being maintained. Any other construction of the section would in very many cases defeat the object of the suit and render the decree infructuous."

The case, therefore, depends on the peculiar remedy given to the attaching creditor by S 283 of the old Code, and is not an authority for the broad proposition that whenever an attachment is removed under a misapprehension and a fresh attachment is made, an intervening charge is subject to the disabilities specified in S 64 of the present Code. This case was followed on the same ground in *Ram Chandra Marwari* v *Mudeshwar Singh* (8) and *Ali Ahmed Khan* v. *Bansidar* (9). Reliance is placed by Mr. Aiyangar on the remarks of Rankin, J., in *Najmunisa Bibi* v. *Nacharuddin Sardar* (10), (*at p.* 556 *of* 51 *Cal.*). That was a case relating to attachments under decrees and a declaratory suit, but no question actually arose under S. 64. Rankin, J., said.

"It is quite plain that, if an attachment comes to an end validly, then upon a second attachment no Court can refuse to recognize an interest validly created in the meanwhile. It is also plain that if an attachment is wrongly released, and the right to attach is subsequently established according to law either by appeal or otherwise the attachment will relate back to the time when it was made."

From the context it would appear that he was discussing the position in relation to O. 21, Rr. 60 and 63 of the Code. If his remarks were intended to have any wider application they were obiter dicta.

In *Aziz Bakhsh* v *Kaniz Fatima Bibi* (11), the assignee of a decree attached two properties one of which was burdened with a mortgage in favour of the assignor and the other of which was not so mortgaged. The judgment-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage. On 2nd June 1909, the Court dismissed the application for execution in toto.

On 10th August 1909, the decree-holder applied for review of judgment, on the ground that the order dismissing the application with regard to the non-mortgaged property was erroneous, and on 13th June 1910, the review was accepted and the execution as regards the non-mortgaged property ordered to proceed. Between these last two dates the judgment-debtor sold the non-mortgaged property to a third party. After the 13th June 1910, the decree-holder applied to go on with the execution proceedings and to sell the non-mortgaged property. The judgment-debtor (not his transferee) objected on the ground that under O. 21, R 57, the previous attachment had ceased to exist, and that a fresh attachment was necessary and the property could not be sold, as he had already sold it to another person. O. 21, R. 57 provides that when property has been attached but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it may dismiss it and thereupon the attachment is to cease. But in the case under discussion there was no default and no order of dismissal for default, and it was held that the attachment still subsisted and it was valid as against the purchaser. All that the case holds is that the attachment never had been removed. It is not an authority for the general proposition that if the first attachment is actually removed, albeit under a misapprehension, a second attachment relates back to the

(8) [1906] 33 Cal. 1158=10 C. W. N. 978.
(9) [1909] 31 All. 357=1 I. C. 951=6 A. L. J. 434.
(10) A. I. R. 1924 Cal. 744=51 Cal. 748.
(11) [1912] 34 All. 490=15 I. C. 49=10 A.L.J. 48.

date of the first attachment. The case on which Mr. Janab Ali most strongly relies is that of *Gopal Prasad* v. *Kashi Nath* (12). In that case there were two suits pending against the same defendants by different plaintiffs, one in the Aligarh Court in which Kashi Nath was the plaintiff, and the other in the Mainpuri Court in which another person was the plaintiff. On 9th August 1909, the defendants applied to the High Court to transfer the Mainpuri case to Aligarh in order that both cases might be tried together, and on the same date obtained an order "Let notice go; stay meantime." On 14th August 1909, Kashi Nath attached before judgment certain properties of the defendants. On 27th August 1909, the Aligarh Court, on the application of the defendants, withdrew the attachment on the ground that the order of the High Court must be taken as a stay of proceedings in both Courts, and not of those in the Mainpuri Court only, and that, therefore, the attachment being a proceeding subsequent to the order, was illegal. Kashi Nath appealed to the High Court which held that the stay order of 9th August 1909, related only to the proceedings in the Mainpuri Court :

"and by its order of the 16th March 1910, directed that the parties be restored to the position they occupied on 9th August 1909, and that all orders which had followed from the wrong interpretation of the stay order be set aside."

In the interval between 27th August 1909 and 16th March 1910, however, when as a matter of fact, there was no order in existence attaching the properties the defendants sold them to four different transferees. Kashi Nath obtained a decree in his suit, and took out execution proceedings for sale of the properties on the strength of the attachment before judgment. The transferees having made unsuccessful objections in the execution department, brought four separate suits for declarations that the transfers were good and that the properties were not saleable in execution of Kashi Nath's decee. The suits were dismissed and four appeals were filed, three of which were heard and dismissed by various Benches, and then Gopal Prasad's appeal was heard, apparently by a different Bench. There was no finding that Gopal Prasad had been in collusion with the defendants, and the Court assumed that he was a bona fide purchaser of property which he knew was not at the time of his purchase under attachment. It was held, however, that the order of 16th March 1910, had retrospective effect and that, consequently, the sale to Gopal Prasad effected between 9th August 1909 and 16th March 1910, when there was no subsisting attachment was invalidated. The decision was based on two grounds. First, the Calcutta decisions which I have cited were without discussion treated as authorities for the broad proposition laid down and secondly the Court held that that it was bound by the previous unreported decisions of the Benches in the cases of the appeals of two of the three transferees.

It appears to me that this case is distinguishable from the one which I have to decide. The order of the Allahabad High Court of 16th March 1910, distinctly stated that it was to relate back to 9th August 1906. The order of Rutledge, J., of 5th March 1923, directed in terms an entirely fresh attachment and I do not think it can be implied that he meant it to have retrospective effect ; if he had so meant, he would have so stated just as he had stated that if by his earlier order of 2nd February 1909, he had meant that personal security should be accepted, he would have so stated. Further, I think, that the decision of the Allahabad High Court was not justified by the Calcutta decisions which I have cited and on which it professed to rest. Those decisions, as I have pointed out, are based on the peculiar remedy given to an attaching creditor by O. 21, R. 63, and are no authority in any other class of case. Even if the order of Rutledge, J., is to be deemed to have been passed with the intention that it should have retrospective effect I am of the opinion that the first attachment having been validly withdrawn, no subsequent attachment could have such an effect as against a person taking a transfer form the judgment-debtor in the interval. There is nothing in the Code, or so far as I know, elsewhere, which confers such a power on the Court. I do not say that in properly constituted proceeding, if fraud and collusion were alleged and proved between the judgment-debtor and a transferee a transfer obtained under such circumstances

(12) [1919] 42 All. 89=52 I. C. 343=17 A.L.J. 901.

as exist in the present case could not be set aside. But in the objections of creditor No. 2, filed on 31st March 1927, there is no allegation that the charge was obtained either by fraud or collusion, and the objection, raised by Mr. Janab Ali for the first time before me, is simply, that the charge is void by reason of S. 64, Civil P. C. I hold that it was not for that reason void.

The only remaining objection pressed is that, inasmuch as the charge was given on 23th February 1923, and Nasse was adjudicated an insolvent on 23th March 1923, the charge is void as being a fradulent preference. This is a matter which was not gone into before Otter, J., and one on which I must hear evidence. The circumstances under which the charge was obtained may or may not have a bearing on that issue. As to that, at present, I express no opinion.

I think it desirable here to make a few remarks as to the time which the hearing of the review has already taken. A whole day was occupied by a discussion of preliminary objections to the review which failed, and by Mr. Burjorjee's arguments on the two points in issue before Otter, J., on one of which he succeeded, and another half day was occupied by arguments on a point taken before Otter, J., where I have held that Mr. Burjrajee has failed. A further half-day was occupied on an objection not alleged before Otter, J., on which I have held that Mr. Burjorjee has succeeded.

Order.—(25*th June* 1928) This order should be read in continuation of my order of 4th May 1928. I should first state that the objecting creditors are V. S. R. M. Chettyar (No. 2), Watson and Son Ltd. (No. 8) and D. (or O.) M. Sonai Muthia Pillay (No. 9). In the heading of my previous order by a clerical error V. S. R. M. Chettyar is described as creditor No. 2. In the body "Watson and Son Ltd., was declared as No. 7. It was so described in its objections. When I delivered that order, as it appeared possible that the evidence might be lengthy I directed that the case should come into the daily list in a week's time. The intervention of a long case has been the cause of the delay in the completion of the hearing. In this part of the case Mr. Joseph did not appear. Mr. Tambe was present all the time, but was content to adopt the arguments of Mr. Janab Ali.

The question for decision is whether the transaction evidenced by the charge of 23th February 1923, and the power of attorney of 2nd March 1923, in view of the fact that the adjudication took place less than three months of its date, is a fraudulent preference within S. 56 (1) of the Presidency Towns Insolvency Act, 1909. Mr. Burjorjee said that he did not dispute that Nasse was at the time unable to pay his debts as they became due from his own money, and the only question I have to decide is whether the charge was created by him in favour of the applicants "with a view of giving" them a preference over the other creditors. The law applicable is not in dispute, counsel agree that the view of preferring need not be the whole view, but that it must be the dominant view. As was observed as long ago as 1883 by Baggalay, L. J., in *Ex-parte Hill* (13) at p. 701 in relation to the corresponding section of the Bankruptcy Act, 1869.

> All that S. 92 says is that the conveyance must be made "with a view of giving such creditors a preference:" it does not say with the sole view. I understand it to mean that the substantial object or view must be the giving the creditor a preference, and that the mere fact that besides that view there may have been also some view of an advantage to be gained by the person who makes the preference does not alter the case, or prevent the application of S. 92."

Nor is it in dispute that the onus of showing that there is a fraudulent preference is, at any rate in the first instance, on those who assert it. Mr. Janab Ali argues that if a prima facie case is made out that a transaction amounts to a fraudulent preference, the onus shifts. Mr. Burjorjee does not contest this proposition. Reference is made to *In re, Cohen* (14). It was there held by a majority of the Court of Appeal that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, there is a prima facie case of fraudulent preference. Consequently, it being held that the trustee had proved a prima facie case of fraudulent preference, and there being no evidence to the contrary,

(13) [1883] 23 Ch. D. 695.
(14) [1894] 2 Ch. 505.

the truestee was entitled to suceed on his application that the payment was a fraudulent preference Warrington, L. J., however, (at p 539) observed :

"The case is a peculiar one, and it must not be supposed that it will be any authority for questioning the validity of a payment of a debt made in the ordinary course of business by a man who knows he is at the time insolvent, but who may well make such payments in the hope of keeping his business on foot for a time and perhaps even of passing safely through the period of danger. Such payments have been held not to be fraudulent within the meaning of the section, and I desire to throw no doubt on the correctness of such decisions."

Sargant, L. J., who delivered a concurring judgment, said (at p 543) that there was .

"a general current of authority that, when a preference in fact has been given in anticipation of bankruptcy such preference in fact requires justification by the establishment of some other sufficient dominant intention."

He went on to say (at p 544) that the Court was not dealing with a case :

"where a debtor who knew himself to be insolvent made a payment to a creditor in the course of his business, and with the object of being able to carry his business on."

The position, therefore, is that it is for those who assert that there is a fraudulent preference to make out a prima facie case. If such a case is made out, it can be rebutted by proof that the explanation of the preference is that there was a dominant intention in the mind of the insolvent other than a desire to prefer a particular creditor. If there is such a dominant intention, the prima facie case is rebutted

Mr Janab Ali, accepting the preliminary onus, stated that he relied on the records of C. R. No 39 of 1923 (the suit by creditor No. 2 in which attachment before judgment was effected) and of C. R. Nos. 158 and 159 of 1923 (in which the applicants sought to establish their charge) taking the view that a prima facie case had been made out, he adduced no further evidence and closed his case. Mr. Burjorjee called two material witnesses namely, Vithaldas (a partner of the applicants) and the insolvent himself, to show that the charge was created by the insolvent in the ordinary course of his business and with the object of carrying it on.

I have already dealt at length with Civil Regular Suits Nos 39, 158, and 159 of 1923 and for the purposes of the issue I have now to decide it is only necessary to make brief reference to them in the light of the evidence which has now been given. (After discussing evidence, his Lordship proceeded) After giving my best consideration to the evidence, I have arrived at the conclusion that the dominant intention of Nasse was not to give a preference. As has been said the onus of proving a fraudulent preference is on those who assert it. I do not think that the records on which Mr. Janab Ali relies are sufficient to establish a prima facie case. The omission of the applicants to include their other securities in their suits, to my mind, has no bearing at all on the case. The proceedings in relation to the removal of attachment of the debt have a suspicious appearance, but suspicion is not equivalent to proof. Of evidence of collusion in the matter between the applicants and Nasse there is no proof whatever. Vithaldas says that he knew nothing about creditor No. 2's suit or the attachment proceedings, and Nasse says that he told Vithaldas nothing about them. If he was expecting to get further advances by giving security, he would not be likely to inform the prospective lender of the risky nature of the proposed security. As to his motive for desiring to get the attachment removed, his evidence is that he believed that he had a defence to the suit of creditor No. 2. He also thought that the persons who had been financing the Kokine brickfield had a right to the moneys accruing due in respect of it superior to that of creditor No. 2. And Mr. Burjorjee contends that there is some legal justification for his view inasmuch as if insolvency had supervened before the attachment was removed, the applicants (who were creditors of Nasse alone), would have had the right to be paid before creditor No. 2 who was creditor of a partnership consisting of Nasse and A. K. N. Mohamed Ebrahim.

However this may be, I do not think that Nasse's evidence on this point is sufficient to prove that in executing Ex. F he did so with a view of giving them a preference in the sense in which the expression is used in S. 56 (1) of the Act. I lay no stress on his having stated that he executed it " voluntarily." He was obviously using the word in contradistinction to " under pressure " as that

term is usually used in this class of cases.

Even if a prima facie case could be held to have been made out by the opposing creditors, I am of the opinion that it has been rebutted. The applicants had been advancing large sums to Nasse to finance his Kokine brickfield contract. The work was nearing completion, and, so far as the evidence goes, there was at the time every prospect, once it was completed and the inevitable obstacles in the way of getting prompt payment surmounted, of a large sum being received in respect thereof. According to Zaveri, the other witness of the applicants, the claim subsequently made on behalf of the insolvent's estate was for over Rs. 1,20,000. The only difficulty was that Nasse was in embarrassed circumstances and could not pay his sub-contractors and coolies If he could be helped over the last lap, there was a reasonable prospect of the applicants' recovering their money The security which the applicants had was insufficient, and they might reasonably expect as a condition of their advancing further sums that they should receive further security. The same considerations apply, as I think, with even greater force, to Nasse If he could manage to hang on and complete his contract, he had a reasonable prospect of paying off the applicants and of making enough to enable him to continue his business. And this is how, according to the evidence, the charge came to be created Nasse gave the charge in order that he might receive the further advances which would enable him to carry on his business. I am of the opinion, therefore, that the charge was given in the ordinary course of business and was not a fraudulent preference It follows that the present application for review succeeds; and that I must rescind the order of 2nd June 1927, dismissing the applicants' application of 27th January 1924. The applicants are entitled to the order for which they then seek subject to one qualification. As will be seen on p. 6 of my previous order, Mr. Burjorjee undertook that the applicants would first realize the other securities for their debt and give credit for the net amount realized before seeking to enforce their charge. The order which I propose to make is that after the applicants have realized all their other securities for the debt due to them by the insolvent and have given credit for the net amount realized, the Official Assignee be directed to pay to them so much of the sum of Rs. 33,752-5-2 in his hands as may be necessary to satisfy the balance of such debt.

Creditors 2, 8 and 9 must pay the applicants' costs of the application for review. The case involves a large sum of money and important and difficult questions of law arose. The hearing was also protracted. I have noted in my previous order the time occupied up to its date The trial of the issue of fraudulent preference has occupied the equivalent of a full day. I allow as advocate's costs Rs. 340, and special costs at Rs 170 a day for three days.

S.N./R K. *Application granted.*

A. I R 1929 Rangoon 240

OTTER, J.

Abdullakin—Appellant.

v.

Maung Ne Dun and *another*—Respondents.

Special Second Appeal No. 428 of 1928, Decided on 18th February 1929, against judgment of Dist Judge, Benzada, in Civil Appeal No. 24 of 1928.

(a) Evidence Act, S 92—Oral evidence as to real character of consideration is not barred.

Section 92 does not debar a party from showing by oral evidence the real character of the consideration fixed between the parties. What is not allowed is to contradict the terms of the document : 11 *Cal.* 519, 5 *Mad.* 6, 11 *Mad.* 213; 33 *Mad.* 150, *Ref.* [P 241 C 2]

(b) Contract Act, S. 25—Part of consideration referring to past debt—Debt must be definitely specified.

Where part of consideration refers to a past debt and not the liability arising under the contract, it must be definitely specified. [P 240 C 2]

Ray—for Appellant

R. M. Sen—for Respondents.

Judgment.—In this case the plaintiff sued the defendants upon a deed leasing to defendant 1 certain paddy lands. Defendant 2 was impleaded as a guarantor for payment of rent in accordance with the covenants of the lease. The lease was granted in 1288-89 (1926-27) and the rent stated in the lease (Ex. A) was 670

baskets of paddy. The amount claimed by the plaintiff was 448 baskets of paddy or their value, the receipt by him of 222 baskets being admitted. The defence was that the land was leased to them for 250 baskets only, and, among other suggestions by way of defence fraud was alleged against the plaintiff.

It was the case for the plaintiff that of the total sum of 670 baskets mentioned in the deed of lease the amount of 420 baskets represented a debt due to the plaintiff by defendant 1 in respect of rent of other land This debt was, it is agreed, time barred when a deed of lease was executed.

The defendant's case upon the question of the amount was that the rent of 670 baskets of paddy was originally fixed in respect of the two parcels of land, but that later the plaintiff refused to lease one of the parcels to them, the rent for the remaining parcels actually being 250 baskets.

It is unnecessary to deal with the various points argued in the two lower Courts for it was conceded by R. M. Sen on behalf of the respondents that upon the facts the plaintiff was bound to succeed. That this is so is evident from an examination of the statements of the witnesses which in my view disclose an overwhelming case in support of the contentions of the plaintiff

The only serious suggestion made on behalf of the defendant before me was that this is a case to which S. 25, Contract Act of 1872, must apply and as there is no direct reference in Ex. A to the previous time barred debt the amount claimed upon this footing is not recoverable. Furthermore, it was said that as the terms of the Contract Act were reduced to the form of a written document oral evidence to prove the true nature of the consideration was inadmissible. Now it is perfectly true that the document makes no mention of the previous debt. Indeed its terms stated clearly that the rent reserved was in respect of the leased land. The case of *Appa Rao* v. *Suryanarayana* (1), is relied upon and supports the first part of Mr. Sen's argument.

The case of *Ganpathy Moodelly* v. *Munisawmi Moodelly* (2), is relied upon by Mr. Ray for the plaintiff. In that case there was a clear reference to an existing debt in the document and I am of opinion that the present case must stand upon a different footing. It is clear, however, that S. 92, Evidence Act, forbids only the

"contradicting, varying, adding to or subtracting from the terms of the contract."

The consideration in the present case according to the plaintiff is the exact amount stated in the document. It has been decided that S. 92, Evidence Act, does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the terms of the document. The question therefore is whether to show that a part of the consideration is in respect of a previous debt, and is not in respect of the amount due under the lease is a contradiction of the terms of the contract Four cases are of importance upon this point, viz. . *Lal Mahomed* v. *Kallanus* (3), *Vasudeva Bhatlu* v. *Narasamma* (4), *Kumara* v. *Srinivasa* (5) and *Ganpathy Moodelly* v *Munisawmi Moodelly* (2)

In all these cases the Courts have held the view that a party is not debarred by anything in the Evidence Act from showing the real character of the consideration fixed between the parties. In the present case the amount of the consideration is correctly stated, and it seems to me that the plaintiff brought himself within the principle I have referred to, when he adduced evidence to show that part of the consideration represented a past debt for rent and not a future liability arising under the contract. For these reasons the appeal must be allowed with costs in all Courts.

V B./R K. *Appeal allowed.*

(1) [1899] 23 Mad. 94.
(2) [1909] 33 Mad. 159=5 I. C. 754=7 M. L. T. 81.
(3) [1885] 11 Cal. 519.
(4) [1882] 5 Mad. 6.
(5) [1887] 11 Mad. 213.

A. I. R. 1929 Rangoon 241

CHARI, J.

W. Banvard—Plaintiff.

v.

M. M. Moolla—Defendant.

Civil Regular No 455 of 1928, Decided on 30th November 1928

Contract Act, S. 30—*K* owing money to *N* on betting transaction—*N* demanding it and on *K*'s refusal threatening to post him—*K*

giving cheque to *N* but requesting not to present it and promising to make payment on certain date—*N* not posting *K*—There is good consideration for passing of cheque in *N's* refraining from posting *K* and under S. 30 promise based on such consideration is not illegal.

The sections of the Contract Act make a wagering contract void to the extent that no Court will enforce such a contract but they are not illegal. [P 242 C 2]

K owed money to *N* in respect of betting transaction. *N* demanded the money and on *K's* refusal threatened to post him under Rangoon Turf Act. *K* then gave *N* a cheque post dated and requested him not to present it and promised to make the payment on a certain date. *N* did not post *K* as he could have done.

Held, that there had been good consideration for the passing of the cheque in the fact that *N* refrained from posting *K* and that there was nothing in S. 30 which made a promise based on such consideration illegal: *A. I. R.* 1923 *Cal.* 445, *Hyams* v. *Stuart King*, (1908) 2 *K. B.* 696, *Rel. on.* [P 242 C 1,2]

Doctor—for Plaintiff.

E Maung—for Defendant.

Judgment.—The facts of this case are perfectly clear. The defendant owed money to the plaintiff in respect of certain betting transactions which apparently took place at the end of November 1927 Some time in December the defendant having made default in payment of the amount due, except a sum of Rs 600, the plaintiff began pressing him for payment and sent two of his assistants to get the money from the defendant. They apparently did not succeed, in getting anything from him, and some time about the third week of December, Abraham, one of the assistants of the plaintiff, went and told the defendant that unless he paid up his master the plaintiff threatened to post him. The defendant pretends that he does not know the rules of the Turf Club in this respect, but I have not the least doubt that he knows everything about them The defendant thereupon gave a cheque post dated to 15th January. On that day or on the next day he wrote to the plaintiff asking him not to present the cheque and promising to make payment of Rs 1,000 on the succeeding Friday and the balance in the succeeding month. The plaintiff did not post the defendant as he could have done, and I am satisfied that the consideration for the passing of the cheque is the plaintiff's act in refraining from posting him before the Turf Club and bringing him on the list of defaulters of the Turf Club, which is the punishment inflicted in such cases.

The next question for consideration is the legal question whether the plaintiff is entitled to recover on the cheque in these circumstances It is alleged that the consideration for the cheque was an illegal consideration. The cheque was given for a collateral purpose, namely to induce the plaintiff to refrain from posting the defendant, and there is nothing in S. 30, Contract Act, which makes a promise based on such a consideration illegal. In the case of *Leicester and Co.* v. *S. P. Mullick* (1), the facts were somewhat similar to the facts in this case. There a hundi was passed and the person in whose favour the hundi was passed had already reported to the Turf Club, but agreed in consideration of the passing of the hundi to withdraw his name and prevent him from being posted as a defaulter. In *Hyams* v. *Stuart King* (2), the facts were exactly similar to those in the present case, the consideration there being a promise to refrain from declaring the giver of the cheque a defaulter. This was held to be a good consideration. The case in 27 *Calcutta Weekly notes* therefore practically disposes of the defendant's contention, but Mr. E. Maung, who appears for him, argues that the Calcutta case proceeded more or less on the English decisions which themselves were based upon a different Act Some of the provisions of the English Gaming Act are undoubtedly different from the Indian Act, but the principles applied are the same both in England and in this country. As a matter of fact at p. 447 (*of* 27 *C. W. N*) in *Leicester's* case (1) the Calcutta High Court disposes of an argument based upon S. 30, Contract Act, that that Act makes agreements by way of wager illegal. The learned Judges of the High Court pointed out that the sections of the Contract Act make a wagering contract void to the extent that no Court will enforce such a contract and not illegal. The collateral agreement therefore based upon a transaction which was originally a wagering transaction is not on that account illegal. I am therefore satisfied that there has been good consideration for the passing of the cheque in that the

(1) A. I. R. 1923 Cal. 445.

(2) [1908] 2 K. B. 696=24 T. L. R. 675=93 L. T. 424=77 L. J. K. B. 794=52 S. J. 551.

plaintiff refrained from making any report against the defendant to the Rangoon Turf Club There will therefore be a decree for Rs. 2,200 and costs.

P.N./R.K. *Suit decreed.*

A. I. R. 1929 Rangoon 243

BROWN AND CHARI, JJ.

Ma Pwa Sein—Appellant.

v.

Maung Ba Saw and *others*—Respondents.

First Appeal No. 2 of 1929, Decided on 1st July 1929

(a) Administration — Part of property partitioned—Suit for administration of unpartitioned portion lies.

A division of a portion of the estate does not preclude any of the heirs from filing an administration suit in respect of the undivided portion. [P 243 C 2]

(b) Buddhist Law (Burmese)—Gift.

Death bed gift is not within competence of Burmese Buddhist. [P 244 C 1]

(c) Buddhist Law (Burmese) — Gift by sister without joining her husband—Validity is doubtful.

Whether as a release or as a gift, it is very doubtful if a Burmese woman can without being joined by her husband, transfer her interest to her sister or relinquish the same in her favour. [P 244 C 1]

Eunoose—for Appellant.

T. S. V. Chari—for Respondents.

Judgment.—The facts of the case out of which this appeal arises are that the defendant Ma Pwa Sein and Ma Thin Hline (deceased) were sisters, being the daughters of U Po Ku from whom they had inherited certain properties. Ma Thin Hline died on 8th July 1927 and 11 days before her death, namely on 29th June 1927 she executed what purports to be a release of her rights in the share or interest to which she was entitled in the estate of her father, U Po Ku. After Ma Thin Hline's death, her husband Maung Ba Saw and her two children, plaintiffs 2 and 3, instituted the present suit for administration of U Po Ku's estate As regards the deed of release executed by Ma Thin Hline, they alleged that it was executed on the death bed of Ma Thin Hline, and that it was obtained by the defendant by undue influence at a time when Ma Thin Hline was enfeebled by illness. The defendant Ma Pwa Sein pleaded that the release deed was for consideration and was executed by Ma Thin Hline when she was in a sound state of mind. She also alleged that there was a prior partition and that the suit for administration did not therefore lie. The trial Judge found against the defendant on all the issues and gave a decree in favour of the plaintiffs. The defendant now appeals. As regards the question of prior partition, the evidence of Maung Tun Pe, one of the lugyis who admittedly effected the partition shows that the sisters divided only the moveable properties leaving immovable properties undivided. A division therefore of a portion of the estate does not preclude any of the heirs from filing an administration suit in respect of the undivided portion.

As regards the other defence, the trial Judge held that the deed was in effect a transfer by way of gift and having been made on Ma Thin Hline's death bed was invalid The Burmese doctors who were examined as witnesses state that Ma Thin Hline was suffering from a lingering disease of which she died. They and U Po Hla, the Sub-Registrar, who went to the house, all state that her mind was not in any way clouded, when the deed was executed This may or may not be so, but there is no doubt that Ma Thin Hline was ill at the time of the execution of the deed and died of the illness. She must have known that she was going to die. If the deed is a death bed gift no question of the donor's mental state arises The deed itself, though not very happily worded shows clearly that it was intended to be a release of Ma Thin Hline's rights in her father's estate. The consideration is stated to be the necessaries supplied to Ma Thin Hline and her children by the donee, Ma Pwa Sein, for over 5 or 6 years and the necessaries supplied during Ma.Thin Hline's sickness. It is fairly clear that this is a very illusory consideration. Both the sisters had an interest in the paddy lands, the two houses and house sites, which form part of the estate of U Po Kin, and if the defendant did support her sister or sister's children it may reasonably be presumed that she did so out of the proceeds of their father's estate. The learned trial Judge was perfectly right in the conclusion he arrived at that the consideration was illusory and that the document if it could take effect

at all could only take effect as a death bed gift is not within the competence of a Burmese Buddhist. The appeal must therefore fail. We may also note that whether as a release or as a gift, it is very doubtful if Ma Thin Hline could without being joined by her husband, transfer her interest to her sister or relinquish the same in her favour. For these reasons we dismiss the appeal without costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 244

BROWN, J.

Maung Po Htaik—Applicant.

v.

Bramadin and *others*—Respondents.

Civil Revn No 244 of 1928, Decided on 21st February 1929, from judgment of Dist. Judge, Thayetmyo, in Civil Appeal No. 217 of 1928.

(a) Contract Act, S. 30—If as result of wagering contract, principal proves that agent received money on his behalf, agent is liable to account to principal for the money and onus is on principal to prove that agent so received money—Evidence Act S. 101.

A suit cannot be brought in which the cause of action is based directly on the wagering contract, but if, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money and the onus lies on the principal to prove affirmatively that the agent actually received the money on his behalf. 25 *All.* 639, *Rel. on.* [*P* 244 C 2]

(b) Civil P. C., S. 115—Scope.

If the lower Court's method of arriving at the conclusion is irregular and if it entirely misconceives the point at issue there is sufficient ground for High Court's interference in revision. [P 245 C 1]

Halker—for Applicant.

Ba Soe—for Respondents

Judgment — The respondents brought a suit against the petitioner, Maung Po Htaik, for the recovery of Rs 141. Their case was that money was collected for a confederacy to buy tickets for the Rangoon St. Leger Sweep from Mandalay. The confederacy to purchase the tickets consisted of certain officials in the Thayetmyo District. The petitioner was collecting one rupee contributions and obtained Re. 1 for this purpose from the respondents. The confederacy finally won a prize as a result of the race and each subscriber of Re. 1 obtained as his share of the prize Rs. 141. The respondents claimed a similar sum from the appellant. The trial Court dismissed the suit, but the suit was decreed by the District Court on appeal and the petitioner has now come to this Court in revision.

Section 30, Contract Act provides that "agreements by way of wager are void and that no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

It is clear, therefore, that the respondents could not possibly succeed merely on the strength of their agreement with the petitioner. The second clause of S. 30 which the trial Judge discusses obviously has no application to the present case

The District Court referred to an unofficial report of a case decided by the late Chief Court of Lower Burma. The question decided there was also decided in *Bholanath* v. *Mulchand* (1). If, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money, but a suit cannot be brought in which the cause of action is based directly on the wagering contract The plaintiffs in the present case clearly could not succeed merely on the strength of their contract with the petitioner They must prove that the petitioner has received the prize money and is holding it on their behalf. The plaint on this point is vaguely worded, but assuming that it does allege that the petitioner did receive the money, it seems to me quite impossible to hold that that allegation has been proved. There is no evidence whatsoever on that point. The prize money was received by the confederacy, but the evidence on the record is to the effect that the respondent's names were never entered in the books of the confederacy as having contributed towards the stake money. The learned District Judge remarks:

"Defendant on the other hand admits having received Re. 1 from the plaintiffs for the Office Society Confederacy and for the Mandalay Sweep and he also admits that a prize has been won and that each share amounted to Rs. 141, but he avers that as Maung Ma who kept the list of subscribers had

(1) [1903] 25 All. 639=(1903) A. W. N. 161.

told him that the list had been closed, he had added to the Re. 1 given by the plaintiffs another Re. 1 and purchased a share in another sweep, the list of subscribers in that confederacy being held by one Maung Po Nyo and he submits that he informed the plaintiffs of this fact. The point for decision, therefore, is . Did the defendant inform the plaintiffs that the Office Society list had been closed and that their Re. 1 had been deposited with Maung Po Nyo for another sweep, and if so, did the plaintiffs agree ? The onus of proof lies on the defendant, who has not been able to produce a tittle of evidence to prove this point. "

It seems to me that the District Judge has entirely misconceived the question he had to decide. The plaintiffs could not sue on their wagering contract and could not claim from the petitioner because he had failed to carry out its terms. They have to prove affirmatively that he had actually received the prize money on their behalf. There was no evidence whatsoever on this point nor can I see how any presumption can be drawn that the petitioner did receive the money. In my opinion, the respondents entirely failed to prove a cause of action on which they could sue The case is before me in revision, but I think there is sufficient ground for interference It seems to me that the District Court's method of arriving at its conclusion was irregular and that the Court entirely misconceived the point at issue I set aside the decree of the District Court and restore that of the trial Court dismissing the suit of the plaintiff-respondents. The plaintiff-respondents will pay the costs of the petitioner throughout.

P.N./R.K. *Revision allowed.*

A. I. R. 1929 Rangoon 245

HEALD AND OTTER, JJ.

C. T. V. S. Chettyar Firm—Applicants.

v.

Commissioner of Income-tax—Respondent.

Civil Misc. Appln. No. 129 of 1928, Decided on 25th March 1929.

(a) Income-tax Act, S. 66 (3)—In particular year assessment made on actual income—Objection that sum already assessed in previous years was included in assessment—Assistant Commissioner finding that assessment in those years being on best data, there was no conclusive proof that sum was already assessed—Question of law arises from such order viz., whether assessee is entitled to show sum is included in estimate in previous years and Commissioner must refer case.

In a particular year an assessment was made on actual receipts. It was objected by the assessee that a certain sum already assessed in previous years was included in the receipts. Assistant Commissioner in appeal found that as the estimate of income in those years was not assessment strictly on accrued basis but merely on best available data, there was no conclusive proof that such sum had already been included in the assessment of the previous years.

Held . that a question of law arose from the order whether or not the assessee was entitled to show that the actual receipts had in fact been included in the estimates of the previous years and the Commissioner must state and refer the case on the question.

[P 246 C 1, 2]

(b) Income-tax Act, S. 33—Question whether pending application under S. 66 (2) is bar to proceedings under S. 33 is question of law.

Per Otter, J.—Where an application is pending under S. 66 (2) question whether or not such application is a bar to proceedings under S. 33 is a question of law and Commissioner must state a case on such a question.

[P 246 C 1]

Venkat Ram—for Applicants.

C Grant, Offg. Govt. Advocate—for Respondent.

Heald, J.—Applicants, who are the C. T. V S. Chettyar Firm were assessed for income-tax on an estimated income of Rs 19,030 for the year 1924-25. For the year 1926-27 they submitted a return showing a loss of over Rs 45,000 They said that the actual income from their business for the two years 1924-25 and 1925-26 was Rs. 10,250 and that in view of the fact that for those two years they had paid on an estimated income of Rs. 56,138, they had already paid on an excess of more than Rs 45,000 over their actual income. They produced certain accounts and a statement which showed their actual income for 1925-26 as Rs. 1,795 and another statement which showed their loss as Rs. 3,877-10-0. The Income-tax Officer rejected these statements on the doubtful ground that although an assessee can file a revised return he cannot file revised statements. On an examination of the accounts for the year 1925-26 the Income-tax Officer found that appellant's income for that year was Rs. 36,654 That assessment was based on a calculation of interest which had actually accrued due during that year in the case of transactions with other Chettyars and interest which had

been actually received in that year in the case of transactions with customers other than Chettyars. Applicants objected that part of the sum which on that method of calculation represented the actual interest received from non-Chettyar customers during the year 1925-26 had already been assessed to income-tax in that year and in the previous year, because in those years the amount entered on account of interest from non-Chettyar creditors was based on an estimate and not on actuals, and that estimate included interest earned, but not yet received in the year of assessment. The Income-tax Officer rejected this contention and assessed applicants on Rs. 36,654 for 1926-27.

Applicants appealed to the Assistant Commissioner of Income-tax who said that it was obvious that so much of the interest receipts from non-Chettyars as accrued in the previous years must have been taxed already in those years and that to include those receipts in the present assessment would be tantamount to double taxation. He accordingly returned the proceedings to the Income-tax Officer for enquiry and report as to the amount of interest from non-Chettyars which accrued in the previous years and which was included in the assessment for 1926-27. The Income-tax Officer reported that the amount of interest from non-Chettyars which accrued in the previous year was actually received in 1925-26 was Rs. 34,876 but the Assistant Commissioner said that on further consideration he found that the estimates made for the two years 1924-25 and 1925-26 were not strictly assessments on what is known as the "accrued" basis but mere assessment on the best data available and that therefore there wrs no conclusive proof that the sum of Rs. 34,876 had been included in the assessment for the previous years. He accordingly dismissed the appeal. Applicants then applied to the Commissioner of Income-tax to state the case and refer it to this Court under the provisions of S. 66 (2), Income-tax Act. The Commissioner refused to state and refer the case and at the same time he passed an order dealing in review with the Assistant Commissioner's orders. Applicants now ask us for an order under S. 66 (3) of the Act requiring the Commissioner to state and refer the case to this Court. The only question which is at present before us is whether a question of law arises out of the Assistant Commissoner's order.

It seems to me clear that a question of law does arise, that question being whether in a case where an assessment has been made not on actual receipts but on estimated receipts during the previous two years and the basis of assessment for the third year is charged to a basis on actual receipts, the assessee is entitled to show that the actuals which are taken as the basis of the assessment for the third year that is, in the present case the year 1926-27, include sums which were included in the estimates for the earlier year or years, on which income-tax was paid for those years. It seems clear that if the income-tax has in an earlier year already been paid on amounts actually received in a later year, income-tax cannot be charged on those receipts in the later year, and it does not seem to me to matter whether the income-tax authorities choose to call the assessment for the year or years in which the tax was actually paid on those amounts an assessment on the "accrued basis" or an estimate on the best data available. In either case, the basis of of the assessment is admittedly an estimate and the question of law seems to me to be whether or not the assessee is entitled to show that receipts for the latter year have in fact been included in the estimate or estimates for the earlier year or years. I would therefore require the Commissioner to state and refer the case under the provisions of S. 66 (3), Income-tax Act. The cost of the present application should abide the orders of this Court on the reference.

Otter, J.—This is an application under S. 66 (3), Income-tax Act, 1922, asking this Court to require the Commissioner to state a case upon a question of law for reference to this Court. The short history of the matter is that, on 29th January 1927, by an order of the Income-tax Officer, Maubin, the applicant firm was assessed to income-tax for the year 1926 27 on the sum of Rs. 36,654 in respect of income for that year. The assessment for that year was made so far as non-Chettyar customers were concerned upon the basis of cash receipts from them during that year. The figure arrived at by the Income-tax Officer for

such receipts was Rs. 79,716. It was objected by the applicants that included in that sum was an amount of about Rs 39,000 which had already been assessed to income-tax in the two preceding years. In these years, viz., 1924-25 and 1925-26, the assessment was said to have been made on what is known as the "accrued basis." For the year 1926-27 the basis of calculation was altered and as I have said, the applicant firm was assessed for non-Chettyar receipts upon a cash basis. Upon an appeal to the Assistant Commissioner the latter by an

"interim order dated 23rd March 1927, returned the proceedings to the Income-tax Officer for enquiry and report " as to the amount of interest from non-Chettyars which accrued in previous years and which had been included in the sum of Rs. 79,716."

and adjourned the appeal. The Income-tax Officer reported the correct figure to be Rs. 34,876, on 27th April 1927, the Assistant Commissioner passed final orders dismissing the appeal. In the course of that order he stated that he found that the accountant's description of the previous assessment on "accrued basis" was not strictly correct. It should be stated that it is said that an assessment on "accrued basis" means an assessment upon amounts due but not necessarily paid during the period in question. The Assistant Commissioner went on to say that after a return by the applicants had been filed (for the year 1924-25) the firm's books were called for and after extracting certain figures from the books certain calculations were made according to the system then in vogue, it was reported that the assessable income was Rs. 19,630. This figure was accepted by the Income-tax Officer and assessment was made accordingly. According to the Assistant Commissioner this method was in reality an estimate on the best data available. For the following year according to him, after the return had been filed by the applicant firm certain figures were again extracted from the account books, and after making certain calculations according to the same system as in the previous year, the accountant reported the assessable income as Rs. 37,188 and assessment was made accordingly on this figure. Here also, according to the Assistant Commissioner it was an estimate on the best available data." This officer went on to say that:

"It could not rightly be called the accrued basis. It follows therefore that there is no conclusive proof that the amount Rs. 34,876 had been taxed in the previous years."

He, therefore, was unable to exclude this amount from the assessment for 1926-27.

On 26th May 1927, the applicant's firm applied under S. 66 (2) of the Act to the Commissioner of Income-tax praying that certain questions of law arising out of the appellate order of the Assistant Commissioner should be referred to this Court. On 19th August and 16th September 1927 respectively, notices were issued by the Commissioner of Income-tax to the assessee under S. 33, Income-tax Act, calling upon them (apparently) to make any representation they wished to make in respect of a proposed revision of their assessment. On 5th March 1928, the Commissioner modified the orders of the Assistant Commissioner, dated 23rd March 1927 and 27th April 1927 by passing an order rejecting the appeal of the assessees dated 26th February 1927 on the ground :

" that the assessments for the previous years having been computed on a method of averages, the sum in question viz., Rs. 39,000 . . . . . has not been subject to double assessment. "

In other words he held that as the method adopted was not " accrued basis " but a basis he called a " method of averages " as a matter of fact, the Rs. 39,000 was not and could not have been doubly assessed He seems also to have thought that the Assistant Comissioner would be bound by his conclusion contained in the adjournment order of 23rd March 1927 and he therefore " modified " this order and that of 27th April 1927. On 7th March 1928 the Commissioner of Income-tax passed orders upon the application preferred by the applicant firm on 26th May 1927 and said that none of the questions he was asked to refer could be said to arise and refused to state a case for this Court.

I observe that the applicant firm had objected to the revision proceedings initiated by the Commissioner but these objections were overruled in the order which is not before the Court. The Commissioner deals with these objections at length. He also says (as I understand at the end of para. 6, of his

order) that as the figures for 1924-25 and 1925-26 were taken from assessee's books which were kept on a cash basis (and not on accrued basis) no double taxation took place. Later he makes a statement that I cannot follow viz :

" as regards the first objection, I do not think that it can be contended seriously that the question whether or not the assessment in the previous years was made in the " accrued " basis is a question of fact. "

He may not have meant to say this, but if of course this is a question of law it should be stated for this Court.

It seems to me however, that the matter should be put differently viz., as a matter of law, cannot the assessee be allowed to show not necessarily that his assessment was made on one basis or another but that in fact from figures he has been doubly assessed. In other words is the applicant not to be allowed to show (if he can) that the total of the estimated income of the firm for 1924-25 and 1925-26 plus the actual income for 1926-27 in fact exceeded the total actual income for those 3 years. The Commissioner then deals with the objection that revision proceedings cannot be opened by the Commissioner in a case where an application is pending under S. 66 (2) of the Act He decides that such an application is no bar to proceedings under S. 33. But surely this is a question of law He can only pass orders subject to the provisions of the Act. (sub-S. 2) and it might be argued that when the Act provides a remedy for an assessee, action should not be taken by the Commissioner until it is decided whether such remedy is available or not. It is true that the proviso to sub-section of S. 66 may provide an answer But it might also be argued that action by a Commissioner under S 33 which cannot (apparently) be called in question by this Court might shut out an assessee from his remedy under S 66 (2)

I think, therefore, that the Commissioner must state a case for our decision upon the following questions of law :

(1) Is the applicant firm entitled to show that the income upon which he was assessed for the 3 years in question exceeded the income actually received in those 3 years ?

(2). Can the Commissioner during the pendency of an application under S. 66, sub-Ss. 2 and 3, Income-tax Act, take up under S. 33 of the Act proceedings which are the subject of the said application ?

P.N./R.K. *Ordered accordingly.*

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* A. I. R 1929 Rangoon 248
Full Bench

HEALD, OFFG. C. J., CHARI AND ORMISTON, JJ.

Commissioner of Income-tax — Applicant.

v.

C. T. V. S. Chettyar Firm — Respondents.

Civil Ref. No. 9 of 1929, Decided on 19th August 1929, made by Commissioner of Income-tax, Burma.

*** (a) Income-tax Act, S. 13— Computation of income, profits under S. 13 —Assessee is entitled to show that income included in assessment for subsequent year was included in that computation.**

Where the computation of income, profits and gains for a particular year has been made under the provisions of S. 13 upon such basis and in such manner as the Income-tax Officer may determine the assessee is entitled to show that income, profits and gains included in the assessment for a subsequent year were included in that computation and it is a question of fact, to be decided on the evidence in each particular case: *K. T S. K. S. Chettyar (Misc. Appln. No. 17 of 1927); Commissioner of Income-tax* v. *Muthu Sarvarayadu, Income-tax Cases* 208, *Expl.* and *Dist.* [P 251 C 2]

***(b) Income-tax Act, S. 33—Power of review.**

During the pendency of an application under S. 66 (2) the Commissioner can exercise his power of review under S. 33. [P 249 C 2]

Government Advocate—for Applicant.

Bose, Venkatram and *De*—for Respondents.

Opinion.—On Civil Miscellaneous Application No. 129 of 1928, the Commissioner of Income-tax was required to state the case of the assessment of the C T. V. S. Chettyar Firm for the year 1926-1927 and to refer it to this Court. His statement of the case shows that for the assessment for the year 1924-1925 the firm produced its account books, and that after an examination of these books its income was computed at Rs. 19,030 and that for the following years its income was similarly computed to be Rs 37,188, the computation for both years being made not according to the income shown in the account books, but by a determination of the total capital of the firm and a calcu-

lation of the interest which might reasonably be expected to be earned by that capital, after deduction in respect of borrowed capital and expenses. For the year 1926-1927 a different method of assessment was adopted, the assessment being based on actual receipts of interest in respect of transactions with non-Chettyars, that is as the Commissioner says with "the vast majority of the persons to whom loans are made" and on interest accrued due, but not necessarily received in respect of transactions with Chettyars. On that basis, the assessment for the year 1926-1927 was Rs. 36,654. The firm appealed to the Assistant Commissioner against this assessment on the ground that, so far as transactions with non-Chettyars are concerned it included actual receipts of interest amounting to 39,000 which had accrued due in the previous years, and according to the method of assessment adopted in those years had been included in the assessment for those years.

The Assistant Commissioner accepted that view and sent the case to the Income tax Officer for a report as to what part of the receipts included in the assessment for 1926-1927 represents interest which had accrued in the previous years. The Income-tax Officer reported this sum to be 34,876. The Assistant Commissioner then changed his mind, and found that because the assessments for the previous years were not based directly on the firm's accounts, this sum of 34,876 could not be regarded as having been included in the assessments for these years. He accordingly rejected the claim to have that amount excluded from the assessment The firm thereupon applied to the Commissioner to refer to this Court certain questions or alleged questions of law. Before disposing of the application for a reference to this Court the Commissioner reviewed the Assistant Commissioner's orders and substituted for them an order rejecting the appeal to the Assistant Commissioner on the ground that the assessment for the previous years having been computed on a method of averages, the sum which the firm claimed to exclude from the assessment for 1926-1927 had not been subject to double assessment. On the footing of his finding that the basis of the assessment for the two previous years was not technically an assessment on what is known as the "accrued basis" but was "a method of averages" and of his having set aside these parts of the Assistant Commissioner's order which were in question he held that none of the questions which he was asked to refer arose.

The firm then applied to this Court under the provisions of S 66 (3) of the Act, and a Bench of the Court required the Commissioner to state the case, and refer it under that section. Of the two Judges who dealt with the application under S. 66 (3) one was of opinion that the question of law which arose on the facts was whether in a case where the assessment for the two previous years had been made on a basis not of actual income but of income established at a certain rate per cent on the capital of the business, and where for the third year the basis of assessment is changed to a basis of actual income the assessee is entitled to show that the actual income which is taken as the basis of assessment for the third year, includes sums which formed part of the estimated income for the previous years and which had therefore been included in the assessment for those years on which tax had already been paid. The other learned Judge put the same question in a more practical form namely:

"Is the applicant firm entitled to show that the income on which he was assessed for the three years in question exceeded the income actually received in these three years?"

He also added a question whether during the pendency of an application under S 66 (2) of the Act the Commissioner can exercise his power of review under S 33. As an answer to the latter question I would say merely that proviso to S 66 (2) of the Act shows that the Commissioner can exercise that power.

In his order of reference the Commissioner says that :

" It is for the applicant firm to show that the estimates of its income made by the Income-tax Officer in those two assessments (for 1924-25, and 1925-26) included the disputed amount."

He thus admits the right of an assessee to show that there has been a double assessment, and that right cannot be questioned. If in fact there has been a double assessment it is clear that in law, there is no warrant for such double assessment, and that income on which tax has already been paid must be excluded from the assessment. But the Commissioner goes on to say that if the assess-

ment for a particular year was based on an estimate and not on actual figures, then the assessee " cannot show " that income included in a subsequent assessment was included in the assessment based on that estimate. If as seems probable this statement was intended to be a statement of fact, and to mean that it is impossible to show that income subsequently assessed was included in the computation on which an earlier assessment was based or in the assessment based on that computation, then it is a statement based entirely on the Commissioner's opinion and not on the facts of the case. If on the other hand it was intended to be a statement of the law, namely that where an assessment has been based on a computation under the proviso to S. 13 of the Act, an assessee is not entitled to show that income included in a subsequent assessment was included in the computation and in the assessment based on the computation, then it raises a clear question of law which it is for this Court to decide.

As supporting his statement, whether it is a statement of fact or law the Commissioner relies on the decision of a Bench of this Court in the case of *K. T. S. K. A S. Chettyar* (1), but in that case the Court was clearly of opinion that the inclusion of income in the assessment for one year which had in fact been included in the assessment on which tax had been paid for a previous year would warrant the exclusion of such income from the assessment for the subsequent year, and the basis of the decision was that because the assessment for the previous year was an assessment made by the Income-tax Officer " to the best of his judgment " under S. 23 (4) of the Act, and because it was the inclusion of the disputed income in the assessment for that year which was alleged to be mistaken, that alleged mistake could not be allowed to be proved because no appeal lies against an assessment under S. 23 (4), so that the applicants who by their own default had precluded themselves from appealing against the inclusion of that income in the assessment for the previous year, could not in the following year be allowed to claim that the mistake should be corrected by the exclusion of that income from the assessment based on the receipt of the year in which it was actually received.

Whether that decision was right or wrong, and it seems probable that as a general statement of law it was wrong, it is no authority for the proposition that where income has been assessed for one year under the proviso to S. 13 [and not under S. 23 (4)] the assessee cannot whether in fact or in law show that the same income has been included in the assessment for the following year.

A case which was in some respects similar to the present case was decided by a Special Bench of the High Court of Madras in the *Commissioner of Income-tax* v. *Muthu Sarvarayadu* (2) where the question referred was :

" where computation of the income, profits and gains for the particular year is made as directed in the proviso to S. 13, Income-tax Act of 1922, are any income, profits or gains which accrued during that year, but are received subsequently liable to be assessed as income for the year during which they are received ?"

The Bench said that if the wording of the question was intended to propound the question whether, if a man has been taxed in respect of book debts owing to him in one year, which he has not actually received he can again be taxed on the same sums of money when they are actually received in cash in a later year of assessment, the answer must obviously be " No." But in that particular case the Commissioner had recorded, as a finding of fact based on the evidence in the case, that the sums which the assessee claimed to deduct from his assessment for the subsequent year had not been included in assessment from the previous years, and by reason of that finding the learned Judges said that the question referred could not really arise out of the findings of fact which were binding on them, namely, that the man had not been taxed at all on the sums in question until he was sought to be taxed in the year of assessment, which was under consideration in that case.

In the present case there is no finding of fact that the sums in question were not included in the assessments for the previous years. On the contrary the only finding of fact on this subject is that of the Income-tax Officer that Rs. 34,876 had been so included. The findings on the footing of which the Assistant Commissioner and the Commissioner

(1) Civ. Misc. Appln No. 19 of 1927.

(2) 2 Income-tax Cases 208.

rejected the claims were either findings of fact based on evidence or findings of law, since they were that the assessee could not prove that the sums in question were included in the "computation" which was made under the proviso to to S 13. The Commissioner said that his finding on this point was a finding of fact and he put into the form of a finding of fact when he said that there had not been a double assessment, but the reason which he gave for that finding, namely, that the assessment for the previous years had been computed on a method of averages and that the assessee could not prove that the disputed income had been included in these assessments shows that his answer begged the question of law and as a finding of fact was not based on any relevent evidence.

The facts of the case are that the assessments for 1924-25 and 1925-26 were based on a computation of income, profits and gains under the proviso to S. 13 of the Act; that that computation included all interest earned or "accrued" whether it had been received or not, that for the year 1926-27, so far as interest from non-Chettyar customers was concerned the basis of the assessment was changed from a basis of computation of accrued interest to a basis of interest actually received; that by reason of that change the question arose whether interest actually received in the year, on the income of which the assessment for 1926-27 was based, had accrued and had therefore been included in the computation and assessments for the previous years, and that the Income-tax Officer found that a sum of Rs. 34,876 which was received in the year on the income of which the assessment for 1926-27 was based and was therefore included in the assessment for 1926-27, had in fact accrued and had therefore been taxed in the previous years. On these facts it seems clear that there had been a double assessment and that the assessee was entitled to relief unless the Commissioner was right in holding that because the assessments for 1924-25 and 1926-27 were made under the proviso to S. 13, the assessee could not prove that income included in the assessment for 1926-27 had already been included in the assessments for 1924-25 and 1925-26.

I know of no authority in the Act or elsewhere for the view that the fact that the basis of an assessment was a computation under S. 13 of the Act, precludes the assessee from showing that particular income was included in that assessment, and I see no reason to believe that there is in fact any warrant for the Commissioner's opinion that it is impossible for an assessee to show that such income was included in such an assessment.

I would accordingly decide the question, which in my opinion is raised by the case, by saying that where the computation of income, profits and gains for a particular year has been made under the provisions of S. 13 of the Act:

"upon such basis and in such manner as the Income-tax Officer may determine,"

the assessee is entitled to show that income, profits and gains included in the assessment for a subsequent year were included in that computation, and that it is a question of fact, to be decided on the evidence in the particular case, which he succeeds in showing that they were so included. I would direct the Commissioner to pay the costs of the firm in this reference and in Civil Miscellaneous No. 129-28, advocate's fees in each case to be 10 gold mohurs.

P.N./R.K. *Reference answered.*

A. I. R. 1929 Rangoon 251

RUTLEDGE, C. J AND BROWN, J.

Maung Po Kywe and *others*—Appellants.

v.

Maung Po Tin and *others*—Respondents.

Letters Patent Appeal No. 127 of 1928, Decided on 18th February 1929, from judgment of High Court in Civil Second Appeal No 372 of 1928.

Transfer of Property Act, S. 54—Contract of sale—Specific performance barred by limitation—Still delivery given under oral agreement on payment of price is valid defence to suit for possession by vendor—Part performance.

To a suit by the owner to recover possession of immovable property of the value of Rs. 100 or upwards, it is a valid defence that the defendant had been put into possession under an oral contract of sale after paying the purchase money and such defence can be raised even though the right to sue for specific performance of the contract of sale may be barred by limitation: *A. I. R.* 1924 *Rang.* 214 (*F. B.*), *Appl.*; *A. I. R.* 1921 *U. B.* 10, *A. I. R.* 1924 *Mad.* 271 and *A. I. R.* 1923 *Bom.* 479, *Rel. on*: *A. I. R.* 1927 *Cal.* 365, *Dist.* [P 252 C 1, 2]

Ba Han—for Appellants.

E. Maung—for Respondents.

Brown, J.—The plaintiff-appellants sued the defendant-respondents for possession of certain land. The defence was that the defendants had been put into possession under an oral contract of sale by the predecessor-in-interest of the plaintiffs. The trial Court found that the defendants did obtain possession in this way and that the plaintiffs had obtained the purchase money, and the suit was accordingly dismissed. The District Court on appeal concurred with the trial Court in its finding on the facts and dismissed the appeal. The appellants then came to this Court in second appeal, and it was urged that the defendants were not entitled to rely on their possession under the contract in view of the fact that at the time the suit was brought a suit by the vendees for specific performance of the contract of sale was barred by limitation. The appeal was heard by a single Judge of this Court who decided against the contention put forward by the appellants but who subsequently granted a certificate under S. 13 of the Letters Patent for further appeal on the ground that the point had not previously been decided specifically by this Court.

In the case of *Maung Myat Tha Zan* v. *Ma Dun* (1), it was held by a Full Bench of this Court that to a suit by the legal owner for possession of immovable property of a value of Rs. 100 or upwards it was a valid defence that the defendant was given possession of the property by the legal owner under a contract for sale as defined in S 54, T. P. Act. It has not been suggested that we are not bound by this decision. But it is contended that the decision had reference only to cases in which a suit by the person in possession for specific performance of a contract of sale was not barred by limitation. Although the answer to the reference in that case was made in general terms, it is clear that in making that answer two at least of the Judges of the Bench had in mind the fact that in that particular case a suit for specific performance was not barred. I agree therefore with the contention put forward by the appellants that *Maung Myat Tha Zan's* case (1) does not decide definitely the point now at issue between the parties. I am, however, of opinion that the principle approved in *Maung Myat Tha Zan's* case (1) must be held to be applicable whether a suit for specific performance of a contract of sale is or is not barred by limitation.

I dealt precisely with this point as an Additional Judge of the late Judicial Commissioner's Court, Mandalay, in the case of *Maung Po Tha* v. *Maung Ba Din* (2). The view I took in that case was that although the provisions of the Limitation Act would prevent the defendant from suing for specific performance of a contract, they did not debar him from setting up his contract in defence to a suit for possession by the plaintiff. At the time I wrote that judgment there were conflicting decisions on the point, and the view of the High Court of Madras was that unless there was a registered document in the circumstances to which S 54, T P. Act applied, the person in possession under a contract of sale could not resist a suit for possession brought by the owner. But the previous decisions to that effect have since been overruled by a Full Bench of that Court in the case of *Vizagapatam Sugar Development Co* v *Muthuramareddi* (3) In that case the plaintiff had agreed to sell all lands worth more than Rs 100 to the defendant, had received consideration and had put the defendant in possession but had not executed a conveyance It was held by the Full Bench that part performance by way of delivery of possession and an enforceable right on the defendant's part to specific performance were each a good defence to the action; and when the same case came up for decision on a further point before a Bench of two Judges, that Bench held that the plea of part performance was not limited to cases where the right to sue for specific performance was not barred on the date of the subsequent suit. A similar view of the law has been taken by the High Court of Bombay in the case of *Sandu Walji* v. *Bhikchand Surajmal* (4).

We have been referred on behalf of the appellants to the case of *Kalipada Basu* v. *Fort Gloster Jute Manufacturing Co.*

(1) A. I. R. 1924 Rang. 214=2 Rang. 285 (F.B).

(2) A. I. R. 1921 U. B. 10.

(3) A. I. R. 1924 Mad. 271=46 Mad. 919 (F.B.).

(4) A. I. R. 1923 Bom. 473=47 Bom. 621.

Ltd. (5). It is suggested that this is an authority for holding that the defence raised in this case cannot be put forward when the claim for specific performance would be barred by limitation. I notice, however, that in the Calcutta case it was the plaintiff who was seeking to recover title on the strength of his possession and the present question was not therefore directly in issue.

I referred to and followed the Allahabad case of *Salamatuzzamin Begam* v *Masha Allah Khan* (6) in my judgment in *Maung Po Tha's* case (2). I see no reason for altering the opinion I expressed in that case, and for the reasons set forth therein I hold that the defence that the defendant has been put into possession under a contract of sale after paying the purchase money can be raised in a suit to recover possession by the original owner, even though the right to sue for specific performance of the contract of sale may be barred by limitation.

It is contended that the ordinary rule should not be followed in this case because it is in evidence that the defendants knew at the time of the contract that a registered document was necessary in order to convey a valid title. But we are unable to see how these facts can affect the principle applicable. It is suggested that the defendants deliberately refrained from obtaining a registered deed in order to save stamp duty and thereby defraud the revenue. This argument appears to me to be somewhat farfetched, and if there were any fraud at all it was not against the plaintiffs. I am of opinion that this appeal should be dismissed with costs.

Rutledge, C. J.—I agree that this appeal must be dismissed with costs. While *Maung Myat Tha Zan's* case (1) does not expressly decide the point at issue in the present case, I am also of opinion that the principles therein approved must be held applicable irrespective of a suit for specific performance lying or not. The cases cited by my brother Brown show that a large preponderance of Indian judicial opinion is in favour of the view we take.

P.N./R.K. *Appeal dismissed.*

(5) A. I. R. 1927 Cal. 365.
(6) [1917] 40 All. 197=43 I. C. 645=16 A. L. J. 98.

A. I. R. 1929 Rangoon 253

HEALD AND MAUNG BA, JJ.

Ma Sai Da—Appellant.

v.

Ma Nwe—Respondent.

First Appeals Nos. 24 and 36 of 1929, Decided on 24th June 1929.

(a) Buddhist Law (Burmese)—Succession to payin property enunciated.

Where a person after the death of his first wife inherits property and the property constitutes payin of the person when he marries second time, the child of the first marriage is entitled to three-fourths and the stepmother to one-fourth in such property: 4 *L. B. R.* 110, *Expl.* and *Dist.* [P 253 C 1, 2]

(b) Buddhist Law (Burmese)—According to Manukya payin includes property acquired during two marriages.

According to Manukya payin is not restricted to the property acquired during the first marriage but also includes the property during the two marriages. [P 254 C 2]

(c) Buddhist Law (Burmese)—Text.

Where Manukya is not ambiguous other Dhammathats need not be referred to. *A. I. R.* 1914 *P. C.* 97, *Foll.* [P 254 C 1]

Krishnaswamy—for Appellant.

Tun Tin—for Respondent.

Judgment.—These two appeals arise out of an administration suit filed in the District Court of Hanthawaddy by one Ma Nwe who claims to be the legitimate daughter of the late U Tun Lin by his wife Ma Ngwe Sa against her stepmother Ma Sai Da. Ma Nwe claimed a three-fourth share valued at Rs. 1,16,000. The status of her mother as a wife was denied, and it was contended that, if Ma Nwe was entitled to any share, it could not be three-fourths. But what the share should be has not been stated in the written statement. The learned District Judge held that Ma Nwe is U Tun Lin's legitimate child, and passed a decree in her favour giving a half share in the payin property of her father and one-eighth share in the hnapazone property of the last marriage. Ma Nwe appeals because she considers that she is entitled to three-fourths share in the payin property. Ma Sai Da also appeals because Ma Nwe has been held to be the legitimate child of U Tun Lin. (Here his Lordship discussing evidence on the question whether Ma Nwe was the legitimate child of U Tun Lin concluded that there was no reason to disturb the finding of the learned Judge of the Court below.) Now we come to the question of shares.

The estate appears to be made up of the payin property brought to the last marriage by the deceased as well as of the hnapazone of that marriage. The major portion was inherited after the death of Ma Nwe's mother and before the marriage with Ma Sai Da. Tun Lin's father U Ein Ga died in 1273 (1911). A month or two after U Ein Ga's death there was a partition of his estate between Tun Lin and his step mother Ma Yon. Ma Sai Da was married about three years later. The inherited property no doubt constituted the payin of Tun Lin when he married Ma Sai Da The learned Judge followed the division made in a similar case of *Ma Leik* v. *Maung Nwe* (1) by Moore, J., in which Hartnoll, J., concurred, namely half to the stepchild and half to the stepparent Moore, J., after referring to the Dhammathats in S. 229 of Kinun Mingyi's Digest observes :

"There is thus a fairly general consensus of authority for the proposition that of the property taken by the father to the second marriage, the children of the first marriage shall receive three-fourths and their stepmother one-fourth. I think it is clear from the above quotation that the property referred to is the property of the first marriage, and that the children of the first marriage are awarded a larger share in this property because it was their parents' property at the commencement of their union."

Out of the 25 Dhammathats quoted in S. 229 about seven seem to support that view. They refer to the payin brought to the second marriage as the property of the former marriage. But it is very strange that Manukye has not been quoted in S. 229 at all. The Privy Council has given that Dhammathat a commanding position among all the Dhammathats and in the case of *Ma Hnin Bwin* v. *U Shwe Gon* (2) their Lordships have laid down that where Manukye is not ambiguous other Dhammathats do not require to be referred to.

Section 8 of Book X of the Manukye gives the rule of partition between the stepparent and the step-child, regarding the payin taken to the second marriage and the hnapazone of that marriage. As regards payin it gives three-fourths to the stepchild and one-fourth to the step-parent. This division is the same as laid down by the majority of the Dhammathats quoted in S 229 of the Digest. But Manukye does not appear to restrict the payin to the property acquired during the former marriage. It seems to include also the property acquired during the two marriages. The expression " Maya dwin shithamya oksa" (all the property possessed by the wife) is wide enough to include such property. The above rule of partition given in the Manukye is in no way ambiguous. If the property was inherited before the last marriage, the stepparent is entitled to only a quarter share, but if the property was inherited during the last marriage, the stepparent is entitled to half We therefore cannot accept the rule of division laid down in *Ma Leik's* case (1) As regards the hnapazone of the last marriage, the division made by the lower Court is correct and is in accordance with the rule of partition laid down in the Full Bench case of *Ma Nyein* v. *Maung Maung* (3).

We accordingly modify the decree of the lower Court by increasing Ma Nwe's share in the inherited property of her father from one half to three-fourths. She is entitled to her costs on the value of the quarter share in this Court and on the value of the three-fourths share in the Court below. Ma Sai Da's cross-objection is dismissed with costs.

P N./R K *Decree modified*

(1) [1908] 4 L B.R. 110

(2) A.I R. 1914 P.C. 97=41 Cal. 887=41 I.A. 121 (P.C.).

(3) A I.R. 1925 Rang. 340=3 Rang. 549 (F B.).

A. I. R. 1929 Rangoon 254

CARR, J.

Emperor—Referee.

v.

Nga Po Sein Gyi—Opposite Party.

Criminal Ref. No. 131 of 1928, Decided on 7th February 1929, made by Dist. Mag., Bassein.

(a) Burma Expulsion of Offenders Act, S. 2 (B) (3) and (4) — Under S. 2-B (3) and (4) person may become offender not by reason of conviction of offence.

Under S. 2-B (3) (4) a person may become an offender not by reason of conviction of an offence, for it is well recognised law that orders under S. 118, Criminal P. C., or under S. 7, Burma Habitual Offenders Restriction Act are not convictions of offences. [P 255 C 2]

(b) Burma Expulsion of Offenders Act, S. 4 (1) — Wording of S. 4 (1) restricts its application to offender under S. 2-B (1) (2).

Wording of S. 4 (1) restricts the application of the section to persons who are offenders under S. 2-B (1) (2) and the section can have no application to a person who is an offender under S. 2-B (3) (4). [P 255 C 2]

(c) Burma Expulsion of Offenders Act, S. 4 — Neither District Magistrate nor High Court has jurisdiction to deal with person against whom order of restriction is passed under Burma Habitual offender's Restriction Act S. 7.

Although a person against whom an order of restriction is passed under S. 7 is an offender and is liable under S. 3 to be expelled, the Act provides no machinery for the enforcement of the liability and so neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter under S. 4. [P 255 C 2]

Gaunt—for Referee.

Judgment—This is a reference made by the District Magistrate of Bassein under S. 4 (4), Burma Expulsion of Offenders Act, 1926. The respondent is a Bengali Mahomedan by birth and has apparently lived in Burma for some 13 to 15 years. He has married a wife, who, on the mother's side, is partly of Burmese blood, and has apparently several children by her. Thus, by birth, he is a non-Burman, but it may be that he has acquired a domicile in Burma; and, if that is so, he would not be a non-Burman within the definition in S. 2 (A) of the Act referred to

Before the District Magistrate the respondent admitted that he was a non-Burman, and the District Magistrate seems to have acted on this. But I am not prepared to accept such an admission as conclusive in a case of this kind. Being a non-Burman by birth, an ignorant person, such as the respondent, might very well admit that he was a non-Burman without knowing that any question of domicile is involved On this question, therefore, I should have been obliged to return the proceedings for further enquiry, but for certain other considerations with which I will now deal.

The respondent, in 1926, was convicted of an offence of theft under S. 379, I.P.C. and was imprisoned for six months. But, for the purposes of the present case, that conviction is immaterial. He has not since been convicted of any offence, but, on 11th October 1928, an order of restriction was passed against him under S. 7, Burma Habitual Offenders Restriction Act, and it is this order which is the basis of the present proceedings and of the District Magistrate's recommendation that the respondent be expelled from Burma.

Section 2 (B), Expulsion of Offenders Act, contains the definition of an "offender" for the purposes of that Act. Cls. (i) and (ii) of that subsection deal with certain convictions of offences. Cl. (B) (iii) deals with orders under Ss 118 and 110, Criminal P. C, and under analogous laws. Cl. (iv) deals with an order of restriction under the Burma Habitual Offenders Act, and it is under this last clause that the respondent becomes an "offender" as defined in the Act.

Section 3 of the Act provides that any non-Burman who is an offender under the definition in S. 2 shall be liable to be expelled from Burma. S. 4 then proceeds to set out the manner in which an offender may be expelled; but sub-S. (1), S. 4 is somewhat curiously worded. It reads:

"When an offender becomes liable by reason of his conviction of an offence to be expelled from Burma under the preceding section, the District Magistrate of the district in which such offence was committed may call upon him to show cause why he should not be expelled."

The remaining subsections of this section deal with subsequent procedure.

Now, in sub-S. (1) the insertion of the words "becomes liable by reason of his conviction of an offence" is of considerable importance. Referring back to the definition of an "offender," we find that it is only under S. 2 (B) (i) and (ii), that a person becomes an "offender" by reason of a conviction of an offence. Under Cls. (iii) and (iv) of that section, a person may become an offender not by reason of conviction of an offence, for it is well recognized law that orders under S. 118, Criminal P. C., or under S. 7, Burma Habitual Offenders Restriction Act, are not convictions of offences.

The result is that the insertion of the words above quoted in S. 4 (1) restricts the application of this section to persons who are offenders under S. 2 (B), Cls. (i) and (ii) and that this section can have no application to a person who is an offender under Cls. (iii) and (iv), S. 2 (B) The result is that, although such offenders as the present respondent are liable under S 3 of the Act to be expelled from Burma, the Act, in fact, provides no machinery for the enforcement of that liability.

In my view, therefore, neither the District Magistrate, nor this Court, has any jurisdiction to deal with the matter under S 4 of the Act. It is impossible, therefore, for me to deal with a reference under sub-S. (4) S. 4. The proceedings

may be returned to the District Magistrate with a copy of this order.

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 256

HEALD, J.

Emperor

v.

Nga Po Seik—Non-Applicant.

Criminal Revision No. 389-A of 1929, Decided on 3rd May 1929, against order of Township Magistrate of Myanaung, in Criminal Regular Trial No. 114 of 1928.

(a) Burma Excise Act, S. 30 (a)—"Country liquor" explained — Particular kind must be specified.

"Country liquor" is a generic term which can be equally applied to tari, country spirit, and country alcoholic liquor other than spirit, i. e., country fermented liquor. In Excise cases, it is always necessary to distinguish bstween these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ. [P 256 C 2]

(b) Burma Excise Act, S. 30 (a)—Person cannot be convicted for possession of less than one quart of country spirit or country alcoholic liquor other than spirit.

A person cannot be convicted under S. 30 (a) for mere possession of less than one quart of country spirit or country alcoholic liquor other than spirit, the quantity being within the limits for possession prescribed for either of the kinds of liquor in the Excise Department Notification No. 61 of 14th June 1928 [P 256 C 2]

(c) Burma Excise Act, S 37—Proof of offence under—Guilty knowledge must be proved.

In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial. [P 256 C 2]

(d) Burma Excise Act, Ss. 30 (a) and 37—Alteration of offence under S. 30 (a) to one under S. 37—Criminal P. C, S. 227.

An illegal conviction under S. 30 (a) cannot be altered to a conviction under S. 37 if the accused is not called upon to answer a charge under the latter section. [P 256 C 2]

Judgment.—In this case, the accused has been convicted of an offence under S. 30 (a), Burma Excise Act, for the possession of half a quart of "country liquor" and an empty bottle with the smell of "country liquor."

"Country liquor" is a generic term which can be equally applied to tari, country spirit, and country alcoholic liquor other than spirit, i. e., country fermented liquor. In Excise cases, it is always necessary to distinguish between these different kinds of country liquor and specify which particular kind is involved in the case, as the quantities of each of these different kinds of alcoholic liquor which may be possessed without a license differ: vide Excise Department Notification No. 61, dated 14th June 1928, reproduced as as item 261 of the correction pamphlet to the Burma Excise Manual.

In this case the accused admitted possession of the liquor seized and pleaded that he had kept it for the purpose of a propitiatory offering to the nats according to the Karen custom. As almost invariably country spirit is used for this purpose, the liquor involved in this case may be presumed to have been of that variety But whether the liquor involved was actually country spirit or country alcoholic liquor other than spirit, the quantity seized which was less than one quart, was within the limits for possession prescribed for either of those kinds of liquor in the Excise Department Notification mentioned above. Hence no conviction under S. 30 (a), Excise Act, could be had in respect of it.

But if the accused was in possession knowing or having reason to believe that the liquor was obtained from an illicit source, he would thereby commit an offence under S 37 of the Act. In order to establish an offence under S. 37 it is necessary that the guilty knowledge or belief, which is an essential ingredient of the offence should be included in the particulars of the offence stated to the accused and proved at the trial On this point the Magistrate is referred to para. 783-A, Burma Courts Manual, added by item 19 of Circular No. 5. This guilty knowledge or belief was not, however, alleged in the particulars of the offence stated to the accused, nor proved at the trial in this case. The conviction under S. 30 (a) was obviously illegal. It cannot be altered to a conviction under S 37 as the accused was not called upon to answer a charge under that section. The conviction and sentence are therefore set aside and the fine paid must be refunded to the accused.

P.N./R.K. *Conviction set aside*

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A. I. R. 1929 Rangoon 257

CHARI, J.

Ma Sa—Defendant—Appellant.

v.

Ma Sein Nu and *another*—Plaintiffs—Respondents.

Second Appeal No. 99 of 1929, Decided on 18th July 1929, from judgment of Dist., Judge of Thaton in Civ. App. No. 126 of 1928.

(a) Civil P. C., S. 100—When Court arrives at finding there being no evidence there is error of law—High Court can consider whole case.

Where the lower Courts arrive at a finding when there is no evidence on the point, there is an obvious error of law which vitiates the judgment. The High Court can admit an appeal and is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration [P 259 C 1]

(b) Buddhist Law (Burmese)—Person paying consideration but purchasing property in wife's or son's name has to show the object with which the property was purchased.

A Burman husband or father purchasing property in the name of his wife or child does not stand in the position of a Hindu or Mahomedan in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land before the Court can decide whether the property purchased was a benami transaction or not: *Rang. First App. No. 36 of 1925* and *A. I. R. 1926 P.C. 77, Rel.*; *on A I.R. 1928 Rang. 220, Expl.*

[P 258 C 2, P 259 C 1]

Tun Aung—for Appellant.

Ko Ko—for Respondents.

Judgment—The plaintiff in this case, who is the respondent in this Court filed a suit against the defendant Ma Sa for declaration and recovery of possession of a piece of paddy land and for cancellation of a registered deed of sale in the following circumstances:

The plaintiff Ma Sein Nu was the wife of Maung Pan Byu (now deceased). Maung Pan Byu was the son of Ma Sa and U Khe. U Khe is dead When Maung Pan Byu was 14 or 15 years old, the old couple Ma Sa and her husband U Khe bought a piece of paddy land, which is now in dispute, in the name of their son Maung Pan Byu. They had at the time other children also. The land was being assessed in the name of Maung Pan Byu until 1925-26. In the year 1925 when U Khe was alive, Maung Pan Byu purported to convey the land to his parents for an alleged consideration of 500. It is admitted that no consideration was paid to Maung Pan Byu and the defendant's case was that the land was originally purchased in the name of Maung Pan Byu without any intention that he should be the beneficial owner of the property and that later he conveyed the property to his parents who were the actual owners.

The question therefore before the lower Court resolves itself mainly into whether the property was purchased by the old couple in Maung Pan Byu's name as an advancement to their son Maung Pan Byu or without it, was merely put in his name without any intention of conferring upon him the beneficial ownership. The lower Court decided in the plaintiff's favour and gave a decree as prayed. The judgment was confirmed by the lower appellate Court, and hence this second appeal.

Under S. 100, Civil P. C., a second appeal lies only on the grounds; (a) that the decision is contrary to law or some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

It was argued before me that the finding by the trial Court that the original transaction was not a benami transaction but was intended to confer ownership on the son is a finding of fact and that as both the Courts are clear in their finding, no appeal lies to this Court under S. 100, Civil P. C. The learned advocates on both sides cited a number of authorities, in some of which it was held that a question of intention is a question of fact, while in others it was held that a question is one of law In the case of *Har Parshad* v. *Bhagat Singh* (1), which was a decision under the Provincial Insolvency Act 3 of 1927 whether the finding that a person made a transfer of his property with intent to defeat or delay his creditors was a question of law or fact. All the cases are cited therein and some of them are explained. The Punjab Court decided in favour of the position that the question of intention is a question of fact This position, if

(1) [1916] 104 P. R. 1916=36 I. C. 594=85 P. L. R. 1917.

it were necessary, I would have accepted because the question of a man's state of mind is a question of fact, but in this case, it is unnecessary to decide this particular question, because there is an obvious error of law which vitiates the judgment. Both the Courts have held that the transfer by Maung Pan Byu of the property to his parents for an ostensible consideration of 500 was made with intent to defeat the rights of his wife There is absolutely no evidence on this point and it was merely an inference from the admitted fact that no consideration was paid.

The Courts assumed that Maung Pan Byu was the absolute owner and since he had transferred the property to his parent and taken no money for it, they came to the conclusion that the transfer was made with the intent to defeat the wife's right. They failed to see that even assuming Maung Pan Byu to be the owner of the property, there was nothing to prevent a son making a gift to his parents and that very often gifts are made in the form of conveyance for consideration, but no consideration is paid.

It is true that the finding of the lower Courts about the validity of the transfer may be supported on the Full Bench ruling in *Ma Paing's* v. *Mg Shwe Hpan* (2), because a husband has no power to make a gift of property without his wife's consent· see *U Po U* v. *Ma Tek Gyi* (3). The lower Courts did not decide the case on this point, and on the point on which they did decide, they were wrong, and I have jurisdiction to entertain this appeal. When there is an error of law, which vitiates the judgment the High Court is not confined to a consideration of the particular error which vitiates the judgment, but the whole case is open for consideration.

Turning to the question as to whether the transaction was benami or an advancement, it is necessary to consider a recent ruling by a Bench of this Court reported as *Kyaw Pe* v. *Maung Kyi* (4). The summary of the ruling in the headnote that if a Burman had property in the name of his child, a presumption of advancement of the benefit would arise, does not exactly reproduce the effect of that ruling. To consider what that ruling actually decided a little explanation is necessary.

It was held in *Ma On Pe* v. *Ma Nyien Kin* (5), that the burden of showing that a transaction which on the face of it is operative as a transfer of property was not intended so to operate is on the person alleging it, that is, the plaintiff in this case, if he challenges the transaction.

This is the view of the burden of proof which was taken by their Lordships of the Privy Council in the case of *Maung Po Kin* v *Maung Po Shein* (6). This question of burden of proof is not affected by the prevalence or otherwise of benami transactions in a country. Where once, however, the person who alleged that a transaction is benami proves that he paid the purchase money, the law so far as Hindus and Mahomedans are concerned raises a presumption that a purchase in the name of a son or wife raises a contrary presumption, namely that it was intended as a provision for the wife or child. These presumptions are not due to any peculiarity of the laws of the country, but are merely a judicial recognition of the well known usage of the people. In India, it is quite common for a person to buy property in the name of his child or wife without any particular object or motive. In England on the other hand, when a person buys property in the name of his child or wife, in the vast majority of cases it is because he intends to make provision for his wife or child. That this is the ground of the presumption is quite clear from the fact that even in English law property purchased in the name of a stranger raises no such presumption and the person in whose name the property is purchased holds in trust for the person who advanced the purchase money. In Burma on the other hand, as pointed out in the ruling referred to and certain other rulings there is no prevalent usage of purchase of property without any rhyme or reason in the name of the wife or child, but there are many occasions where property is purchased in the name of a wife or child with some particular object or motive. When therefore a Burman husband or father who had purchased property in the name of his wife and child produces no evidence that he

(2) A. I R. 1927 Rang. 209=5 Rang. 206.
(3) A. I. R. 1929 Rang. 123=7 Rang. 374.
(4) A. I. R. 1928 Rang. 220=6 Rang. 203.
(5) First Appeal No. 36 of 1925.
(6) A.I.R. 1926 P. C. 77=4 Rang. 518.

advanced the purchase money, he does not stand in the position of a Hindu or Mahomedan, in whose cases the law raises a presumption of benami. He has to show further with what particular object or motive he purchased the land, before the Court can decide, whether the property purchased was a benami transaction or not. This is all that was intended to be laid down in that ruling. This is clear from the last paragraph of the judgment which appears in p. 212 of the report.

Turning to the facts of this case, when the property was purchased, the person in whose name it was purchased was a boy at the time. He admittedly did not advance the money which was actually advanced by his parents. A presumption of advancement in his favour is countered by the fact that there were a number of other children for whom no provision was made by the parents. The question then for consideration is whether the course taken by the parents referred to in the judgment supports any presumption that the purchase in Maung Pan Byu's name was intended as an advancement for him.

The evidence on this point is that Maung Pan Byu was cultivating the land for a long time. This is quite consistent with the ownership of the parents because he is working the paddy fields of his parents. Moreover, he also cultivated paddy fields of his parents other than the one in dispute.

The next point is that tax was being paid in Maung Pan Byu's name right through. This is nothing whatever, because since the property is in Maung Pan Byu's name, his parents would naturally pay the tax in his name. There is some evidence that at Maung Pan Byu's marriage, his parents stated that he (Maung Pan Byu) was the owner of a piece of land. It is unnecessary to discuss the evidence at any length which to my mind is not very convincing, but assuming that Maung Pan Byu's parents who made such a statement, namely that he was the owner of a piece of paddy land, it cannot be read as an implied recognition of Maung Pan Byu's ownership of this piece of land. Such a declaration is too weak to raise any inference that the boy was intended to be a beneficial owner of the piece of land. These are the points against the case of the defendant and she in her evidence states that the property was purchased in the name of Maung Pan Byu because an astrologer told appellant that no paddy land should be accepted in their own name. This strikes me as being a very likely explanation. It must be remembered that the parties are Taungthus, who are very superstitious and if an astrologer tells them what to do, I have not the least doubt that they would act upon the advice of the astrologer.

In the judgments of the lower Courts, this was considered to be an unlikely explanation, and it was asked why then, should the property be put in Maung Pan Byu's name and not in that of any other children, but it has to be put in some child's name.

From a consideration of the whole of the evidence, I have come to the conclusion that the defendant Ma Sa has made out a case that the original transaction was benami and that the property was put in Maung Pan Byu's name without any intention of conferring beneficial ownership upon him. If that is so, no question of the validity of the transfer by Maung Pan Byu to his parents arises because Maung Pan Byu is only putting in his parent's names what already was their own property. For these reasons, I set aside the judgment and decree of the lower appellate Court and dismiss the plaintiff's suit with costs in favour of the defendant-appellant in all three Courts.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 259

MAUNG BA, J.

Ma Kyan—Appellant.

v.

Maung Min Din and *another*—Respondents.

Second Appeal No. 141 of 1929, Decided on 6th August 1929, against decree of Dist. Judge, Yamethin, in Civil Appeal No. 2-A of 1929.

Transfer of Property Act, S. 54—Scope.

The sale of immovable property of the value of less than Rs. 100 can be effected by mere delivery of property. But if a deed is executed it must be registered and if it is not registered no legal title passes under it.

[P 260 C 1]

Po Aye—for Appellant.

Wellington—for Respondents.

Judgment.—The suit land originally belonged to Ma E. Appellant is her granddaughter. She is now in possession after having obtained it by a suit under S 9, Specific Relief Act. The respondent sought to oust her from such possession, relying upon their title derived from Ma E's son-in-law Aung Baw under an unregistered sale-deed, Ex. B, dated 28th December 1927. He was given a decree for possession. Both the Courts below have overlooked the law governing the case. Though the value of the property sold is less than 100 the sale deed requires to be registered under S. 54, T. P Act. Of course the sale could have been effected without any deed and by mere delivery of the property. Since a deed was executed, it must be registered and since it was not registered no legal title passes under it. The claim based upon such deed must fail. The decrees of the Courts below are set aside and the suit dismissed with costs thoughout.

P.N./R.K. *Suit dismissed.*

A. I. R. 1929 Rangoon 260

OTTER, J.

Maung Tha Nyo and *Co.* — Appellant.

v.

Ma Un Ma Pru and *others*—Respondents.

Special Second Appeal No. 364 of 1928, Decided on 18th February 1929, from Dist. Judge, Akyab, in Civil Appeal No. 26 of 1928.

(a) Burma Registration of Business Names Act (1920), S. 3 Proviso—Proviso refers to S. 3 (c).

The proviso refers back to S. 3 (c) for in it is found the only reference to a change or addition to a name. [P 261 C 1]

(b) Burma Registration of Business Names Act (1920), S. 3 (b) and S. 5 (1) — Arkanese carrying on money lending business in his own name — After his death his widow carrying on same business under old name with " and Co " added — Mortgage entered in business name — Registration effected but widow's children shown as partners when they were not — Suit on mortgage by widow—Case falls under S. 3 (b) and as plaintiff widow was under disability provided in S. 5 (1) her suit must fail.

One Maung Tha Nyo carried on a money lending business in his own name. After his death his widow carried own the same business under the style of Maung Tha Nyo & Co. She entered into a mortgage and the mortgagees were described as Maung Tha Nyo & Co. Then a registration was effected but the names of parties were shown as the name of the widow together with her children though the children were not partners. She brought a suit on the mortgage.

Held : that S. 3 (proviso) did not apply to the case as it fell under S. 3 (b) and as the business was not carried on in the true name and that as the plaintiff widow was under the disability provided by S. 5 (1) her suit must fail. [P 261 C 2]

Held further ; that she might bring fresh suit after registering in accordance with the Act. [P 261C 2]

Lambert—for Appellant

Sein Tun Aung—for Respondents.

Judgment.—This is an unfortunate case. This suit is upon a mortgage. The only point of apparent substance taken on behalf of the defendants has been that in consequence of provisions of the Burma Registration of Business Names Act of 1920 the plaintiff firm is unable to enforce their claim against the defendants This point was not taken in terms in the written statement but it was argued in both lower Courts unsuccessfully in the Sub-Divisional Court but with success in the District Court. The short facts are that a man called Maung Tha Nyo carried on a money-lending business in his own name till he died on 8th February 1921. Since his death the widow Ma Hla Ma Khine has carried on and still carries on the same business under the style of Maung Tha Nyo & Co On 10th May 1924 the mortgage in suit was entered into, the mortgagees being described as Maung Tha Nyo & Co. The Act in question had come into force on 1st June 1923. I may observe at once that the drafting of the Act leaves much to be desired It is described in the preamble (which of course does not form part of the Act) as an Act to make provision for the Compulsory Registration of Business Names :

Section 3 of the Act is as follows :

Subject to provisions of this Act :

(a) " Every firm having a place of business in any area to which this Act extends and carrying on business therein under a business name which does not consist of the true names of all partners who are individuals and the corporate names of all partners who are corporations ;

(b) every individual having a place of business in any area to which this Act extends and carrying on business therein under a business name which does not consist of his true name ;

(c) Every individual or firm having a place of business in any area to which this Act extends, who or a member of which has either before or after the passing of this Act changed or added to his name except in the case of a woman in consequence of marriage shall be registered in accordance with the provisions of this Act."

And the following proviso is then enacted: Provided that:

"(1) Where the change or the addition merely indicates that the business is carried on in succession to a former owner of the business, that change or addition shall not of itself render registration necessary."

It is said that S. 3 (b) and perhaps S. 3 (a) have been infringed for when on 3rd June 1924 a registration was effected by a mistake the names of parties were shown as Ma Hla Ma Khine together with each of her ten children. It should be said that the family is an Arkanese family and the business is carried on in Akyab. There is no doubt of course that a technical breach of S. 3 (b) occurred if that section applies to the case.

It is said by the plaintiff, however, that the proviso (1) applies, and that registration is unnecessary. It is not easy to see exactly what the proviso is intended to mean. It is clear, however, that whatever its meaning it only refers back to sub-S. (c), S. 3, for in it is found the only reference to a change or addition to a name. There are more than one point of difficulty with regard to the wording of the subsection, e. g., it is not clear how far the subsection is intended to be retrospective. But in the present case I cannot see that the "change or addition" contemplated took place. The only "change" was in name of the "business" Ma Hla Ma Khine did not change her name and the word "firm" is defined as meaning an unincorporate body (a) of two or more individuals or (b) one or more individuals and one or more corporations who have entered into partnership with one another with a view to carrying on business for profit. Thus I think S. 3 (b) must apply without qualification for there is no doubt Ma Hla Ma Khine carried business under a name which did not consist of her true name.

It becomes necessary therefore to see what the Act says is to be the effect of these matters. S. 5 is as follows:

"Where any firm, corporation or individual by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default cannot be enforceable by suit or legal proceedings either in the business name or otherwise."

I would observe that nowhere in the Act is there any provision requiring a firm etc, to furnish a statement of particulars. All the Act requires is "registration in accordance with the provisions of this Act." It is true there is a penalty laid down by S. 6 (b) in the case of a person who furnishes particulars which he knows or has reason to believe are false. But the Act neither says "particulars" are to be furnished, nor of course what particulars are to be furnished. Moreover the words "default" or "defaulter" are not defined.

It is said by the appellant that she has done all that she is required to do viz., she has furnished "particulars." But these "particulars" are inaccurate for the children are not partners and although there is no clear provision requiring particulars or correct particulars that such are required may be inferred from Ss. 3 (a) and 6 (1) (b) of the Act. That being so the plaintiff was at all material times under the disability provided for by S. 5 (1) of the Act and upon purely technical grounds her suit was correctly dismissed. So far as I am able to judge, however, Ma Hla Ma Khine acted honestly throughout and with a genuine endeavour to comply with the Registration Act. I observe that she did apply to the District Judge for a remand of the case in order that she might apply to the Court for relief. I observe also that this application was refused. I do not understand what was the reason for this refusal, and the learned Judge merely states that he sees no reason to remand the case as a fresh suit will not be barred. That being the view of the learned Judge I think the best course for the plaintiff is to register in accordance with the Act (and this I am told she has done) and bring a fresh suit. Her appeal therefore for the reasons I have have given must be dismissed but in the special circumstances of this case the appeal is dismissed without costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 262

MYA BU, J.

Po Naw and *another*—Appellants.

v.

Maung Ba Chit—Respondent.

Special Second Appeal No. 241 of 1929, Decided on 26th July 1929, from decree in Civil Regular No. 96 of 1926.

Evidence Act, S. 92—Surety bond—Wording not supporting that surety was not liable for decretal amount—Surety told that he was for appearance only—Application for surety supporting him—Release order vague—Evidence held admissible to prove that execution was under mistake.

The wording of the surety bond did not support a person's contention that he did not sign a bond for payment of the amount but for his appearance and payment of the amount only on failure to produce him, The evidence showed that though the bond was read out to the person, he was told that he was surety for the appearance. The person had offered himself to be a surety by an application in which he stated that as the judgment-debtor would be produced he placed the properties mentioned therein as security. The order for the release of the judgment-debtor was vague.

Held: that though ordinarily the wording of the bond could not be allowed to be contradicted there was ample ground for holding that the bond happened to be executed under a mistake as to its real purport. [P-262 C 2]

Janabali—for Appellants.

Kyaw Zan—for Respondent.

Judgment.—The respondent, Maung Ba Chit, obtained a money-decree against one Maung Tha Hto in Civil Regular No. 96 of 1926 of the Township Court of Paan and made a verbal application for the execution of the decree under O. 21, R. 11, Civil P. C., by arrest and imprisonment of the judgment-debtor. The judgment-debtor then expressed a desire to prefer an appeal and to be released to enable him to have an opportunity of doing so. The Court ordered that he might be released if he furnished sufficient security. The present appellants offered themselves to be sureties by a petition in which they stated that, as the judgment-debtor would be produced before the Court on the date fixed, they placed the properties mentioned therein as security. Their suretyship was accepted and they executed a security bond and it is in this security bond that the respondent seeks to require the payment of the decretal amount from the appellants, because, although they were able to produce the judgment-debtor in Court when required, the latter was unable to pay the amount.

The appellant's case is that they never signed a bond for payment of the decretal amount on the judgment-debtor's failure to pay the same, but that they executed a bond for the appearance of the judgment-debtor in Court, whenever he was required by the Court, and for payment of the decretal amount in the event of their failure to produce the judgment-debtor when the latter's appearance was required by the Court. The wording of the bond does not support the appellant's case, but it is clear from the statement in their petition offering security and the evidence of the Head Clerk and Bench Clerk of the Township Court, that the appellant executed the bond in the belief that it was a bond for the production of the judgment-debtor whenever they were required to do so, and to be liable to pay the decretal amount in the event of their failure to produce the judgment-debtor.

The evidence of the Head Clerk and the Bench Clerk clearly shows that although the bond was read out to them, the appellants were told that they were sureties for the appearance of the judgment-debtor. Ordinarily it would be difficult to give any substantial weight to such evidence and allow the wording of the bond itself, which was before the parties to be contradicted. But in this case, judging from the vagueness of the order for the release of the judgment-debtor on furnishing security, which appears to me to have in fact been written after the bond was executed, and the definite offer made in the application for the production of the judgment-debtor on the date fixed by the Court, there is ample ground for believing in the truth of the story that the bond happened to be executed under a mistake as to its real purport.

The clerks of the Court should not have made use of the form on which this bond was printed, but from the mere fact that they did make use of this form, it is not sufficient to say that their evidence in the present proceedings is false, for it might most probably be due to their ignorance of the proper terms in which the sureties' undertakings should have been couched, or, in other words, their incompetency or neglect. The case appears to me to fall within the proviso

to S. 92, Evidence Act. The appellants cannot be called upon to pay the decretal amount unless and until they failed to discharge their obligation to produce the judgment-debtor when required by the Court. This obligation appears to have been fulfilled, because, when execution was taken out, it was taken out both against the judgment-debtor and against the sureties, the judgment-debtor duly appeared in Court. For these reasons, I allow this appeal, set aside the order of the District Court, and restore that of the Township Court. U Kyaw Zan for the respondent pleads that he should not be saddled with costs, because everything was due to the mistake made by the officer of the Court. I make no order as to the costs of this appeal.

P.N /R.K. *Appeal allowed.*

A. I R. 1929 Rangoon 263

OTTER, J.

Fontyne & Co.—Appellants.

v.

S. C. Appanna—Respondent.

Second Appeal No. 530 of 1928, Decided on 20th June 1929, from decree of Dist. Judge, Amherst, D/- 5th September 1928.

Evidence Act, S. 101—Plaintiffs suing defendants for sum of money said to be due to him in respect of labour supplied to them and producing document signed by partner in defendants' firm saying balance claimed was due to him—Onus is on defendants to show that document which amounted to admission was obtained under circumstances not legally binding.

Plaintiff sued defendants for recovery of a sum of money said to be due to him in respect of labour supplied to them. He alleged that accounts of labour supplied were settled and the sum of money was found due to him and produced a document signed by a partner in defendants' business saying the balance claimed in respect of labour was due to plaintiff;

Held: that it was an admission and it was for the defendants to prove that such an admission was obtained from them under circumstances which would prevent its being legally binding upon them: *A. I. R.* 1927 *Rang.* 318, *Cons.* and *Dist.*, *A. I. R.* 1925 *Lah.* 471, *Rel. on.* [P 264 C 2]

A. B. Banerjee—for Appellants.

M. M. Rafi—for Respondent.

Judgment.—This is an appeal against a judgment and decree of 5th September 1928 passed by the District Court of Amherst, setting aside a judgment and decree of the Sub-Divisional Court of Moulmein. The plaintiff (respondent) sued the defendants (appellants) for the recovery of Rs. 3,434-5-0, said to be due to him on account of labour supplied to the defendants up to July 1927. In para. 1 of the plaint, it was alleged that the accounts of labour supplied were settled and a sum of Rs. 3,434-5-0 was found due, and a document Ex. (A), was annexed to the plaint in the following terms:

"Due to Appanna, balance Rs. 3,434-5-0 for labour up to July 1927."

Signed over one anna stamp.

"Per Pro Fontyne & Co.,
H. E. Stephenson 3-8-1927."

The defendants by their written statement stated inter alia that they denied any settlement of account, and also that a sum of Rs 3,434-5-0 was then found due. They further alleged that in consequence of a misrepresentation by the plaintiff to Mr. H. E. Stephenson (a partner in the defendant's business) the former obtained the acknowledgment I have set out above. Certain issues were apparently prepared by both sides, and on 23rd June 1928, those prepared on behalf of the defendants seem to have been approved by the then Sub-Divisional Judge. On 12th July, however, it appears that the following issues were settled after examination of parties:

(1) Was the sum of Rs. 3,434-5-0 due to the plaintiff?

(2) If not, did Mr. Stephenson grant the acknowledgment on the plaintiff's misrepresentation?

It is clear from the judgment of the lower Court that it was upon these issues that the trial proceeded. By a diary order dated 20th July 1928, it is plain that when the case was called on, both parties were represented by their advocates. It is also plain that both sides confined themselves to the pleadings, and did not cite any witnesses, nor do they appear to have argued, and the matter was left to the Court. By his order of 23rd July 1928, dismissing the case, the Sub-Divisional Judge stated that the advocate for the plaintiff had said that he would not examine any witnesses if the defendant firm did not examine any and he went on to say that as both counsel:

"agreed that case be decided on the pleadings as they cannot agree on whom the burden of

proof lies. 2 P. Ws. and 2 D. Ws. ..... are waived and discharged."

The matter was then apparently "left entirely in the hands of the Court." The learned Sub-Divisional Judge was of opinion that, as the burden of proof was upon the plaintiff upon the first issue and as the defendants denied that anything was due, the plaintiff had failed to discharge the onus, which was upon him. In the District Court, however, to which the plaintiff respondent appealed, the learned District Judge in a careful order reversed the order of the lower Court and passed a decree in favour of the plaintiff for the amount claimed with costs.

In that Court, as also before me, the only question was whether the plaintiff was entitled to succeed upon the ground that in view of the admission by the defendants that the acknowledgment (Ex. A) had been signed on their behalf, the onus of proof was shifted to them, and that as they called no evidence, the plaintiff was entitled to judgment upon the prima facie case set up upon the pleadings. It is conceded I think, that if Ex. (A) may be regarded as an admission of liability by the defendants, the order of the District Court was correct. It is said, however, that as the case for the plaintiff was based upon a settlement of accounts between the parties, it was incumbent upon him to prove such settlement, and it was also suggested that Ex. A, partly because it was said to have been given as a result of such a settlement, and partly I think from its terms, cannot be regarded as such an admission of liability as would in law place upon the defendants the onus of disproving liability

The case of *Hoe Moh* v. *I. M. Seedat* (1) is relied upon on behalf of the defendants. That was a suit on promissory-note, and the defendant, though admitting his signature denied that the amount claimed was due and stated that he had signed a blank note upon which figures denoting a lesser amount appeared. It was held that as the defendents had specifically denied a promise to pay the sum named, the burden of proving the loan rested upon the plaintiff. It seems to me that this case may be distinguished from the present case, for if Ex. (A) can be construed as an admission of liability (or a promise to pay) it clearly covers the whole amount claimed by the plaintiff. From a perusal of the judgment in *Hoe Moh's* case (1), it seems to me that had the defendant there in addition to admitting signing the promissory note admitted that the figures representing the amount claimed appeared upon it, the decision would have been otherwise.

The Full Bench decision in the case of *Ram Chand* v. *Chhunnumal* (2) was relied upon by the plaintiff. In that case the alleged admission was an admission regarding receipt of consideration and not a direct admission of liability. The example given at p. 473 (*of* 6 *Lah.*) of the report seems to me to bear upon the present case. The learned Chief Justice said :

"If *A* sues *B* for money due on a document, the burden of proving the existence of facts, upon which the legal liability of *B* depends lies on *A*. When *A* has proved the execution of the document by *B*, x x x x x and the document contains an acknowledgment of the receipt of consideration, it is the duty of *B* to show that what he himself admitted ..... was as a matter of fact false and that he did not receive the consideration."

At p. 475 (*of* 6 *Lah.*) of the report, the learned Chief Justice also said :

"Nor is there any valid reason in principle for drawing a distinction between an admission in a registered deed and that contained in an unregistered document, in so far as the question of onus probandi is concerned. In both cases the person denying consideration is confronted with his own admission, and it is for him to prove that it was falsely made."

In the present case, therefore, it seems to me that it may well be successfully argued that the person denying liability is confronted with his own admission of liability and it follows, therefore, that it is for him to prove that such an admission was obtained from him under circumstances which would prevent its being legally binding upon him. If I am right in my view on these authorities, the only question then on this part of the case is whether Ex. (A) can be construed as a plain admission of liability. Upon its wording I have no doubt it can, and for the amount claimed The matter does not quite rest here, however, for, as I have previously indicated, Mr. Banerjee on behalf of the defendants (appellants) argued that, as the decision of the case rests upon the settlement of

(1) A. I. R. 1927 Rang. 319=5 Rang. 527.

(2) A. I. R. 1925 Lah. 471=6 Lah. 470 (F.B.).

accounts and that as Ex. A. is only alleged to have been given as a result of such settlement, it was incumbent upon the plaintiff-respondent to prove by other evidence that a settlement in fact was come to

It is clear that Ex. A is in itself not an admission that a settlement of accounts had taken place. On the other hand it is by no means clear to me that the present suit could be described as one upon a settlement of accounts, or in other words according to English procedure, as an action upon an account stated. It does not appear that it is necessary to decide this point, however, for upon the pleadings the suit may, in my view, be properly described and I think was, a suit for money due in respect of labour supplied. It is possible that it may also be a suit upon a settlement, but I think it makes no difference. If I am right in this, there can be no doubt at all that if Ex. A is an admission of liability, as I hold it is, it is an admission that the amount claimed is due in respect of labour supplied. That being so, I cannot help coming to the conclusion that the decision of the District Court that a prima facie case had been established in the lower Court by the plaintiff is correct.

Being of that opinion the next question is whether the judgment in favour of the plaintiff should be allowed to stand or whether I should send the case back to the lower Court in order that the defendants may have an opportunity of establishing their case. I was at first inclined to take this latter course upon the ground that it would appear from the diary order I have quoted, that it was by agreement between the advocates concerned that no evidence was called on either side. This may have been so, though from the judgment of the Sub-Divisional Court this may not be quite so clear. I observe, however, that on behalf of the defendants two witnesses were in fact present, but they were discharged. This of course was done before the Sub-Divisional Judge passed his order, which he seems to have done later in the day. There was no obligation, however, upon either advocate to come to the agreement I have referred to, or to discharge his witnesses. In my view the ordinary procedure ought to have been followed and the Judge should have been asked to decide the preliminary point as to onus of proof. Having decided it, the case should have proceeded, and the matter dealt with, if necessary, upon the pleadings. Furthermore it might also well be argued that as the parties agreed to a trial upon the pleadings and as I hold that in these circumstances the plaintiff should succeed the matter should rest there The appeal must, therefore, be dismissed with costs and the order of the District Court must stand.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 265

HEALD AND MYA BU, JJ.
and subsequently
HEALD AND OTTER, JJ.

Ma On Thin—Appellant.

v.

Ma Ngwe Yin and *another*—Respondents.

First Appeal No. 237 of 1928, Decided on 25th April 1929 from judgment of District Court, Hanthawaddy, in Civil Regular No. 56 of 1927.

(a) Civil P. C., O. 41, R. 20—Neither appellant nor respondents deriving claim touching dispute in appeal from party not joined in appeal—Decision of appeal not injuriously affecting interest of that party under decree appealed against—Such party is not necessary to appeal.

Where neither the appellant nor the respondents derive their claim in respect of the dispute in appeal from a party to suit but not joined in appeal and from the nature of the appeal itself it is evident that either the success or the failure of the appeal will in no way injure the interest acquired by the party under a decree appealed against such a party is not a necessary party to the appeal: *A. I. R.* 1927 *P. C.* 252, *Dist.* [P 267 C 1]

(b) Buddhist Law (Burmese)—Children of first marriage taking share of inheritance on second marriage cannot inherit property inherited by father after their mother's death and before or after second marriage.

The children of the first marriage who have already taken their share of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the death of their mother and before the second marriage; nor can they have any share in respect of the property inherited by their father after the second marriage which becomes the lettetpwa property of that marriage: *A. I. R.* 1921 *P. C.* 88, *Rel. on*; *A. I. R.* 1926 *Rang.* 23, *Expl.* and *Dist.* [P 268 C 2]

Ba Thein (1)—for Appellant.

Hay—for Respondents.

Heald and Mya Bu, JJ.—The learned counsel for the respondents has raised a preliminary objection contending that the appeal is incompetent for non-joinder of a necessary party and should therefore be dismissed The appeal is against the preliminary decree in an administration suit filed on behalf of a minor plaintiff named Ma Htwe Sein (now deceased) against the appellant, Ma On Thin, and the respondents, Ma Ngwe Yin and Ma Nyun, for administration of the estate of U Mya, deceased The respondents are the issue of U Mya's first marriage. After the death of their mother Ma Thaw, U Mya gave them half of the properties of the first marriage. He then married his second wife Ma The Myit and the plaintiff Ma Htwe Sein was born to them. Ma The Myit also predeceased U Mya. Thereafter U Mya married the appellant and died a few months later on 5th July 1927, leaving the appellant enciente and she subsequently gave birth to a son.

In the lower Court there was no dispute as to the heirship of the parties. The only issue was :

"To what shares are the parties respectively entitled in the estate of U Mya deceased ?"

In view of the partition between U Mya and the respondents of the properties of the first marriage, the Court held on the authority of the rulings in the cases of *Ma Toke* v. *Ma U Le* (1) and *Ma Htay* v. *U Tha Hline* (2), that the respondents were not entitled to any share either in the remaining properties of the first marriage or in the joint properties of the second and third marriages. The Court went on to fix the shares of the plaintiff and the appellant respectively in these properties ; and in the absence of any dispute and practically in accordance with the unanimous opinion of the Court and the counsel appearing for the respective parties, the Court found that the three parties as representing three families were entitled to one-third each in the properties inherited by U Mya after the death of his first wife.

The preliminary decree made in accordance with the judgment declared:

(1) that the plaintiff was entitled to three-fourths share in the properties of the first and second marriages, one-eighth, share in the properties, if any, of the third marriage and one-third share in the inherited properties of U Mya ;

(2) that Ma On Thin, defendant 1 (now appellant) was entitled to one-fourth share in the properties of the first and second marriages, seven-eighths share in the property, if any, of the third marriage and one-third share in the properties inherited by U Mya ; and

(3) that Ma Ngwe Yin and Ma Nyun, defendants 2 and 3 (now respondents) were entitled to one-third share in the properties inherited by U Mya. It was ordered that a commissioner be appointed to find out inter alia what the inherited properties were and what the properties of the first, second and third marriages respectively were. This decree bears date 30th June 1928.

The appellant filed the present appeal on 12th September 1928 only as against the respondents merely objecting to the declaration in the preliminary decree in the latter's favour, valuing the appeal at Rs. 2,000 "being one-third share in the inherited property" but without joining the plaintiff either as an appellant or as a respondent. It may be pointed out that the minor plaintiff, Ma Htwe Sein, died on 1st August 1928, that is after the preliminary decree and before the filing of the appeal.

In support of his contention, the learned counsel for the respondents urges that the legal representatives of Ma Htwe Sein were necessary parties to this appeal and should have been joined as such, that the appeallant's omission to join Ma Htwe Sein's legal representatives has deprived his clients of their right to take, if they chose, cross-objection adversely affecting the interest of Ma Htwe Sein or her legal representatives; that the time limited for an appeal against Ma Htwe Sein having expired neither she nor her legal representatives can now be joined ; and that the whole appeal has for these reasons become incompetent.

The learned counsel quotes the rulings in the cases of *V. P. R. V. Chokalingam Chetty* v *Singaram Chetty* (3) and *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (4). They refer to the same case, the former being a decision of a Bench of this Court and the latter being a deci-

(1) A. I. R. 1924 Rang. 71=1 Rang. 487.
(2) A. I. R. 1925 Rang. 184=2 Rang. 649.
(3) A. I. R. 1925 Rang. 108=2 Rang. 541.
(4) A. I. R. 1927 P. C. 252=6 Rang. 29=55 I. A. 7 (P.C.).

sion of the Privy Council on appeal arising out of the same case. In that case the plaintiff having bought from the Official Assignee property which had belonged to the insolvent sued several defendants for recovery of the property alleging that the transfer by the insolvent to the first defendant and transfers by defendant 1 and other defendants to one another successively were all invalid. When the suit was dismissed, the plaintiff appealed against the dismissal without joining defendant 1 as a respondent, at the time of the hearing of the appeal, which took place after the expiry of the period of limitation for such appeal, the plaintiff applied to join defendant 1 in whose absence the appeal could not succeed. The application was refused on the ground that as defendant 1 held a decree against which an appeal was barred so far as he was concerned, he was not interested in the result of the appeal within the meaning of O. 41, R. 20. It was also pointed out that under O. 41, R. 33 an appellate Court could add a defendant as respondent for the purpose of making a decree against him.

In the present case the position of the plaintiff who has not been joined as a party to this appeal is quite different from that of defendant 1 mentioned in the above rulings. Neither the appellant nor the respondents derived their claim in respect of the dispute in this appeal from the plaintiff as the respondents in those appeals did from defendant 1. From the nature of the appeal itself, it is quite evident that either the success or failure of the appeal will in no way injure the interest acquired by the plaintiff under the preliminary decree and that therefore any such order as this Court may pass in this appeal may be passed without adversely or injuriously affecting the interest held by the plaintiff. For these reasons the plaintiff cannot in our opinion be said to be a necessary party to this appeal.

We have not been shown any authority for the view that it was incumbent on an appellant to join in an appeal a party who is unnecessary for the purpose of the appeal itself, in order to enable the respondent or respondents to take cross-objection which may affect the interest of such party. The objection raised on behalf of the respondent does not appear to us to possess any merits. We consider that the appeal may finally be heard and decided as it stands.

The learned counsel for the appellant, however, has no objection to bringing on record in this appeal the legal representatives of the deceased plaintiff for the purpose merely of satisfying the respondent. As pointed out above the nature of the appeal does not indicate any likelihood of a decree in this appeal affecting injuriously the estate of the deceased plaintiff acquired under the preliminary decree and at the present stage it is too early for us to say whether the decision in this appeal will affect the deceased plaintiff's estate beneficially. If the decision does affect such estate beneficially the provisions of O. 41, R. 33 may safely be taken advantage of: see *Jawahar Bano* v. *Shujaat Husain Beg* (5). At this stage we do not consider it necessary or expedient to order the joinder of the deceased plaintiff's legal representatives in this appeal. We overrule the objection raised on behalf of the respondents and direct that the appeal be heard on its merits (The case subsequently came before Heald and Otter, JJ. and the following judgment was delivered).

Heald, J.—Respondents are children of one Maung Mya by his first wife, Ma Thaw, who died about 20 years ago. There is also a daughter, Ma Twe Sein, by Maung Mya's second wife, Ma The Myit, who died about three years ago. Appellant was Maung Mya's third wife. Ma Twe Sein, the daughter by the second wife sued for administration of Maung Mya's estate, and the Court made a preliminary administration decree declaring that she, Ma Twe Sein, was entitled to three-quarters of the properties of the first and second marriages and to one-eighth of the property of the third marriage, and was further entitled to a one-third share of certain property which was inherited by Maung Mya, that appellant Ma On Thin, the surviving widow was entitled to a quarter of the properties of the first and second marriages, to seven-eighths of the property of the third marriage, and to one-third of the inherited property, and that respondents, the children of the first marriage, who had admittedly received the share of inheritance in respect of

(5) A. I. R. 1921 All. 367=43 All. 85.

the first marriage to which they became entitled by reason of their father's second marriage, were entitled to one-third of the inherited property only.

Neither of the parties to this appeal contests the correctness of the shares allotted to Ma Twe Sein, the daughter of the second marriage, but appellant says that respondents ought not to have been given any share in the inherited property, and that the share allotted to them ought to have been allotted to her, that is to say, she ought to have been given two-thirds of that property and respondents ought not to have been given any share of it It is common ground that the properties in dispute were inherited by Maung Mya after the death of his first wife Ma Thaw who was respondent's mother, but it does not appear whether they were inherited before or after the date of the second marriage. It is, however, said to have been agreed in the lower Court that it should be assumed that they were inherited in the interval after the death of the first wife and before the marriage with the second.

The learned Judge in the trial Court said that the learned advocates who appeared for the parties were of opinion that each of the three sets of heirs, that is the children of the first marriage, the child of the second marriage, and the surviving third wife, should each be entitled to a one-third share of those properties, and he gave judgment accordingly.

Appellant now says that the opinion of the learned advocates was mistaken, and that under Burmese Buddhist Law the children of the first marriage who had taken their shares of inheritance on the occasion of the second marriage have no claim to inheritance in respect of property inherited by their father after the first marriage had come to an end.

There is so far as I know no judicial authority directly on the point, the nearest approach to a decision on the matter being the case of *Ma Thaung* v. *Ma Than* (6), which was not cited to us by either side. In that case their Lordships of the Privy Council quoted a passage from Dhamathatkyaw as saying:—

"After the death of the husband, the wife partitions the property with her children and marries again. On her death the children of her former marriage cannot claim from their stepfather any property which she took to the second marriage, because they have already obtained their shares. The same rule applies when after the death of the wife the husband marries again after having given the children their respective shares."

Their Lordships accepted that rule and applied it to a case, where before the second marriage the father had made a partition of the properties of the first marriage and after the second marriage had carried on the family business, which was the subject matter of the partition, in partnership with the children of first marriage so far as concerned the shares which the children of that marriage received at the partition Their Lordships said that although there was no definite separation between the father and the children of the first marriage, the new menage was carried on quite independently and separately from them. A verbal translation of the passage cited by their Lordships runs as follows

"If after the death of the husband the wife divides the properties that there are into son's share and daughter's share and taking her own share marries another husband and then dies, and if the children say we ought to get the properties which went with our mother, let them not say so. The later husband and children should have them because they (the children of the first marriage) have already been given their own shares. If the mother die, and the father give (their shares) to the children and take a second wife and die in the time of the second wife, in the same way the children of the first marriage shall not be entitled to the property which went with their father."

That passage, which as I have said, was accepted by their Lordships of the Privy Council as a rule of Burmese Buddhist Law, would seem to settle the matter in controversy in the present appeal, since on the assumption that the property in dispute was inherited by the father after the mother died and before the second marriage, that property would clearly be property which "went with the father" to the second marriage, while if in fact the property was inherited after the second marriage, it would be lettetpwa property of that marriage in which the children of the first marriage could have no share.

But it is sought to distinguish the present case on the ground that the children of the first marriage did not separate from their father, but lived with him and their stepmother. There is no allegation

(6) A.I.R. 1924 P.C. 88=5 Rang. 175=51 Cal. 374=51 I.A. 1 (P.C.).

to that effect in the pleadings on which, apparently by consent, the preliminary decree was passed, but even if it were established that the children of the first marriage did continue to live with their father after the second marriage, I do not think that that fact would be sufficient to distinguish the case from *Ma Thaung's* case (6), where, as I have said, their Lordships pointed out that there was no definite separation between the father and the children of the first marriage.

Reliance is placed on an obiter dictum of mine in the case of *Po San* v *Po Thet* (7) (at p 441 *of* 3 *Rang.*) where I said :

"I have no doubt that under the old law joint living, that is a continuance in the family, was necessary for a continuance of rights in the family property, and that a child who took his share and separated himself from the family was regarded as having no further interest in the family property Manussika and Dyajja in dealing with the right to partition between children and the stepparent on the death of the parent make the right of the children of the first marriage to share in the property of the second marriage dependent on their having assisted in the acquisition of that property, that is not having left the family, and Vannana says that if the children of the first marriage have taken their share on their parent's remarriage they have no interest in the property of the second marriage, while the Dhammathats cited in S 211 of the Digest enunciate a similar principle. But it has been held in many cases and very recently by the Privy Council in *Maung Dwe* v. *Khoo Haung-Shein* (8), that the requirement of joint-living is now relaxed and that in the absence of actual separation from the family the right of inheritance subsists. It would seem to follow that even if the auratha has taken his share on the death of a parent or on the remarriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the stepparent unless separation is proved or is to be presumed "

Those remarks it will be noted applied to the share of the auratha son, in whose case no question of separation from the family arose under the old law since he took the father's place in the family, and they would not apply with equal force to children who have taken their share of inheritance on the surviving parent's remarriage, since in the case of such children there is some initial presumption of an intention to separate and not to regard themselves as members of the family of the second marriage, and in any case such an obiter dictum carries no weight against a decision of the Privy Council. Reliance is also placed on the second " manner of partition " mentioned in Manugye (X-2) but that passage is corrupt, vide my judgment in the case of *Shwe Ywet* v. *Tun Shein* (9), and it does not refer to a case where the children of the first marriage have already received their shares.

I know of no authority either in the Dhammathats or in the cases for the proposition that children of a first marriage, who have already received their shares of the property of the marriage of their parents on the remarriage of the surviving parent are entitled to claim from the stepparent after the death of the surviving parent any share of property inherited by the surviving parent after the death of the parent either before or after the second marriage, and as the decision of the Privy Council in *Ma Thaung's* case (6), seems to me to warrant a finding that respondents, who are the children of the first marriage have no claim as against appellant, who is the stepmother, in respect of property inherited by their father after the death of their mother, I would allow the appeal with costs and would alter the preliminary decree passed by the lower Court so as to give appellant Ma On Tin two-thirds of the inherited property and to omit the part of the decree which says

"It is further ordered that Ma Ngwe Yin and Ma Nyun, defendants 2 and 3, are also entitled to one-third share in the properties inherited by their father U Mya (deceased) after the death of their mother Ma Thaw."

I would note that the reference in the decree to the properties of the first marriage is of course to the properties of that marriage which were left after the children of that marriage had received their shares

Otter, J.—I concur.

P.N /R K *Appeal allowed.*

(9) A.I.R. 1921 L.B. 68=11 L.B.R. 199.

(7) A.I.R. 1926 Rang. 23=3 Rang. 438.

(8) A.I.R. 1925 P.C. 29=3 Rang. 29=52 I.A. 73 (P.C.).

* A. I. R. 1929 Rangoon 269

BROWN, J.

A. K R M. M C T. Chetty Firm— Appellants.

v.

Maung Tha Din and *another*— Respondents.

Civil Misc Appeal No. 92 of 1928, Decided on 1st March 1929, against Judgment of Dist. Court, Pyinamana, in Civil Appeal No. 39 of 1928

*** Civil P. C., S. 47 — Judgment-debtor paying certain amount towards satisfaction of decree—Decree-holder not certifying payment and executing whole amount due under decree—Judgment-debtor bringing suit to recover amount paid— Such suit is maintainable—Civil P. C., O. 21, R. 2.**

Where a judgment-debtor paid a certain amount towards the satisfaction of a decree to the decree-holder but the decree-holder did not certify or recognize the payment and took out execution of the whole amount due under the decree and where the judgment-debtor brought a suit to recover the amount paid, such suit is maintainable and S. 47 does not bar such suit as it is based on an alleged failure of the decree-holder to carry out his promise of crediting the amount to his decree which though bearing on question as to satisfaction of decree is not directly a question relating to such satisfaction: *A.I. R.* 1923 *Rang.* 88, *Rel. on.* [P 270 C 2]

Venkatram—for Appellants

Basu—for Respondents.

Judgment.—The respondents brought a suit against the appellants for the recovery of a sum of Rs 604 together with interest thereon. Their case was that in December 1924 they paid the sum of Rs. 500 to the appellants towards satisfaction of a decree the appellants held against them. The appellants have since that date taken out execution for the whole amount due under the decree and have not certified or recognized this payment of Rs. 500 They further stated in their plaint that the actual amount overdrawn in the executing Court by the appellants was Rs. 604, and the amount they actually claimed is this sum of Rs 604. It is quite clear, however, that so far as the case is based merely on an overdrawal in the executing Court, the present suit cannot lie and this is admitted by the learned advocate for the respondent. The question for decision now is whether a suit can be brought for recovery of the Rs 500.

The trial Court held that it could not and dismissed the suit. The District Court in appeal held that such a suit could be brought and remanded the case for a decision on the merits The case of *Maung Myo* v. *Maung Kha* (1), is clearly in favour of the view taken by the District Judge. The District Judge appeared to have thought that the decision in *Maung Myo's* case (1) was difficult to reconcile with the wording S. 47, Civil P. C. Under that section questions arising between the parties to the suit in which the decree was passed and relating to the satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. But the question that arises in this case is the alleged failure of the appellants to carry out their promise of crediting the amount to this decree. It has of course a bearing on questions as to the satisfaction of the decree, but it is not directly a question relating to such satisfaction. I see no good reason for dissenting from the decision in *Maung Myo's* case (1). It has been suggested that the present suit must fail because of the wording of the receipt given for the payment of the money. That point has not yet been considered by the trial Court and it is sufficient to say that I am not satisfied at this stage that it is shown that this objection is fatal to the suit. The question of limitation which has also been mentioned must also be left for decision in the first instance by the trial Judge. I am of opinion that the suit as regards the Rs. 500 with possibly interest thereon is maintainable. I therefore dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R. 1923 Rang. 88=11 L. B. R. 429.

A. I. R. 1929 Rangoon 270

MYA BU, J.

Tun Hlaing—Applicant.

v.

Ma Kha Bu—Respondent.

Civil Revn No. 158 of 1929, Decided on 13th August 1929, from preliminary order of Township Judge, Zigon, in Civil Regular Suit No. 120 of 1928.

(a) Stamp Act, S. 12 (10-b) and (2)—One of two anna stamps on promissory note uncancelled—Such note under S. 12 (2) is unstamped so far uncancelled stamp is concerned.

If one of the two anna stamps on a promissory note is not duly cancelled and the one anna stamp alone is not sufficient for such note, it cannot be held that the promissory note is sufficiently stamped for under S. 12 (2), the note is to be deemed unstamped so far as the uncancelled stamp is concerned. [P 271 C 1]

(b) Civil P. C., S. 115—Scope.

An erroneous decision on an issue is no ground for revision during the pendency of the suit. [P 271 C 1]

P. K. Basu—for Respondent.

Judgment.—This is an application for revision of the findings of the Township Court of Zigon on certain preliminary issues, namely: (1). Whether the

promissory note in suit was sufficiently stamped, and (2) if not, whether it was admissible in evidence. The Township Court held that the promissory note was sufficiently stamped and that, therefore, the second issue did not arise. It is clear that this view is erroneous. One of the two one anna stamps on the promissory note was not duly cancelled, as required by S. 12 (1) (b), Stamp Act, and under Cl. (2) of the same section the promissory note was to be deemed unstamped so far as the uncancelled stamp was concerned. One one-anna stamp alone was insufficient for the promissory note in suit. Be that as it may, an erroneous decision on these issues is no ground for revision during the pendency of the suit. An error in the decision of these issues could be made a ground of appeal from the decree passed in the suit Moreover the amended plaint filed before the determination by the Township Judge of these issues bases the claim on alternative causes of action, namely the promissory-note, or in the event of the promissory note being held inadmissible in evidence on the original cause of action, the loan itself. The issues in question, are not such as are sufficient to dispose of the suit, whether they are found in the affirmative or in the negative In any case there are no grounds for revision and I dismiss this application with costs, advocate's fee 2 gold mohurs.

P.N/R.K. *Revision dismissed.*

A. I. R. 1929 Rangoon 271

CHARI, J.

Maung Po Thet and *others* — Appellants.

v

Daw Shwe Myin—Respondent.

Special Second Appeal No. 148 of 1929, Decided on 9th August 1929, against decree of Dist. Judge, Thayetmyo in Civil Appeal No. 86 of 1928.

Transfer of Property Act, S. 84—Liability of usufructuary mortgagee to account for mesne profits arises only when money is actually tendered to him—Transfer of Property Act, S. 76.

The liability of the usufructuary mortgagee to account for the mesne profits arises only when money is tendered to him. The money must actually be tendered and a notice sent by the mortgagor asking the mortgagee to come to his place and take the money cannot be a tender of money and no liability of the mortgagee arises to account for the profits of the land . 36 *All.* 139; 42 *All.* 420; 2 *N. L. R.* 62, *Rel. on.*; 9 *L. B. R.* 18, *Dist.*

[P 271 C 2, P 272 C 2]

So Nyun—for Appellants

Lun Thi—for Respondent

Judgment. — The plaintiff in this case sued to redeem a mortgage, which is admitted. She also claimed mesne profits for last year on the ground that she offered to redeem the land but was not allowed to do so. The trial Judge gave a mere redemption decree and disallowed the claim for mesne profits On appeal the learned District Judge allowed the plaintiff's claim for mesne profits also. He purported to follow a ruling of the late Chief Court of Lower Burma in the case of *Po Tun* v. *E Kha* (1). The facts about which there is no dispute are that the mortgagor did ask to be allowed to redeem orally and also wrote a letter offering to redeem and asking the mortgagees to bring the title-deeds to her place when they would be paid the money two days after notice.

The mortgage in this case is a usufructuary one, and in this class of mortgages, the mortgagee remains in possession realizing the profits of the land in lieu of interest. S. 84, T. P. Act, enacts that interest on the principal money ceases from the date when the money is tendered to the mortgagee. On an application of that principle the liability of the usufructuary mortgagee to account for the mesne profits will arise only when money is tendered to him. It has been held in a number of cases that money must actually be tendered. Thus in *Chetan Das* v. *Govind Saran* (2), it was held that an offer by letter to pay the money due on a mortgage is not a good tender. In a later case of the same High Court in *Mahomed Mushtaq Ali Khan* v. *Banke Lal* (3), where a notice was sent to the mortgagee offering to pay him a certain sum of money, it was held that, as no actual money was produced, there was not a valid tender of the sum due under the mortgage.

In a case which arose apparently at Nagpur, but of the reports there are no copies in this Court, it was held that

(1) [1916] 9 L. B. R. 18=33 I. C. 735=9 Bur. L. T. 117.

(2) [1914] 36 All. 139=22 I. C. 659=12 A. L. J. 111.

(3) [1920] 42 All. 420=55 I. C. 931=18 A. L. J. 440.

the tender must be made at the mortgagee's place: *Makadaji* v. *Pairia* (4). The notice, therefore, sent by the mortgagor asking the mortgagees to come to her place, and take the money cannot be a tender of the money and no liabilities of the mortgagees can possibly arise to account for the profits of the land.

The learned District Judge followed the case of *Po Tun* v. *E Kha* (1). If that ruling was intended to lay down broadly that a production of money was not necessary to validate an offer of redemption in all cases, I cannot accept it But in that case, the mortgagee denied the mortgage, and obviously there was no use in tendering money to a mortgagee, who did not even accept the position of a mortgagee. That case is, therefore, distinguishable from the present one. For these reasons, I set aside the judgment of the lower appellate Court and restore that of the trial Court. There will be no order as to costs either in this Court or in the District Court. The order as to costs in the trial Court will stand.

P N./R.K. *Decree set aside.*

(4) [1906] 2 N. L. R. 62.

A. I. R. 1929 Rangoon 272

CHARI, J.

Maung Thu—Appellant.

v.

Maung Shwe Hla and *others*—Respondents.

Special Second Appeal No. 161 of 1929, Decided on 9th August 1929.

(a) Buddhist Law (Burmese)—If Burmese Buddhist directs one of coheirs to discharge his liabilities which are a great deal less than value of his property, transaction is to be regarded as gift of excess of property over debt and principle of part performance does not apply to such case—Part Performance.

When a Burmese Buddhist directs one of the heirs to discharge his liabilities which are a good deal less than the value of his properties, and take over his properties, the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, it may be a death-bed gift of that excess. The principle, therefore, of part performance, which applies to a purchaser of the property for consideration has no application to such a case and if such heir discharges the liabilities by selling a portion of the property, he holds the other property on behalf of other heirs. [P 273 C 1]

(b) Buddhist Law (Burmese)—Admission by one heir—Evidence Act, S 18.

Admission by a person that one of the heirs has absolute right to the property to which the person along with others is an heir, cannot affect the other heirs. [P 272 C 2]

(c) Decree—Form of.

Giving of money decree for immovable property is wrong. [P 272 C 2]

P. K. Basu—for Appellant.

S. S. Halkar—for Respondents.

Judgment.—The plaintiff in this suit claimed as the stepson of one Ma Ye to recover a house and site from the defendants. The house admittedly formed part of the estate of one Ko Maung, whose niece Ma Ye was. Ma Ye was one of the eight nieces and nephews, and it is admitted that Ma Ye would have been entitled to a one-eighth share, if there were no circumstances showing that she had obtained the whole of this property. Her case was that Ko Maung at his death asked her to take his properties and discharge his liabilities and that she did so. She had been paying the taxes on the house and remained in possession of the house till she died. These are the circumstances relied upon by the learned advocate for the appellant as showing that Ma Ye had become the owner of the house. He also relies upon the reply sent by one of the heirs, Maung Shwe Hla, to a notice sent on behalf of the appellant. The position taken up by Maung Shwe Hla will not, as a matter of fact affect the other heirs, even if the letter could be deemed to be an admission of the rights of Ma Ye to the property. The trial Judge accepted the plaintiff's contention and gave him a decree as prayed. This was varied by the lower appellate Court which held that the plaintiff was entitled to a 1/12th share in the property as Ma Ye's son and gave him a money decree for 41-10-8. This giving of money decree for immovable property is wrong, but no objection is taken by the learned advocate in respect of this part of the decree, and I do not propose to interfere with it, if I am in favour of the respondents in other respects.

The decision of the case depends upon exactly what happened when Ko Maung died and the construction to be put upon that transaction. The evidence obviously is not quite clear, and the circumstances in which Ma Ye paid the debt and remained in possession of the pro-

perty are ambiguous and are capable of being construed that she as one of the co-heirs was acting on behalf of herself and other co-heirs and not necessarily that she was acting as carrying out the directions of Ko Maung it is highly probable as the lower appellate Court has held and it has not been shown that it was wrong in so holding that Ma Ye sold a portion of the property, discharged the Chettyar's liability and remained in possession of the unsold property. The learned trial Judges viewed the transaction as an inchoate sale and applying the principles of part performance, held that Ma Ye was entitled to the property, though there was no registered conveyance. But the transaction is capable of being viewed in a different light When a Burmese Buddhist directs one of the heirs to discharge his liabilities, which are a good deal less than the value of his properties, and take over his properties the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, or it may be a death-bed gift of the excess. The principles, therefore, which would apply to a purchaser of the property for consideration have no application to a case of this nature. Even, therefore, on the assumption that this part of Ma Ye's case was true, in my opinion she would be holding this property on behalf of all her co-heirs, having sold a portion and discharged the liabilities of the deceased. In this view the judgment of the lower appellate Court is right, and I therefore dismiss this appeal with costs

P.N./R K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 273

RUTLEDGE, C. J., AND BROWN, J.

Ma Shopjambi—Applicant.

v.

Mubarak Ali and *others*—Respondents.

Civil Revn. No. 236 of 1927, Decided on 18th March 1929, from order of Dist. Judge, Akyab, in Civil Misc. Case No. 88 of 1926.

Civil P. C., O. 33, R. 5 (d)—Court examining only applicant and taking into consideration his examination as well as his petition—It also taking judicial notice of certain proceedings in which applicant was party—Court's action is proper—Civil P. C. O. 33, R. 7.,

It is open to the Court to consider not only the statements made in the plaint but also the statements made in his examination by the applicant before determining whether his allegations disclose a cause of action as laid down in O. 33, R. 5 (d) ; but the Court cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant.

[P 273 C 2]

The Court did not examine any other witness that · the applicant himself. It took into consideration the applicant's examination as well as his petition. It also took judicial notice of certain proceedings in Court in which the appplicant was a party and in which he made certain applications

Held : that the Court's action was perfectly correct . 46 *Cal.* 651, *Rel. on.* [P 274 C 1]

Sein Tun Aung—for Applicant.

K. C. Bose—for Respondents.

Judgment.—This is a petition by way of revision from the order of the learned District Judge of Arakan, dismissing the petitioner's application to sue as a pauper under O. 33, R. 5 (d), that her allegations do not show a cause of action inasmuch as the cause of action, if any, has been long barred by limitation The main objection urged is that the Court was not competent at the enquiry into her pauperism to go into the merits of her case and dismiss it. The learned trial Judge, we notice, has discussed in the first three pages of his judgment a number of cases, not a single one of which is reported in an authorized report. They are consequently of no assistance to us and have no binding force as authorities on the trial Court.

The decisions of the several High Courts are by no means unanimous in respect of how far a Court may go in enquiring into the substance of the cause of action in applications to sue as a pauper. But the decision relied on on behalf of the petitioner in *Jogendra Narayan* v. *Durga Charan* (1), is really against her. There a Bench of the Calcutta High Court held that it is open to the Court to consider not only the statements made in the plaint but also the statements made in his examination by the applicant before determining whether his allegations disclose a cause of action as laid down in O 33, R. 5, clause (d), but the Court cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant

It is not suggested that any other witness has been examined here except the applicant herself. The Court has taken

(1) [1918] 46 Cal. 651=52 I. C. 610.

into consideration her examination as well as her petition which if admitted constitutes her plaint. The Court has also taken judicial notice of certain proceedings in Court in which the petitioner was party and in which she made certain applications. In so doing the Court's action was, in our opinion, perfectly correct

The learned trial Judge has set out very clearly from the 5th page of his judgment beginning with the words :

"The first ground of objection is that the plaint discloses no subsisting cause of action and that applicant's claim is barred by limitation"

down to the middle of the 7th page ending with the words :

" and I do not think any such trust can be inferred from the circumstances of the present case"

his reasons for holding that the petitioner's present claim is on the face of it barred by limitation. We are in full agreement with his finding and do not consider it necessary to add any further reasons. The application is dismissed with costs

P.N/R K. *Revision dismissed.*

A. I. R. 1929 Rangoon 274

RUTLEDGE, C. J., AND BROWN, J.

U Dun Htaw and *another* — Appellants.

v.

Maung Aw and *others*—Respondents.

Letters Patent Appeal No. 134 of 1928, Decided on 25th March 1929, from judgment of Rangoon High Court in Second Appeal No. 254 of 1928.

(a) Contract Act, S. 40 — Illustrations (a) and (b)—Specific performance can be asked against legal representative in respect of contract for purchase of immovable property.

In view of S. 40 and its illustrations which indicate the class of contracts which the legal representative of a person must perform and those which one cannot ask him to perform, the specific performance can be asked against a legal representative in respect of a contract for purchase of immovable property and the remedy does not die with the party who agrees to purchase. [P 274 C 2]

(b) Specific Relief Act, S. 27 (b)—Scope.

The words "any other person claiming under him by a title arising subsequently to the contract," include the heirs and legal representatives of a deceased party to a contract. [P 274 C 2]

Thet Tun—for Appellants.

Halkar—for Respondents.

Judgment.— This is an appeal by special leave from a judgment on second appeal by Das, J., reversing the decision of the Sub-Divisional Court, confirmed on first appeal by the District Court of Amherst, on the ground that specific performance could not be asked in respect of a contract for the purchase of immovable property, the remedy apparently in the opinion of the learned Judge, dying with the party who agreed to purchase. This decision seems to be irreconcilable with S. 40, Contract Act and its illustrations, namely:

"(a) *A* promises to pay *B* a sum of money. *A* may perform this promise either by personally paying the money to *B* or by causing it to be paid to *B* by another: and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally,"

These illustrations seem to indicate the class of contracts which one cannot ask the legal representatives of a dead man to perform such as the painting of a picture, and the class of contracts which the legal representatives must perform such as the payment of the balance of purchase money, as in the present case. The learned Judge seems to have misconstrued the terms of S. 27, Cl. (b), Specific Relief Act. The words:

"any other person claiming under him by a title arising subsequently to the contract,"

in our opinion clearly include the heirs and legal representatives of a deceased party to a contract. The test is not whether they repudiate and wish not to be bound by the contract, which their predecessor-in-title had entered into, but it is whether they are, in fact, the heirs and legal representatives of such deceased party. If they are, the estate of the deceased is vested in them and that vesting of title arose subsequently, namely, on death, to the contract in suit. They claim under him by operation of law, being his heirs and legal representatives. If the estate is unable to meet the legal obligations of the deceased, the law does not require them to do the impossible. No personal liability devolves upon them but the estate which has come into their hands is answerable for the liabilities of its deceased owner, and, as representatives of the latter, they must defray these liabilities so far as that estate will enable them to do so. The the points

raised in the memorandum of appeal before Das, J., do not seem to have been proved before him and do not require discussion here. For these reasons we reverse the decision of this Court and restore the order of the District Court. The plaintiff-appellants to have costs throughout.

P.N./R.K. *Decision reversed.*

A. I. R. 1929 Rangoon 275 (1)

MAUNG BA AND BROWN, JJ.

U Lu Gale and *another*—Appellants

v.

M. Mahomed Habi—Respondent.

First Appeal No. 185 of 1929, Decided on 28th August 1929.

(a) Civil P. C., S. 60—Application.

Section 60 does not apply to executions under a mortgage decree. [P 275 C 1]

(b) Civil P.C., S. 47—Correctness of decree cannot be called in question in execution.

A judgment-debtor cannot raise an objection that he has no saleable interest in the property ordered to be sold in execution of a mortgage-decree. The proper time to raise such objection is at the hearing of the suit and before the decree ordering the sale is passed: *A.I.R.* 1926 *Pat.* 202, 34 *All.* 25, *Rel. on.* [P 275 C 1]

S Ganguli—for Appellants.

Judgment.—The District Court of Pegu has ordered the sale of certain properties in execution of a mortgage-decree. We are asked to set aside that order on the ground that the judgment-debtors have no saleable interest in the property and that S 60, Civil P. C., therefore, applies. The property in question apparently consists of land which forms part of a Government estate, and for which the appellants are lessees or licensees of Government. It is stated that the appellants' license has not been renewed for the current year We are unable to see how it is possible to pass the order desired. The property is not being sold in execution of an ordinary money decree, but in execution of a mortgage-decree. No attachment is necessary and the provisions of S. 60, Civil P. C., do not apply. Further if the provisions of the section did apply the proper time to raise the objection was at the hearing of the suit and before the decree ordering the sale was passed. The correctness of that decree cannot now be called in question in execution. The sale will not of course pass anything more than the right, title and interests of the parties in the mortgaged properties, but the decree-holder has under the decree the right to put that to sale if he so desires. The view we are taking is that taken by the High Court of Patna in the case of *Amrit Lal Seal* v. *Jagat Chandra Thakur* (1), and by the majority of the Full Bench of the High Court of Allahabad in the case of *Bholanath* v. *Mt Kishori* (2). We dismiss this appeal under the provisions of O. 41, R. 11, Civil P.C.

P.N./R K *Appeal dismissed.*

(1) A. I. R. 1926 Pat. 202=4 Pat. 696.
(2) [1912] 34 All. 25 = 11 I. C. 646 = 8 A. L. J. 1045.

A I. R. 1929 Rangoon 275(2)

RUTLEDGE C. J., AND BROWN, J.

Ma Bibi and *others*—Appellants.

v.

Abdul Hamead Khan and *others*—Respondents.

First Appeal No 202 of 1928, Decided on 13th June 1929, from decree of Dist. Judge, Tharrawaddy, in Civil Regular No. 8-A of 1928.

Limitation Act, Art. 120—Scope.

It cannot be said that all suits, irrespective of their nature, which are based on an award must be governed by Art. 120 : *A. I. R.* 1921 *Bom.* 399 ; *A.I.R.* 1925 *Bom.* 519 ; 33 *Cal.* 881 ; *A. I. R.* 1923 *Rang.* 108 and *A. I. R.* 1921 *Lah.* 71, *Ref.* [P 276 C 2]

Auzan—for Appellants.

E. Maung—for Respondent 1.

Judgment.—The plaintiff-respondent Abdul Hamead Khan brought a suit against the appellants and the other respondents for possession of a share in an estate. The property in dispute is the estate of Nahiruddin and his wife, Sunni Mahomedans, both of whom died in the year 1914. They left as heirs 6 daughters. The plaintiff-respondent married one of the daughters, Marian Bibi, who died on 9th November 1921. He had two daughters by her and they have both since died, and he now claims under the Mahomedan Law to be entitled to an 11/12th share of Marian Bibi's share in the estate The plaint as originally filed set forth that in the year 1920, the question of partitioning the estate between the heirs was referred to one U Nyein, who made an award.

Under that award, certain lands were apportioned to Marian Bibi but she never in fact got possession of those lands. A house was also awarded to her, and she did get possession of that house, but since her death the plaintiff-respondent has handed the house back to the defendant appellant 1, Ma Bibi. The plaintiff subsequently filed an amended plaint. In that plaint, he again sets forth the award. He gave further details about the house and as regards the paddy land said that Ma Bibi had paid to Marian Bibi the rents and profits of the paddy land awarded to her. It is not disputed that the plaintiff did represent his deceased wife Marian Bibi to the extent of an 11/12th share of her estate. The award by U Nyein was denied and it was contended that the estate was partitioned a year or two before the suit was filed. The defence claims that about a year and half before the filing of the suit there had been a final partition of the estate and that the plaintiff was a consenting party to this partition. It became quite clear, however, in evidence that at this so called partition, the plaintiff was not awarded any share. He has since married another daughter of the deceased, but the share claimed by her is quite distinct from that claimed by the plaintiff as heir of Marian Bibi.

The trial Court found that the so-called award by U Nyein in 1920 had been proved, but that, for some reason which the learned Judge does not make very clear, it was abortive. He held, however, that the plaintiff was entitled to claim his share in the estate irrespective of the award and gave him a decree accordingly. The present appeal has been filed on a number of grounds, but only one ground has been pressed before us, and that is that the suit was barred by limitation. The contention is that the suit was one for enforcing an award, that the article of the Limitation Act applicable to such suits is Art. 120, and that as the award is dated more than 6 years before the filing of the suit, the suit is barred by limitation.

We have been referred to certain rulings, which it is contended to support the view that the suit to enforce an award must for the purposes of limitation be held to be governed by Art. 120. In the case of *Rajmal Girdharlal* v. *Maruti Shivram* (1), a suit was brought to enforce an award. It had been contended that the article of Limitation applicable to such a suit was Art. 113 and that for this reason the suit was barred by limitation. The Court overruled this contention and the learned Chief Justice in his judgment stated that the period allowed was 6 years under Art. 120. He dealt with the matter in these words :

"It seems to be settled now that a suit to enforce an award is a suit not provided by any other article of the Limitation Act. Then the time is 6 years under Art. 120."

There is no discussion of authorities and no further reason given for this decision. The report of the case does not show what was the nature of the award, and the effect of the judgment was that Art. 113 did not apply and that the suit was not barred by limitation. It does not seem to us that this is an authority for the contention that in every case suits which are based on an award must be governed by Art. 120. In a later Bombay case *Nanalal Lallubhai* v. *Chottalal Narsidas* (2) the decision in *Rajmal Girdharlal's* case (1) was followed. In this latter case, the award was for the payment of money and the effect of the decision was that the plaintiff was allowed 6 years within which to file his suit instead of the ordinary 3 years that would have been allowed in a suit for recovery of money due Here again there was no discussion of the principles underlying the decision.

On the other hand the High Court of Calcutta in the case of *Bhajahari Saha Banikya* v. *Behary Lal Basak* (3) held that in a suit brought on an award by an arbitrator declaring the plaintiff's right to land, suit being for the recovery of possession of land was a suit under Art 142 or 144, Lim. Act. This case was followed in the Upper Burma case of *Maung Ne Dun* v. *Maung Cho* (4). Another case which has been cited for the appellants that of *Kartar Singh* v. *Bhagat Singh* (5), is not of much assistance, and it was admitted that in that case Art. 120 was the article applicable.

Now the present case, though as framed it was in part based on an award,

(1) A. I. R. 1921 Bom. 389=45 Bom. 329.
(2) A. I. R. 1925 Bom. 519=49 Bom. 693.
(3) [1906] 33 Cal. 881=4 C. L. J. 102.
(4) A. I. R. 1923 Rang. 108.
(5) A. I. R. 1921 Lah. 71=2 Lah. 320.

was in substance a suit for a share in the estate of a deceased person. If the award was treated as a valid award, it would have the effect of vesting certain rights in immovable property in Marian Bibi and the suit would be one for possession of that immovable property. There is no specific article of the Limitation Act applying to suits for the enforcement of an award. It may be that in many such suits, it would be impossible to say that the suits can be classified under any other article, and, therefore, that Art. 120 applies. But had the legislature intended that in all suits to enforce an award, entirely irrespective of their nature, the period of limitation applicable should be 6 years it is extremely unlikely that a specific article dealing with such suits would not have been inserted in the schedule. Actually the decree as framed is not directly based on the award at all. The trial Court has held the award to be abortive and has merely passed a preliminary decree declaring the plaintiff to be entitled to 11/12th of the share of the deceased wife Marian Bibi in the estate of her parents. And regarded as a suit for a share in this estate, we agree with the learned trial Judge that the suit was not barred by limitation, the finding being to the effect that until quite recently the estate or at any rate Marian Bibi's share of it has been expressly held by Ma Bibi on behalf of the other heirs. We are, therefore, of opinion that the trial Judge was right in holding that the suit was not barred by limitation. No other point has been pressed before us on behalf of the appellants, and we must, therefore, dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 277

MYA BU, J.

Ma Yin and *another*—Appellants.

v.

Ma Bok and *others*—Respondents.

Special Second Appeal No. 89 of 1929, Decided on 15th August 1929, from decree of Dist. Judge, Amherst, in Civil Appeal No. 153 of 1928.

Registration Act, S. 57 (5) — S. 57, Registration Act only shows that when secondary evidence has in any way been introduced as by loss of original document copy certified by Registrar is admissible to prove contents of original — Evidence Act, S. 65 (f).

Section 57, Registration Act, only shows that when secondary evidence has in any way been introduced as by proof of the loss of the original document a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original, that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. But that does not make such a copy a document which may be given in evidence without other evidence to introduce it. [P 278 C 1]

E. Maung—for Appellants.

Darwood—for Respondents.

Judgment.—The appeal turns upon the question as to the admissibility of the document Ex 1 which is a certified copy of a registered deed of gift alleged to have been executed by Ma Bok and Ma Lauk, both deceased in favour of the first appellant and father of the second appellant, on 7th May 1914. Both the Courts below have held on the evidence that the appellants failed to prove the alleged loss of the deed, and this being a pure question of fact, ground 1 set out in the memorandum of appeal is untenable and has not been pressed. The plaintiff respondents' case is that Ma Bok and Ma Lauk made a valid gift of only 1/3 of the land in suit to Maung San Lun by registered deed, but the defendant appellants claim that the whole of the land was given to Maung San Lun.

The appeal has been pressed on the lines indicated in grounds 2 and 3 of appeal The provisions of S. 65 (e), Evidence Act, and of S. 65 (f) read with S. 57 (5), Registration Act, have been relied on in support of these grounds. The general rule as to the proof of documents declared in S. 64, Evidence Act, is that the documents must be proved by primary evidence, that is, by production of the documents themselves, and S. 65 deals with the exceptions to this rule In *Krishna Kishori* v. *Kishori Lal* (1), their Lordships of the Privy Council held that secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for, so as to bring it within one or other of the cases provided in S. 65, Evidence Act. Thus the learned authors of the Law of

(1) [1887] 14 Cal. 486=14 I. A. 71=5 Sar. 18 (P.C.).

Evidence applicable to British India, Sir John Woodroffe and Mr. Amir Ali pointed out at p 508 of the eighth edition, that although there are cases in which secondary evidence is admissible even though the original is in existence and produceable as in the case of Cls. (e) (f) (b) and (g), S. 65, ordinarily, it must be shown that the document is not produceable in the natural sense of the word for this is the general ground upon which secondary evidence is admitted.

With reference particularly to the operation of S. 57 (5), Registration Act or S. 65 (f), Evidence Act, I think it is safe to accept the view expressed in the case of *Harishchunder Mullick* v. *Prosunno Coomer Banerjee* (2), which is to the effect that S 57, Registration Act, only shows that when secondary evidence has in any way been introduced as by proof of the loss of the original document a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original, that is, it shall be admitted without other proof than the Registrar's certificate of the correctness of the copy and shall be taken as a true copy. But that does not make such a copy a document which may be given in evidence without other evidence to introduce it. I see no reason to interfere with the judgment and decree of the Courts below. The appeal is dismissed with costs

P.N./R K. *Appeal dismissed.*

(2) 22 W. R. 303.

A I. R. 1929 Rangoon 278

CARR, J.

Nga Po Ngwe—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 87-B of 1929 Decided on 12th March 1929, from order of Addl. Mag., Taungdwingyi, in Criminal Regular No. 164 of 1928.

(a) Penal Code, S. 227—In case under S. 227 conviction of accused, its date of sentence and fact that accused was granted remission of punishment and the conditions on which remission was granted must be proved by documentary evidence.

In a case under S. 227 the conviction of the accused, its date and the sentence passed should be proved by documentary evidence. Further the facts that the accused person was granted a remission of punishment and that the conditions on which the remission was granted must also be proved by documentary evidence. But the fact that the accused is the person convicted, sentenced and granted remission and that he has committed a breach of a condition of remission may be proved by oral evidence. The Magistrate should not overlook the requirements of documentary evidence and the accused should not be questioned at all until proper evidence is on the record. [P 278 C 2]

(b) Burma Act (3 of 1928), S. 2—Scope—Penal provision has no retrospective effect—Interpretation of Statutes.

Section 2 has no retrospective effect. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. [P 279 C 1]

Judgment.—The respondent, Nga Po Ngwe, has been convicted under S. 227, I. P. C., of a breach of a condition of remission of punishment, and has been sentenced under that section and S. 2, Burma Act 3 of 1928, to nine months' rigorous imprisonment. The unexpired portion of his original sentence was found to be four months and 26 days

In a case under S. 227, Penal Code, it is necessary to prove the following :

1. That the accused person has been convicted and sentenced. The conviction and its date and the sentence passed should under Chap 5, Evidence Act, be proved by documentary evidence, that is by the judgment in the case. The judgment being a public document it may, under S. 65 (e), Evidence Act, be proved by a certified copy. But oral evidence to prove it is not admissible.

2 That the accused person was granted a remission of punishment. This again must be proved by documentary evidence that is, by the order granting the remission Here also a certified copy of the order is admissible, but no other form of secondary evidence

3. The conditions on which the remission was granted. This again is provable only as above, i.e., by a certified copy of the order of remission The bond executed by the accused should also be put in, or a certified copy of it.

4. The fact that the accused is the person convicted, sentenced and granted remission must be proved, and for this oral evidence is admissible.

5 The fact that the accused has committed a breach of a condition of the remission This may also be proved by oral evidence, but obviously no breach can be proved until the condition itself has been proved as set out in head 3 above.

The trying Magistrate has overlooked all the requirements of documentary evil

dence and allowed everything to be proved by oral evidence. But as the accused admitted all the facts I think it would be hypercritical to interfere on this ground, though properly the accused should not have been questioned at all until proper evidence of the facts was on the record. A further point arises in the case. The alleged breach of condition was committed before Burma Act 3 of 1928 was passed. It was contended by the accused that therefore he could not be sentenced under that Act but the Magistrate overruled that contention, though he gave no good reason for doing so. On the ordinary principles of penal legislation a penal provision does not have retrospective effect. The wording of S. 2, Burma Act 3 of 1928 is somewhat peculiar. It reads :

"Whoever is convicted of absconding in violation of a condition of a remission of punishment under S. 227, Penal Code, shall in addition to the punishment prescribed by that section, be punished by the convicting Magistrate with rigorous imprisonment for a term which may extend to one year."

This suggests that it is incumbent on the Magistrate to add some term of imprisonment to that prescribed by S 227, though the length of the term to be added is within his discretion. This point, however, is not of importance in the present case.

If the section were worded in the ordinary way that is, if it began: "Whoever absconds in violation of a condition ....." I think there can be no doubt that it would not have retrospective effect, and that the additional sentence passed on the accused in this case was illegal. But the wording "Whoever is convicted of absconding ....." makes it arguable that S. 2, Act 3, applies to anyone convicted before the Act came into force and not only to an offence committed after that date. This interpretation, however, is so contrary to the accepted principles of penal legislation that I think it would be unsafe to accept it on grounds no stronger than are to be found in the section. I am not prepared, therefore, to hold that the section has retrospective effect. I therefore reduce the sentence passed on Nga Po Ngwe to one of rigorous imprisonment for 4 months and 26 days.

P.N./R.K. *Sentence reduced.*

A. I. R. 1929 Rangoon 279

CARR, J.

Nga Mya—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 86-B of 1928, Decided on 12th March 1928, for review of order of 3rd Addl. Magistrate of Taungdwingyi, in Criminal Regular No. 159 of 1928.

Penal Code, S. 227 and Burma Act (3 of 1928), S. 2—Magistrate sentencing person, convicted under S. 227, Penal Code, and S. 2, Burma Act, for period in excess of his powers—Such sentence is illegal.

There is nothing in either S. 227, Penal Code or Burma Act to empower any Magistrate to pass a sentence in excess of that which he is empowered under the Criminal P. C., to pass. Thus if a Magistrate sentences a person, convicted under S. 227 of the Code, and under S. 2, Burma Act, for a period which is in excess of his power, the sentence is illegal. [P 279 C 2]

Judgment.— The respondent Nga Mya has been convicted under S. 227, Penal Code and sentenced under that section and S. 2, Burma Act 3 of 1928, to rigorous imprisonment for two years, eight months and six days. The Magistrate who passed this sentence has ordinary 1st class powers and the maximum term of imprisonment that he can impose for one offence is two years. The sentence is, therefore, illegal. There is nothing in either S. 227, Penal Code or Burma Act 3 of 1928 to empower any Magistrate to pass a sentence in excess of that which he is empowered under the Criminal Procedure Code to pass. The conviction and sentence passed on Nga Mya are set aside and it is ordered that he be retried by a competent Magistrate.

This case is similar to the same Magistrate's Criminal Regular No. 164 of 1928 in that oral evidence has wrongly been admitted to prove the fact and particulars of the accused's conviction and the fact and conditions of the grant of a remission of sentence. I have explained in my order in *Nga Po Ngwe* v. *Emperor* (1) which is a review of that case, the nature of the evidence required in cases under S. 227, I. P. C. The Magistrate who retries this case should see that proper evidence is produced He should also in passing sentence, if the accused is convicted, take into consideration the imprisonment

(1) A. I. R. 1929 Rang. 278=7 Rang. 355.

suffered by the accused under the sentence that is now set aside.

P N./R.K. *Conviction set aside.*

A. I. R. 1929 Rangoon 280

HEALD AND MYA BU, JJ.

Maung Shwe An—Applicant.

v.

Ma The Nu and *others*—Respondents.

Civil Misc. Appln. No. 66 of 1928, Decided on 13th February 1929, from a judgment of a Rangoon Bench in First Appeal No. 210 of 1927.

(a) Transfer of Property Act, S. 54 — Mortgagor transferring mortgaged property by report, to revenue authorities, of sale— No registered conveyance—Mortgagee can successfully defend suit for redemption— Part performance — Mortgagor and Mortgagee.

A person's admission that he is a party to the transaction which is proved by a report to the revenue authorities but not by a registered document to have been an outright transfer in satisfaction of a mortgage debt debars him from alleging that he is not bound by the transaction and though the transaction does not convey a good title to the mortgagee the transfer not being effected by registered deed as required by S. 54, still it is a good defence to the suit to redeem the property. *A. I. R.* 1924 *Rang.* 214 (*F. B.*), *A. I. R.* 1923 *Rang.* 125, *A. I. R.* 1927 *Rang.* 33, *A. I. R.* 1925 *Rang.* 119 and *A. I. R.* 1926 *Rang.* 81, *Rel. on.* [P 281 C 1, 2]

(b) Civil P. C., S. 110 — "Material question of law" explained.

Where a law on a particular point does not seem to have ever been laid down by the Privy Council, the question does not cease to be a material question of law merely because cases involving somewhat similar points have been dealt with by the Privy Council so as to disentitle a party to leave appeal to Privy Council *A. I. R.* 1928 *All.* 61, *Dist.*; 24 *Mad* 377; *A. I. R.* 1914 *P. C.* 27; *A. I. R.* 1916 *P. C.* 139 and *A. I. R.* 1924 *Rang.* 214 (*F. B.*), *Ref.* [P 281 C 2, P 282 C 1]

Ba Thein (2)—for Applicant.

Anklesaria—for Respondents.

Judgment.— Petitioner applies for leave to appeal to His Majesty in Council against a judgment of a Bench of this Court which on appeal from a decree of the District Court of Amherst dismissing petitioner's suit affirmed the decision of the District Court. Petitioner valued the property which is the subject-matter of the suit at Rs. 10,000 when he first filed the suit and at Rs. 13,000 when he gave evidence, and it is not suggested by the respondents that the value of the subject-matter in dispute in the suit and in the appeal to this Court and in the proposed appeal to His Majesty in Council is less than Rs. 10,000. Petitioner claims that the proposed appeal involves a substantial question of law because, as he alleges, the judgment of this Court recognized as valid an oral transfer of immovable property and such recognition contravenes the provisions of S. 54, T. P. Act, which provides that a sale of immovable property worth Rs 100 or more can be made only by registered instrument

In his original plaint, a copy of which (Ex. 12) is on the District Court's record petitioner alleged that in 1909 by registered deed he made a simple mortgage of the lands in suit in favour of one Ma Son and her two sons San Ye and Tun Hlaing, that in 1917 he put the mortgagees into possession of the lands on an agreement that the rents and profits should be taken by them in lieu of interest and that he was entitled to recover the lands from the mortgagees or their heirs and legal representatives on payment of the original mortgage money without interest. The defence was that the transaction of 1917 was not as petitioner alleged, a conversion of a simple mortgage into a possessory mortgage but was an outright transfer of the mortgaged properties to the mortgagees in satisfaction of the mortgage debt.

Petitioner admitted that profits of the lands were only sufficient or barely sufficient to pay the interest due on the mortgage and the Government revenue and that he allowed his brother Kya Baw to work the lands taking nothing from Kya Baw by way of rent or profits. It appeared from the official land records registers that about 1915 a report of a transfer of the lands by petitioner to Kya Baw was made to the revenue authorities and that in the registers for the year 1915-16 the lands were transferred from petitioner's name to Kya Baw's name as owner. It appeared also from the official registers that in 1917 the lands were transferred outright by Kya Baw to San Ye and Tun Hlaing for Rs. 4,000 the transaction being reported to the revenue authorities as a sale, that being the usual form of report in this country when mortgaged properties are transferred to

the mortgagees in satisfaction of the mortgage debt. There was some evidence that the petitioner himself took part in this transaction, and although the trial Court rejected that evidence it must be remembered that in his original plaint petitioner himself said that it was he who transferred the lands to the mortgagees. It seems clear therefore that petitioner took part in the transaction of 1917 and that that transaction instead of being, as he alleged, a mere putting of the mortgagees into possession under an agreement that they should take the rents and profits in lieu of interest was in fact intended to be an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt. The only difference between this case and many similar cases which come before this Court is that the person who made the transfer to the mortgagees in this case, as shown by the entry in the land records registers, was petitioner's brother Kya Baw and not petitioner himself. But petitioner had admittedly allowed his brother to deal with the lands as owner and had allowed them to stand in his brother's name as owner for several years, and on his own statement in the plaint he was a party to the transaction of 1917. In these circumstances the trial Court found that petitioner could not be allowed to repudiate the transaction of 1917 which was proved to be in intention though not in law an outright transfer of the lands to the mortgagees in satisfaction of the mortgage debt. Petitioner appealed to this Court on the ground that the lower Court should not have recognized the transfers of the lands by him to Kya Baw and by Kya Baw to San Ye and Tun Hlaing because those transfers were not effected by registered deed.

This Court said that petitioner's admission that he was a party to the transaction of 1917, which was proved to have been an outright transfer in satisfaction of the mortgage debt, debarred him from alleging that he was not bound by that transaction, and that although that transaction did not convey a good title to San Ye and Tun Hlaing, nevertheless it was a good defence to petitioner's suit to redeem the property. That decision was based on a long line of decisions of this Court that an agreement to sell, which is inherent in the execution of a conveyance which was not registered, or in a report of an outright sale made by the vendor to the revenue authorities with a view to mutation of names, is a good defence to a suit for possession of the property brought by the legal owner. That view of the law is settled, so far as this Court is concerned, by the Full Bench cases of *Myat Tha Zan* v. *Ma Dun* (1) and *Ma Ok Kyi* v. *Ma Pu* (2) and has been adopted in numerous cases of which the following are examples, namely, *Shwe Hmon* v. *Tha Byaw* (3), *Ma Ma E* v. *Maung Tun* (4) and *Tun Bye* v. *Maung Kya* (5).

Petitioner's learned advocate asks us to give leave to appeal to His Majesty in Council on the ground that all those cases have been wrongly decided in that they recognize as valid transfers which are declared by S. 54, T. P. Act, to be invalid. Respondent's learned advocate refers us to the case of *Mathura Kurmi* v. *Jaydeo Singh* (6) as laying down that the application of well defined legal principles to a particular set of facts does not raise any question of law which can fairly be described as substantial, but in quoting that case the learned advocate has omitted certain important words. The Bench qualified the generality of the statement quoted by the words " in these circumstances," the circumstances in that case being that the matter had been agitated time and again before their Lordships of the Privy Council, who had repeatedly laid down the law in the sense in question. In the present case the law does not seem ever to have been laid down by their Lordships of the Privy Council. There are certain cases in which their Lordships have dealt with somewhat similar points, namely, the cases of *Immudipattan* v. *Peria Dorasami* (7) *Mahomed Musa* v. *Aghore Kumar Ganguli* (8), and *Sheo Go* v. *Maung*

(1) A. I. R. 1924 Rang. 214=2 Rang. 285 (F. B.).
(2) A. I. R. 1927 Rang. 33=4 Rang. 368 (F. B.).
(3) A. I. R. 1923 Rang. 125=11 L. B. R. 462.
(4) A. I. R. 1925 Rang. 119=2 Rang. 479.
(5) A. I. R. 1926 Rang. 81=3 Rang 603.
(6) A. I. R. 1928 All. 61=50 All. 208.
(7) [1900] 24 Mad 377=28 I. A. 46=7 Sar. 811 (P. C.)
(8) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).

In (9)., but in thoe cases, as was pointed out in the case of *Myat Tha Zan* v. *Ma Dun* (1) the question of precise effect of the provisions of S 54, T. P. Act, was not material to the decision In these circumstances we are unable to hold that the decision in *Mathura Kurmi's* case (6) applies to the facts of the present case.

The question whether the cases in this Court mentioned above and similar cases decided in the other High Courts of India were rightly decided is clearly a question of law and in view of the number of such cases occurring in this country and the importance of the legal principles involved it seems to us to be a material question of law. We therefore grant a certificate that as regards amount or value and nature the case fulfils the requirements of S. 110 of the Code. Costs in respect of this application will abide the final desision of the appeal, advocate's fee in this Court to be five gold mohurs.

P. N./R.K. *Application granted.*

(9) A. I. R 1916 P. C. 130=44 Cal. 542=44 I. A. 15 (P.C.).

A. I. R. 1929 Rangoon 282

HEALD AND MYA BU, JJ.

Maung Po Mya —Appellant.

v.

Ma Hla and *others*—Respondents.

First Appeal No. 273 of 1928, Decided on 29th April 1929, from judgment of Dist. Judge, Hanthawaddy, in Civil Regular Suit No. 34 of 1928.

(a) Buddhist Law (Burmese)—Succession —Orasa son taking his share on father's death—He cannot inherit in remainder on death of surviving parent when she leaves children.

Where there is a child of the family surviving the last dying spouse, the orasa who has taken a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent ; 1 *L. B. R.* 50, *Affirmed* ; 8 *L. B. R.* 501 ; *A. I. R.* 1924 *Rang.* 71 and *A. I. R.* 1926 *Rang.* 23, *Ref.* [P 284 C 1]

(b) Buddhist Law (Burmese) — Text — Manugye.

Where Manugye is not ambiguous, other Dhammathats need not be referred to : *A. I. R.* 1914 *P. C.* 97, *Foll.* [P 283 C 1]

Ba Maw—for Appellant.

Po Han and *On Thwin*—for Respondents.

Mya Bu, J —Appellant Maung Po Mya was the eldest born child of a Burman Buddhist couple U Pu and Ma Gyi who had two younger children Ma Hla, respondent 1, and Maung Than, the father of respondents 2 and 3 U Pu died in 1920 and Po Mya claimed and obtained his quarter share in the estate of the parents as the orasa son. Maung Than died in 1923. In 1928 Ma Gyi died. Maung Po Mya now sues for administration and partition of the estate of Ma Gyi, claiming 11/24ths share of the estate as against his sister and the children of his deceased brother The estate left behind by Ma Gyi consists entirely of the joint property of herself and U Pyu. The defence is that as the appellant took his quarter share as orasa son on the death of U Pu he is not entitled to claim any share in the estate left by Ma Gyi.

The question for decision is whether an orasa son after taking his quarter share on the death of the father retains any right to inherit in the remainder of the estate on the death of the mother The case of *Maung Hmu* v. *Maung Po Thin* (1), is an authority showing that the orasa son in such a case retains no further right, and if it still remains good law, then the question must be answered in the negative The decision in that case was to the effect that the orasa son after having taken his quarter share of the estate of his deceased father retained no right to any further future partition of, or any right in, the remainder of the estate. This decision was based on the Dhammathats collected in S. 30 of Kin Wun Mingyi's Digest and on the ruling in *Ma On* v. *Ko Shwe O* (2), where it was held inter alia that on the death of one of the parents the eldest son or daughter may claim his or her share and the remainder of the property vests in the surviving parent for himself or herself and the remaining children. *Ma On's* case (2), has now been overruled by a Full Bench of the Chief Court of Lower Burma in *Ma Sein Ton* v. *Ma Son* (3),

(1) [1900] 1 L. B. R. 50.
(2) [1872-1892] L. B. R. 378.
(3) [1915] 8 L. B. R. 501=30 I. C. 588=8 Bur. L. T. 903 (F.B.).

which, however, does not deal with the question as to whether an orasa son after having taken his quarter share on the death of his father is entitled to claim a further share in the joint property on the death of the mother, but simply strengthens the widow's right of disposal over the remaining three-quarter share.

In the case of *Ma Toke* v. *Ma U Le* (4), in which the question was whether partition having been effected between the surviving parent and the children on the remarriage of the surviving parent, the children of the first marriage could claim any further share in the lettetpwa property of the surviving parent and his second spouse, the ruling in *Maung Hmu's* case (1), was referred to. One of the texts collected in S. 30 of Kin Wun Mingyi's Digest is an extract from the Manugye which corresponds to Manugye —Book 10—S. 5, which deals with the partition between the mother and sons on the death of the father and states after detailing the personal belongings of the father which go to the eldest son and those of the mother which go to her:

"Let the residue be divided into four parts of which let the eldest son have one, and the mother and younger children three"

This clearly indicates that after the orasa's claim to a quarter share has been satisfied the only other persons having an interest in the remainder are the mother and children other than the orasa although the interests of such children, according to settled law, are not vested until the death of the mother.

Their Lordships of the Privy Council have laid down in *Ma Hnin Bwin* v. *U Shwe Gon* (5), that where the Manugye is not ambiguous other Dhammathats do not require to be referred to, and I do not think that it is necessary for the purpose of the present case to refer to the other Dhammathats in S. 30 of the Digest which I may, however, say do not introduce anything inconsistent with the rule enunciated by Manugye, Book 10, S. 5 Further support to the view that the orasa son having taken his quarter share on the death of the father is not entitled to a further share on the death of the mother, is gained from S. 155, of the Attasankhepa Vannana Dhammathat compiled by the Kinwun Mingyi who was also the author of the Digest and who during regime of the last two Burmese Kings and for many years after the annexations until his death was the greatest living authority on Burmese Law and Literature and whose opinion is therefore very reliable.

For these reasons it is in my opinion safe to uphold the ruling in *Maung Hmu's* case (1) except where it speaks of the right of pre-emption, which is contrary to the ruling of the Full Bench of the Chief Court of Lower Burma in *Maung Ye Nan O* v. *Aung Myat Sari* (6).

The learned counsel for the appellant relies on the obiter dictum in *Maung Po San* v. *Maung Po Thet* (7) which is to the effect that even if the orasa has taken his quarter share on the death of one parent or on the remarriage of the surviving parent, he is still entitled to claim a share on the death of the surviving parent or on the death of the step-parent, unless separation from the family is proved or is to be presumed.

According to my experience of the modern practice an orasa child who has taken a quarter share on the death of the parent of the same sex does not usually act up to the old notions of continuing in the family looking after the family estate and the younger children; and there is no reason why an orasa child who has actually taken a quarter share from the surviving parent and lives separately as in this case, should not be regarded as having been separated from the surviving parent and the younger children. It is contended that the orasa child gets his or her quarter share on the death of the parent of the same sex because of the special and outstanding position that such child occupies in the family, and therefore such share should be regarded as a reward and should not be taken into consideration in the final division of the estate on the death of the surviving parent. Bearing in mind the fact that the orasa child is given the right to claim a quarter share on the death of the parent of the same sex while other children are not entitled to claim anything till the death of the surviving parent, which is in itself a special privilege, the contention that the actual share—not merely the right—is given as a reward appears to

(4) A. I. R. 1924 Rang. 71=1 Rang. 47.
(5) A. I. R. 1914 P. C. 97=41 Cal. 887=41 I. A. 121 (P. C.).
(6) [1915] 8 L. B R. 466=31 I. C. 512=8 Bur. L T. 167.
(7) A. I. R. 1926 Rang. 23=3 Rang. 438.

me to be quite untenable. The learned counsel points out that according to the texts mentioned in S. 149 and the allied sections of the Digest, the orasa child has a right to participate in the inheritance along with other children on the death of the surviving parent. But there is nothing to show and it does not appear that the references to the orasa in the text relate to the orasa child who has taken a quarter share on the death of one of the parents.

It is possible that in spite of the fact that an orasa child has obtained a quarter share of the parental estate from the surviving parent on the death of the parent of the same sex, he or she may be allowed to inherit on the death of the surviving parent where no other child survives. But it is in my opinion clear that where there is a child of the family surviving the last dying spouse the orasa who has taken a share of the parental estate from the surviving parent on the death of the parent of the same sex, does not retain any right to a further share in the partition of the remainder of the estate on the death of the surviving parent. For these reasons I would dismiss the appeal with costs

Heald, J.—I concur.

P.N./R.K. *Appeal dismissed.*

A. I R. 1929 Rangoon 284

HEALD, OFFG., C. J. AND MYA BU, J.

Ma Zaw May—Appellant.

v.

Maung Ba U—Respondent.

Misc. Appeal No. 103 of 1929, Decided on 6th September 1929, against order of Dist. Judge, Thaton in Misc. Case No. 19 of 1929.

Buddhist Law (Burmese) — Guardian and Ward.

A mother's sister is a preferential guardian to a putative father or stepfather when the estate belonged to the minor's deceased father. [P 284 C 2]

Janab Ali—for Appellant.

Shwe Thwin—for Respondent.

Judgment.—Shwe Ya and Ma Ngwe U were husband and wife They lived together for many years, but had no children. Some 10 years or more ago, Shwe Ya, who must have been well over 70 years of age, married Ma Wut, a girl of about 20 who had been living with them as a servant. Not long afterwards, the present respondent Ba U came to live in their house as a clerk. Ma Wut conceived four times, while she was married to Shwe Ya. One conception was abortive, and two of the children died soon after birth, but the last child, a girl Ma Thu was born five months and 13 days after Shwe Ya's death, and is still alive. There is a strong presumption that this child was conceived while Shwe Ya was alive and that it was his child Shwe Ya died in July 1924, and thereafter his widow, Ma Wut and the clerk Ba U lived together as husband and wife. They had no children. Shwe Ya's estate was admittedly worth of Rs. 1,00,000 or more, and the minor Ma Thu as his daughter would be entitled to claim partition by reason of her mother's remarriage, and would also be entitled to claim a share of inheritance from Ba U, if he was her stepfather.

The appellant Ma Zaw May is Ma Wut's own sister, and she claims to be appointed guardian of the person and property of her minor niece Ma Thu. Her object is doubtless to file a suit on behalf of the minor against Ba U. Ba U objects to her appointment as guardian on the ground that he is in fact Ma Thu's father, having had adulterous intercourse with her mother Ma Wut during Shwe Ya's lifetime. The learned Judge in th lower Court said that he was inclined to hold that Ma Thu was not begotten by Shwe Ya, but was begotten by Ba U. For this reason he dismissed appellant's application to be appointed guardian.

It seems to us that it is unnecessary for the purposes of these proceedings to decide whether or not Ba U is in fact the father of Ma Thu because even if he was her father that fact would in the circumstances of the case give him no right to be guardian of either her person or her property It is quite clear that his interests are adverse to hers, and we are of opinion that appellant who is admittedly the sister of the minor's mother ought to have been appointed guardian of the minor's person and property. Respondent's learned advocate suggests that her antecedents are such as to disqualify her from appointment, but respondent's own antecedents are none of the best and in view of the appellant's admitted relationship to the minor, we think that she

may reasonably be appointed, provided of course, that she gives security for the full value of the property, which she may be expected to recover on the minor's behalf. We therefore set aside the order of the lower Court and direct that appellant be appointed guardian of the person and property of her minor niece Ma Thu on giving such security as may be fixed by the lower Court. The respondent will pay appellant's costs in both Courts. Advocate's fees in this Court to be five gold mohurs.

P N./R.K. *Order set aside.*

A. I. R. 1929 Rangoon 285

HEALD, OFFG., C. J. AND CHARI, J.

U Oh—Appellant.

v.

U Shwe Thaung—Respondent.

Letters Patent Appeal No. 96 of 1929, Decided on 26th August 1929, from decree of Rangoon High Court in Second Appeal No. 492 of 1928.

(a) Civil P. C., O. 2, R. 2—O. 2, R. 2, is no bar if cause of action in subsequent suit is different from one in earlier suit.

In an earlier suit the claim was based on the conveyance and the cause of action was the discrepancy between the area of the land as mentioned in the conveyance and the actual area of the land. In the subsequent suit the cause of action was an alleged failure to convey the land agreed to be conveyed, the land being land different from the one mentioned in the conveyance and the claim was based not on the conveyance but on the agreement to convey.

Held: that such subsequent suit could not be barred by operation of O. 2, R. 2. [P 287 C 1]

(b) Buddhist Law (Burmese)—Agreement by husband to convey land jointly belonging to him and his wife—Consent of wife not obtained—Claim for specific performance cannot succeed—Specific Relief Act, S. 28.

If a Burmese Buddhist agrees to convey land jointly belonging to him and his wife without obtaining her consent, suit for specific performance of such agreement cannot be obtained as the husband is not competent to alienate land without obtaining wife's consent. [P 287 C 1]

F. S. Doctor—for Appellant.

E. A. Villa—for Respondent.

Judgment.—Respondent who is a man of between 70 and 80 years of age, had a number of children by his first wife, and appellant who is nearly 50 himself is one of those children. About 1925, respondent married a young wife and the children by the first wife claimed partition of property. Respondent's lands were mortgaged for Rs 7,760 and so in April 1926, it was arranged that the children or some of them should buy the properties from him at the full market price, that the sale proceeds so obtained should be used to pay off the mortgage, that the father should have half of what was left after the mortgage had been paid off and that the children should share the other half between them, the price actually payable by children who bought property being reduced by the amount of the share payable to them under the arrangement. In accordance with that arrangement appellant agreed to buy certain lands for Rs. 10,000 and a conveyance of a certain holding of paddy land to him for that amount was executed and duly registered. That holding was described in the conveyance as holding No. 15 of 1925-26 in Ngamonchaun Kwin, measuring 28.82 acres, those particulars being copied into the conveyance from the tax ticket for 1925-26 but in copying the figures a mistake is made, and the figures 26.82 were read as 28.82, figures for 6 and 8 in Burmese script being easily mistaken for each other.

On discovering the mistake appellant sued his father to recover either the supposed deficiency of the two acres or Rs. 700 as being the price of the 2 acres, which as he alleged he had overpaid, but his suit was dismissed on the ground that he was himself in possession of all the tax receipts for the previous years, which showed the area as 26.82 acres, that he admitted that he knew before the conveyance was executed that the area of the land was in fact only 26.82 acres, and not 28.82 acres and that he had not been prejudiced by the mistake in the conveyance, because he knew the holding which he was buying and had got exactly what he intended to buy. Long before the suit was filed appellant was already in dispute with his father about another matter which as he alleged arose out of the same agreement to buy from his father certain lands for Rs. 10,000.

Adjoining the holding of 26.82 acres there was an extension into State waste land which had been made by his father apparently during the year 1925, but which was said not to have been assessed to revenue at the time when the conveyance was executed. That extension was assessed to revenue in the name of the

father and the new wife as a separate new holding namely holding No. 4 of 1927-28 of 10.38 acres. It does not appear when that holding was first assessed to revenue, but it seems probable that it was at about the time of the conveyance of the 26 82 acres holding to appellant. Appellant claimed that although that holding was not included in the conveyance it was intended that he should receive it along with the 26.82 acre holding, and he attempted to take possession of it, with the result that the new wife prosecuted him for criminal trespass. He replied by prosecuting his father for cheating and his father and the new wife together for mischief.

The basis of the charge of cheating, which it may be noted was made on 23rd June 1926, the date of the conveyance being the 24th April 1926, was that his father had fraudulently and dishonestly induced him to buy the 26.82 acre holding by representing that the adjoining extension which the father had cleared and prepared for cultivation during the previous year but which according to his father had not yet been assessed to revenue, would pass to him along with the 26 82 acre holding. He said that the reason for his paying so much as 350 per acre for the holding mentioned in the conveyance was that it was agreed that he should get also the adjoining holding of 10.38 acres thrown in at the same price. The basis of the charge of mischief, which was made on 9th July 1926, was that his father and the new wife had damaged the growing paddy planted by him on the 10.38 acre holding. All these criminal proceedings were abortive, appellant's charge of cheating being classified as false, and his complaint of mischief being dismissed without trial. Appellant's suit for the recovery of the two acres of land or Rs. 700 which was instituted on 3rd September 1927 having been dismissed on 5th December 1927, he instituted the present suit on 16th January 1928.

In his plaint in this suit he alleged that his father agreed to sell him both the 28.82 acre holding and the 10 38 acre holding for 10,000 agreeing to convey the former holding forthwith and the latter after it had been assessed to revenue, that the former holding was duly conveyed to him, the whole consideration for the sale of the two holdings being entered in the conveyance as the consideration for that holding, that his father had failed to convey the latter holding, and that he was entitled to a decree for a conveyance of it and for mesne profits, which he assessed at 600. The father denied that he ever agreed to sell the 10.38 acre holding and said that if he had agreed to sell it there was no reason why it should not have been included in the conveyance, because it had actually been assessed to revenue and the tax ticket for it had issued before the conveyance was executed He pleaded that the suit was barred by reason of the former suit in which the appellant had claimed either the two acres of land or its value. He also pleaded that appellant could not be allowed to vary the terms of the conveyance by oral evidence to show that although only the 26 82 acre holding was mentioned in the conveyance, the 10.38 acre holding was also intended to be conveyed.

The trial Court found that the respondent did agree to sell both the holdings for 10,000, that no conveyance of the 10.38 acre holding was executed because respondent's rights in it were those of a mere "squatter" and land alienated by a squatter is liable to be resumed by Government, and that S. 92, Evidence Act, did not prevent appellant from proving that the 10.38 acre holding was included in the agreement for sale. The learned Judge regarded the pleading that the present suit was barred by the previous suit as being a pleading of res judicata, and finding that the subject matter of the present suit was not res judicata by reason of the earlier suit, gave appellant a decree for a conveyance of the 10.38 acre holding and for mesne profits. Respondents appealed but the lower appellate Court accepted the findings of the trial Court and dismissed his appeal with costs.

Respondent then came to this Court in second appeal, and the learned Judge who dealt with this case was of opinion that the present suit was barred by the operation of O. 2, R. 2, on the ground that the present claim ought to have been made in the earlier suit. The matter now comes before us as an appeal under S. 13 of the Letters Patent on a declaration of the Judge who passed the judgment that the case is a fit one for appeal. It seems

to us clear that the decision of the learned Judge was mistaken, because the cause of action in the earlier case was the discrepancy between the area of the land as mentioned in the conveyance and the actual area of the land, the claim being based on the conveyance itself, whereas in the present case the cause of action is an alleged failure to convey the land agreed to be conveyed, that land being land different from the land mentioned in the conveyance and the claim is based not on the conveyance but on the agreement to convey.

What appellant claims in the present suit is specific performance of an agreement to convey the 10.38 acre holding to him, but that claim cannot succeed because it is clear from appellant's own admissions that that land was acquired by his father after his marriage to his present wife, so that it belongs to the father and the stepmother jointly, and the father could not alienate it without the consent of the stepmother It is clear that the stepmother did not consent to the alienation, since she prosecuted appellant for trespass as soon as he attempted to enter into possession of the land. The case is therefore not one in which the Court would decree specific performance, and appellant must be left to such other remedies as may be open to him In this connexion we may note that in our opinion appellant would be well advised to let matter rest where it is, and not to embark on any further litigation which it is certain to be costly and likely to be infructuous. The appeal is dismissed, and in the circumstances of the case the parties will bear their own costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 287

RUTLEDGE, C. J., AND BROWN, J.

Ah Kway—Appellant.

v.

Administrator-General, Burma, and *another*—Respondents.

Civil Misc. Appeal No. 51 of 1929, Decided on 8th April 1929, from order of Original Side in Civil Regular No. 663 of 1928.

Arbitration Act, S. 19—Order refusing to stay proceedings under S. 19 is not appealable not being judgment under Letters Patent (Rangoon), Art. 13.

If an application is made to the Court under the provisions of S. 19 and the Court after hearing the parties on the application passes an order refusing to stay proceedings, the order is not a judgment within the meaning of Art. 13, Letters Patent and is not appealable : *C. M.* 82 *of* 1925 *Cons.* 47 *Cal.* 611, *not Foll.*, *A. I. R.* 1929 *Rang.* 41 (*F.B.*), *Rel. on.* [P 289 C 1]

N. M. Cowasjee—for Appellant.

K. C. Bose and *P. B. Sen*—for Respondents

Judgment.—The respondent to this appeal is the Administrator-General of Burma as administrator of the estate of one Lee Woot Hong, deceased. He brought a suit on the Original Side of this Court against the appellant, Ah Kway for a declaration as to the share to which Lee Woot Hong's estate is entitled in a partnership business carried on with the appellant, for the taking of accounts and for the winding up of the partnership. Subsequently the respondent 2, Lee Way Pein, was added as a defendant to the suit in his claiming that he was a subsisting partner. Ah Kway did not file a written statement but made an application to the Court under the provisions of S 19, Arbitration Act, asking for a stay of proceedings. After hearing the parties on this application, the trial Judge passed orders refusing to stay proceedings and Ah Kway has now filed an appeal against this order.

It is contended on behalf of respondent 1 that no appeal lies and reliance is placed on the Full Bench ruling of this Court in the case of *P. K. P. V. E. Chidambaram Chettyar* v. *N. A Chettyar Firm* (1) It has been suggested on behalf of the appellant that we should not follow this Full Bench decision because a different view of the law was taken by their Lordships of the Privy Council in the case of *Sooniram Jeetmul* v. *R. D. Tata & Co.* (2) In that case a suit was brought on the original side of this Court and an objection was taken that the suit was not within the local jurisdiction of the Court. The trial Court overruled the objection and proceeded to deal with the case on the merits. An appeal against this decision was filed before a Bench of this Court, and the Bench held that an appeal did

(1) A. I. R. 1929 Rang 41=6 Rang. 703 (F.B.).

(2) C. M. No. 82 of 1925.

lie, but, eventually, dismissed the appeal on the merits. The defendants then applied to the Privy Council for special leave to appeal against the order of the Bench and special leave was given. The order granting special leave to appeal records that counsel had been heard in support of the application and in opposition thereto. If no appeal had lain in the first instance to a Bench of this Court that would have been a complete answer to the application for special leave to appeal to the Privy Council It is contended therefore that the order of their Lordships admitting the appeal involved a finding that an appeal from the trial Judge to the appellate Bench did lie. We are unable, however, to accept this contention. In the order admitting the appeal there is no reference whatsoever to the question whether an appeal had lain in the first instance from the order of the trial Judge. The Privy Council finally decided the case against the appellants. Their judgment is reported [*Soni Ram* v *Tata & Co, Ltd.* (3)]. There is no reference in their judgment to the question whether an appeal lay in the first instance from the order of the trial Judge. The appeal was dismissed on the merits and the respondents were not called on for a reply. It is quite clear, therefore, that at the hearing of the appeal the question whether an appeal had lain from the trial Judge was not considered. The order admitting the appeal did not involve any finding on any question in dispute. The final result of the appeal was against the appellants and we are unable to hold that the order of their Lordships of the Privy Council involved any finding on the question whether an appeal did lie in the first instance from the order of the trial Judge.

Reference has also been made on behalf of the appellant to the case of *Joylall & Co.* v. *Gopiram Bhotica* (4). In that case a Bench of the Calcutta High Court did decide that an appeal would lie from an order refusing to stay proceedings under S. 19, Arbitration Act. That is clearly an authority in favour of the view that the present appeal lies but it appears to us to be in conflict with the decision in the Full Bench case of *Chidambaram Chettiar* (1). In that case Ormiston, J., wrote a long judgment in which he discussed exhaustively the previous authorities on the point. The question referred for the decision of the Full Bench was :

" whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not as a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Art. 13, Letters Patent. "

The five Judges who composed the Bench were unanimously of opinion that the question referred should be answered in the negative.

At pp 709 and 710 in his judgment, Ormiston, J., sets forth three criteria which had been suggested as means for determining whether or not an order is appealable within the meaning of Cl. 13. On p. 710, he states as follows :

" The first is that adopted by the Madras High Court in 1868, where a judgment is stated to have the meaning of 'any decision or determination affecting the rights or the interest of any suitor or applicant' : The second is that adopted by the Calcutta High Court in 1872, and which on very many occasions has been described as classical. According to this view, 'judgment' means 'a decision which affects the merits of the question between the parties by determining some right or liability' and it is immaterial whether it is final, or merely preliminary or interlocutory . . . The third criterion . . . which may be described in contradistinction to the others as the modern view, being that laid down by the Chief Justice of the Madras High Court in 1910, and adopted by the late Chief Justice of this Court in 1924. According to this view, the test is whether or not the effect of the adjudication is to put an end to the suit or proceedings so far as the Court before which the suit or proceedings is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding ; if it has this effect the adjudication is a judgment ; otherwise not. ' "

After discussing the case law on the subject, the learned Judge came to the conclusion that this last test was the proper test to be applied. The order which was appealed against in that case was merely an order on one issue in the case and its effect was not to put an end to the trial of the suit or proceeding, but to allow it to continue. The Officiating Chief Justice in a concurring judgment remarks, at p. 738 :

" The finding with which we are concerned is one, in effect, which decides "

that the suit is maintainable, and so

(3) A. I. R. 1927 P. C. 156=5 Rang. 451=54 I. A. 265 (P.C).

(4) [1920] 47 Cal. 611=58 I. C. 755=24 C. W. N. 612.

paves the way for the determination of the main question between the parties. It does not finally decide the rights of the parties and will be subject to attack on appeal, if the decree is ultimately against the appellant.

It is quite clear that according to the principles approved in that case the finding on a single issue in the trial of a case which does not finally determine the rights of the parties is not a judgment within the meaning of Cl. 13, Letters Patent, and previous rulings of this Court to the effect that a preliminary finding whether the trial Court had jurisdiction to try the case is appealable were expressly dissented from. We are bound by this decision and we find ourselves unable to distinguish the question involved in the present appeal. The trial Court has decided to proceed with the trial of the case but it has not come to any decision on the merits of the dispute between the parties, and the effect of the order is not to put an end to the suit or proceeding. It cannot by its nature be an order which, if not complied with, would put an end to the suit or proceeding. When the trial Court has proceeded to try the suit on its merits and passed its final judgment thereon, an appeal will then lie and it will then be open to the appellant, if aggrieved by the final order, to raise the point that an adjournment should have been allowed under S. 19, Arbitration Act. The effect of the order may be temporarily to deny the appellant the right to have the matter referred to arbitration, but it is not a final order on the point. It is true that the order appealed against is not a decision on an issue in the case, but its effect is the same as if it were an order on an issue as to jurisdiction It was expressly held in *Chidambaram Chettyar's* case (1) that a preliminary order deciding that the Court had jurisdiction on an issue was not appealable, and it seems to us necessary to follow that the order appealed against here is also not appealable We are, therefore, of opinion that the present appeal does not lie. The appeal is therefore dismissed with costs.

P.N./R K. *Appeal dismissed.*

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A. I. R. 1929 Rangoon 289

HEALD AND MYA BU, JJ.

Li Tone Koke and *others*—Appellants.

v.

S. A. R. M. Firm and *others* — Respondents.

Application No. 186 of 1928, Decided on 28th March 1929, arising out of First Appeal from judgment of Original Side in Civil Regular No 213 of 1927.

Civil P. C., O 41, R 10—Appellant asked to give security under O. 41, R 10 (1) failing to furnish it within time ordered, with knowledge of order for security — Application made for extension after expiration of time to give security refused — Appeal rejected — No order to restore appeal can be made.

An appellant was directed to give security under O 41, R. 10 (1) and notice of the application for security was duly served on him. With knowledge of the order for security, he failed to give security within the time ordered by the Court and applied after the expiry of that time, for extension His application was refused on the ground that it was made after the expiration of the time allowed and that no security was given up to the date of the hearing of the application. The appeal was rejected under O 41, R 10 (2) and not merely struck off the file.

Held: that no order to restore the appeal could be made: 8 *All.* 315 (*P. C*); 17 *Cal.* 1 (*P. C*), 17 *Cal.* 512 (*P. C*) and 42 *All* 626, *Cons.* and *Dist.* [P 290 C 1, 2]

Foucar—for Appellants.

Heald, J.—On 11th December last an order under O 41, R. 10 was made against applicants and they were directed to give the necessary security on or before 15th January They failed to give the required security but on 22nd January they applied for an extension of one month The opposite party objected and asked that the appeal should be rejected under O 41, R 10 (2) The case was fixed for hearing the two applications on 13th February and the Bench which heard the applications said that the time for furnishing security expired on 15th January, that no application for extension of time was made until 22nd January and that it was admitted that up to the date of hearing, that is, up to 13th February no security had been offered. On these grounds the Bench refused the application for further time and rejected the appeal. Applicants now on 14th March ask us to restore the appeal, which has been rejected, on the ground that they are now in a position to give security.

Their learned advocate has referred us to a decision of their Lordships of the Privy Council in the case of *Balwant Singh* v. *Daulat Singh* (1), but the facts of that case seem to be different from those of the case which is before us. In that case the order for security was made without notice to the appellant Three days before the date by which security was to be given the appellant filed a petition showing cause why he should not be ordered to give security, but nine days later, that is six days after the date fixed for giving security, the Court ordered the appeal to be struck off the file on the ground that security had not been given within the time prescribed by the Court. Subsequently the appellant filed a petition in which he brought to the notice of the Court the fact that he had received no notice of the application for security and applied for the appeal to be restored. On that application the Court seems to have granted him further time to give security, but when he tendered the security the Court said that the appeal was not dismissed under S. 556 or 557 of the Code and that the petition was not entertainable under S. 558 and was inapplicable to an order made under S. 549. The references were of course to the old Code of Civil Procedure and the appellate Court's order was in effect that because the appeal had not been dismissed for default under the provisions of law which are now Rr. 17 and 18, O. 41, but had been struck off under provisions corresponding to those of O. 41, R 10, no application under what is now O. 41, R. 19 would lie. Their Lordships of the Privy Council said that there was some difficulty in saying what in substance was the proper course to be taken in these circumstances, but assuming that after the appeal had been ordered to be struck off the file, the Court had allowed the appellant further time to give security they held that he should be allowed to give security and that on his giving security his appeal should be restored to the files of the Court.

It is clear that that decision is no authority for the proposition that there is a general discretion to restore an appeal which has been rejected under O 41, R. 10 (2), or that there is such a discretion in a case where notice of the application for security has been duly served on the appellant, where with knowledge of the order for security he has failed to give security within the time ordered by the Court, where he has subsequently applied for further time which has been refused for reasons given in the order, and where the appeal has been rejected as directed by the Code and not merely struck off the file.

Applicant's learned advocate has, however, referred us to another Privy Council case, namely *Rajab Ali* v. *Amir Hossein* (2). In that case an appellant was ordered to furnish security under S. 549 (now O. 41, R. 10) to the satisfaction of the Judge of the trial Court before a certain date Security was tendered before that date but the Judge found it to be insufficient and refused to allow other security to be given on the ground that the time allowed by the appellate Court had by that time expired. The appellant appealed against the order refusing to allow him to give other security, but the appellate Court said that he took the risk of furnishing security which was found to be insufficient and that therefore he could not be allowed the opportunity, after the expiry of the prescribed period, of furnishing fresh security The appeal in respect of which security had been ordered to be furnished was accordingly rejected. Their Lordships did not in fact interfere with the decision of the appellate Court but they pointed out that that Court had a discretion to enlarge the time allowed for finding security or to accept fresh security. The law as to enlargement of time as laid down by their Lordships is now embodied in S 148 of the Code, and since their Lordships' dictum is merely a statement of that law, it does not help applicants so far as the present case is concerned

The learned advocate has referred us also to the case of *Badri Narain* v. *Sheo Koer* (3), in which the High Court had held that it had no power to grant an extension of time after the expiry of the time fixed. In that case their Lordships said that the application to the Court to enlarge the time for giving security may be made either before or after the expir-

(1) [1886] 8 All. 315=13 I A. 57=4 Sar. 707 (P.C.).

(2) [1890] 17 Cal. 1=5 Sar. 389 (P.C.).

(3) [1890] 17 Cal. 512=17 I.A. 1=5 Sar. 493 (P.C.).

ation of the time within which the security has been ordered to be furnished and the Court may therefore enlarge the time according to any necessity which may arise where it is just and proper that they should do so. That decision similarly does not go beyond the provisions of the present S. 148.

The only other case cited was that of *Sundar* v. *Habib Chik* (4). In that case the appellants were ordered to give the necessary security within a week. On the last day of the week allowed they filed an objection to the order calling on them to give security, but apparently they neither tendered security nor applied for an extension of time. Their appeal was rejected, but two days later they applied for a reconsideration of the matter and they were granted an extension of time, their appeal being restored to the file The opposite party applied to the High Court against the extension of time and the restoration of the appeal, and the High Court purporting to follow the ratio decidendi in *Balwant Singh's* case (1), said that the Court was entitled to reconsider on cause subsequently shown an order rejecting an appeal under O 41, R. 10 (2), and accordingly, regarding the application before them as an application for rovision and the order of the lower Court as an order passed in review, refused to interfere. All that need be said about that case is that it seems possible that the view which the learned Judges took as to the effect of the decision in *Balwant Singh's* case (1) was not warranted by the facts of that case and that in any case the facts there were different from those of the present case.

In this case more than a month was allowed for furnishing the security, and the appeal was not rejected until applicants had been heard on their application for an enlargement of time. After due consideration of the time granted in the first instance, of the fact that applicants had not tendered any security within that time, of applicants' delay in applying for an enlargement of time, and of the grounds shown by them for the enlargement for which they asked, the Bench decided to refuse to extend the time and rejected the appeal. We are not asked to deal with that order in review and this Bench as now constituted could not do so. We are merely asked to restore the appeal and to grant further time on the footing of a supposed right based on the judgment of the Privy Council in *Balwant Singh's* case (1), but that case is no authority for the existence of such a right in a case like the present. On the analogy of the rejection of a plaint there would be no such right and I see no reason to believe that any such right exists I would therefore dismiss the application.

Mya Bu, J.—I concur.

P.N./R.K. *Application dismissed.*

(4) [1920] 42 All. 626=18 A.L.J. 898.

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* A. I. R. 1929 Rangoon 291

HEALD, OFFG C. J. AND MYA BU, J.

L. C. T. R. M. Sathappa Chettyar and *another*—Appellants.

v.

A. S. Chettyar Firm and *others*—Respondents.

Civil Misc Appeal No. 29 of 1929, Decided on 12th August 1929.

*** Provincial Insolvency Act, S. 16—Original petition validly presented—Petitioner not proceeding with due diligence—Court can substitute in his place other creditors as petitioners during pendency of insolvency proceedings and they will take place of original petitioner ab initio—No fresh act of insolvency is necessary**

If the original petition by a creditor to get a debtor adjudicated insolvent is validly presented and the case is one in which the petitioner does not proceed with due diligence on his petition it is open to persons to come in as creditors at any time while the insolvency proceedings are pending and it is open to the Court to substitute them as petitioners for the original petitioner; the effect of such substitution would be that they take the place of the first petitioner ab initio and are entitled to prosecute the original petition as if it were their own petition so that no question of the necessity for a fresh act of insolvency could arise *In re, Maund*, (1895), 1 *Q B D* 194, *Dist*, *In re, Mangham*, (1888), 21 *Q B D*. 21, *Ref* [P 293 C 1]

F. S. Doctor—for Appellants.

Eunoose and *Banerjee*—for Respondents.

Heald, Offg. C. J.—On 19th December 1927, the present respondents 1 who are A. S. Chettyar Firm, filed a creditor's petition under S. 9, Provl. Insol. Act, for the present respondents 5, 6 and 7 who are mother, son-in-law, and daughter and who according to the petition were jointly indebted to respondents 1 in respect of certain promissory notes, which they had executed jointly, to be adjudi-

cated insolvents. The acts of insolvency which they alleged were that the alleged insolvents had on 20th September 1927 that is within three months before the date of the petition made two transfers of their properties in favour of the T A. Chettyar Firm, which transfers would under S. 54 of the Act be void as being a fraudulent preference, if the 5th, 6th and 7th were adjudicated insolvents.

On 10th February 1928, the present respondents 4 who are the M. V. R. Chettyar Firm, applied to be joined petitioning creditor on the ground that the alleged insolvents and the T A. Chettyar Firm were trying to induce respondents 1 to withdraw their petition in fraud of the rights of the other creditors They relied on the acts of insolvency mentioned in respondents 1's petition. Respondents 1 and the alleged insolvents stated that they had no objection to their being joined as petitioning creditors, and they were so joined by consent. On 27th March and 11th August 1928, the present respondents 2 and 3 respectively also applied to be joined as petitioning creditors, alleged the same acts of insolvency. On 10th October 1928, before orders had been passed on the applications of respondents 2 and 3, these respondents applied to be allowed to withdraw their applications and respondents 1 and 4 applied to be allowed to withdraw the petition.

On the same date, the present appellants namely the L. C. T. R M. and T. S. T. Chettyar Firms applied to be joined as petitioning creditors. They alleged that respondent 1, that is the original petit oning creditor and some of the other creditors had fraudulently and collusively come to an arrangement with the alleged insolvents out of Court to their own advantage and to the detriment of the general body of creditors and they prayed that leave to withdraw the petition should not be granted and that the insolvency proceedings should be continued by adding or substituting them as petitioning creditors, if necessary under the provision of S. 16 of the Act. On 26th November 1928 the Court directed the first four respondents to file statements of the terms on which they asked to be allowed to withdraw. They filed petitions in which they denied that they had come to any arrangement with the alleged insolvents and said that the ground for their withdrawal was that they were satisfied that the alleged act of insolvency could not be proved. The Court then allowed the withdrawal of the original petition and of the applications of respondents 2 and 3 to be joined as petitioning creditors, and directed that the appellants should be substituted as petitioning creditors and should file new petitions on their own behalf.

Appellants appeal against the order allowing the withdrawal of the petition and directing them to file a new petition on the ground that that order prevents them from taking advantage of the act of insolvency mentioned in the original petition, since that act took place more than three months before the date on which new petitions can be presented. The first four respondents, that is, the creditors who applied to be allowed to withdraw, admit that the lower Court's order has the effect of preventing appellants from prosecuting the insolvency proceedings on the footing of the act of insolvency originally alleged, but say that in law the Court could not allow the appellants, whose application to be made petitioning creditors was made more than three months after the alleged act of insolvency to be joined as petitioning creditors so as to rely on that act of insolvency. The alleged insolvents support the contention and say that in order to succeed appellants must prove a new act of insolvency committed within three months of their application.

All the respondents rely on the decision in the case of *In re, Maund* (1). In that case certain creditors filed a petition on 16th May 1894, alleging that an act of bankruptcy had been committed on 5th March 1894. On 15th June an application to add the names of two other persons as petitioning creditors was made, the reason for that application being that there was a doubt whether the amount of the debts due to the creditors who had filed the petition was sufficient to entitle them to present the petition. The English Bankruptcy Act of 1883, contained in S. 107 a provision similar to that of S. 16, Provl. Insol. Act, which gives the Court power in cases where the petitioner does not proceed with due diligence on his petition, to substitute as petitioner any other credi-

(1) [1895] 1 Q B 194=64 L J. Q. B. 185=43 W. R. 207=72 L. T. 58.

tor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor; but the learned Judge said that:

"the power ought not to be exercised after the lapse of three months from the date of the act of bankruptcy."

The decision was doubtless right on the facts of the particular case in which it was given, since in that case it was desired by the exercise of the power to remedy a defect, which might invalidate the filing of the petition itself, but it has no application to a case like the present where the petition was validly filed ab initio or to a case where fraud and collusion between the alleged insolvents and the petitioning creditors is pleaded since in the very case on which that decision was based and in which it may be noted the expression of opinion which it followed was clearly obiter namely the case of *In re, Mangham* (2), it was expressly said that if on an application for substitution fraud was alleged the Court would strain its jurisdiction to the utmost. In the present case, there is no need to strain the jurisdiction. The original petition was validly presented and could not be withdrawn without the leave of the Court. The case was clearly one in which the petitioner did not proceed with due diligence on his petition and was further one in which fraud and collusion were alleged. It was open to the appellants to come in as creditors at any time while the insolvency proceedings were pending and it was open to the Court to substitute them as petitioners for respondents 1.

The effect of such substitution would be that they took the place of respondents 1 ab initio and that they were entitled to prosecute the original petition as if it were their own petition so that no question of the necessity for a fresh act of insolvency could arise I would therefore set aside the lower Court's order allowing the original petition to be withdrawn and directing the appellants to file a new petition and under the provisions of S 16 of the Act I would substitute appellants as petitioners for the respondents 1. The respondents should bear the appellants' costs in this Court, Advocate's fee to be five gold mohurs and the cost of the lower Court would abide the final order for costs in the insolvency proceedings.

Mya Bu, J.—I concur.

P N./R K. *Order set aside.*

(2) [1883] 21 Q. B. D. 21.

A. I. R. 1929 Rangoon 293

RUTLEDGE, C. J , AND BROWN, J.

Maung Tun Pe and *another* — Appellants.

v.

Maung Sein Myi and *another*—Respondents

Second Appeal No. 540 of 1927, Decided on 25th March 1929, from judgment of Dist. Judge, Tavoy, in Civil Appeal No 20 of 1927.

(a) Transfer of Property Act, S. 54—Possession under oral contract of sale—No registered deed—Such possession is good defence to suit for possession—Part performance.

In a suit for possession of land it is a good defence that the person in possession has obtained possession under an oral agreement of sale, although no registered deed of sale has been executed and, therefore, no actual sale has taken place : *A. I. R* 1924 *Rang.* 214 (*F B*), *Rel. on.* [P 294 C 1]

(b) Evidence Act, S. 91—Oral evidence as to contract for sale is not rendered inadmissible by document which does not record terms of contract for sale.

The document that was executed was not a document recording the terms of the contract for sale, but it merely recited that the land had been sold for a certain amount and further recorded an agreement as to repurchase by the heirs of the vendor

Held, that oral evidence as to the contract for sale was not rendered inadmissible by the document that was executed. [P 295 C 1]

(c) Registration Act, Ss. 49 and 17—Contract for sale unregistered—S. 49 does not preclude it from being given in evidence to prove terms of contract — Evidence Act, S. 91

Section 49, Registration Act, must be read together with S. 17 of that Act and S. 91, Evidence Act, and a fair interpretation of S. 49 does not preclude an unregistered document which is required by law to be registered from being given in evidence as to the terms of the contract for sale : *A. I. R* 1923 *Mad.* 207, *Appr.*; *A. I. R.* 1923 *Lah.* 495, *Rel. on.*; 35 *Mad.* 63 (*F.B*), *not Foll*, 9 *Cal.* 520 (*F. B*) and *A. I. R.* 1919 *P. C.* 44, *Ref.* [P 296 C 2]

Payet—for Appellants

P. B. Sen—for Respondents.

Judgment.—The appellants in this case sued for partition and possession of a third share of certain land. The appellant Tun Pe, respondent Ma E Thwe,

and one Ma Mya Nwe who was a defendant in the trial Court, were joint heirs of the land in question. At the time of filing the suit, the land was in the possession of Ma Mya Nwe and Ma E Thwe. Ma Mya Nwe did not contest the suit and we are concerned now only with the land in possession of Ma E Thwe. Her defence was that in the year 1921 Tun Pe entered into a contract for the sale of his share to the defendants and put the defendants into possession under the contract. Admittedly a document was drawn up at the time of the transaction and that document has not been registered The lower Courts have held that that document is inadmissible in evidence, but that oral evidence of the contract of sale is nevertheless admissible. They have found that this oral evidence establishes the case of the defendants and have dismissed the suit of Tun Pe Tun Pe's appeal to this Court was originally heard by a single Judge, who was of opinion that the existence of the document precluded the bringing of oral evidence and gave the plaintiffs a decree. An order has been passed granting an application to review this judgment and the appeal is now again before us for decision.

It may now be regarded as settled law that in a suit for possession of land, it is a good defence that the person in possession has obtained possession under an oral agreement of sale although no registered deed of sale has been executed and, therefore, no actual sale has taken place All the Indian High Courts are now agreed on this point, the leading case of this Court on the subject is the case of *Maung Myat Tha Zan* v. *Ma Dun* (1). It is, however, contended on behalf of the appellants that the same rule cannot be applied when a document has been executed by the parties. If the document in question were merely one recording the terms of a contract for sale, the contention that oral evidence could not be adduced to prove the terms of the contract would no doubt be correct. Such evidence would be precluded by the terms of S. 91, Evidence Act. No practical difficulty would, however, arise in such a case, because such a document would not require registration (S. 2, Act 2 of 1927) and would, therefore, itself be admissible in evidence. In the present case, the document that was drawn up is clearly not a document recording the terms of a contract for sale. It first of all recites that the land has been sold for Rs. 400 and then goes on to record the agreement as to repurchase by the heirs of Tun Pe It is suggested that it is not a document of sale at all and that it does not require registration However that may be, we are not satisfied that the existence of this document precludes the bringing of oral evidence as to the alleged contract of sale. Mosley, J., who dealt with this appeal in the first instance, held that the agreement to sell was superseded by and merged in the document for sale. It does not appear that the actual document was ever before him or that he was aware of its terms. In *Maung Mayat Tha Zan's* case (1) Robinson, C. J., remarks at p. 304 (*of* 2 *Rang*) of the judgment :

" As regards S. 91, Evidence Act, it appears to me that it does not apply in this case at all. It deals with cases where the terms of a contract have been reduced to the form of a document, and to cases in which any matter is required by law to be reduced to the form of a document. If we were dealing with a deed of a sale that was in existence, or with a contract for sale which was required by law to be reduced to the form of a document, some such question might arise; but we are dealing here with a contract for sale which the law does not require to be reduced to the form of a document. An agreement to sell may be an oral agreement, and no question, therefore, of the admissibility of the evidence, I think, arises. It is not the transaction of sale that it is in question, but the agreement to sell, which must, and always does, precede the execution of the contract for sale. By Expln. 3 to the section, even if a statement was made in a document of sale, which was not registered, of the prior oral agreement to sell, evidence as to that prior oral agreement is excluded from the provisions of the sections."

A distinction here is no doubt drawn between a case where the transaction is wholly oral and a case in which a document has been drawn up, but it seems to us that the existence of the document in the present case has no effect on the general principles to be applied. Under S. 91, Evidence Act :

" when the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a docu-

(1) A. I. R. 1924 Rang. 214=2 Rang. 285 (F.B.).

ment, no evidence shall be given in proof of the terms of such a contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Oral evidence is excluded equally when a document does exist and when the law requires the matter to be reduced to the form of a document So far, therefore, as the sale itself is concerned, the existence of an unregistered document makes no difference Whether a document exists or not, no oral evidence of the sale can be given. But a contract of sale is not a matter which is required by law to be reduced to the form of a document, and it has been clearly held in *Mayat Tha Zan's* case (1), that the contract which proceedes the sale can be separated and distinguished from the sale itself. In this case there is a document, but whatever that document may be, it is not a document which records the terms of a contract for sale. The terms of that contract have not been reduced to the form of a document The intention of the parties may have been to go beyond a mere contract and to record in the document an actual sale. But that does not, in our opinion, convert the contract into a sale in such a way as to preclude the defendants from relying on the contract independently of the actual sale. We do not think that in the present case oral evidence as to a contract for sale was rendered inadmissible by the document that was executed.

That is perhaps sufficient for the disposal of this appeal, but we would go further than this and say that whilst oral evidence as to the contract for sale is admissible, the document itself is also admissible in so far as it throws light on the terms of the contract in dispute between the parties. It is contended, as we have said, on behalf of the respondents that the document is not a document which requires registration at all. We are of opinion that whether it requires registration or not, the document would be admissible in evidence as to the terms of the contract which preceded its execution Under S. 49, Registration Act :

"No document required by S. 17 to be registered shall (a) affect any immovable property comprised therein; or (b) confer any power to adopt; or (c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered."

An unregistered sale document, of course, does not affect any immovable property described therein, but the question here is not whether it affects the property, but whether it can be received as evidence of a collateral matter, namely, the previous contract of sale, and that depends on the exact meaning of the words "any transaction affecting such property." There have been a number of judicial decisions on the meaning of these words. In the case of *Ulfatunissa* v. *Hosain Khan* (2), it was held by a Full Bench of five Judges of the High Court of Calcutta that the words mean "shall be received as evidence of any transaction so far as it affects land." The question then for decision is whether a contract for sale by itself affects land. In one sense, of course, it does, as it imposes personal obligations on the contracting parties with reference to land. But, under the provisions of S. 54, T. P. Act, a contract of sale does not of itself create any interest in or charge on such property. The effect that such a contract has on land is, therefore, indirect only, and the question is whether the provisions of S. 49 (c), Registration Act, were meant to exclude such an indirect affecting.

In the case of *Narayanan Chetty* v. *Subbayya Servai* (1), it was held that the phrase must be interpreted in a wide sense. On page 73 of the Court's judgment, the following passage occurs :

"Mr. S. Srinivasa Ayyangar has in his able argument drawn our attention to the provisions of S. 40, T. P. Act and S. 91, Trusts Act. The first of these provisions speaks of an obligation arising out of a contract and annexed to the ownership of immovable property but not amounting to an interest therein or easement thereon being enforceable against a transferee with notice or a gratuitous transferee of the property affected thereby. This shows that a contract to sell or an agreement to lease immovable property is a transaction which affects the property * * * * When, therefore, S. 49, Registration Act, declares that a document compulsorily registrable but remaining unregistered shall not be 'received in evidence of a transaction affecting such property' or, as put by the Calcutta High Court, 'of a transaction so far as it affects such property, it would seem that the legislature meant to indicate that the instrument should not be received in evidence even where the transactions sought to be proved does

(2) [1889] 9 Cal 520=12 C. L. R. 209 (F.B.).

not amount to a transfer of interest in immovable property but only created an obligation to transfer the property."

If this judgment is good law then a document for sale which was unregistered clearly could not be admitted as evidence of the terms of the previous contract of sale, but this judgment was delivered before the decision of their Lordships of the Privy Council in the case of *Varada Pillai* v. *Jeevarathnammal* (4), and a different view of the interpretation of S. 49 has subsequently been taken by the same Court. In *Varada Pillai's* case (4), the persons in possession of certain property claimed that the property had been given to them. No document had been drawn up, but it was held that certain petitions to the Collector with regard to the land and changes of names made in his registers were admissible to prove the nature of the possession of the defendants The documents held so admissible were not documents which were required by law to be registered and this decision has, therefore, no direct bearing on the point before us. It does, however, suggest that the laws of evidence in such a case should not be interpreted in too rigid a sense. In the case of *Saraswatamma* v. *Paddayya* (5), a view of the meaning of S. 49 was taken entirely different from the view taken in *Narayanan Chetty's* case (3) At p. 359 of the judgment, Spencer, J., remarks :

"I have the highest respect for the opinion of Sadasiva Ayyar, J., but I think he stretched too widely the meaning of the verb "affect" in S. 49, Registration Act. All sorts of transactions may remotely affect immovable property. S. 49, Registration Act has to be read in the light of S. 17 of the same Act and S. 91, Evidence Act. If this is done, the word 'affect' will be seen to be only a compendious term for expressing the longer phrase of 'purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent to.' "

In the case of *Qadar Bakhsh* v. *Mangha Mal* (6), it was held that a document although inadmissible for want of registration to prove title may be referred to in order to ascertain the nature of the possession sought to be disturbed The provisions of S. 49, Registration Act are not discussed in this judgment, but the finding is clearly an authority in favour of the admissibility of such a document for the purpose of proving a contract of sale. If the interpretation in *Saraswatamma's* case (5) be adopted, then it is quite clear that the contract of sale is not a transaction affecting property within the meaning of S. 49. The object of S. 49 is clearly to prevent the law as to compulsory registration of certain documents from being nugatory and to supplement the law of evidence. It has now been definitely held that oral evidence can be accepted as to contracts for sale when no documents have been drawn up It would obviously be an entirely unsatisfactory state of affairs if parties should be in a worse position when they had drawn up a document but failed to have it registered than if they had drawn up no document at all And it would be still more unsatisfactory if in such circumstances parties were allowed to give oral evidence but were not allowed to give evidence of the document itself. Such a state of affairs would involve an entire negation of the principles underlying S. 91, and the following sections of the Evidence Act, but it would be the result of our adopting the wide interpretation of S. 49, Registration Act. We agree with the remarks in *Saraswatamma's* case (5).

We are of opinion that S. 49, Registration Act must be read together with S. 17 of that Act and S. 91, Evidence Act and that a fair interpretation of S 49 does not preclude an unregistered document, which is required by law to be registered, from being given in evidence as to the terms of the contract for sale. Even, therefore, if the document in the present case is required by law to be registered, we are of opinion that it was admissible in evidence for the purpose of proving the original contract of sale. The document was not admitted by either of the lower Courts, but we do not think it is necessary to remand the case now for further consideration. The document does not recite the terms of the contract for sale at all, but it does recite that there has been an outright sale and it contains an agreement that the children of Tun Pe claiming as his heirs may get the land back on payment of the purchase price plus interest That clearly does not help

(3) [1910] 35 Mad. 63=21 M. L. J. 44 = 8 I. C. 520=(1910) M. W. N. 743 (F B).
(4) A. I. R. 1919 P. C. 44=43 Mad. 244 = 46 I. A. 285 (P.C.).
(5) A. I. R. 1924 Mad. 297=46 Mad. 349.
(6) A. I. R. 1923 Lah. 495=4 Lah. 249.

Tun Pe and in no way contradicts the oral evidence as to the agreement, so far as Tun Pe is concerned, being to sell outright. We are, therefore, of opinion that the case has rightly been decided by the lower Courts and we dismiss this appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 297

HEALD AND OTTER, JJ.

S. R. M. M. A. Firm—Appellants

v.

Maung Po Saung and *others*—Respondents.

First Appeal No 159 of 1928, Decided on 3rd April 1929, from judgment of Dist Judge, Magwe, in Civil Regular No. 23 of 1928.

(a) Limitation Act, S. 14 — Proceeding contrary to clearly expressed provision of law is not prosecuting another civil proceeding in good faith.

Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Act. [P 298 C 1]

Thus if a person, against whom an order is made under O. 21, R. 63, Civil P. C., instead of bringing a suit applies for revision of the order, and brings a suit when his application for revision is dismissed, he is not entitled to the exclusion of the period for which he was prosecuting his application for revision. 8 *L. B. R.* 146, *Rel. on.* [P 298 C 1]

(b) Civil P. C., S. 115—High Court does not ordinarily interfere in revision with orders passed under O. 21, R. 63.

High Court does not ordinarily interfere in revision with orders made under O. 21, R. 63, because such orders are by the rule itself declared to be conclusive and the rule itself provides a remedy by way of suit for the person against whom such an order is made. 3 *U. B. R.* 13 and *A. I. R.* 1917 *P. C.* 71, *Ref.* [P 298 C 1]

Anklesaria—for Appellants.

Thein Maung—for Respondents

Judgment.—In Suit No. 9 of 1924 of the District Court of Magwe the present appellant obtained a money decree against the present respondents Po Saung and Ma Twe, and in execution of that decree he attached certain oil well sites. The respondents Po Maung and Ma E applied for removal of the attachments on the ground that they were in possession of the said sites under a possessory mortgage, and the Court made an order removing the attachment.

Instead of filing a suit under the provisions of O. 21, R. 63, appellant applied to this Court for revision of the order removing the attachment. His application was dismissed. Appellant then filed a suit under O. 21, R. 63, for a declaration of his right to attach the properties.

The date of the order removing the attachment was 22nd April 1926 and under Art. 11, Sch 1, Limitation Act, the suit under O. 21, R 63, to set aside that order ought to have been filed within one year from that date. Appellant's suit was not filed until 17th September 1927, and the lower Court held that it was barred by limitation and dismissed it. Appellant appeals on the ground that under S. 14, Lim. Act, he was entitled to exclude the period between 15th July 1926 and 6th January 1927, during which his application for revision was pending in this Court.

The same question which arises in this appeal was decided by a Bench of the late Chief Court of Lower Burma in the case of *Tun U v Y. P. S. P. L. Chettyar Firm* (1). In that case, the learned Chief Judge said :

"Subsection 1, S. 14 of the Act says that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.

The course which the plaintiff should have pursued is very clearly indicated in R. 63, O. 21, Civil P. C., which says that where a claim or an objection is preferred to an attachment the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Art. 11, Lim. Act, gives one year from the date of the order for the institution of such suit.

With such plain provisions staring him in the face it was sheer culpable negligence on the part of the advocate who was then acting for the plaintiff to incur the risk of the plaintiff losing all remedy by filing the appeal and the application for revision. If the plaintiff is bound by the acts of his advocate no case for exclusion of time under S 14 of the Act is made out, because proceeding contrary to a

(1) [1915] 8 L.B.R 146=27 I.C. 929=8 Bur. L.T 93.

clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words 'good faith' are defined in the Act, viz., done with due care and attention."

In the Upper Burma case of *San Ba* v. *Lun Bye* (2), the question whether the High Court even has power to interfere in revision with orders made under O. 21, R. 63, was considered and it was said that the High Court will interfere only where the extrinsic conditions of the lower Court's legal activities have been plainly infringed, but where the alleged or apparent error consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision it will respect the finality intended by the wording of O. 21, R. 63 and will intervene only when it is manifest that by the ordinary and prescribed method an adequate remedy or the intended remedy cannot be had. In this connexion reference may be made to the case of *Balakrishna Udaya* v. *Vasudeva Aiyar* (3), where their Lordships of the Privy Council said that S. 115 of the Code, which is the section which confers on the High Court power to revise the decisions of subordinate Courts :

"applies to jurisdiction alone, the irregular exercise or non-exercise of it on the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

The High Court in both Upper and Lower Burma has repeatedly said that it does not ordinarily interfere in revision with orders made under O 21, R 63 because such orders are by the rule itself declared to be conclusive and the rule itself provides a remedy by way of suit for the person against whom such an order is made. Appellant's learned advocate has referred us to the case of *Phomon Singh* v. *Wells* (4), where a Judge of this Court said that where an investigation has been refused or an order has been passed without investigation or where the order passed is not a proper order passed in accordance with O 21, Rr. 59—63, the High Court would interfere. That statement may or may not be a correct statement of the law, but it is clear that it did not overrule the decision in *Tun U's* case, and as we are in entire agreement with that decision we dismiss the appeal with costs, advocate's fee to be five gold mohurs.

P.N./R.K. *Appeal dismissed.*

(2) [1917] 3 U.B.R 13=42 I.C. 74=11 Bur. L.T. 123.

(3) A.I.R. 1917 P.C. 71=40 Mad. 793=44 I. A. 261 (P.C.).

(4) A.I.R. 1923 Rang. 195=1 Rang. 276.

A. I. R. 1929 Rangoon 298

CHARI, J.

Ba Hlaing—Appellant.

v.

Sit Hauk and *others*—Respondents.

Special Second Appeal No. 131 of 1929, Decided on 31st July 1929.

(a) Transfer of Property Act, S 101—Sum advanced on first mortgage included in consideration of second charge created by first mortgage is available against intermediate mortgagee

A charge created by a mortgage of property in favour of a person does not extinguish and is available against an intermediate mortgagee even though the amount advanced on the first mortgage is included in the consideration of the second mortgage effected in favour of the same person 16 *Cal.* 523; 3 *Cal* 307 and *Tennson* v. *Sweene*, 1 *Jo. & Hc'.* 717 *Rel. on.* [P 299 C 2]

(b) Transfer of Property Act, S 78 — Scope.

A puisne mortgagee cannot get rid of the priority of the earlier mortgagee except by proving that the prior mortgagee was guilty of fraud or gross negligence. [P 300 C 1]

Ba Thaung—for Appellant.

S. Ganguli and *Wellington*—for Respondents

Judgment.—The plaintiff Ba Hlaing, filed a suit in the Sub-Divisional Court of Tavoy on a mortgage dated 8th February 1927, executed by Maung Ba and Ma Bok. The mortgage covers certain immovable property and four buffaloes. Prior to this mortgage, Maung Aung Ba and Ma Bok had executed a mortgage in favour of Tan Sit Hauk, who was defendant 3 in the suit, on 4th March 1924 for Rs 300 the property mortgaged being a piece of paddy land, two male buffaloes, and three female buffaloes, total five buffaloes, Whether the two male buffaloes included on the subsequent deed are two out of five included in the earlier deed, we have no means of knowing, as no evidence was directed on the point. The learned advocates think that it would be safe for me to leave out of consideration the buffaloes entirely, and I would do so except for the purpose of construing the second mortgage-deed in favour of Sit Hauk.

On 7th March 1927, the same mortgagors executed a mortgage in favour Tan Sit Hauk for Rs. 1,000 but in this mortgage deed no mention is made of any buffaloes. This last transaction had been held to be a mortgage by way of conditional sale, and this finding has not been challenged.

In the trial Court, the plaintiff obtained a decree for the sum of Rs. 1,000 and Rs. 260 which sum is claimed by way of compensation, because the mortgage does not mention any interest and is to the effect that if the mortgagors deliver the two hundred baskets of paddy to the mortgagee for 10 years the mortgagee shall be deemed to have been discharged The mortgage in favour of Tan Sit Hauk is also to a similar effect. In the trial Court, the learned Judge did not keep in mind the points in issue between the parties clearly, and raised only one issue namely whether defendants 3 and 4, that is Sit Hauk and his wife knew of the mortgage to the plaintiff by defendants 1 and 2, and agreed to settle defendant's libilities to the plaintiff at the time that the mortgaged land was sold to them by a registered sale deed. This issue was raised on the defence of the original mortgagors, that as defendants 3 and 4 had agreed to discharge the mortgage, they were no more liable on it. The learned Judge did not raise any issue as to how far the mortgage was operative against Tan Sit Hauk, who had subsequent to his mortgage become the purchaser of the property. The learned Judge therefore contented himself with answering the first issue in the affirmative, that is Sit Hauk had knowledge of Ba Hlaing's mortgage and agreed to pay the amount due on the mortgage to Ba Hlaing. The evidence shows that he did have knowledge of Ba Hlaing's mortgage, but it does not show that he agreed to pay the amount to Ba Hlaing either with Aung Ba the mortgagor or with Ma Bok.

On appeal, the learned District Judge modified the decree to this extent. He held that it was proved that the sum of Rs. 300 due to Sit Hauk in respect of the first mortgage was included in the sum of Rs. 1,000 which was the consideration for the mortgage of 7th March 1927. I have no doubt that this is a correct finding, and that it is entirely in accordance with the probabilities of the case. He therefore gave a decree in favour of Ba Hlaing subject to the payment of Rs. 300 in respect of the prior mortgage to Sit Hauk and his wife. Both Ba Hlaing and Sit Hauk have appealed to this Court. On behalf of Ba Hlaing it is contended that the order postponing his mortgage to the extent of Rs. 300 due to Sit Hauk on the first mortgage is wrong In the argument, it is urged that, on the evidence, it is clear that Sit Hauk gave up the registered mortgage deed or destroyed it, showing a clear intention that that mortgage should be discharged and extinguished. It is argued on Sit Hauk's behalf that, since it is to his benefit to keep alive the earlier mortgage, it must be deemed to have been kept alive and could be used as a shield against the subsequent mortgagee Ba Hlaing.

It is unnecessary to refer to many authorities on this point. I shall therefore refer to two cases. In *Gopal Chandra Sreemany* v. *Herombo Chandra Haldar* (1), the facts were similar to the present case. There an old debt was included in a new one, and certain new properties were also added to the security, and the question arose whether the old mortgage was extinguished to the extent of not being available against an intermediate encumbrancer The learnad Judges held that what was done was merely a fresh advance with fresh security in respect of both but they added that even if it were not so, and if the old debt had been paid by the new transaction, it would not necessarily destroy the security. They cited a number of cases to only one of which I shall refer and that is the of case *Goluknath Misser* v. *Lalla Prem Lal* (2). In that case, it was held that a creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower, or in any way impair its priority by taking a subsequent mortgage, including the same lands for the same debt. At p. 310 of the judgment they referred to an English case *Tenison* v. *Sweeny* (3) where Lord Leonards stated that the contention that the former mortgage was merged in the new, because the new mortgage included the amount due on

(1) [1899] 16 Cal. 523.
(2) [1877] 3 Cal. 307.
(3) [1844] 1 Jo. & Hot. 717

the old, was a novel view of the operation of deeds, and held that the former mortgage remained untouched and operative, and that the effect of the new mortgage was merely to let in the further advances as security on the property.

It is therefore clear that the learned Judge's order in giving Sit Hauk priority in respect of Rs. 300 is correct. A memorandum of cross objection has been filed by Sit Hauk and he claims priority over Ba Hlaing's for the whole of his amount and not merely for Rs. 300. The contention is clearly untenable. He is a puisne mortgagee and he cannot get rid of the priority of the earlier mortgagee except by proving that the prior mortgagee was guilty of fraud or gross negligence. The learned advocate for Sit Hauk referred to parts of the evidence but there is nothing in it to show that Ba Hlaing, the earlier mortgagee, was negligent or fraudulent so as to lose his right of priority. In the result the appeal is dismissed with costs in favour of respondents 1 and 2. The memorandum of cross objection is also dismissed in favour of the appellant, the mortgagors being merely formal parties are not entitled to any costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 300

HEALD AND MYA BU, JJ.

Maung Pwe and *another*—Appellants.

v.

Maung Chan Nyein and *others*—Respondents

Letters Patent Appeal No. 97 of 1928, Decided on 9th April 1929, against judgment of High Court in Special Second Appeal No. 707 of 1927, reported as *A. I. R.* 1929 *Rang.* 31.

(a) Limitation Act, S. 26—Right of user is defeated when suit is not brought within two years of last user.

Where a suit for asserting a prescriptive right is not brought within two years of the termination of the user, the right of user is lost. [P 301 C 2]

(b) Easement—Right to surface water cannot be claimed even apart from provisions of Easements Act.

Even quite apart from the provisions of the Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage: 37 *Mad.* 304; *Rawstron* v. *Taylor* (1855), 11 *Ex.* 369; *A. I. R* 1923 *Pat* 65, *Ref.* [P 302 C 1]

(c) Custom—Essentials—Custom that only ground on lower level is to be cultivated and that each piece of ground is to have catchment area is unreasonable as it deprives Government of right to dispose of State lands on higher level: *A I.R.* 1923 *Rang.* 31=6 *Rang.* 615, *Reversed.*

A custom must be peaceable and acquiesced in; reasonable, certain and definite, compulsory and not optional. Where these factors are not established by evidence the custom cannot be accepted. [P 302 C 2]

A custom to the effect that only ground on the lower level is to be cultivated and that each piece of such ground is to have a catchment area is unreasonable because any person by cultivating a piece of land in the lower part of a slope in the locality in question can successfully deprive the Government of the right of disposal of State lands in the higher part of the slope for the purposes of cultivation : 14 *M. I. A.* 570 (*P C*) 17 *All.* 87; *A.I.R* 1923 *Lah* 448, *Ref* **A.I.R. 1929 Rang. 31=6 Rang. 615, Reversed.** [P 303 C 2]

Kale—for Appellants.

Ba So—for Respondents

Mya Bu, J.—This is an appeal preferred under Cl 13, Letters Patent from the judgment in Special Civil Second Appeal No. 707 of 1927, which set aside the judgment of the Court of first appeal and restored that of the Court of first instance. [*Mg. Chan Nyein* v. *Mg. Pwe* (1).]

Three pieces of culturable land known as holding Nos. 10, 3 and 8 in Kongyaung Kwin, Pettaw Circle, Taungtha Township, Myingyan District, belong respectively to the respondents Chan Nyein, Thu Daw and Po Kyaw These three pieces together measure 12·69 acres. On the west of these lies holding No. 8/219 of the same kwin measuring 13·50 acres which is State land worked by the appellants under a permit granted by the Deputy Commissioner of Muingyan District in October 1922. They are situate in a locality of undulating land and are apparently on the same side of a rising ground, the part occupied by holding No. 8/219 being higher than that occupied by holding Nos.10, 3 and 8.

The respondents sued for an injunction restraining the appellants from entering upon and working the holding No. 8/219 and directing them to remove the kazins which the latter had constructed thereon, alleging that they (the respondents) were the owners both of holdings Nos 13, 3

(1) A. I. R. 1929 Rang. 31=6 Rang. 615.

and 8 which they cultivated and of holding No. 8/219 which they did not cultivate but from which water ran down to the former three holdings.

In view of the fact that holding No. 8/219 was State land at the disposal of the Government and that the appellants worked it with the permission of the Deputy Commissioner who undoubtedly has authority to grant the permission, the respondents' assertion of ownership thereto could obviously have possessed no strength, The respondents could not prove the alleged ownership and the Township Court dismissed their suit on 9th June 1926.

The respondents then appealed to the District Court accepting the adverse finding of the Township Court on the question of ownership but changing their ground to one of right to receive the water flowing down from holding No. 8/219 to their lands. The Additional District Judge observed to the effect that the respondents claimed an easement in respect of surface water flowing from holding No. 8/219 to their lands, and remanded the suit to the Township Court for trial on the following issues:

(1) Has the surface water flowed from the disputed land to the plaintiffs' lands adjoining thereto ?

(2) If so, how long have they enjoyed the right to use it ?

(3) Are they entitled to continue the right ?

This order of remand was made on 21st August 1926

It is important to note that it was in respect of surface water that the respondents claimed the right and their case was not based on any assertion that the water flowed in a defined channel either natural or artificial.

When the case got back to the Township Court the whole record was lost in a fire to the Court house. The present record of the suit has been reconstructed from copies and such like and does not contain any copy of the depositions of the previous trial After recording fresh evidence the trial Court answered issue 1 in the affirmative It found on issue 2 that the respondents had enjoyed the right of use of the water for more than 25 years, and on issue 3 that the respondents on account of uninterrupted use of the water flowing from holding No. 8/219 for more than 20 years had acquired by prescription an absolute and indefeasible right of use of the water flowing from that land. In the result the trial Court passed "a decree as prayed for" by the respondents. The obvious effect of the decree was absolutely to restrain the appellants from entering upon and working the holding No. 8/219.

The appellants then took the matter up on appeal to the District Court which set aside the decree of the trial Court and ordered the dismissal of the respondents' suit on the ground that the respondents could not in law possibly have acquired a prescriptive right to the use of water not running in a natural or defined or artificial channel. The Additional District Judge took the analogy from S. 17 (c), Easements Act This Act, however, does not apply to this province

When the matter came up to this Court, the respondents for the very first time claimed the benefit of an alleged local custom for only the lower ground to be cultivated and for each piece of lower ground to have a catchment area attached to it. This, however, appears to have weighed with the learned Judge who disposed of the second appeal and whom the alleged custom struck as a proper one without which there could be no cultivation in the area in question. The learned Judge found this custom proved, and it was principally on this ground that he proceeded to set aside the judgment of the District Court and restore that of the trial Court. Although the judgment contains some expression of the learned Judge's inclination to the view that the water from holding No. 8/219 might have flowed in a stream, he did not, as far as we can judge, come to any definite finding to that effect. Even assuming that there was a finding to that effect and that it would have supported an assertion of a prescriptive right to the use of the water, the respondents' claim for a right under S 26, Lim. Act, would have been defeated on account of the period of user having terminated more than two years before the filing of the suit. There is sufficient evidence to show that the appellants obtained the permit in October 1922 and began to cut and clear the land and started cultivation in the following year. The date of institution of the suit can-

not be ascertained from the materials before us but there can be no doubt that the suit was instituted in the early part of 1926 Thus the suit was filed after a lapse of more than two years from the time when the user must have ceased.

Further, although the learned Judge emphasised the fact that the Indian Easements Act did not apply in this province, nevertheless he stated that in the ordinary way a right merely to receive surface water would not be recognized by the Courts as an easement This statement is undoubtedly correct, for no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage . see *V. Adinarayanna* v. *P. Ramudu* (2).

This principle is taken from the English case of *Rawstron* v *Taylor* (3), where it was held that the plaintiff who claimed the right of easement by prescription had no right to surface water which had no defined course, for the plaintiff had no right to water in alieno solo. At p.383, Platt, B., very pertinently observed

"The plaintiff could not insist upon the defendant maintaining his fields as a mere watertable."

The same principle underlies the ruling in *Mt Sarban* v *Fhudo Sahu* (4), which as pointed out at p.117 (of 2 *Pat.*), relates to a case to which the Indian Easements Act does not apply and where it is held that every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire.

Therefore even quite apart from the provisions of the Indian Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage.

Turning now to the question of the respondents' contention of having acquired the easement in virtue of custom it is desirable to bear in mind the ordinary definition of an easement which according to the English Law is a right which a person has in respect of land belonging to him to utilize certain land belonging to another in a particular manner not involving the taking of any part of the natural produce of the latter or of any part of its soil, or to prevent the owner of the latter from utilizing his land in a particular manner. This is deducible from the digest of the case law set out in paras 470 and 489 of Halsbury's Laws of England, Vol. 2 While the Indian Easements Act declares that an easement may be acquired in virtue of a local custom, such easements being called customary easements the English Law also recognizes easements existing oy custom: see para 492 of Halsbury's Law of England, Vol. 2.

Evidence of such custom is relevant under S 13, Evidence Act. The learned author of the Law of Evidence, Sir John Woodroffe, points out at pp. 167 and 168 of the 8th Edn. of his work that "custom" as used in the sense of a rule which in a particular district, class, or family has from long usage, obtained the force of law, must be peaceable and acquiesced in, reasonable, certain and definite, compulsory and not optional to every person to follow or not

In the case of *Ramalakshmi Ammal* v *Sivanantha Perumal Sethurayar* (5), which was a case relating to a special family custom their Lordships of the Privy Council held that it was essential that special usages modifying the ordinary law of succession should be established to be so by clear and unambiguous evidence, observing that it was only by means of such evidence that the Courts should be assured of their existence.

In *Kuar Sen* v. *Mamman* (6), it was observed as follows:

"A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the

(2) [1914] 37 Mad. 304=17 I. C. 648=24 M. L. J. 17.
(3) [1855] 11 Ex. 369=25 L. J. Ex. 33.
(4) A. I. R. 1923 Pat. 65=2 Pat. 110.
(5) [1870] 14 M. I. A. 570=17 W. R. 552=I. A. Sup. Vol. 1=12 B. L. R. 396=3 Sar. 109 (P.C.).
(6) [1895] 17 All. 87=(1895) A. W. N. 10.

persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which if there was no such custom, would be acts of trespass the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to as leads to the conclusion that the usage has by agreement or otherwise become local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time."

In *Mt. Diyan* v. *Hira Nand* (7), a Bench of High Court of Lahore emphasized the necessity to endeavour to ascertain the existence or nature of the custom in cases where the custom is alleged.

The question which now remains for consideration is whether the evidence establishes a local custom which is reasonable and certain and leading to the conclusion that it has become the local law of the place by virtue of which the respondents derived the right of use of the water flowing from holding No. 8/219 into their lands. The evidence is to the effect that where the land is undulating only the lower lands are cultivated and almost all such lands have some higher lands as their water resources called in Burmese "yegya" which apparently are lands regarded as catchment areas.

The appellant Maung Pwe went as far as to say "we cannot cultivate the place if it is kept as the water resources for fields" This statement, however, is quite insufficient to warrant the belief that all unoccupied lands on higher level from which water runs down to the lower cultivated lands are recognized as having been reserved as catchment areas or 'water resources. The uncultivated lands on the higher levels are apparently Government waste lands as was the holding No. 8/219 before the appellants' occupation.

Looking at the relative advantages to be gained by lands in higher and lower levels of an undulating area in the dry zone, it is evident that cultivators would prefer to occupy the lower lands and not the higher ones and it would not be strange to find that most of the higher lands have no occupiers or persons who would think of cultivating them. While they remain vacant, those occupying the lower lands would enjoy the benefits of water much or little which flows down from the higher lands; and these cultivators would certainly call all the unoccupied higher lands as their catchment areas In my opinion the evidence does not go further than that

It is not contended that the unoccupied waste lands on the higher levels have been reserved as catchment areas like, for instance, grazing grounds reserved for the benefit of the cattle of certain localities The unoccupied State lands are the property of the Government, and it is inconceivable that the Government should be considered to have reserved them as catchment areas or permitted the cultivators to reserve them as such merely on account of the fact that the Government has, by reason of the absence of cultivators to apply to cultivate them, allowed them to remain unoccupied. There would, of course be nothing to prevent a cultivator to occupy a large area of land and cultivate only the lower part thereof, keeping the higher part as his water resources or catchment area. In such a case the uncultivated area would not be Government waste land, and it is not certain that when Maung Pwe spoke of lands kept as water resources he was not referring to such lands as are kept as water resources without being Government waste lands. The alleged custom if stretched to the extent to which the respondents attempted at stretching, must necessarily be unreasonable because anybody by cultivating a piece of land in the lower part of a slope in the locality in question would successfully deprive the Government of the right of disposal of State lands in the higher part of the slope for the purposes of cultivation to those sufficiently enterprising to attempt at cultivating them.

For these reasons I am not satisfied that the alleged custom is reasonable or certain or that it establishes a custom to enjoy the use of the water flowing down from the higher part of the slope as of right. The respondents did not think of setting up such a custom even up to the time when the case went to the District Court for the first time. Nor

(7) A. I. R. 1923 Lah. 448=4 Lah. 202.

does it appear that they expressly pleaded the existence of such a custom at any stage before the case reached this Court on second appeal.

In my opinion the respondents' suit failed. I would allow this appeal and direct that the suit be dismissed with costs throughout.

Heald, J.—Respondents sued for an injunction to restrain appellants from working a certain holding of land. Their case was that appellants' working that holding caused a diminution of the water-supply to their lands, and that therefore they were entitled to prevent appellants from working it.

Respondents' lands adjoin that holding but are on a lower level. Until 1922, when appellants obtained permission from the revenue authorities to work that holding the surface water from the higher land of which that holding consists flowed down to respondents' lands and naturally improved their fertility, the rain fall in this neighbourhood, which is known as the dry zone of Burma, being precarious

The lands which are comprised in appellants' holding are State lands and until permission was given to appellants to occupy them were State lands.

Unless respondents could establish that they had a right to the use of the surface water as an easement they would not be entitled to the injunction which they sought. To establish the easement which they claimed they would have to prove enjoyment as of right and without interruption for a period of 60 years ending within two years next before the institution of the suit. Their suit was instituted in 1926, so that they could not succeed if their enjoyment was interrupted before 1924 or if the interruption had been submitted to or acquiesced in for one year after they had notice of it. Since appellants obtained permission to work the land in 1922, it is probable that respondents' enjoyment of the right to the water which they claim was interrupted not later than 1923, and that on this ground, even if they established that they had enjoyed the right for 60 years, which in fact they did not establish, their suit was bound to fail.

There is also another obstacle in the way of their success, and that is that there can be no easement in respect of the use of surface water. My learned brother has considered the law on this subject and I agree with his conclusions.

Respondents doubtless had an opportunity of objecting to appellants' application to the revenue authorities for permission to work the land and an appeal to the discretion of those authorities was in my opinion the only way in which they could attempt to prevent the lands being worked. It is not suggested that they took that course, and as I do not think that they have any rights which a civil Court can enforce, I concur with my learned brother in setting aside the judgment and decree of this Court in Special Civil Appeal No 707 of 1927, and in dismissing respondents' suit with costs for appellants throughout.

R M /R.K. *Appeal allowed.*

A. I. R. 1929 Rangoon 304

BROWN, J.

Maung Saw and *others*—Applicants.

v.

Ma Shin and *others*—Respondents.

Civil Revn. No 75 of 1929, Decided on 2nd September 1929, from order of Dist. Judge, Magwe, in Civil Misc. Appeal No 89 of 1929.

(a) Limitation Act, Art 181—Application for execution made beyond time—Application to be regarded as application for extension of time governed by Art. 181.

An application to execute a decree for redemption beyond time is to be regarded as an application for extension of time and is governed by the provisions of Art. 181 and the period of limitation begins to run at the latest on the last date fixed in the original decree for payment : 43 *Bom* 689, *Foll.*

[P 905 C 2]

(b) Civil P. C., S. 115—Lower Court overlooking question of limitation—High Court can interfere.

Where the order of the lower appellate Court overlooks the question of limitation entirely in deciding the appeal, the High Court can interfere in revision. [P906 C 1]

S. Ganguli—for Applicants.

S S Malkar—for Respondents.

Judgment.—On 20th November 1923, the respondents obtained a decree for redemption of a usufructuary mortgage. The preliminary decree directed that if the mortgage money be paid by the 20th May possession of the land would be made over. On 20th May the decree-holder asked for execution of this decree by delivery of possession. The

amount due under the decree was apparently not deposited until 19th June. On that date, the decree holder's advocate asked that the case might be closed as the final decree had not yet been passed. The case was closed accordingly and the money in deposit was withdrawn by the decree-holders on 25th September 1924. Nothing further was done until the 23rd July 1927; on that date a final decree was drawn up apparently on a petition filed by the decree-holder, on 5th July 1927. By a curious mistake the trial Court passed a final decree declaring the plaintiffs to be absolutely debarred from all rights to redeem the property. Since a decree in any case could not have been passed in a suit for redemption of a usufructuary mortgage, it was clearly not a decree which the plaintiffs wanted. On 28th July the plaintiff applied for execution of the decree of November 1923. Notice was issued, and when the respondents appeared they asked for time, and again it appears that a long period elapsed during which nothing was done by either party. On 28th March 1928, the decree-holders asked for an order for the delivery of the land. It appears that on 1st August 1927, they had deposited the amount, they were ordered to pay under the decree. Orders were passed for the delivery of the land, without the issue of notice on the judgment-debtors, and the delivery order was returned as duly executed. On 13th April 1928, the decree-holder made a further application saying that the judgment-debtors were resisting their attempts to obtain possession and asking for an order under R. 97, O. 21, Civil P. C. The judgment-debtors objected and orders on this application were finally passed on 16th August. The trial Court dismissed the application on the ground that the time limit for execution of the decree had been exceeded. Against this order the decree-holders appealed to the District Court. The District Court set aside the order and directed that redemption should be allowed. Against this order the judgment-debtors have come to this Court in revision.

The time within which the redemption money could be paid under the original decree expired on 20th April 1924. The application for redemption made on 28th July 1927 could only have been granted under this decree if the time allowed in the decree was extended. It was held by the Bombay High Court in the case of *Vasudev* v. *Gopal* (1), that when an application to execute a decree for redemption was made three years after the passing of the decree the application was barred by limitation. It was held that the application must be considered as an application for enlargement of time and would be governed by the provisions of Art. 181, Lim. Act. That would also be the case here. The redemption could not have been granted to the decree-holders without extension of time and the decree-holders could not have succeeded unless their application were considered as one for extension of time to which Art. 181, Lim. Act, would apply.

It was held in the Bombay case that the period of limitation in such a case must begin to run at the latest on the last date fixed in the original decree for payment. I see no reason for not holding this to be a correct exposition of the law, and the right to apply for extension of time in the present case was therefore barred by limitation at the latest on the 20th May 1927. By July 1927, the decree-holders by efflux of time had lost their right to redeem under the original decree. Even if the application were regarded strictly as an application for execution of the original decree, it would still be time barred. The original case was closed on 19th July 1924. The withdrawal of the amount deposited by the decree-holders on 25th September 1925 could not possibly be construed as a step-in-aid of the execution, and by 1927 the right to apply for execution of the decree was barred by limitation. I cannot, therefore, see how the decree-holders could possibly succeed in the present case. The final decree which was drawn up was clearly incorrect, but the application before the Court was not to execute that decree. I am of opinion therefore, that the trial Judge was right in refusing to allow execution of the decree and the District Court was wrong in setting aside the trial Court's order. The order passed would appear to be one under S. 47, Civil P. C., so that a second appeal would lie. But even if the petitioners are correct in coming before this Court by way of revision, I think there

(1) [1919] 43 Bom. 689=51 I. C. 921=21 Bom. L. R. 697.

is sufficient reason for interference. The District Court in passing orders appears to have overlooked entirely the question of limitation. I set aside the order of the District Court and restore that of the trial Court dismissing the decree-holder's application for execution. Costs in the District Court and in this Court will be borne by the decree-holders, the first three respondents in this application, advocate's fee in this Court two gold mohurs.

V.B./R.K *Application allowed.*

A. I. R. 1929 Rangoon 306

CHARI, J.

Daw Ywet—Applicant.

v.

Ko That Hlut—Respondent.

Civil Revn. No. 291 of 1929, Decided on 28th August 1929, from decree of Sm. C. C. Judge, Rangoon, in Sm. C. S. No. 3471 of 1929.

Buddhist Law (Burmese)—Husband and wife—Burmese Buddhist husband and wife are partners and so Buddhist wife can sue in respect of partnership asset in her capacity as suriving partner—Contract Act S. 45.

A Burmese Buddhist husband and wife are regarded as partners and as such a Buddhist wife can maintain suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly : *A. I. R.* 1927 *Rang.* 209 and 4 *L. B. R.* 99, *Rel. on*; 2 *U. B. R.* 204, *not Foll.* [P 306 C 2; P 307 C 1]

Dangali—for Applicant.

Judgment.—The plaintiff in the suit in the Small Cause Court is the survivor of Burmese couple She claimed to recover a debt due to her deceased husband in which she presumably had a half interest as the wife. The defendant objected to the suit on the ground that the plaintiff could not file a suit without first obtaining letters of administration or a succession certificate. The learned Judge of the Small Cause Court held that he was bound by the previous practice, which was to insist upon the production of a succession certificate or letters of administration by a Burmese Buddhist wife or husband when a suit was filed in respect of a debt jointly due to them. In some of the old rulings of the late Chief Court of Lower Burma, and of the Judicial Commissioner of Upper Burma, it was assumed that one of the Buddhist couple got the whole estate not by survivorship but by succession, so far as one half of the estate is concerned and therefore it was necessary for him or her to get a succession certificate or Letters of Administration in respect of the debt.

The position of a Buddhist couple as regards their proprietary rights has been considered in the Full Bench case of *Ma Paing* v. *Maung Shwe Hpaw* (1). In that case it was held that their position was analogous to that of a partnership, and that all the incidents of a partnership, which were not obviously inapplicable to them because their relationship was not a contractual one, but a result of status, might be applied in consideration of their rights, proprietary or otherwise If this is so it follows that standing in the position of a surviving partner, the widow could maintain a suit in respect of an asset of the partnership, irrespective of the question whether the share of the deceased partner belonged to the surviving partner or somebody else. In these cases, what the law recognizes is the right of the surviving partner to realize the assets of the partnership. O. 30, R 49, Civil P C. makes this clear, but even before this provision of law, it had been held by the late Chief Court of Lower Burma, that a partner could maintain a suit in his or her own name in respect of a partnership asset without joining the legal representatives of the deceased partner in the suit: *K L. P. L. Perianeh Chetty* v. *Armuga Pather* (2). In that case Sir Charles Fox dissented from the Calcutta ruling which took a contrary view and agreed with the rulings of Madras and Bombay. This position is made clear in an Upper Burma case *U Guna* v *U Kyw* (3). The Judicial Commissioner of Upper Burma there recognized the position that the union of a husband and wife among Burmese Buddhists should be treated as a partnership, but held that because of the provisions of S. 45, Contract Act, the wife could not sue in her personal capacity alone and must therefore obtain succession certificate in respect of the share of the other partner. But a different view of the applicability of

(1) A. I. R. 1927 Rang. 209=5 Rang 296 (F. B.).
(2) [1908] 4 L. B. R. 99.
(3) [1892-96] 2 U. B. R. 204.

S. 45, Contract Act was taken in Lower Burma in the case I have cited above, where it was held that nothwithstanding the provisions of S. 45, Contract Act, surviving partners could file a suit in respect of a debt due to the partnership without joining the legal representatives of the deceased partner. It therefore follows that a Buddhist wife can maintain a suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her husband in the asset or debt due to them jointly. As this is the sole point on which the learned Judge of the Small Cause Judge Court dismissed the case, I set aside his decree and remand the case for disposal on the merits.

P.N./R.K. *Case remanded.*

A. I. R. 1929 Rangoon 307

HEALD AND OTTER, JJ.

Ma Thein Nwe—Appellant.

v.

Maung Kha—Respondent.

First Appeal No. 175 of 1928, Decided on 2nd April 1929, from judgment of Dist. Judge, Tharrawaddy, in Civil Regular No. 13-A of 1927

(a) Buddhist Law (Burmese)—Divorce—Mere adultery by husband is not by itself sufficient to entitle wife to divorce.

Ordinary grounds for divorce are adultery and cruelty on the part of the husband and adultery on the part of the wife; and mere adultery on the part of the husband is not by itself a sufficient ground to entitle the wife to divorce. 5 *L. B. R.* 87, *Rel. on*; 9 *L. B. R.* 191, *Ref.* [P 308 C 1, 2]

(b) Buddhist Law (Burmese)—Marriage—Husband's misconduct disentitles him to decree for restitution of conjugal rights.

If a Burmese Buddhist husband misconducts himself with his wife and treats her extremely badly, the case is not in which restitution of conjugal rights can be ordered to him. (1909) *U. B. R.* 1*st Qr. Buddhist Law* 1; (1904) *U. B. R.* 4*th Qr. Buddhist Law* 5, *Ref.* [P 309 C 2]

(c) Buddhist Law (Burmese) — Texts — Dhammathats are merely directory.

Per Otter, J.—The Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. [P 309 C 1]

Kyaw Din—for Appellant.

Lhein Maung—for Respondent.

Heald, J.—In suit No. 13-A of 1927 of the District Court of Tharrawaddy appellant sued respondent for divorce as by mutual consent on the ground of respondent's repeated acts of adultery, and she also claimed partition of the property of the marriage. In suit No. 16-A of the same Court, respondent sued appellant for restitution of conjugal rights and it was agreed between the parties that the evidence recorded in the earlier suit should be evidence in the later suit, and that the plaint in the earlier suit should be regarded as a written statement in the later suit.

The suits were therefore in effect heard together and the judgment in the later suit followed the judgment in the earlier suit. Both suits were dismissed, the Court holding that mere adultery on the part of the husband does not entitle the wife to divorce, and that in the circumstances of the case respondent was not entitled to claim restitution of conjugal rights. Appellant appeals against the dismissal of her suit for divorce, and respondent, instead of appealing against the dismissal of his suit for restitution, has taken the mistaken course of filing a cross-objection to appellant's appeal. Appellant's sole ground of appeal at the hearing in this Court was that according to the Burmese Buddhist Law laid down in the Dhammathats adultery by the husband is by itself sufficient to entitle the wife to divorce.

The learned advocate's argument is more ingenious than convincing, and can hardly be taken seriously. He says that because one Dhammathat says that a wife may abuse a husband who commits adultery and another Dhammathat says a husband may divorce a wife who abuses him, the Dhammathats must be taken as regarding adultery by the husband as a sufficient ground for divorce. The actual passages in the Dhammathats on which he bases this argument are a passage in Manugye (12, 46) which says:

"No blame attaches to a wife who uses abusive language towards a husband who does not consort with her but consorts with prostitutes and continues to frequent their company in spite of her protests,"

and a verse from a metrical Dhammathat known as "Myingun's cited in S. 302, Kinwun Mingyi's Digest (Vol. 2) which says that a husband may leave a wife whose language is unrestrained, who is excessively coarse and disgusting, who has hard and bitter tongue, who sulks and has a violent temper and whom he does not want, and that in these circumstances he may live with the wife of his desire.

It is hardly necessary to say that even if these two passages are read together, and there is no reason why they should be, they do not go far towards establishing the proposition that the husband's adultery by itself is a ground for divorce in a suit brought by the wife. The learned advocate has, however, referred us also to two pas[illegible] from the Dhammathats which a[illegible].0 of the Digest The first [illegible] extract from Kaingsa which runs [illegible] Jews :

"If a wife say to her husband you have violated another man's house and belongings, you are suffering from a loathsome disease, I do not want to live together with you, she shall not be blamed."

The second is a passage from Dhamma which says that a wife may discard a husband who is a drunkard and a gambler and who seduces other men's wives, if he continues in his misconduct in spite of having promised the wise men three times in writing to give up his evil ways. He has referred us further to a passage in Dhammathatkyaw cited in S 256 of the Digest which says that if the wife is guilty of adultery, she is to have her head shaved in four patches and to be sold into slavery, and that if the husband keeps a paramour he is to leave the house with only the clothes he is wearing The last of these passages is the only one which goes any way towards supporting appellant's argument that a wife may divorce a husband for mere adultery, and it can hardly be contended that the Courts are bound to enforce that law at the present day.

As a matter of fact the distinction between wife and husband in the matter of adultery as a ground for divorce is clearly shown in the passage from Manugye (V, 24) which is reproduced in S. 302 of the Digest immediately after the verse from Myingun mentioned above. That passage says that where one party to a marriage behaves like an animal it shall be no defence to a suit for divorce brought by the other party for the husband, if the suit is brought by the wife, to say that he has not been guilty of cruelty and has not taken a lesser wife, or for the wife if the suit has been brought by the husband, to say that she has not taken a paramour. This passage supports the view that the ordinary grounds for divorce are cruelty and adultery on the part of the husband and adultery on the part of the wife.

That is the view of the law which has hitherto been taken by the Courts : vide the case of *Ma Ein* v. *Te Maung* (1), and we are not convinced by the reasoning of the appellant's learned advocate or by the passages in the Dhammathats which he has cited that we ought to hold that mere adultery on the part of the husband is by itself a sufficient ground for divorce. It follows that, since appellant bases her case merely on adultery, her appeal should be dismissed.

As for respondent's cross-objection, it clearly does not arise in respect of appellant's suit and appeal but supposing that it could be regarded as an appeal against the decree in respondent's suit, all that need be said about it is that in view of respondent's misconduct, which I would hold proved, the case is not one in which restitution of conjugal rights ought to be ordered The cross-objection should in my opinion be dismissed. In the circumstances, each party should bear its own costs in this Court.

Otter, J.—This is an appeal against a judgment of the District Court of Tharrawadddy refusing to grant a decree for divorce at the instance of the appellant The suit was heard together with a cross-suit in which the respondent asked for a decree for restitution of conjugal rights. He was refused this decree. He now files a cross-objection to the appeal of the appellant asking that the decree of the lower Court should be modified by granting him restitution of conjugal rights The only ground relied on by the appellant in her appeal is that the respondent was guilty of adultery. No allegation of cruelty was put forward and there is no suggestion that the respondent took to himself a second wife. The parties are Burmese Buddhists. The first question therefore is whether, according to the Burmese Buddhist Law, a divorce can be granted to a wife against her husband upon the sole ground of adultery.

Mr. Kyaw Din who appeared for the appellant referred us to a large number of extracts from the Dhammathats, and I would say at once that with the possible exception of an extract from the Kaingza appearing in S 230 of U Gaung's Digest of the Burmese Buddhist Law, all the passages referred to appear to us to point to a conclusion contrary to that con-

(1) [1909] 5 L. B. R. 87=3 I. C. 715.

tended for by him. It is necessary to point out that the Dhammathats can only be regarded as directory and not as statements of the law which are necessarily binding in law. Moreover there is authority, which in my view shows that it is not and never has been the law, that a Burmese Buddhist woman can divorce her husband on the sole ground that he has had sexual intercourse with a woman not his wife. The extract from the Kaingza appearing in S. 230 of the Digest, to which I have referred, says that the wife has the right of refusing to cohabit with her husband who is adulterous, or is suffering from some repugnant disease. In my view this expression of opinion, though perhaps then in accordance with the usages of Burmese Buddhist , does not amount to a statement that under such circumstances a divorce even by mutual consent could be obtained.

Turning to the decided cases upon the point the case of *Ma Ein* v. *Maung* (1), (decided by a Bench of the late Chief Court) lays down that in the case of Burman Buddhist married couple, adultery on the part of the husband does not alone or even accompanied by a single act of cruelty, entitle the wife to a divorce. In that case the Court expressed the opinion that it appears from the Dhammathats that adultery on the part of the husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce. A wife is, however, entitled to a divorce as by mutual consent, if her husband takes a lesser wife without her approval. This was decided after examination of a mass of conflicting authorities by a Full Bench of the late Chief Court in the well known case of *In re, Maung* v. *Hwe Ma Sein* (2). But the act of adultery, quite apart from that of taking another woman to wife, is different, and on this point no authority was cited in support of the appellant's contention. Thus the proposition that adultery alone does not entitle a wife to divorce her husband has been established and there is no case where the correctness of this view has since been questioned.

Upon this part of the case I need mention one further point only. There was some evidence that adultery took place during the temporary absence of the appellant in a house where they had been living together, and some suggestion was put forward that such adultery under these circumstances might amount to legal cruelty. No authority was put forward in support of this view, and moreover so far as we know there is nothing even in the Dhammathats which supports this view. It seems to me, therefore, that the appellant cannot in law succeed in this appeal It is unnecessary, therefore, to examine the facts upon which she relies.

The only remaining question is whether the learned District Judge was right in refusing to the respondent an order for restitution of conjugal rights. For many years doubts had existed as to whether such a suit would lie under the Burmese Buddhist law In 1907, however, the question was decided in the affirmative : see the Upper Burma case of *Nga Chit Dat* v. *Mi Kin Pu* (3). In all such cases, however, the party seeking a decree must be free from blame : see as to this the case of *Maung Sein* v. *Kin Thet Gyi* (4). In the present case there was abundant evidence to justify the lower Court in coming to the conclusion, as apparently it did, that the respondent misconducted himself on several occasions with Ma Saw Mya. Comment was made that the evidence called for the appellant upon this matter ought not to be relied upon owing to the low station in life, or relationship to the appellant, of certain of the witnesses. Such comment is, of course, permissible, but I have read the evidence and see no reason to disagree with the view taken by the District Judge who heard these witnesses give their evidence.

The learned District Judge also pointed out that the respondent was at fault in that he left the appellant after a heated quarrel with his wife. There seems to have been repeated quarrels between them. A serious quarrel occurred some three months or so before the final rupture. On this occasion the respondent left the house taking with him some, at any rate, of the family furniture, and an apparently false charge of infidelity was made by the respondent against his wife. I have little doubt that a contributory cause of the quarrels between the parties was the tendency on the part of the res-

(2) [1918] 9 L. B. R. 191=45 I. C. 959=11 Bur. L. T. 236.

(3) [1909] U. B. R. 1st Qr. Buddhist Law 1.

(4) [1904] U. B. R. 4th Qr. Buddhist Law 5.

pondent to excessive drinking. The respondent finally left his wife saying he would obtain a divorce, and some preparation was made to have a deed drawn up While a discussion about this was going on, the two brothers of the respondent arrived, and after a conversation between them and the respondent the two brothers violently abused the appellant It was said on his behalf that the final quarrel was entirely due to resentment by the appellant on account of this abuse It seems impossible to hold that this was so. It is true that in a letter (Ex. 3) written by the appellant to the respondent after the separation there are many statements which show her resentment at the conduct of the appellant's family It is equally clear, however, that the respondent was in the habit of abusing the appellant to members of his family, and there can be no doubt that they took his part against her

It is unnecessary for us to deal more in detail with the evidence, for I agree with the conclusion arrived at by the learned District Judge From the whole of the evidence it is plain that the respondent has treated the appellant extremely badly and he is not a man whom the Court will assist by ordering his wife to return. The appeal and the cross-objection thereto must, therefore, be dismissed. Neither party is successful, and we, therefore, order that each party will bear their own costs of this appeal and the order of the lower Court as to costs will stand.

P.N./R.K. *Appeal dismissed.*

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* A. I. R. 1929 Rangoon 310

BROWN AND CHARI, JJ

Maung Shwe Htein and *another*—Appellants.

v.

Ma Lon Ma Gale—Respondent.

First Appeal No. 31 of 1929, Decided on 1st July 1929, against decision of Dist. Judge, Henzada, in Civil Regular Suit No. 10 of 1928.

***(a) Civil P. C., O. 30, R. 4—All that O. 30, R 4 contemplates is existence of partnership.**

All that O. 30, R. 4 contemplates is the existence of partnership and so it is competent for a surviving partner to file a suit in respect of partnership debts without joining the legal representatives of the deceased partner though the partners cannot sue in a firm name they having no firm name. 4 *L. B. R.* 99, *Rel. on.*, 18 *Cal* 86, 2 *U. B R* 204, *not Foll.* [P 311 C 1]

(b) Burmese Law (Buddhist) — Husband and wife—Presumption.

The fact that the money borrowed on a promissory note purports to have been taken for the husband and his sister is no sufficient reason for not drawing ordinary presumption that the husband in executing the promissory note was acting on behalf of his wife as well as himself. [P 311 C 1]

A. H. Darwood—for Appellants.

P. K. Basu—for Respondent.

Judgment.—The facts of the case are very simple. The suit was instituted by Ma Lon Ma Gale against the defendants, who are husband and wife. It is alleged in the plaint that the husband borrowed the sum of money for which the promissory note was executed for the family purposes, and benefit of himself and his wife The promissory note was in favour of two persons, namely Ma Lon Ma Gale, and Ma Mya Bu. These two were sisters and carried on a money lending business in partnership. The trial Court gave a decree for the amount claimed, and the defendants now appeal.

The sole ground argued in the appeal is that no decree can be passed in favour of Ma Lon Ma Gale alone unless the legal representatives of Ma Mya Bu, the deceased partner are also added as parties to the suit Reliance is placed for this argument on a ruling in *U Guna* v. *U Kyaw Gaung* (1), in which the Judicial Commissioner of Upper Burma followed an Indian ruling and held that a suit by the surviving partner was not competent without joining the legal representatives of the deceased partner. The majority of the Indian High Courts have taken a contrary view In *K. V. P L. Perinan Chetty* v. *Armuga Pather* (2), Sir Charles Fox, C J., of the late Chief Court of Lower Burma, followed the decisions of the other Indian High Courts and dissented from the Calcutta ruling in *Ram Narain Nursing Dass* v *Ram Chunder Jankee Lall* (3). In the present Civil Procedure Code O. 30, R. 4 enacts that where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be neces-

(1) [1892-96] 2 U. B. R. 204
(2) [1908] 4 L. B. R. 99.
(3) [1891] 18 Cal 86.

sary to join the legal representatives of the deceased as a party to the suit. In cases of partnership. it is competent for the surviving partner to file a suit in respect of partnership debts, without joining the legal representatives of the deceased partner.

The learned advocate for the appellants argues that it is only when the suit is instituted in the name of a firm that O. 30, R. 4 applies. O. 30, R. 4, does not say so in terms, and merely provides that when two or more persons may sue and be sued in the name of a firm the provisions of that order applies. In this case the two Burmese ladies had no firm name, though undoubtedly they carried on business in partnership. Since they cannot sue in a firm's name, it is argued that the legal representatives of the deceased person are a necessary party. We cannot accept this contention All that O. 30 R 4 contemplates is the existence of a partnership. Even if O 30, R. 4 were not applicable, the previous rulings certainly are. We are therefore of opinion that it was competent for Ma Lon Ma Gale to maintain the suit and it was properly decreed.

The only other point taken before us is, that the promissory note having been signed by Maung Shwe Htein alone, his wife appellant 2, Ma Bu Ma, is not bound by it. It is suggested that the presumption that Maung Shwe Htein was acting on behalf of his wife as well as himself cannot be drawn in this case, because the money purports to have been taken for Maung Shewe Htein and his sister. That does not seem to us to be sufficient reason for not drawing the ordinary presumption in such cases. We dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 311

RUTLEDGE, C. J. AND BROWN, J.

Maung Ohn Tin—Appellant.

v.

P. R. M. P. S. R. M. Chettyar Firm and *others*—Respondents

Civil Miso Appeal No. 119 of 1928, Decided on 25th March 1929, from order of original side in Civil Execution No. 605 of 1927.

(a) Civil P. C., O. 21, R. 90—Official Receiver not in possession nor party—Absence of notice of auction to him does not amount to material irregularity.

The absence of notice of auction to an Official Receiver of an estate who has an interest in the property sold by auction, but who is not himself in possession of such property and is not a party and has not also applied to be made a party to the proceedings does not amount to material irregularity or fraud in publishing or conducting the sale : *A. I. R* 1928 *Mad.* 144, *Dist.* [P 312 C 1]

(b) Civil P. C., O. 21, R. 84—Officer conducting sale is to declare highest bidder as purchaser.

The reasonable interpretation of O. 21, R. 84, is that the officer conducting the sale shall be the person to declare the highest bidder to be the purchaser. *A. I. R.* 1929 *Rang.* 12, *Diss. from* [P 312 C 2]

(c) Civil P. C, O. 21, Rr. 65 and 84—Neither provisions of O. 21 of Code nor procedure on original side of Rangoon High Court contemplate highest bid at auction sale to be placed before Judge for acceptance — Rangoon High Court Rules and Orders Rr. 258, 259 and 261.

The rules of procedure on the original side of Rangoon High Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor do the provisions of O. 21, require a bid to be accepted by a Judge before the contract of sale can be held to be complete. [P 313 C 1]

Burjorjee and *Clerk*—for Appellant.

N. N. Sen—for Respondent 5.

K. C Bose—for Decree-holders.

Judgment.—This is an appeal from an order of the original side of this Court, setting aside the sale of a mill by auction in Civil Execution Case No. 605 of 1927 on the ground that the Official Receiver was not given notice of the auction. It is not alleged that the Official Receiver was the receiver in possession of the mill property, but it 1926 he was appointed receiver of the estate of one U Maung Gyi, and U Maung Gyi had a half interest or share in the mill. The learned trial Judge states that the Official Receiver was in legal possession of U Maung Gyi's half share in the mill. That may be ; but it is not alleged that either U Maung Gyi, before his death, or the Official Receiver, was in actual possession of either the mill or its compound, the possession and management being in the hands of the other partners. The learned Judge proceeds on the analogy of an administrator to an estate, but in our view such an analogy is dangerous and not helpful, as the legal position of an administrator is very different to that of a receiver. Unless special powers have been given to a receiver, in the words of Sir Charles Fox in *Po Shan* v. *Mg. Giji* (1)

(1) [1910] 5 L. B. R. 213=8 I. C. 976=3 Bur. L. T. 89.

"The status of a receiver is merely that of an officer of the Court. He is sometimes referred to as the "hand of the Court" He acquires no proprietary rights or interest in the property of which he is appointed receiver. Having no title to the property he cannot convey or assign any title to it to any other person"

"A receiver has no proprietary rights or interest whatever. Notwithstanding his appointment the proprietary rights in the estate remain in the persons who are by law entitled to the estate. The receiver's possession is not a possession by any personal right. It is the possession of the Court and he is totally devoid of any interest in the property." (Woodroffe on Receivers, 3rd Edn., p. 4.)

The heirs and legal representatives of U Maung Gyi, deceased, in whom the legal title to the estate is vested, were parties to the proceedings. The Official Receiver was not a party and never applied to be made a party We have not been referred to any provision of the Civil Procedure Code requiring notice to issue to a receiver of an estate, who has an interest in the property in question but who is not himself in possession of such property. In the absence of such provision, we are unable to agree that the absence of notice to the Official Receiver was material irregularity or fraud in publishing or conducting the sale. Reliance has been placed on what the learned trial Judge calls, "a grossly inadequate price" which the mill and its premises fetched to satisfy the proviso to R. 90, O. 21, Civil P. C., and it is mentioned that the mill was mortgaged for a lakh of rupees in 1921. The mortgage, however, is dated 1921, and the evidence of Mr. David shows that the mill was in a very bad condition and would require an expenditure of something like Rs. 31,000 and odd to put it in proper condition. In a climate such as Rangoon, rice mill machinery deteriorates very rapidly if not properly looked after, and there is nothing intrinsically improbable in a mill which, though it might be worth a lakh of rupees in 1921, at an auction sale would not fetch more than Rs. 21,000, after several years of neglect.

The decree-holders, respondents 1 and 2, had leave to bid and were present at the auction sale, and we must presume that they would have exercised their power if they were satisfied that the property was going to be sold for a grossly inadequate price. We are not satisfied and cannot accept the explanation that they were so persuaded that the auction was going to be postponed through paucity of would be buyers, that they did not pay due attention to the auction. But, if Mr. David's estimate is at all near the mark, namely, that Rs. 31,000 and odd would have to be spent on the mill, we can understand the Chettyar's reluctance to bid any higher price for it.

Reliance was placed on the decision of a single Judge in the case of *Fraser* v *Krishnaswami Aiyer* (2), but that decision, even if correct is easily distinguishable from the present. There the receiver was in actual possession of the whole partnership property and had applied to be made a party. Mr. N. N. Sen states that there is a further objection in that his client, Ba U, had not been served with notice. It is true that Ba U was not personally served, but the notice was affixed to his house and we find a diary entry in the execution record dated 23rd March 1928, which the Deputy Registrar held to be good notice. The objection does not seem to have been strenuously urged in the trial Court, and the learned Judge makes no mention of it. We see no reason for differing with the Deputy Registrar, and hold that the service on Maung Ba U was good.

A further point has been raised before us on behalf of the respondent. It is contended that when the applications for setting aside the sale were before the trial Judge, the trial Judge had not accepted the highest bid at the auction or declared the bidder to be the purchaser and that therefore the bid had not been accepted. It was therefore open to the trial Judge to refuse to accept the bid whether there were grounds for setting aside the sale under R. 90, O 21 or not. The contention is based on the judgment of a single Judge of this Court in the case of *Afazuddin* v. *Howell* (3). It was there held that the highest bidder at a Court sale of immovable property becomes the purchaser thereof not when the bid is accepted by the fall of the hammer, but when the presiding officer of the Court has accepted the bid and declared the bidder to be the purchaser. Reliance was placed on the case of *Jaibahadur Jha* v. *Matukdhari Jha* (4). In that case the properties had been sold in execution by the nazir of the Court. The

(2) A. I. R. 1923 Mad. 144=47 Mad. 47.
(3) A. I. R. 1929 Rang. 12=6 Rang. 609.
(4) A. I. R. 1923 Pat. 525=2 Pat. 548.

bidsheet was sent to the Munsif who wrote: "Close against the last offer," but never signed the declaration that the property had been knocked down in favour of the bidder. It was held that in the circumstances the Munsif had the power to refuse to accept the bid and to order property to be resold. It would appear, however, from the judgment that the practice in carrying out such Court sales was for the nazir only to conduct the sale and record the bids, but for acceptance of the bid to be with the Munsif

There has been no such practice in the Courts of this Province. Under R. 65, O. 21, Civil P C., every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed Under R. 258 of the rules of this Court published at p 126 of the High Court Rules and Orders sales of immovable property in execution of a decree for money are to be conducted by the bailiff under the direct supervision of a Registrar There is no provision in the Rules which requires a Judge to accept a bid. Under R. 259 if the highest bid be equal to or higher than the reserved price (if any), the bailiff shall make an entry in the sale book to the following effect :

"I declare . . . . . to have been the highest bidder for the purchase of the property above set forth (or of lot No.) for the sum of Rs. . . . . ."

And under R. 260 an application for an order confirming a sale of immovable property is not necessary. If no application to set aside the sale is made within the period allowed therefor a Registrar may pass an order confirming the sale. It is quite clear therefore that the rules of procedure on the original side of this Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor does it seem to us that the provisions of O. 21, Civil P. C., require a bid to be accepted by a Judge before the contract of sale can be held to be complete.

Rule 84, O 21 provides that on every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be re-sold. R. 69, O. 21 quite clearly recognises that a sale elsewhere than in the precincts of the Court house is regular and when the sale is held elsewhere than in the precincts of the Court house the officer conducting the sale has a discretion to adjourn it without reference to the Court On the failure of the payment of the deposit, R. 84 requires that the property should forthwith be re-sold. It is quite clear that if the property were sold away from the Court house, it would be impossible to comply with the provisions of this rule in many cases, if the reference had to be made to the presiding Judge for acceptance of the bid. The bailiff of the Court is appointed to be the officer to conduct the sale, and in our opinion the reasonable interpretation of R 84, O 21 is that the officer conducting the sale shall be the person to declare the highest bidder to be the purchaser.

In *Afazuddin's* case (3), the sale was not in this Court but in a Court in Pegu District. But in our opinion the same considerations would apply in both cases.

There is no rule in the Burma Courts Manual corresponding to R 259 of the High Court Rules and Orders. But it is clear from the rules laid down in paras. 219 to 222 of the Manual, that the necessity of a declaration as to the highest bidder by the presiding Judge is not contemplated as part of the procedure of a sale. We must therefore dissent from the decision in *Afazuddin s* case (3). For the reasons already given, we set aside the the order appealed from and confirm the sale. The appellant is entitled to costs of this appeal and also in the trial Court, advocate's fee ten gold mohurs in this Court.

P.N./R.K. *Sale confirmed.*

A. I. R. 1929 Rangoon 313

BROWN AND MAUNG BA, JJ.

Wor Lee Lone & Co —Appellant.

v.

V. E. R. M. V. Chettyar Firm—Respondent.

Civil Misc Appeal No. 131 of 1929, Decided on 11th September 1929, from order of original side in Insolvency Case No 150 of 1929.

Presidency Towns Insolvency Act, Ss. 9 (e) and 12 (1) (c)—Under S 9 (e) act of insol-

vency becomes complete at conclusion of 21 days and application to get person adjudicated insolvent must be made within three months from conclusion of 21 days.

Section 9 (e) merely lays down that if the property has been attached for 21 days or more there has been an act of bankruptcy. The act becomes complete at the conclusion of 21 days. Thus a creditor is not entitled to present a petition to adjudicate a person insolvent beyond three months after the person's property is attached for 21 days though the property is under attachment at the time of the presentation of the petition : *In re, Beaston*, (1899), 1 *Q. B.* 626 and *A. I. R.* 1927 *Bom.* 633, *Rel. on.* [P 315 C 2]

N. M. Cowasjee—for Appellant

Venkatram—for Respondent.

Judgment. — The appellants have been adjudicated insolvents on the application of the respondents The acts of insolvency on which the respondent relied in their application for adjudication were that certain properperties of the appellants had been under attachment for not less than 21 days They claimed that a rice mill had been attached on 23rd August 1928, that other properties of the appellants had been attached on 6th November 1928, and that in both cases the attachments were still in force when the application for adjudication was filed. The application for adjudication was filed on 20th June 1929, and the contention on behalf of the appellants is that the acts of insolvency alleged were committed more than three months before the application for adjudication, and that the adjudication should not therefore have been allowed. In the case of each attachment it is clear that a period of 21 days had elapsed for more than three months before the presentation of the petition. Under S. 12 (1) (c), Presidency Towns Insolvency Act, a creditor is not entitled to present an insolvency petition unless the act of insolvency on which the petition is grounded has accrued within three months before the presentation of the petition. The contention of the appellants in this case is that the act of insolvency alleged accrued on the expiry of the 21 days and that therefore the respondents were not entitled to present the petition under S. 12.

The learned trial Judge held that the attachments were continuing acts of insolvency and that, as they were still in force at the time of the application, the application was within time. That this is not the law in England is made quite clear in the case of *In re, Beeston* (1). The relevant section of the English Bankruptcy Act, reads as follows:

"A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, and the goods have been either sold or held by the sheriff for 21 days."

In the case of *In re, Beeston* (1) the goods had been seized by the sheriff and had remained in his possession for over a year before the application for ajudication had been made. It was held by the Court that the act of bankruptcy was complete 21 days after the sheriff had entered on possession, and that there was therefore no act of bankruptcy within three months of the receiving order being made. On this point Lindley, M. R., remarks at p. 631·

"Now, is it possible to fairly construe that section so as to make continued possession for more than 21 days either a continued act of bankruptcy or if it should be a succession of periods of 21 days, a succession of acts of bankruptcy ? I do not think that it is consistent with the language. We know perfectly well that acts of bankruptcy have to be regarded critically and carefully. There is no such thing as an act of bankruptcy except that which the statute declares to be one, and when the statute says an act of bankruptcy is committed if an execution has been levied by seizure and the goods have been held by the sheriff for 21 days, that means that the seizure and holding for 21 days together are essential for the consideration of whether there is an act of bankruptcy or not. It seems to me it would be straining this section beyond all reason to say that there was a succession of acts of bankruptcy at the expiration of every period of 21 days or that there has been one continued act of bankruptcy running over a year and a half."

In a concurrent judgment Vaughan Williams, L. J., remarks at p. 633:

"I have only one word to add, and that is a word about whether the bankrupt here by the seizure and the possession for 21 days has committed either a continuous act of bankruptcy for the whole term of possession or an act of bankruptcy which will be repeated each time that there is a fresh period of 21 days of possession. I have no doubt myself that it is one act of bankruptcy that it is not a continued act of bankruptcy, and it is not a repeated act of bankruptcy, on the happening of each fresh period of 21 days.

"I entirely agree with all that has been said by the Master of Rolls as to the words of the section, but I wish to add one observation. Until the recent legislature there was no such act of bankruptcy, as this act of bankruptcy constituted by seizure and remaining in possession for 21 days or any other time. The act

(1) [1899] 1 Q. B. 626=68 L. J. Q. B. 344=47 W. R. 475=6 Manson 27 =80 L. T. 66.

of bankruptcy was by execution for a certain amount followed by sale, and it is that which has been extended. One finds here in this section two things together, and I have no doubt myself that if, as the legislature intended, the act of bankruptcy defined in respect of the seizure and sale be one act done at the instance of the execution-creditor for the purpose of the realization of his security—a security gained by the seizure—so in respect of the continuing in possession the act of bankruptcy is an act of bankruptcy which takes its origin at the seizure and whether the seizure be followed by sale or whether the seizure be followed by possession for 21 days there is only one act of bankruptcy and if there is no fresh sizure, there is no fresh act of bankruptcy."

This decision was followed by the High Court of Bombay in the case of *In re Hyderbhai Husseinbhai* (2). The learned Judge in that case considered the difference between the wordings of the English Act and the Presidency Towns Insolvency Act and held that the view of the law taken in *In re, Beeston* (1) was the correct view to take in construing S. 9 (e), Presidency Towns Insolvency Act. S. 9 (e), Presidency Towns Insolvency Act, reads:

"If any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any payment of money."

It is contended on behalf of the respondents that the law laid down in *In re, Beeston* (1) cannot be followed in India, because of the difference in the wording of the Acts applicable. The English Bankruptcy Act provides that the sheriff shall hold the property for 21 days. In the Presidency Towns Insolvency Act the words used are "for a period of not less than 21 days."

The argument, as we understand it, is that under the Indian Act, at the conclusion of any period of 21 days or more there is a definite act of bankruptcy on which the creditor is entitled to rely for the purposes of S. 12 (1) (c), Presidency Towns Insolvency Act. We are unable to accept this view The Presidency Towns Insolvency Act was enacted after the delivery of the judgment in *In re, Beeston* (1) In its general terms it follows the English Law, as regards this particular act of insolvency. If the legislature had intended to introduce such a change in law from the English law as suggested here, it seems to us that they would have done so clearly and unequivocally. The section as drafted merely lays down that if the property has been attached for 21 days or more there has been an act of bankruptcy. That act is clearly complete at the conclusion of the 21 days. The same considerations would apply as were applied in the case of *In re, Beeston* (1)under the English Act.

In the Bombay case the learned Judge remarks.

"Having regard to the similarity between the Indian and English sections, in fact they are identically the same as pointed out above, I think that the view of the law taken in *In re, Beeston* (1) is the correct view to take in construing S. 9 (e) of the Act, and that is clear if we look to the reason of the rule as regards the period of 21 days. The reason appears to be, that, if a debtor is unable to satisfy a decree against him and his property is attached in execution, it shows prima facie that he is not in a position to pay his debts and therefore is liable to be adjudged an insolvent in order that his property may be distributed rateably amongst his creditors. But the legislature provides that a certain period after attachment should be given to the debtor as an allowance made to him in order to enable him to pay off the debt and redeem both his property and his character and that period is fixed both in Indian and English Law at 21 days It is then provided that if the debtor fails to do so within that period, he will be held to have committed an act of insolvency. It is therefore clear that the act of insolvency is committed immediately on the expiry of the definitely fixed period of 21 days, and just as the English section does not say that this becomes a recurring or a continuing act of insolvency if the attachment continues for more than 21 days, equally so there is nothing in the Indian section to that effect."

With these remarks we are in general agreement. We do not know why the Indian Legislature used the words "for a period of not less than 21 days" instead of "for a period of 21 days." But we do not think that it can be held that by such a change in the wording they intended to introduce a radical difference between the law in force in India and the law in force in England It has been suggested before us that if we hold against the respondents on the point that has been argued we should not set aside the adjudication order but should remand the case for hearing as to whether the adjudication should be allowed on other grounds. It is clear, however, that in the application for adjudication the sole ground relied on was the attachment of the properties, and we see no reason to allow the raising of fresh grounds now. The result is that we set

(2) A. I. R. 1927 Bom. 683=52 Bom 126.

aside the order of the trial Judge adjudicating the appellants as insolvents, and direct that the application of the respondent be dismissed. The respondent will pay the costs of the appellants in each Court, advocate's fees in each Court 5 gold mohurs.

P N /R.K. *Order set aside.*

A. I. R. 1929 Rangoon 316

CHARI, J.

Maung Hla Maung and *others* —Defendants—Appellants.

v.

Maung Po Htai and *others*—Plaintiffs—Respondents.

Special Second Appeal No. 526 of 1926, Decided on 1st May 1929

Transfer of Property Act, S. 123—Doctrine of part performance has no application in the case of donee—Part performance.

The doctrine of part performance on which it is held that a vendee in possession who has paid consideration but has not obtained a registered conveyance cannot be ousted by the vendor or a person claiming under the vendor has no application to the case of the donee : *A I. R* 1924 *Rang.* 200 and *A. I. R.* 1924 *Rang.* 102, *Cons.*[P 317 C 1,2]

Lambert—for Appellants.

B. Banerjee—for Respondents

Judgment.—The plaintiffs in this suit, who are the respondents in this appeal, filed a suit for a declaration of their rights to, and possession of a piece of land in the following circumstances :

The eleven plaintiffs are the children and grandchildren of an old couple U Soe and Daw The Hmon, who originally owned this land, defendant 1 in the suit, Maung Hla Maung is a grandson of the same old couple to whom Daw The Hmon is alleged to have gifted the land. Saw Yoe Tha, defendant 2, is a person to whom Maung Hla Maung sold this land. It is alleged that Maung Hla Maung was a minor at the time of the transfer, but the question really does not arise. A Chettyar attached this land as belonging to Saw Yoe Tha and had it sold in execution of a decree of his, and Maung San U, defendant 3, was the purchaser at the Court auction sale. The trial Court found that there was a gift. The gift was not effected by a registered instrument as required by S. 123, T. P. Act, but by a report to the revenue surveyor and entry of that report in a pyatpaing This fact itself was denied, but it has been found by the trial Court that such a report had been made, and I accept its finding that Daw The Hmon did report the transfer by gift of this land. The learned trial Judge also held that, as the matter was one of inheritance, the provision of the transfer of Property Act did not apply to the transaction and that therefore there was no need to have a registered gift for this purpose. This view of the law was not accepted by the lower appellate Court, and the learned advocate for the appellants in this Court does not seek to support it. The lower appellate Court then referred to the case of *M. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) and distinguished that case from the present one, and holding that a registered document was necessary to effect a gift held that there was no valid and operative gift in favour of Maung Hla Maung. It will be noticed that the sole question for decision is the question of the validity of this gift. If the gift is valid, the plaintiff's suit is bound to fail, irrespective of whether the property still remains the property of Maung Hla Maung or has become the property of Saw Yoe Tha The lower appellate Court having taken this view decreed the case in favour of the plaintiffs, and the defendants in the suit now come up in appeal. The facts being more or less admitted the sole question for me to consider is whether the ruling in *M. L. M. P Chetty* v. *Ma Ngwe Sin* (1) applies and whether the distinction drawn by the learned Judge of the lower appellate Court is a sound one.

He distinguishes that case from the present one on the ground that there was no evidence of Maung Hla Maung's possession or enjoyment of the property and that all that could be said in favour of Maung Hla Maung was that his father So Maung worked the land for about two years. Po Kyaing was admittedly in possession of the land after Soe Maung's death, and he says he was so in possession with the consent of the heirs. The learned Judge therefore held that there was no valid gift and no such possession as would make the ruling in 1 *Rangoon* applicable. There is another case reported in 1 *Rangoon*, dealing

(1) A. I. R. 1924 Rang. 200=1 Rang. 665.

with gifts unperfected by registered instrument and I shall shortly refer to both the cases. The first *Ma Shin* v. *Maung Hmna* (2) is a judgment of my brother Heald, where there was a gift of immovable property made as in this case by a report to the revenue surveyor. There is, however, this distinction between that case and the present one, that all the other heirs of the donor signed the report as witnesses to the transaction and of possession being given to the donee. The learned Judge held that in the circumstances the heirs were estopped from denying the donee's title. It will be noticed that that decision is an application of the doctrine of estoppel.

In the other case of *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin* (1) also the gift was purported to have been made by a report to the revenue authorities. The gift was made by the grandmother of the donee. After the death of the grandfather who had also joined in the report, the property was being managed by the father of the minor donee Maung Ba Shewe, who, as the learned Judge deciding the case found, collusively transferred the land as orasa son, with the concurrence of his mother Ma Le Ywa, one of the donors, to the Chettyar firm. On these facts the learned Judge held that the minor donee having attained majority and being in possession of the property it was not open to the transferee of the land to claim possession If the reasonings of this case is that Maung Ba Shwe being in effect also party to the gift, the Chettyar firm who claimed under him was, as in the earlier case decided by my brother Heald estopped from denying the validity of the gift, the ruling may be considered as an application merely of the doctrine of estoppel. But if that ruling is intended to lay down a general principle that in all cases of gift where the gift is not effected by a registered instrument but the donee happens to be in possession for a fairly long time, it is open to the donee, on the analogy of a person buying property for valuable consideration who has been let in possession of it, to resist the claim of the legal owner, then I must express my dissent from that ruling. The doctrine of part performance on which the Indian High Courts have held that a vendee in possession who has paid consideration but has not obtained a registered conveyance could not be ousted by the vendor or a person claiming under the vendor, has no application to the case of a donee That doctrine is based on the application of equitable principles and has for its foundation the maxims of equity. But where there is equal equity, the law must prevail Story on Equity, Edn. 3, p 36. A Court of equity refuses to interfere, either for relief or discovery, against a bonafide purchaser of the legal estate for a valuable consideration, without notice of the adverse title, because his equity is much superior to that of the others. The last sentence in para. 64C is instructive:

"So the purchaser must have paid his purchase money before notice, for otherwise he will not be protected and if he had paid a portion only, he will be protected pro tanto only."

Showing clearly that it is essential that there must be a superior equity in favour of the person who invokes the aid of an equitable principle. One heir to whom property is given to the exclusion of others, has no superior equity because all the heirs are equally entitled to the favour of the ancestor. The other and more direct maxim on which the doctrine is based is that equity looks upon that as done which ought to have been done, so that if there had been a part performance it is the duty of the vendor to perfect the purchaser's title by a conveyance and equity looks upon that as done which ought to have been done. The true meaning of the maxim is explained in para 64G, where it is stated that equity treats the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. The important part is the following sentence:

"But equity will not thus consider things in favour of all persons but only in favour of such as have a right to pray that the acts might be done."

It will thus be seen that whereas a vendee who has paid consideration has a right to call upon the vendor to specifically perform his agreement by execution of the necessary convevance, a gratuitious transferee like a donee cannot compel the donor to perfect the donee's title by executing a registered

(2) A. I. R. 1924 Rang. 102=1 Rang. 151.

conveyance and the equitable maxim and the doctrine of part performance based on it becomes inapplicable in the case of a mere donee. As I am in a sense dissenting from that ruling, I would, if it were necessary, have placed the matter before the Chief Justice for the purpose of referring the question to a Full Bench, but as my judgment is open to a Letters Patent appeal leave to file which I shall certainly grant if an application is made for that purpose, it is unnecessary to follow that course.

It is thus not necessary to decide the question of possession which was argued by Mr. Lambert for the appellants. He contended that possession was with his client as long as it was possible and argued that on the evidence, Po Kyaing must be deemed to have worked the land on agreeing to pay rent to Maung Hla Maung. In the view I have taken, it is unnecessary to decide this point, and if the Bench by which the appeal is likely to be heard takes a different view of the ruling cited, the point of possession may then be argued before that Bench. I therefore dismiss this appeal with costs.

P N /R K. *Appeal dismissed.*

A I R. 1929 Rangoon 318

RUTLEDGE, C. J., AND BROWN, J.

S. R. A. S. Sidambaram Nadar and *others*—Appellants.

v.

D. R Maganlall Brothers—Respondents

First Appeal No. 257 of 1928, Decided on 19th March 1929, from judgment of Original Side in Civil Regular No. 377 of 1927.

(a) Transfer of Property Act, S. 130—Scope.

Transfers of an actionable claim, whether outright transfers or by way of security, are governed by S. 130 : 37 *Bom.* 198 (*P.C.*), *Foll.* [P 319 C 1]

(b) Transfer of Property Act, S. 130—Debtor by letter authorizing his creditor to draw money due to him (debtor) and depositing securities with him (creditor)—No charge or lien on money is created.

A charge or lien on actionable claim can only be created by a written assignment under the provisions of S. 130. [P 319 C 2]

A debtor by a letter authorized his creditor to draw the money that may be due to him and declared that he had deposited with him (creditor) certain securities.

Held : that no charge or lien was created on the money . 37 *Bom.* 198 (*P.C.*), *Rel. on.* [P 319 C 2]

Hay—for Appellants.

Doctor– for Respondents.

Judgment.—The respondents, D R. Maganlall Brothers, carrying on business in partnership, by their partner, Maganlall Popetbhai, field a suit on the original side of this Court against one Maung Po Nyan, Abdul Gunny and four others. They claimed that Po Nyan had executed in their favour four promissory notes on which at the time of suit the sum of Rs 11,285-13-0 was due. They further claimed that on 23rd June 1927, Po Nyan had by a deed created in their favour a lien or first charge on all sums due by the Public Works Department to Po Nyan. In the suit as originally framed, Po Nyan and Abdul Gunny alone were the defendants, and Abdul Gunny was joined on the ground that he had obtained an order of attachment before judgment on the moneys lying to the credit of Po Nyan in the Public Works Department. The other four defendants were added subsequently on the ground that they also had attached the same moneys

The plaintiffs asked for a decree for the amount due against defendant 1, and for a declaration as against the other defendants that the plaintiffs had a first lien or charge on all sums due by the Public Works Department to defendant 1. The plaintiffs were given a decree in accordance with the prayer in the plaint by the trial Court The present appeal against this decree has been filed only by defendants 4, 5 and 6, A. E. Nagoor Meera, N N. Chettyar Firm and S. R. A. S Sidambaram Nadar.

The first ground in the memorandum of appeal is to the effect that the debts alleged to be due by Maung Po Nyan to the plaintiffs have not been established ; but this ground has not been pressed before us. The promissory notes were produced and were sworn to by Maganlall Popetbhai and Po Nyan has not denied executing them We see no reason, therefore, for interfering with the decree for the payment of money by Po Nyan. It has, however, strongly been urged before us that the declaration in favour of the respondents of the lien on the moneys in question was not justified. On this point it has been urged that the plaintiffs did not obtain the execution of the document on which they rely ; that in any case they have not proved that it

was executed before the attachment by Abdul Gunny ; and, finally, that, even if the document was executed, as alleged, no lien or charge has been established.

Each one of these contentions has been disputed on behalf of the respondents, but we are of opinion that this appeal can be decided by a consideration of the third contention only. On 17th June 1927, Po Nyan executed a power-of-attorney in favour of Maganlall Popetbhai, and on 23rd June he is alleged to have written the document on which the respondents chiefly rely This document reads as follows :

Rangoon 23rd June 1927.

" Maganlall Popetbhai, Esq.,
No. 81 in 28th Street,
Rangoon.

Dear Sirs,

With reference to the loans received by me the undersigned on promotes hereunder mentioned and marked ' A ' I have deposited with you the security deposit receipts hereunder mentioned marked ' B '—as collateral security and authorize you to draw the same when the work is completed and for which I have executed a power-of-attorney in the name of Maganlall Popetbhai dated 17th June 1927 and recorded as No. 1381 of 1927 of the office of the Sub-Registrar of Rangoon and I hereby declare that I have given as security all bills that I have to draw from the Executive Engineer, Public Works Department Rangoon, in connexion with my contract for construction of clerks' quarters at Pauktaw now and in the future and also authorized Mr. Maganlall Popetbhai to draw the same bills and credit the same to my account with Popetbhai Dayabhai and Sons and D. R. Maganlall Brothers of No. 81 in 28th Street Rangoon.

Yours faithfully,
(Sd.) Po Nyan,
23rd June 1927.
No. 18, Obo Street, Kemmendine. "

The Schedule " A, " attached to the letter contains a list of five promissory notes and the Schedule " B, " contains a list of three items, namely one challan, one receipt and a deposit with the Executive Engineer, Rangoon Division. It was held by their Lordships of the Privy Council in the case of *Mulraj Khatan* v. *Vishwanath Prabhuram* (1), that transfers of an actionable claim, whether outright transfers, or by way of security, were governed by the provisions of S. 130, T. P. Act. In that case a debtor held certain insurances on his life. He deposited the policy with regard to one of these insurances with the plaintiff in the case to secure moneys due by him to the plaintiff, and subsequently he executed a formal deed of assignment of this policy to the defendant.

It was held that, in view of the provisions of S. 130, T P. Act, the assignment to the plaintiff was of no effect in creating a charge. At p. 210 of their judgment, their Lordships remark :

" In the present case the respondent bases his claim on a deposit of the policy and not under a written transfer, and claims that this creates a charge on the policy. The section specifically enacts that such a proceeding shall not have any such effect ; such a charge can only be created by a written document. It follows that the respondent acquired no right whatever to the policy or its proceeds by reason of the deposit. "

Under the definition given in S. 3, T. P. Act, " actionable claim " includes a claim to any debt other than a debt secured by mortgage of immovable property, or by hypothecation or pledge of moveable property. In the present case the respondents claim a charge or lien on the money due by the Public Works Department, that is to say, they claim a lien on an actionable claim, and the decision in *Mulraj Khatan's* case (1) is clearly to the effect that such a charge or lien can only be effected by a written assignment under the provisions of S. 130, T. P. Act.

We are unable to read the document on which the respondents rely in this case as being a document of such a nature. It is merely a letter by Po Nyan in which he authorizes not the respondents but Maganlall Popetbhai, one of the respondents, to draw the moneys that may be due to him from the Public Works Department, and declares that he has deposited with him certain securities. Mr Maganlall Popetbhai is authorized to credit the sums he draws with Popetbhai Dayabhai and Sons and with the defendants. But the document clearly does not assign the debt due to Po Nyan to the respondents, Maganlall Brothers, and the Privy Council case already cited is clear authority for holding that the deposit of the document creates no charge or lien at all on the debts. The letter in effect makes Maganlal Popetbhai solely responsible for the recovery of these debts, but it does not assign the debts due to him or to anyone.

We have been referred on behalf of the respondents to a number of English cases, but it was remarked by their Lordships of the Privy Council in *Mulraj Khatan's*

(1) [1912] 37 Bom. 198=17 I. C. 627=40 I. A. 24 (P.C.).

case (1) that in India Courts are bound by the provisions of S 130, T P. Act. Towards the conclusion of their judgment, their Lordships observe :

"The decision of the Court below was therefore erroneous. The error arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they based their decision."

For these reasons we are of opinion that the respondents did not establish that they had any charge or lien on the debts in question We, therefore, modify the decree of the trial Court by deleting therefrom the declaration of a lien or charge in favour of the respondents. The appellants are entitled to their costs in this appeal In the trial Court, defendant 1, Po Nyan, will pay the plaintiffs' costs, and for the rest the parties will bear their own costs.

P N./R.K. *Decree modified.*

A. I. R. 1929 Rangoon 320

HEALD AND MAUNG BA, JJ.

S. A. L. S. Chettyar Firm — Appellant.

v.

Daw Saw and *another*—Respondents.

First Appeal No. 99 of 1929, Decided on 22nd May 1929, from judgment of original side in Civil Regular No. 532 1928.

Contract Act, S 178—*K* obtaining jewellery from lawful owner by fraudulent pretence that he has prospective purchaser but with dishonest intention of raising money on it himself—Jewellery pledged by *K*—Jewellery is obtained by fraud and pledge is invalid.

If *K* obtains jewellery from the owner by means of a fraudulent pretence that he has a prospective purchaser and with the dishonest intention of raising money on it himself *K* obtains the jewellery by fraud and if he pledges it with a person, the pledge is invalid and the person cannot retain the jewellery : *A. I. R.* 1922 *L. B.* 17, *Ref.* [P 320 C 2]

Aiyangar—for Appellant.

Judgment.—The main facts of this case are not now disputed and it is only the legal effect of those facts which is in question Respondent 2 Ma Ma Gyi went to respondent 1 and induced her to hand over certain articles of jewellery on a pretence that she had a prospective purchaser who desired to have inspection of the jewellery. Respondent 1 handed the jewellery to respondent 2, who in fact had no prospective purchaser, and respondent 2 pledged the jewellery next day to appellant Respondent 2 was prosecuted and convicted of criminal breach of trust. Respondent 2 then sued appellant for the return of the jewellery, and a decree has been passed in her favour.

Appellant appeals on grounds that a person who is in possession of goods of any sort can make a valid pledge of such goods provided that the person who accepts the pledge acts in good faith and that the goods have not been obtained from the owner by means of an offence or by fraud. He suggests that because respondent 2 was convicted of criminal breach of trust and not of cheating, the Magistrate must have found that she did not obtain possession of the jewellery by means of an offence. He cites the case of *Annamalai Chetty* v. *Mrs Basch* (1), in which a goldsmith to whom jewellery was entrusted for sale, pledged the jewellery and it was held that because the person who accepted the pledge acted in good faith he was entitled to retain the jewels in spite of the fact that the goldsmith was convicted of criminal breach of trust.

One of the questions to be decided in such cases is whether or not the goods were obtained from the owner by means of a criminal offence or fraud. If they were so obtained the pledge is invalid and the person who has accepted the pledge must return the goods to the true owner. It may be true, as appellant suggests, that such a provision of law is likely to cause serious loss and dislocation of business to money-lenders who act in good faith and with no suspicion that the person making the pledge has obtained the goods by means of an offence or fraud, but it is what S. 178, Contract Act says, and it is therefore the law. In this case we are satisfied that respondent 2 obtained the jewellery from respondent 1 by means of a fraudulent pretence that she actually had a prospective purchaser and with the dishonest intention of raising money on it for herself, and that therefore she obtained the jewellery by fraud. It follows that the pledge was invalid and that appellant cannot retain the jewellery. We therefore dismiss the appeal.

P.N./R K. *Appeal dismissed.*

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(1) A.I.R. 1922 L.B. 17=11 L.B.R. 217.

A. I. R. 1929 Rangoon 321

BAGULEY, J.

Ma Nyen—Complainant—Applicant.

v.

Maung Chit Hpu—Accused—Opposite Party

Criminal Revn. No. 64-B of 1929, Decided on 13th May 1929, from order of Spl. Power Mag., Shwebo, in Criminal Trial No. 118 of 1928.

Criminal P. C., S. 439 (4)—Accused acquitted—No erroneous recording or omission of evidence—High Court cannot direct retrial by holding that on evidence as it is accused ought not to have been acquitted.

High Court interfering in revision may set aside an order of acquittal and direct a retrial owing to non-recording of evidence or improper recording of inadmissible evidence but where there is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded and the High Court is asked to hold that on the evidence the accused ought not to have been acquitted no order directing a retrial can be made : *A. I. R.* 1928 *P. C.* 254, *Rel. on*, *A. I. R.* 1929 *Pat.* 139, *not Foll.* [P 321 C 1]

Sanyal—for Applicant.

Judgment.—The respondent, Maung Chit Hpu, has been tried and acquitted by the Special Power Magistrate, Shwebo, of an offence under Ss 376-511, I. P. C. The present application has been filed by the complainant, Ma Nyein in revision of this order of acquittal I do not see how this application can be entertained. There is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded. The evidence is there and I am asked to hold that on that evidence and no other the respondent ought not to have been acquitted. This seems to me to go very near to saying that he ought to have been convicted and that is a thing which I hold I have no power to do in a revision application. The point has been dealt with by the Privy Council in a very recent case, namely, *Kishen Singh* v. *Emperor* (1). In that case a man was charged with murder (S. 302, I. P. C.); he was convicted under S. 304, and an application for revision was made asking the High Court to find him guilty of murder. In this case the High Court of Allahabad did so, and their Lordships of the Privy Council regarded the case as one which justified them in interfering even though it was a criminal matter, for they pointed out S. 439 (4), Criminal P. C., forbids the altering of an acquittal into a conviction in a revision proceeding.

Were I to say that this case has got to be retried on the same evidence, I should be definitely saying, "On this evidence the man should not have been acquitted," and there is no difference between saying that and saying that he ought to have been convicted, and few Magistrates would be able to retry the accused on the same evidence with my dictum staring them in the face and sufficient independence of spirit to give the man an unbiased trial. Human nature must be taken to be what it is. My attention has been called to the case of *Wazir Kunjra* v. *Emperor* (2). In this case a two Judge Bench of the Patna High Court took up in revision the case of a man who had been acquitted, and altered that acquittal into a conviction. They did not mention S 439 (4), Criminal P. C., in their judgment and appear to have overlooked it entirely.

I can well understand that cases may occur in which, owing to non-recording of evidence, or improper recording of inadmissible evidence a High Court interfering in revision might set aside an order of acquittal and direct a re-trial, which the Magistrate before whom the case came could deal with in a perfectly impartial manner. In the present case where there is no erroneous recording or shutting out of evidence, should I direct a re-trial, it would be for all practical purposes the same thing as sending the case to a Magistrate with directions to convict and this I do not see my way to do.. The applicant has still got plenty of time to move the Local Government to file an appeal against the acquittal if she thinks fit, and this in my opinion is the proper remedy if she is dissatisfied with the acquittal. I dismiss this application for revision.

P.N./R.K. *Revision dismissed.*

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(1) A. I. R. 1928 P. C. 234=50 All. 722=55 I. A. 360 (P. C.).

(2) A. I. R. 1929 Pat. 139=7 Pat. 579.

* A. I. R. 1929 Rangoon 322

OTTER, J

P A. Pakir Mahomed—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1192 of 1926, Decided on 3rd December 1926, from order of Dist. Magistrate, Rangoon, D/- 9th August 1926, in Criminal Regular No. 84 of 1926.

*** (a) Penal Code, S. 480—Ingredients enunciated—Prosecution need not prove intent to defraud—But accused proving want of such intention is entitled to acquittal.**

In order to establish a case under S. 480 the prosecution must prove that the accused marked goods, that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some other person and that such goods are not the manufacture or merchandise of such person. It is unnecessary for the prosecution to prove that an accused in such a case had acted with intent to defraud; should the latter, however, prove that he acted without intent to defraud, he is entitled to be acquitted [P 322 C 2, P 323 C 1]

(b) Trade mark—Trade mark cannot be registered but may be acquired by user.

In India there is no method by which a trade-mark may be registered, but property in or right in respect of a mark may be acquired by user. [P 323 C 2]

(c) Penal Code, S. 482—Person not necessarily manufacturer acquiring rights in respect of the mark can prosecute.

A person, not necessarily a manufacturer, who uses a mark for the purpose of his trade, may acquire rights to and in respect of that mark. Where in the course of a user extending over a large number of years, goods are sold by a firm bearing a certain mark which had been known to purchasers by that mark, a prosecution would also lie at the instance of the firm : 37 *Cal.* 201, *Rel. on.* [P 324 C 1]

(d) Penal Code, S. 482—Corporate body may be prosecuted.

A body corporate such as a firm may be prosecuted for an offence under Ss. 480 and 482 : 7 *L. B. R.* 306, *Ref.* [P 324 C 2]

(e) Penal Code, S. 482—Want of proof that purchasers were deceived does not prove want of intention to defraud—State of mind of accused should be established to discharge onus of proving want of intention to defraud.

Even though no cases of purchasers having been deceived by the use of false trade-mark are proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of the persons responsible for he introduction of the trade-mark is a most relevant fact which can be established by evidence. In the absence of such evidence, the accused cannot be held to have discharged the onus of proving want of intention which was upon him. [P 330 C 2]

*** (f) Penal Code, Ss. 480 and 482—Even trader with some claim to mark cannot adopt it if it causes infringement of other's mark—Actual physical resemblance not sole consideration — If mark bears particular name in market, another mark bearing same name cannot be used.**

A trader even with some claim to the mark or name cannot adopt a trade-mark which causes his goods to bear the same name in the market as those of a rival trader. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. The actual physical resemblance of the two marks is not to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device : *Seix v. Provezende*, (1866) 1 *Ch.* 192, *Foll. Case Law discussed.* [P 324 C 2, 325 C 1]

O. De Glanville—for Appellant.

Mac Donnell—for the Crown

Judgment.—The appellants are the firm of R E. Mahomed Cassim and are represented by their Manager, P. A. Pakir Mahomed. This firm was convicted upon a prosecution entered into at the instance of a firm called The Trading Co. (late Hegt & Co.) for using a false trade-mark under S 480 read with S. 482, I. P. C., and were fined the sum of Rs. 800 or three months rigorous imprisonment. The material portion of these two sections are as follows :

Section 480. " Whoever marks any goods ..... in a manner reasonably calculated to cause it to be believed that the goods so marked ..... are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark."

Section 482. " Whoever uses any false trade mark ..... shall, unless he proves that he acted without intent to defraud, be punished with imprisonment ..... for a term which may extend to one year or with a fine or with both."

It is clear, therefore, that in order to establish a case, the prosecution must prove : (1) that the accused marked goods; (2) that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked were the manufacture or merchandise of some

other person; (3) that such goods are not the manufacture or merchandise of such person.

It is to be observed that it is unnecessary for the prosecution to prove that an accused in such a case had acted with interest to defraud; should the latter, however, prove that he acted without intent to defraud, he is entitled to be acquitted.

It may be stated generally that the law relating to criminal prosecutions in this country does not differ from that relating to civil proceedings, except that in a civil case it is necessary for the plaintiff to prove that the defendant acted with a fraudulent intention.

The prosecutors are a firm of importers of blankets and other similar goods who have carried on business in Rangoon for a large number of years. One particular line of cotton blanket imported by them in considerable quantities from Holland bears a mark stamped upon it consisting of a crown surrounded by an inscription, the letters of which are within two lines which encircle the crown in the shape of an oval. The size of the oval is something slightly less than three inches from side to side and something less than two inches from top to bottom. Exs. 1 and 4 show this mark

The appellants also carry on business in Rangoon and it is, I think, common ground that some time about the month of July of this year they put on the market a line of cotton blanket said to be somewhat inferior quality but of similar appearance, make and weight to the respondents' blanket.

Stamped upon this blanket is a mark of similar shape to that I have described and consisting of an impression of a Fez surrounded by an inscription delineated precisely in the manner I have described as appearing on the mark of the prosecutors The size of the appellant' mark is something over three inches from side to side and something over two inches from top to bottom. The inscription on the prosecutor's mark consists in their name at the top " Van Hegt & Co.," at the bottom " Emschede." The inscription on the appellants' mark consists in the word " R. E. Mahomed & Co." and at the bottom the word " Rangoon."

It was contended on behalf of the prosecutors' firm, viz., the respondents in this appeal, that by long user they had acquired the right to use this particular mark upon their goods and that the appellants' firm by putting upon their blankets the mark I have described were doing so in a manner reasonably calculated to deceive purchasers and others into believing that goods so marked by them were the merchandise of the respondents' firm. It is to be observed that in India there is no method by which a trade-mark may be registered, but property in or right in respect of a mark may be acquired by user It is not disputed here that the respondent firm have acquired the sole right to use their mark. It will also be convenient to state here that it is not contended on behalf of the respondent firm that the mark of the appellant firm if examined or if looked at side by side with the mark of the respondent firm would be calculated to deceive. What is said, however, is that by long user the mark has come to be well known as the " topee " mark, and that, therefore, as admittedly the mark of the appellant firm is known as " top " or " Turkish topee " mark, persons requiring a blanket of the topee mark might well be deceived into purchasing the appellants' blankets. The case for the appellants shortly was that the mark of the respondent is not known as the topee mark but rather as " taz " or " crown " mark and that, therefore, no confusion could arise. In any event it was also said that no confusion could arise for the marks are easily distinguishable; furthermore it was contended on their behalf that even if there was evidence upon which a Court could come to the conclusion that their mark was reasonably calculated to cause it to be believed that their goods were other person's goods yet they had at all material times acted without intent to defraud.

The law upon the matters under review is clearly indicated in certain reported cases to which I propose to refer before dealing with the evidence Certain points, however, which lie upon the fringe of the case should, however, be dealt with before the main questions arising are considered.

There is no doubt, I think, that the appellants would be entitled to maintain civil proceedings for protection of their trade-mark provided that they can

satisfy the Court that by user their goods have become known by the name of that particular mark. It is true that the respondents are not the manufacturers of the blankets in question, but the case of *Jwala Prasad* v. *Munna Lal* (1) is I think sufficient authority for the proposition that a person, not necessarily a manufacturer, who uses a mark for the purpose of his trade, may acquire rights to and in respect of that mark. In the present case I am quite satisfied upon the evidence that in the course of a user extending over a large number of years, blankets manufactured by Hegt & Co and sold by the respondents and bearing the mark shown on Exs. 1 and 4 had been known to purchasers by those marks. A prosecution would, therefore, also lie at the instance of the respondent firm

In this connexion I think it is also clear that as a general rule persons dealing in blankets or purchasing them for their own use refer to them by their marks. This practice is common in the East in the case of many other articles besides blankets I need only mention such well known marks as those representing for example a dagger or an elephant

It is also clear on the evidence that the appellants' blankets have a very large sale all over Burma not only in the towns but in the country districts. They are sent out from the larger dealers in Rangoon and are distributed through various small dealers in the province until they reach the hands of the ultimate purchasers. The latter are generally speaking persons in somewhat humble circumstances.

On an inspection of the two marks under review, it is apparent that in ordinary or colloquial English the mark of the respondents would be correctly described as a "crown," in or with an oval, or simply a "crown" Similarly the appellants' mark would be described as a "Fez" or "Turkish Cap." In Urdu the word for a crown is "Taj" and in Burmese "Tharapu." In Platt's Urdu Classical Hindi and English Dictionary, Taj is translated inter alia as a crown diadem, tiara, a highly crowned cap, crest, tuft plume. The suggestion on behalf of the respondents is that their mark has by long custom been termed "topi mark" or "topi marka" It is not said on their behalf that the word "topi" is a correct and comprehensive word indicating a Crown, but what is suggested is that in this province where so many languages are spoken and so many bastard types of languages have sprung up, the word "topi" has been applied generally to the appellant's mark. On referring to the same dictionary, it will be seen that the word "topi" is translated as a hat, cap . . . . . cover or cap (as of a telescope), head or top (of a thing). Thus from a purely etymological point of view, there is some slight support for the suggestion that a "taj" (or crown) which may be correctly translated or described as a high crown cap, might become known as a cap or even turkish cap There is also no doubt that a body corporated such as the appellant firm may be prosecuted for an offence under Ss. 480 and 482, I P. C · see *Seena M. Haniff & Co.* v. *Liptons Ltd.* (2).

The case for the respondents is that they have brought themselves within the principles laid down in the well known case of *Seixo* v. *Provezende* (3), which have been followed among others in the more recent cases of *In re, Worthington & Co's trade-mark* (4) and *In re, the application of Pomril Ltd.*, (5). The principles I have referred to are correctly summarized in the headnote to *Seixo* v. *Provezende* (3) as follows . "a s·

"Nor can a trader even with some claim to the mark or name adopt a trade-mark which causes his goods to bear the same name in the market as those of a rival trader."

The learned Magistrate who tried this case quoted the following passage from the judgment of Lord Cranworth, L. C., which appears to be as good law to-day as it was in the year 1866 when it was delivered. The passage begins at p. 196 of the report as follows :

"If a purchaser looking at the article offerred to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it, in that belief the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the ac-

(1) [1910] 37 Cal. 204=5 I. C. 1000.

(2) [1914] 7 L. B. R. 306=23 I. C. 689=7 Bur. L. T. 116.

(3) [1866] 1 Ch. 192=14 W. R. 357=12 Jur. (n.s.) 215=14 L. T. 314.

(4) [1880] 14 Ch. D. 8=49 L. J. Ch. 646=28 W. R. 747=42 L. T. 563.

(5) [1901] 18 Rep. Pat. Cas. 181=17 T. L. R. 279.

tual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device."

The first question therefore for me to consider appears to be as to whether the blankets in question have become known in the market as the "topi" blanket or "topi mark" blanket

The second question is whether the adoption by the appellant firm of this mark will reasonably cause their goods to bear the same name in the market and thus cause it to be believed that the goods so marked are those of the respondent's firm.

In this connexion I have been referred to the well known case of *Orr Erving & Co.* v. *Johstone & Co.* (6) where the judgment of Fry, J , (as he then was) was affirmed by the House of Lords. At p. 447 of the nisi prious report, Fry, J., cited with approval the judgment of Lord O' Hagan in *Singer Machine Manufacturers* v. *Wilson* (7) and went on to say

"It appears to me, therefore, that I ought to hold that if one man will appropriate to himself a material and substantial part of the ticket which another man has used for the purpose of indicating his goods, he ought so to appropriate it, and with such precautions as that the reasonable probability of error should be avoided."

It is true that there was some evidence of fraud in that case but the passage I have quoted seems to me to be of general application. I would point out that Fry, J., had already come to the conclusion that the one mark :

"would not be taken for the other by dealers or purchasers of ordinary prudence."

If I come to the conclusion that both the questions I have indicated must be answered in the affirmative, it will then be necessary to consider whether the appellant firm have acted at all material time without an intent to defraud.

On behalf of the respondent firm a mass of evidence is given both oral and documentary.

I do not propose to deal in detail with the evidence but it will be sufficient to say that some 13 or 14 Rangoon traders in piecegoods were called and the result of their evidence is that the mark of the appellant firm has been known to them on the blanket market as the topi mark. (His lordship after considering the evidence, proceeded.) The main intrusion directed against the respondent's evidence is that it was given by traders only and not by actual consumers or purchasers. There is, no doubt, some force in this suggession, for it has been said over and over again in decided cases that it is the interest of the purchaser and especially the ignorant purchaser in a country such as this which has mainly to be considered. I need only refer to two such cases . *Badische Aniline* v. *Maneckji Shapurji* (8),

Where Sergeant, C. J., said .

"The question in a case of this description is not what would be the effects on brokers or even dealers in Bombay . but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the moffussil."

This decision was approved in *Nemichand* v. *C W. Wallace* (9). As was pointed out, however, on behalf of the respondent firm, in *the Madhavji Dharmasey Manufacturing Co., Ltd.*, v. *Central India Spinning Weaving and Manufacturing Co., Ltd*, (10), this point was discussed in the judgment of Scott, C. J , at p. 62. The learned Chief Justice there stated :

"It is said that the witness for the plaintiffs were middle-men or commission agents and not the ultimate buyers and that the witnesses would not be deceived. To this the answer is that their testimony as to the form in which order for the plaintiff's cloth is usually given is good proof of the association formed in the minds of ultimate buyers between the figures and the article produced by the plaintiffs see also in this point. *Level* v. *Goodwin* (11) "

In the present case, a mass of evidence was also tendered consisting of orders from country districts and entries of books in respect of such orders all describing the respondents' mark on the blanket as "topi" blanket or "cap" blanket. It is said therefore that if a small dealer in the district describes the respondents blankets as "topi" or "cap" blanket, the inference is almost irresistible that these blankets are so described by the out of

(6) [1879] 13 Ch. D. 434 on appeal (1881) 7 A. C. 219.
(7) [1878] 3 A. C. 376=26 W. R. 664=47 L.J. Ch. 481=38 L. T. 303.
(8) [1893] 17 Bom. 584.
(9) [1907] 34 Cal. 495=11 C. W. N. 537.
(10) [1917] 41 Bom. 49=34 I. C. 529=18 Bom. L. R. 206.
(11) [1907] 36 Ch. D. 1=36 W. R. 177=57 L. T. 583.

the way purchaser. There is also a certain amount of evidence that actual purchasers in Rangoon described the respondents' blankets as "topi" mark blankets This testimony was, however, somewhat vague and open to criticism.

There was, therefore, called on behalf of the respondent firm, evidence, which, if believed, and if it stood alone, would justify a Court in coming to the conclusion that the first question should be answered in the affirmative. With regard to the second question there was no evidence at all called on behalf of the respondent firm to show that the purchaser or dealers have in fact been deceived by the mark of the appellants' firm into purchasing goods of the latter in the belief that they were purchasing the respondent's goods. It seems to me, however, that when once there is evidence that the mark of the respondents' firm is generally known as the "topi" mark, it will not be difficult also to come to the conclusion that confusion may arise owing to the appellants' mark The point was dealt with by Lord Watson in the *Orr Ewing* case (6) At p 231 of the House of Lords' report he says .

"When a prominent and substantial part of a long and well known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs."

It is said and was urged with some force that looked at side by side, no purchaser could be decieved That I think is clearly proved with regard to dealers and others from India connected with the trade. It is also, I think, proved that a consumer of education and experience who exercises care and skill in his or her purchases might well not be deceived. But blankets of different marks are not always looked at side by side nor are the majority of purchasers persons of skill or intelligence.

Mr. DeGlanville, however, relied on this fact as assisting his contention that the mark of his client's firm ought not to be held reasonably calculated to decieve. Upon this part of the case I would again refer to the judgment of Fry, J., (at p. 448 of the nisi prius report) The learned Judge in considering whether the defendents had appropriated with due precautions to prevent mistake, and he says:

"In considering and answering that question, it strikes one at first that they have thought fit to print the name of their firm upon their ticket in a language which can be read, undoubtedly, by the original purchasers of their goods, but which cannot be read by the ultimate purchasers in the Indian markets, and therefore the protection which would be given by a name capable of being read, wherever the goods go is not afforded by their ticket. According to the evidence before me when the goods reach Bombay, they pass generally into the hands of merchants dealing in a wholesale way, they are then distributed through the intervention of a series of middlemen, who it appears, form a numerous class, employed in the distribution of the goods over the country. In my judgment, the first class of purchasers would probably not be deceived. But, upon the whole of the evidence before me, I think that there is a strong probability that the ultimate purchasers, the weavers who buy the goods in the country villages, and probably also the retail dealers who sell to them would be deceived by the defendant's ticket. One of the witnesses, who is a dealer in English yarn in Bombay, said that, in his opinion the native buyers would be deceived, because, they "would ask for 'Bhe Hathi' and there," (that is, as I understand him, on the defendant's ticket) are Bhe Hathe."

Furthermore the present case is a criminal prosecution and intent to defraud is not an ingredient in the offence

On this part of the case, so far as the evidence for the prosecution is concerned it seems to me that there was evidence, if believed, upon which I could come to the conclusion that the effect of the trade-mark of the appellant's firm is reasonably calculated to deceive. On behalf of the appellants a large body of evidence was also called, and there is no doubt that the witnesses were drawn from both retail and wholesale merchants and brokers. Some of these witnesses say substantially that the respondents' mark is known as the "taj" mark. It is also in evidence that the appellants' mark was also known as "topi" or "Turkish cap" mark, and further a number of exhibits were produced bearing the marks similar to those in dispute, as to which witnesses said that no confusion in fact arose. I will deal with this contention later. Evidence on the latter point was stronger and more definite than that called to establish the fact that the respondent's mark was known as something other than the "topi" mark.

I would refer to the evidence of some of the most important of these witnesses.

A man called Kassim Ismail (D. W. 1) a dealer in piecegoods in Surti Bazar, who sells the appellants' blankets, said that he also knew the mark on Ex. 4, but that he had never sold them (viz. respondents' firms blankets) He stated that Exs. 1 and 4 are known as "taj" mark and that Ex. 2 is known as "topi" mark.

A man called Eusoof (D. W. 6) stated that he called Ex 4 "tarapu" in Burmese and "taj" in Hindusthani. He added that he sold it to the jungle people who asked for tarapu tazeik" (or crown mark).

A man called Mutu Garlan Ahmed (D. W 9) a partner in the firm of Malim Brothers and a merchant in the Surti Bazar said that he knew Ex. 4 and that it was called "taj" mark and added that he had known it since 1899 and had always known it as "taj" mark. He said that he had never heard it called "topi" mark This was perhaps the strongest piece of evidence on behalf of the appellant firm. Several witnesses for the appellants said that they called the respondents' mark "crown" or "taj" or "tarapu" but did not go so far as to say what the mark was generally to purchasers or traders.

Another witness called Aga Ahmed Shirazee (D. W. 10) says that he had never heard of topi mark blankets He said in cross-examination, however, that he dealt with considerably higher class of persons than those who would be likely to buy the blankets of the respondents' firm.

A man called Dada Saheb (D. W. 11), general merchant, who had dealt in the respondents' blankets said that he had never heard of the topi mark blanket.

A great point was made on behalf of the appellants that other similar marks caused no confusion. Exs. A, B and C are such. So also are Exs. 6 and 7, two pieces of velvet one with obvious crown upon it and the other with a Turkish Fez Exs. 8 and 9, two pieces of serge, one having a coloured crown upon the card pattern cover, and the other having a Fez, stamped upon it called a golden cap; Exs. 11 and 12 samples of long cloth, one with a number of crowns stamped upon it, and the other with highly coloured and large label showing a blue Fez.

It was said that no confusion had arisen with regard to these respective marks. No doubt that is perfectly true but as was pointed out by the learned Magistrate non constat that if the matter was tested, a Court might not hold that the purchasers might be deceived by one or other of the marks In each instance, I think it would be possible (as it is of course in the present case) to point to features of difference in each of these marks, but, however that may be, there is no doubt at all that evidence of this kind is of some significance. I would point out, however, that the case for the respondent is, not that purchasers would be deceived by the appearance of the mark, but that they would be deceived into buying the appellants goods because the mark upon these goods was well known by the same name as the mark on the respondents' goods. It is further pointed out that the articles I have referred to would be likely to be purchased by persons of more experience and intelligence than those desiring to buy the cheap cotton blankets in question. There appears to me to be some force in this

The witnesses called on behalf of the appellants therefore did contradict to some extent the testimony of the respondents' witnesses, and it will be necessary for me to consider whether the testimony of the witnesses on behalf of the latter is displaced by that of the former. I would point out, however, that from first to last no light whatever was thrown by the appellant firm upon the circumstances under which their mark came to be adopted. It was suggested that as the appellant firm were represented by an individual in these proceedings, it would have been impossible to adduce such evidence. I cannot agree. The firm are the defendants to the proceedings, and I know of no reason why the manager should not be called on their behalf. It is true that some one must be questioned by the Court upon the evidence for the prosecution but his answers would be given on behalf of the accused (namely the firm) and he would not therefore become the defendant. Furthermore in the event of conviction or fine, the goods of the manager would not be liable to execution. However that may be, and even if the appellant firm believed that their manager was disqualified from entering the witness-box, it seems to me that there must be other persons not necessarily in the position of the manager, who could have

been called, and who could have assisted the Court upon this part of the case

It is obvious of course, that such evidence would be the most material upon the question of the intent to defraud to which I must refer at a later stage. In balancing the evidence given on behalf of the respective parties, I have been assisted by the examination of a large number of authorities and also by the arguments of the learned advocate on both sides I propose only to deal here with those cases which seem to me to have the most bearing upon the matter. In doing so I will endeavour to take the various points relied upon by the learned advocate for the appellant firm and discuss them in the light of some of the reported cases.

It will be seen that nearly all the reported authorities relate to civil suits. There are, however, one or two reports of criminal prosecution It was not suggested by either of the learned advocates appearing in the case that the law in this country differs substantially from that as laid down in England and after considerations of a number of authorities it seems to me that this is so. The different conditions of life and habit in the East, no doubt have to be borne in mind in considering the facts of this case, but the main principles are the same. One of the difficulties in such a case as this is that reports of other cases are of less assistance than many other branches of law. Each case must depend upon its own particular facts, and although it is necessary to consider and apply the general principles enunciated by the Courts from time to time, yet it is in the nature of things impossible to find a decided case, the facts of which resemble closely those of any particular case under review.

The case of *West End Watch Co.* v. *Burma Watch Co.* (12) among others was relied upon by the respondents' firm as showing that similar principles to those enunciated in the case of *Seixo* v. *Provezende* (3) have been laid down in this country. In the course of the judgment of Scott, C. J., in that case the following passage occurs

"The importer who by advertising and pushing the sale of goods under a particular mark secures a wide opportunity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods."

This has been recognized by the Madras High Court in the case of *Lavergne* v. *Hooper* (13). The case of *Seixo* v. *Provezende* (3) was also considered in the case of *Emperor* v. *Bakaullah Mallik* (14). This case was relied upon by the appellant firm. It was a criminal case and the short facts of that case were that the prosecutors had been selling fish hooks with labels showing a design of two fish crossed with their heads and tails pointing upwards. These hooks were known in Calcutta generally as "Mach Marka" or fish mark, and commanded a large sale. The defendant firm also had been selling fish hooks with a similar label containing one fish with head and tail turned upwards, and were convicted of using false trademark under S 482, I. P C. On appeal the conviction was set aside, and the Court distinguished the case of *Seixo* v. *Provezende* (3) upon the facts. I cannot find the principles laid down in the latter case dissented from at all, and while distinguishing the facts, the Court appeared to be of opinion that when a name suggested by the trade is applied as a trade-mark the matter assumes an aspect different from that existing in the present case. where a "crown" or "topi" has been adopted as a trade mark of a blanket. It seems to be the opinion of the Court that a fish was too common a feature and too fit for application to a trade-mark to be afforded protection by the Courts. How far this doctrine is of general application it is unnecessary for me to consider, but it seems to me that the case of *Emperor* v. *Bakaullah Mallik* (14) already referred to does not assist the case for the appellants.

It will be convenient now to deal with the various contentions put forward on behalf of the appellant firm. They were substantially as follows (1) That no evidence had been adduced by the prosecution to show that any one was deceived I have mentioned this contention before, and apart from the defence of want of intent to defraud the matter is not in my view of great importance. It is true that this fact may

(12) [1911] 35 Bom. 425=10 I. C. 805=13 Bom. L. R. 242.

(13) [1884] 8 Mad. 149.

(14) [1904] 31 Cal. 411.

and should be taken into consideration in dealing with the question whether the appellants' mark is calculated to deceive purchasers, yet as I have already pointed out it is unnecessary for the prosecution to establish an intent to defraud on the part of the appellants' firm. In this connexion I would quote a part of the head note in the case of *Madavaji Dharmasee Manufacturing Co Ltd.* v. *Central India Spinning, Weaving and Manufacturing Co. Ltd* (10). It runs as follows :

" It was not necessary for the plaintiffs to prove cases of actual deception, if the defendants had put into the hands of middle-men a means whereby ultimate purchasers were likely to be defrauded. "

This, says Mr. McDonnell on behalf of the respondent firm, is exactly what the appellants did. Mr. deGlanville relied here on the case of *Cope* v *Evans* (15). This was a civil suit and it was dismissed because there was no evidence of actual deception and no such limitation of the plaintiffs' trade-mark as in the opinion of the Court made deception probable. A passage in the judgment of Hall, V. C , occurring at p 150 was relied on among others by the appellants. The learned Vice-Chancellor had been considering *Seixo* v. *Provezende* (3) and asks himself the questions

" Have the plaintiffs in the present case shown that the defendant's user of the mark will cause their goods to be taken for the plaintiffs' ? Will it be the inevitable consequence of the use by the defendants of their mark that purchasers in purchasing the defendants cigars will believe that they are purchasing the plaintiffs' ? It is true the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs ?

and answers them all in the negative. Now it may be that those questions are fit to be asked in a civil case but the present case is a criminal prosecution and the question is a different one and depends on the wording of the statute.

Again Mr. deGlanville quoted " *the Society of Motor Manufacturers & Traders Ltd.*. v. *Motor Manufacturers and Traders' Mutual Insurance Co. Ltd.* (16).

I cannot attach much importance to this authority in the present case. It is not a trade-mark case and it turned only on the right by a company to use certain descriptive words as part of its name.

The real question was one as between the parties concerned, and the rights of the public were only indirectly material. Here the position of the purchaser is vital.

Mr deGlanville also said that there was no direct evidence as to who the actual users of these blankets were. This is to some extent true but it plainly appears I think from the evidence of the prosecution, both oral and documentary that the respondents' blanket were and are largely bought by persons in a humble position in life both in the towns and in the country districts of Burma.

It was said that the witnesses for the prosecution were practically all dealers viz., trading companies and that therefore, their evidence is untrustworthy. I have already referred to this point, and it is an important point. It would have been of great assistance to me had better evidence in this connexion been available. As I have already pointed out, however, there were quite independent witnesses called whose evidence was one of the plainest possible character. Furthermore, as I have also pointed out this was exactly the kind of evidence called for the prosecution in the case of *The Madavji Dharmasee Manufacturing Co. Ltd.* (10). The above contentions, it will be seen, were directed against the case put forward on behalf of the prosecution.

Mr. deGlanville went on to argue that even were I satisfied that upon the evidence of the prosecution a prima facie case has been made out, yet looking at all the evidence I ought to allow the appeal He also argued that, after considering the evidence for the defence I ought to come to the conclusion that the mark of the respondent firm is not known outside the ambit of blanket dealers as the " topi " mark blankets, but rather is known generally to the public as the " taj " mark blankets

No doubt there were categorical statements made on behalf of the appellants' firm directly contradicting the evidence for the respondent. I have already referred to certain of these. I, however, cannot help being much impressed by the apparent position and experience of

(15) [1874] 18 Eq. 138=22 W. R. 450=30 L. T. 292.

(16) [1925] 1 Ch. 675.

the witnesses who testified on behalf of the respondents' firm. Furthermore four of these witnesses were in my view quite independent. Also I cannot lose sight of the mass of documentary evidence put in on behalf of the respondent firm. Some of this no doubt is open to objection. Certain orders were produced without the writers of these being called as witnesses or without their handwriting being identified. Mr. McDonnell contends that under S. 32, sub-S 2, Evidence Act, such evidence is admissible. I am in doubt as to this. It is unnecessary for, me however, to decide the point for in many cases evidence of handwriting was forthcoming, which would, I think, being country orders such as were produced, be directly within the provisions of the Evidence Act I have quoted. Again, account and other books kept in the ordinary course of business were also produced. In substance, the effect of this evidence seems to me to lend very strong support to the case for the respondents' firm. It is true that the evidence for the defendant contains certain categorical statements to the contrary. But upon careful examination of that evidence as a whole it seems to me that it falls short of establishing the contention that the respondents' mark did not and does not bear the significance contended for The witnesses were much more inclined to state that in their opinion the "crown" would and should be translated by them by the word "taj" or "tarapu."

A further strong point was made by Mr. deGlanville to which I have already referred. He said that after weighing the evidence as to Exs. 6, 7, 8 and 9 I must be of opinion that the crown mark was not calculated to deceive I have dealt with this argument and need only add this that, if for example in the case of Ex 6 there was evidence that it was generally known in the market as the "topi" mark I should not find it difficult to come to the conclusion that the "Fez or Turkish Topi" on Ex. 7 might well be calculated to deceive. Upon the whole I have come to the conclusion that the 2 questions I have indicated must be answered in the affirmative. The only question remaining then is whether the appellants have succeeded in satisfying me that they acted without intent to defraud. In the absence of any evidence at all as to how their mark came to be used, it is somewhat difficult to hold, that the appellants have discharged the onus which is upon them. I need not elaborate the sort of evidence which I should have expected to find, but an indication that legal advice had been taken or careful enquiries made among traders before the mark was displayed would have been of the highest importance. It is perfectly true that no cases of purchasers having been deceived have been proved, but in my view this fact standing alone is insufficient to justify the contention that the appellant firm acted without intent to defraud. The state of mind of the persons responsible on behalf of the appellants. firm for the introduction of their trademark is a most relevant fact which could have been established by evidence. As I have already stated, no such evidence is before me.Therefore, in all the circumstances I have come to the conclusion that the appellants' firm has not discharged the onus which is upon it

For the reasons I have given I must hold that the conviction by the learned District Magistrate was right. Further it appears to me that no serious criticizm can be directed against the sentence that was passed. The fine of Rs. 800 does not appear to me to be excessive in a case of this kind, where a very large business in the goods in question is done throughout the province. In coming to this conclusion I am fully aware that no attempt was made to show that the appellant firm adopted their trade-mark either for the purpose of deceiving purchasers or for causing damage to the business of the respondents. Believing, however, as I do, that the act of the appellant firm was in fact reasonably calculated to cause persons to be deceived, a somewhat substantial penalty seems to be required. The appeal against both conviction and sentence therefore must be dismissed.

M.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 331

CARR, J.

K. M. Subbaya Naidu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 221 of 1929, Decided on 3rd April 1929, from order of Dist. Magistrate, Rangoon, in Criminal Regular Trial No 148 of 1928

Criminal P. C., S. 342 — Under S. 342 after examination of fresh witnesses for Crown and recall and cross-examination of prosecution witnesses, accused should be examined, but violation of provisions of S. 342 is mere irregularity curable under S. 537 if it does not involve prejudice to accused—Criminal P. C., S. 537.

A number of witnesses for the prosecution were examined and then the accused himself was examined. At the next hearing two witnesses for the Crown, who had not previously been examined, were examined and after that a considerable number of the other prosecution witnesses were recalled and cross-examined. Subsequently the defence witnesses were examined but the accused was not examined again and a judgment was passed against him.

Held, that the provisions of S. 342 were not obeyed as that section would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined and to be further examined after two fresh Crown witnesses had been examined. [P 332 C 1]

Held further: that such violation if it did not lead to a failure of justice would not vitiate the proceedings and is a mere irregularity which could be cured under S. 537: *A. I. R.* 1922 *Mad.* 512; *A. I. R.* 1923 *Cal.* 196; *A. I. R.* 1923 *Cal.* 668, *A. I. R.* 1923 *Cal.* 470, *A. I. R.* 1924 *Cal.* 975, *Diss. from.*, *A. I. R.* 1924 *Lah.* 84, *A. I. R.* 1925 *Pat.* 414; *A. I. R.* 1923 *All.* 81; *A. I. R.* 1925 *Rang.* 258, *A. I. R.* 1927 *P. C.* 44, *Rel. on.*; 25 *Mad.* 61 (*P. C.*) and *A.I.R.* 1923 *Mad.* 609 (*F.B.*), *Ref.* [P 333 C 2]

Villa—for Appellant.

Tun Byu—for the Crown.

Judgment—On or about 20th January 1928, a leaflet headed "Are we dogs" was distributed at various places on the railway line between Rangoon and Mandalay from a passing train and also at Mandalay itself where at that time a meeting of the Hindu Sabha was being held. On 10th March 1928 the Commissioner of Police, Rangoon, under the orders of the Local Government filed a complaint under S. 124-A, Penal Code against the present appellant K. N. Subbaya Naidu, the editor of a newspaper called "The Desopakari" and Chellan Pillay, the Assistant Manager of that paper. At that time the appellant was not to be found and Chellan Pillay alone was tried. He was convicted by the District Magistrate of Rangoon but on appeal was acquitted by this Court on 15th August 1928. On 22nd October 1928 the appellant surrendered himself to the District Magistrate in Rangoon, who then proceeded to try him for the offence and has convicted him and sentenced him to three years' rigorous imprisonment. Against that conviction he appeals.

The petition of appeal is lengthy and verbose It contains contentions that the District Magistrate had no jurisdiction to try the case and that the leaflet was not seditious and the rest of it may be summed up into the contention that the evidence in the case was not sufficient to prove the publication of the leaflet by the appellant. At the hearing of this appeal Mr. Villa, who appeared for the appellant, has dropped the contention that the District Magistrate had no jurisdiction. I may say also that that contention was really unsustainable. Part of the evidence against the appellant is to the effect that he had this leaflet set up in type in his own press at Rangoon and if that fact is proved, then clearly the District Magistrate of Rangoon could try the case. Other evidence is to the effect that the appellant distributed the leaflet at various stations on the Rangoon Mandalay Line, while he was travelling from Rangoon to Mandalay and if that fact is proved, under S. 183, Criminal P. C., the District Magistrate had jurisdiction. Mr. Villa has also dropped the contention that the leaflet was not seditious. Obviously it was almost seditious and inflammatory composition containing direct incitement to murder every Englishman in Burma, referring, in particular, to the collection of the thathameda tax. Mr Villa has, however, raised a further contention of law that the trial is invalid by reason of the District Magistrate's failure to observe the provisions of S. 342, Criminal P. C.

The facts relevant to this contention are that up to 28th November 1928, 25 witnesses for the prosecution had been examined. The accused himself was then examined. His examination was very brief; but he said at its close that he had prepared a statement which would be translated and filed in Court. He did in fact put in a lengthy statement occupying four pages of type. This is dated

14th December 1928. When it was actually filed, does not appear on the record ; but it seems probable that it was filed on 17th December, which was the date of the next hearing after 28th November. Probably it was put in at the beginning of that hearing. At that hearing two witnesses for the Crown, who had not previously been examined, were examined and after that a considerable number of the other prosecution witnesses were recalled and cross-examined on 17th and 18th December. On 9th January 1929, the defence witnesses were examined and finally judgment was passed on 4th February 1929. After his examination on 28th November the appellant was not examined. There can be no doubt that here the District Magistrate did disobey the provisions of S 342 of the Code. That section lays down that the Court shall examine the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. I have no doubt that this, applied to the present case, would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined after he was finally charged and there is equally no doubt that, after two fresh prosecution witnesses had been examined after the framing of the charge, the section requires that the accused should be further examined.

The question is whether this is merely an irregularity which, if no prejudice has been caused thereby to the accused, is curable under S 537 of the Code or whether it is an illegality which vitiates the trial altogether Before discussing this question fully, I would say that in my opinion the irregularity or illegality whichever it may be has not in any way prejudiced the appellant The evidence of the two additional witnesses called after his examination though relevant added nothing of any very material importance to the case as it stood before that , nor did there emerge from the cross-examination of the other prosecution witnesses anything which required further explanation by the accused.

On the question now to be decided, there is a very considerable difference of opinion among the High Courts in India. In the case of *Re, Maruda Muthu Vannian* (1), a Bench of the Madras High Court held that the failure to examine an accused person after the prosecution witnesses had been recalled and cross-examined after the framing of the charge was not a mere irregularity curable under S. 537 but an illegality which vitiated the trial. This case, however, was overruled in part at any rate by *Varisai Rowther* v. *Emperor* (2), in which four out of the Full Bench of five Judges held that when an accused person had once been examined after the prosecution had finished calling evidence it was not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses recalled at the instance of the accused under S. 256 of the Code The Full Bench further held that, if the prosecution called fresh evidence after the charge was framed, the accused must be questioned generally on the case after this further examination of the prosecution witnesses. The Calcutta High Court has in several cases taken the view set out in *In re, Maruda Muthu Vannian* (1). These cases are *Mazahar Ali* v. *Emperor* (3), *Jummon Christian* v. *Emperor* (4) ; *Pramatha Nath Mukerjee* v. *Emperor* (5) and *Legal Remembrancer, Bengal* v *Satish Chandra Roy* (6)

On the other hand in *Byrne* v. *Emperor* (7), one Judge of the Lahore High Court held that when the witnesses for the prosecution had been examined and cross-examined at considerable length before the framing of the charge and the accused had at that stage been examined, the failure to re-examine the accused after the further cross-examination of the witnesses after the framing of the charge was a mere irregularity and no ground for setting aside the findings of the trial Court unless it had occasioned a failure of justice. A considerably stronger case than this is *Mohiuddin* v. *Emperor* (8), in which a Bench of the Patna High Court held .

"In every case in which the legality of a trial is challenged on the ground that the provisions of S. 342, Criminal P. C., 1898, have not been complied with, the test is whether there has been prejudice to the accused by reason of the absence of judicial questions

(1) A.I.R. 1922 Mad. 512=45 Mad. 820.

(2) A. I. R. 1923 Mad. 609=46 Mad. 449 (F.B.).

(3) A. I. R. 1923 Cal. 196=50 Cal. 223.

(4) A. I. R. 1923 Cal. 668=50 Cal. 308.

(5) A. I. R. 1923 Cal. 470=50 Cal. 518.

(6) A. I. R. 1924 Cal. 975=51 Cal. 924.

(7) A. I. R. 1924 Lah. 84=4 Lah. 61.

(8) A. I. R. 1925 Pat. 414=4 Pat. 488.

and whether the defect is cured by S. 537 of the Code."

Another case is *Emperor* v. *Bechu Chaube* (9), which was before one Judge of the Allahabad High Court. In that case a fresh witness for the prosecution had been examined after the cross-examination of the accused, who was not further examined on his evidence. That witness, however, did not add materially to the evidence which had been already given for the prosecution and which the accused had an opportunity of explaining. It was held that, though there was an error, it did not in the circumstances vitiate the proceedings This case was followed by my learned brother Brown in *Nga Hla U* v. *Emperor* (10). In that case no fresh witnesses for the prosecution had been examined after the examination of the accused and the question before the Court was whether the failure to examine the accused further after the prosecution witnesses previously examined had been recalled and cross-examined was a mere irregularity or illegality which vitiated the trial, it was held that it was a mere irregularity.

Considering the judgments in the cases above-mentioned it seems to me that the Calcutta and Madras High Courts have taken a very highly technical view of the question while the other High Courts have dealt with it in relation to the merits of the cases before them. The view that the omission again to examine the accused is an irregularity curable under S. 537, Criminal P C., and not an illegality which vitiates the trial in my opinion, receives very considerable support from the judgment of their Lordships of the Privy Council in *Abdul Rahman* v. *Emperor* (11). The question before their Lordships in that case was the effect of a failure properly to carry out the provisions of S. 360, Criminal P. C., in regard to the reading over to witnesses of their depositions. Their Lordships drew a distinction between that question and the question which arose in *Subrahmania Ayyar* v. *Emperor* (12), where the procedure adopted was one which the Code positively prohibited. The concluding paragraph in their Lordships' judgment runs as follows :

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which on their Lordships' view, may be supported by the curative provisions of Ss 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed."

These remarks, in my opinion, apply with equal force to the undoubted error which has occurred in this case, and in my view they render strong support to the view taken by my learned brother Brown in the case above mentioned. As I have already said that the omission which occurred in this case has not in any way prejudiced the appellant nor was there anything about it which could lead to a failure of justice being occasioned by it, I hold that the District Magistrate's error does not vitiate the proceedings and is a mere irregularity which is cured by the provisions of S. 537, Criminal P. C. (His Lordship then discussed evidence as regards emanation of the leaflet and of its distribution on the Railway line and at Mandalay and proceeded). His defence is of little or of no value and is certainly not sufficient to rebut the prosecution case, if that is believed. After a careful consideration of the evidence I think that although the case was not in some respects as well handled as it might have been, the District Magistrate was right in holding the guilt of the appellant to be true. The appeal is therefore dismissed.

P.N./R.K. *Appeal dismissed.*

(9) A. I. R. 1923 All. 81=45 All. 124.
(10) A. I. R. 1925 Rang 248=3 Rang. 139.
(11) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).
(12) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

A. I. R. 1929 Rangoon 333

HEALD AND MYA BU, JJ.

P. L. T. A. R. Chettyar Firm — Appellant.

v.

Maung Kyaing and *another*—Respondents.

Letters Patent Appeal No. 108 of 1928, Decided on 18th February 1929, from judgment of High Court, reported in *A. I. R.* 1929 *Rang.* 17.

Transfer of Property Act, S. 41—*K*, lessee of Government land, transferring lease to *N* by registered deed—*N* not getting his name entered in rolls as transferee and not taking steps to obtain possession and further allowing document of lease to remain in *K*'s possession—*N* acts negligently and *K*'s position as ostensible owner must be implied

from his neglect and it being *N's* duty to see to mutation of names he cannot throw blame on registering or revenue officers—*K* then surrendering lease of land to Government and instead receiving new leases of house sites into which part of land covered by original lease was divided and transferring lease of one of house sites to *M*—In suit brought by *N* on the strengh of transfer of original lease for possession of house site, if *M* looks merely at lease issued by Government and at his transferrer's possession of land, he is entitled to rights under S. 41—Lower Burma Town and Village Lands Act, Ss. 29 and 34.

Where *K*, lessee of Government land, transferred the lease to *N* by registered deed but where *N* did not apply to get his name entered in the rolls as transferee, and did not also take steps to obtain possession of the land and further allowed the document of lease to remain in possession of *K*, *N* acts negligently and his consent to *K's* position as ostensible owner must be implied from his acquiescence and failure to take reasonable precautions and as it is the transferee's business to see to the mutations of names he cannot shift the responsibility on to the registering or the revenue officers and where *K* surrendered the land to Government as it wanted to divide it into house sites and laying out roads and received instead new lease for house sites into which part of land covered by the original lease was divided and where *K* transferred the lease of one of the house sites by registered deed to *M* who got his name entered in the rolls as transferee and where *N* sued *M* for possession of the house site on the strength of the transfer of the original lease, such transferee, if he looks merely at the lease issued by the Government and at his transferer's possession of the land, is not guilty of any default as would deprive him of the rights given by S. 41: *A. I. R.* 1929 *Rang.* 17, *Confirmed*

[P 335 C 1, 2]

Clark—for Appellant.

Kya Gaing—for Respondents.

Judgment.—This is an appeal from the judgment of a single Judge of this Court in Second Appeal No 722 of 1927, the Judge who passed the judgment having declared that the case is a fit one for appeal under the provisions of Cl. 13, Letters Patent, constituting this Court The short facts are as follows:

One Ma Gun held from Government a lease of a holding of town land in Pegu town and transferred her lease of that land to the present appellants by registered deed. but appellants never took any steps to have their names entered in the roll of town lands as transferees of the lease, which remained in the rolls in the name of Ma Gun. Appellants then transferred the lease to one Ma Thein Yin and Ma Thein Yin got her name entered in the rolls as transferee of the lease. In the year 1923 Ma Thein Yin transferred the lease back to appellants by registered deed but appellants did not obtain possession of the document of lease and did not get their names entered in the rolls as transferees Subsequently Government decided to divide the lands in that part of the town into house sites and to lay out roads, and Ma Thein Yin, as being the registered lessee, was approached and agreed to surrender the lease and to receive instead new leases for eight separate house sites into which part of the land covered by the original lease was divided, the remainder of that land being reserved by Government for roads. Ma Thein Yin then transferred the lease of one of the house sites to the present respondents, Maung Kyaing and Ma Mya Kin, by registered deed, and respondents got their names entered in the rolls as transferees of the lease. Appellants on the strength of the transfer of the original lease by Ma Thein Yin to them sued respondents for possession of the house site

This Court found that appellants were estopped from asserting their title to the lease in favour of respondents because they failed to obtain the original lease from Ma Thein Yin or to get their names entered in the town lands rolls as transferees of that lease, and because they stood by and allowed respondents to build a house on the land when they had notice that a lease in derogation from their rights had been made by Government and had been transferred to respondents. *Mg. Kyaing* v. *P. L. T. A. R. Chettyar Firm* (1).

Appellants appeal from that decision on grounds that respondents were negligent in failing to enquire into Ma Thein Yin's title, that in view of that failure respondents could not be in the position of bona fide transferees for consideration without notice from an ostensible owner, that there was no estoppel against them, that respondents had notice, actual or constructive, of their title, that if respondents had made proper enquiry they would have found that the land covered by the lease transferred to them formed part of the land covered by the earlier lease which was in Ma Thein Yin's name and that they ought to have enquired how Ma Thein Yin came to obtain the subsequent leases of the house sites, that

(1) A. I. R. 1929 Rang. 17=3 Rang. 643

Ma Thein Yin was not in fact an ostensible owner of the property and that the fact that Ma Thein Yin was entered in the rolls as lessee of the lands was not due to their negligence.

It is clear that if respondents had enquired they would have found that the lease which Ma Thein Yin transferred to them was a lease recently made by Government to Ma Thein Yin, and that if they had gone further they would have found that Ma Thein Yin was the registered lessee under the original lease which covered those lands. There can, in our opinion, be no doubt that Ma Thein Yin was an "ostensible owner" of the property, but appellants' main contention is that she was not an ostensible owner with their consent, express or implied, or by reason of any default on their part They say that the default was on the part of the registering officer or the revenue officer in charge of town lands because under S. 29, Town Lands Act, it was the duty of the registering officer who registered the transfer of the lease by Ma Thein Yin to them to send to the revenue officer a true copy of the entries in the indexes of the registration registers relating to the transfer. It is true that there was probably some default on the part of the registering officer or the revenue officer, but the fact remains that appellants have allowed the lands to remain in Ma Thein Yin's name since 1923. They could have applied at any time for mutation of names and the Act contains provision in S. 34 for such mutation. Further in addition to allowing the lands to stand in Ma Thein Yin's name, they allowed the title deed in the shape of the document of lease to remain in Ma Thein Yin's possession and they allowed Ma Thein Yin to remain in occupation of the land. It seems clear therefore that Ma Thein Yin was ostensible owner of the property by reason of their neglect to take the ordinary precautions which a transferee of a lease of town lands ought to take and that their consent to Ma Thein Yin's position as ostensible owner must be implied from their acquiescence and from their failure to take reasonable precautions.

We are not satisfied that in the circumstances of this particular case where the land had recently been laid out into house sites by Government and leases had been issued by Government it would be reasonable to expect a transferee of one of the leases so issued to look beyond the lease itself, and in a case like the present, where if he had made further enquiries, he would have found that his transferrer who was in possession of the property at the time of the transfer, had prior to the issue of the lease transferred been in possession of the property under an earlier lease, that his transferee was the registered lessee under that earlier lease and that she had actually remained in possession of the document evidencing that earlier lease until the issue of the new leases, the transferee who looked merely at the lease recently issued by Government and at his transferrer's possession of the land was guilty of any default such as would deprive him of the rights given by S. 41, T. P. Act. We therefore see no reason to interfere and we dismiss the appeal with costs, advocate's fee for this appeal to be ten gold mohurs.

P.N./R K *Appeal dismissed.*

A. I. R 1929 Rangoon 335

BROWN AND CHARI, JJ.

Tafuzzal Ahmad—Appellant.

v.

Maung Shwe Kyi and *others*—Respondents.

First Appeal No. 14 of 1929, Decided on 26th July 1929, from decree of Addl. Dist. Judge, Tavoy, in Civil Reg. Suit No. 6 of 1928.

(a) Buddhist Law (Burmese)—*N* few days before his death telling his children by first wife to give *K* his second wife certain property in lieu of her share—*K* consenting to this and accepting it few days after *N*'s death—Property little more than nominal consideration—No specific performance of such contract can be ordered and doctrine of part performance also is inapplicable and *K* is not bound by such contract—Part performance—Specific Relief Act S. 28—Contract Act S. 4.

N, 9 or 10 days before his death told his children by first wife to give certain property to her second wife *K* in lieu of her share in the estate. *K* expressed her consent to this and accepted the property from the children 2 or 3 days after *N*'s death allowing it to be understood that she would not make any further claim to the estate. The property that *K* received was a little more than a nominal consideration having regard to her share in the estate. The children relied on the release and contended that *K* was not entitled to claim anything.

Held: that K's consent to the contract was largely influenced by her disturbed state of mind and could hardly be called free consent.

Held further: that the contract was so inequitable that no Court would pass a decree for specific performance thereof in favour of children, nor could the doctrine of part performance or any of the equities arising therefrom could be applied in their favour and K could not be bound by the contract.

[P 337 C 1]

(b) Family arrangement—Agreement as to division of family property—Heir giving up his undoubted rights to it without consideration and without professional advice—No fraud or undue-influence—Still agreement can be set aside.

An agreement as to division of the family property can be set aside where the heir gives up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance, even though there was no evidence of fraud or undue influence. *A. I. R.* 1924 *Pat.* 49, *Foll.*

[P 338 C 1]

Thein Maung—for Appellant.

Maung Kun—for Respondents

Judgment.—The appellant Tafuzzal Ahmed filed a suit against the respondents for partition of the estate of one U Su Tha (deceased) U Su Tha first married one Ma Tun, and the respondents are his children and grandchildren by her. After her death he married Ma Po, with whom he lived as husband and wife for some 9 or 10 years. U Su Tha died in about September 1927. The appellant claims that since U Su Tha's death Ma Po has sold to him by registered deed her share in the estate. He claims that she has never yet been given her share and sues the other heirs for partition. The defendants do not admit the validity of the transfer by Ma Po to the appellant, and they claim further that Ma Po was given and accepted certain property in full satisfaction of all her claim against the estate, and that she is not therefore any longer entitled to claim anything. It appears that about 9 or 10 days before his death when he knew that he was about to die, U Su Tha called together his children and his wife, and a number of elders He then stated in the presence of the elders that he was going to give his wife Ma Po Rs. 200, 50 baskets of paddy, ten annas weight of gold and a piece of garden, and that if Ma Po agreed to take this, it would be understood that she would have no more interest in the remaining estate. To this it is said, that Ma Po agreed. The defendants go on to say that after U Su Tha's death, they made over the property to her in accordance with the directions of the deceased, and that she accepted in full satisfaction of her claim. Ma Po admits that U Su Tha spoke about her getting this property, before his death, but she denies that she agreed to accept it. She does not admit accepting the properties after his death.

As to what took place, before the death of U Su Tha, the defendants have established their case satisfactorily. Not only the two defendants Maung Shwe Yi and Maung Shwe Kyi give evidence on this point, but they are corroborated by independent witnesses Maung Dwe, Kya Yan, and Aung Tun. We see no reason for not accepting the evidence of these witnesses. There is no rebutting evidence on the point, except that of Ma Po herself As to what took place after U Su Tha's death, Maung Dwe, Kya Yan, Aung Tun, Shwe Thi, and Po Mya all give evidence as well as two defendants Shwe Yi and Shwe Kyi. U Dwe says that two days after the death, Shwe Yi and Shwe Kyi called him to the house and he went there, and in his presence Ma Po was given Rs. 200, 50 baskets of paddy, and as. 10 weight of gold. Four days later Shwe Kyi gave Rs 8 to Ma Po in lieu of 50 baskets of paddy. He says that Po Mya asked Ma Po whether she had received all the property arranged to be given her by U Su Tha before his death, and she admitted that she had received the same Kya Yan gives similar evidence. Aung Tun deposes to Ma Po admitting having received the property. U Shwe Thi says that at the feeding of the Phongyi after the death of U Su Tha, Shwe Yi asked Ma Po whether she would abide by the direction of his father, and she agreed He did not see the actual payment Po Mya also says that Ma Po told Shwe Yi she would abide by the directions of his father, and that Shwe Yi on being asked mentioned what the property was. Po Mya, however, contradicts U Dwe's statement that he, Po Mya, questioned Ma Po as to whether she had received the property and was told by her that she did.

We think that this evidence sufficiently shows that Ma Po did accept the property after U Shwe Tha's death. The appellant values the estate at considerably over Rs. 10,000. The defendants claim

that this is an overvaluation, but the defendant Shwe Yi admits in his cross-examination that according to their estimate the whole estate is worth nearly Rs. 10,000. He further admits that the property received by Ma Po would be worth Rs 300 to 400 only. The appellant claims that some of the property of the estate was the lettetpwa property of Ma Po and the deceased The defendants dispute this, except as to a comparatively insignificant portion of the property. Assuming that the whole of the estate was the atetpwa property of Su Tha, Ma Po's quarter share in that property would still amount on Shwe Yi's admission to about Rs. 2,500. It is quite clear therefore, that what Ma Po got bears no relation whatsoever to what she as an heir was entitled to get under Buddhist Law, and this fact is admitted by the defendants. Maung Shwe Kyi says .

"I never enquired to find out the share of Ma Po in the estate of my father. I myself do not know what that share is" and Shwe Yi says "I do not know what share Ma Po is entitled to legally. I have never tried to enquire. We never consulted with the elders as to the value of the estate in giving Ma Po as directed by our father, but our father consulted with the Phongyis and the elders and then made his directions, and Ma Po agreed."

And of the elders called, U Dwe says :
"I do not know why Ma Po was given only this paltry share in the large estate."

In these circumstances, very clear evidence is required to establish the fact that Ma Po did definitely of her own free will agree to accept this property in lieu of all her claims as an heir. Gwan Shein, a witness for the defence, does say that after U Su Tha's death Shwe Yi and Shwe Kyi asked her whether she would abide by the decision of their father about the property and she replied that she would agree and that she was quite satisfied and would not claim any more of the estate. He adds that at the same time she said that she had received the property. There is no obvious reason for disbelieving this witness and we may perhaps accept it as proved that she did make some such statement, but this occurred only within a few days of her husband's death We think we can safely assume that her consent to U Su Tha's request in his illness was largely influenced by her desire not to disturb him in his last moments and two or three days after his death she would still be so affected by his death that an assent to this death-bed request of his can hardly be treated as a free consent. We hold it proved that Ma Po did express her consent to Su Tha himself before his death and that after his death she did accept the property specified by him and did then allow it to be understood that she would not make any further claim to the estate. But can it be said that on these findings of facts she forfeited all her rights to the estate ? A partition of a family estate amongst the heirs can be made orally and does not require any document to make it valid, but it is impossible to hold that the transaction the defendants rely on in this case was a partition of the estate. It was quite clearly not a partition. It was quite clear that no one had in mind at all the extent of Ma Po's claim as an heir. It is quite clear that all they wished to do was to carry out the desire of U Su Tha expressed before his death that Ma Po should give up her claim as an heir altogether on receiving what was little more than a nominal consideration. It is true that family arrangements for the distribution of ancestral property can be and often are validly made In the judgment in the case of *Ram Bahadur Sen* v. *Ganesh Bhagat* (1) the following passage occurs :

"Halsbury's Laws of England Vol. 19, p. 542 in dealing with what family arrangements can and cannot be supported, points out that an agreement dividing up family property, though entered into under a misapprehension of the legal rights of the parties, provided such misapprehension is not induced by any party to the agreement is entitled to support even where the fact that misapprehension existed has been established by subsequent legal decision. On the other hand at page 54, he points out that an agreement as to division of the property can be set aside where the heir gives up property to which he had undoubted rights without consideration or where he was ignorant or without professional assistance ; even though there was no evidence of fraud or undue influence "

It is doubtful whether in the present case it can be held that there was any real family arrangement As we have said Ma Po did not partition the estate with the children, she waived her claim as an heir for what was practically a nominal sum, and if this could be called a family arrangement at all, she gave up undoubted rights for entirely inadequate consideration and without any professional assistance. Ma Po as an heir was entitled to a substantial share in landed property, admittedly worth some Rs

(1) A.I.R. 1924 Pat. 49=2 Pat. 554.

10,000. Under the provisions of the Transfer of Property Act she could not transfer this property by way of sale or gift save by a registered deed. It is impossible, in our opinion, to hold that there was any partition of the estate between her and the other heirs, and the release given by Ma Po on which the respondents rely is in fact a transfer by sale or by way of gift There was no deed drawn up and therefore the transfer was invalid, and her title to her share in the estate still vests in Ma Po. Nor is this a case where the doctrine of part performance or any of the equities arising therefrom can be applied in favour of the defendants. It may be that Ma Po did enter into a contract to make over her share in the estate but it is quite clearly a contract of so inequitable a nature that no Court would pass a decree for specific performance thereof in favour of the defendants. We are therefore of opinion that Ma Po was not bound by this contract and that she retained her rights as an heir to the estate. We see no reason to doubt that she has transferred her rights to the plaintiff. A registered deed has been produced and she as well as the plaintiff have deposed to the signing of the document. The document is curiously worded In the recital it shows that she is entitled to a one-seventh share in the estate, but from the operative part of the document it is clear that what she intended to sell was her whole share in the estate, whatever that might be. We are therefore of opinion that the appellant did establish his claim to partition, to the estate and the possession of Ma Po's share after allowing for what she was given after her husband's death

Ma Po's share admittedly was one-fourth of the payin property of U Su Tha and a five-sixth share of lettetpwa property of her marriage with him. We allow the appeal, set aside the decree of the trial Court, and pass a preliminary decree declaring that the appellant is entitled to Ma Po's share in the estate after deducting what she has already received and directing that a final decree for partition be passed after such further enquiry as may be necessary The respondents will pay the costs of the appeal. Costs in the trial Court will follow the final result

P N/R K. *Appeal allowed.*

A. I. R. 1929 Rangoon 338

HEALD, OFFG. C.J., AND CHARI, J.

Ko Maung Gyi and *another*—Appellants.

v.

P L M. Chettyar Firm—Respondent.

Civil Misc. Appeal No 56 of 1929 Decided on 17th September 1929, from order of Dist. Judge, Bassein, D/- 10th January 1929, in Misc. Case No. 79 of 1928.

Provincial Insolvency Act, S. 21—Insolvency proceedings pending—Deposit by debtor—Petitioning creditor is not entitled to withdraw it during continuance of proceedings

Where money is deposited in Court by the debtor during the pendency of insolvency proceedings against him, it ought to be kept in Court and the petitioning creditor should not be allowed to withdraw it during continuance of insolvency proceedings. [P 339 C 1]

P K. Basu—for Appellants.

Venkatram—for Respondents.

Judgment—The P. L. M. Chettyar firm of Naikban, Henzada District, applied to the District Court of Bassein for the adjudication of Ko Maung Giy and his wife Ma Chein as insolvents. The application alleged four acts of insolvency. No order either of adjudication or otherwise has been passed on that application In the application the firm prayed for the appointment of an ad interim receiver, and on 16th November 1928, it was apparently agreed between the pleaders of the parties that the debtors should have a month's time in which to arrange to settle the debts without any receiver being appointed On 18th December 1928 the learned pleader for the debtors applied for 10 days' time within which to pay 3000 into Court, and he also had it noted that he paid the amount under protest, that there was no reason for filing the application and that he would later file a suit for damages.

On 2nd January 1929 the debtors deposited 3000 in Court and offered security for the deposit of the balance of the firm's debts On 10th January 1929 the firm was allowed to withdraw the sum of 3000 from the Court On 20th February a bond was executed by the sureties but up to 20th March 1929, the debtors had not deposited the balance of the debt, and on that day a notice was ordered to be issued to the sureties to

show cause why they should not deposit the money. With the proceedings initiated or contemplated against the sureties we are not at present concerned. The debtors appeal to this Court against the order for payment of the sum of 3000 to the firm. On 18th February 1929, the debtors, when asking for 2 months' time to deposit the balance of the money also prayed for an order to call on the firm to refund the sum of 3000 withdrawn by it. No order apparently was passed on this prayer. It is urged on this appeal that the firm had no right to withdraw this money from the Court and that the debtors paid the sum of 3000 into Court merely as a practical demonstration of their ability to pay their debts.

Under S. 14, Provl Insol. Act, a creditor's petition for adjudication cannot be withdrawn without leave of the Court. It has been the practice of the Courts not to allow a creditor's application to be withdrawn solely on the ground that the debts of that creditor have been paid. It is a matter of common knowledge that creditors frequently file insolvency applications merely for the purpose of putting pressure upon their debtors to settle their claims It is an abuse of the process of the insolvency Court, and it is in our opinion a wholesome practice never to allow any creditor to withdraw his application on the ground that his debts have been satisfied. If the claims of all the creditors are satisfied the matter is of course different.

Ordinarily if money is deposited in Court by the debtor during the pendency of insolvency proceedings it ought to be kept in Court. If the debtor is adjudicated insolvent the money will be available for the benefit of the whole body of creditors.

If on the other hand the application is dismissed the money may be paid to a particular creditor with the consent of the debtors or the creditor may file a suit and get an attachment of the money before it is paid out to the debtor. In any event the firm in this case had no present right to withdraw the money We, therefore, hold that the P L. M. firm is bound to re-deposit this money in Court and we direct the District Judge to issue an order to it for that purpose and to take steps to compel it to do so. This order does not affect the proceedings against the sureties contemplated in the diary order of the learned District Judge. These proceedings may go on and the matter should be disposed of in due course. The appellants will be entitled to their costs of this appeal from the respondent : advocate's fee two gold mohurs.

P N./R.K. *Appeal allowed.*

A. I R. 1929 Rangoon 339

BAGULEY, J.

U Ba Gyi—Applicant

v.

U Than Kyauk—Respondent.

Civil Revn. No. 26 of 1929, Decided on 24th April 1929, from judgment of Sm C. C Judge, Mandalay, in Suit No 768 of 1928

Limitation Act, S. 20—Under S. 20 debtor must make payment of interest definitely as interest to start fresh period of limitation.

The creditor is entitled if the debtor makes no stipulation at the time he makes the payment to credit the payment in such a way as would be most profitable to himself. He has a right to appropriate a payment made in a general manner towards interest due to him. But the creditor cannot by his own action and without any act of volition on the part of the debtor start a fresh period of limitation. Under S. 20 the debtor must make the payment of interest definitely as interest and it is the act of the debtor which gives limitation a fresh starting point : 31 *All.* 495 , 24 *Bom.* 493 and 2 *U. B R.* 80, *Rel. on.* ; *A.I.R.* 1922 *P.C.*, 26 and 44 and *A.I.R.* 1922 *P.C.* 233, *Ref.* [P 340 C 1,2]

Sanyal—for Applicant.

Ko Ko Gyi—for Respondent

Judgment.—This revision arises from a Small Cause Court suit. In that suit U Ba Gyi sued Ko Than Kyauk and Ko Ba Sein on a pro-note The pro-note on the face of it was barred by limitation, having been executed on 29th September 1924, while the suit was not filed until 21st September 1928. The plaintiff however, alleged payment of Rs. 50 towards interest on 3rd March 1927, which, if proved, would of course save limitation. The trial Court found that the payment has not been made by either defendant "as interest" and therefore limitation has not been saved.

It is admitted now that so far as Ba Sein is concerned the case is hopeless. But it is still contended that limitation has been saved as against Than Kyauk In my opinion this contention is not good As regards the facts I am prepared

to take them as found by the trial Court. The pro-note was executed by Than Kyauk and Ba Sein. On 3rd March 1927, Amale was sent by Than Kyauk to pay Rs 50 to the plaintiff and she did so, endorsing the payment on the back of the pro-note. The endorsement simply states that Amale pays Rs. 50 to Daw Su (Daw Su being the daughter of the plaintiff Ba Gyi)

It is argued for the applicant that the plaintiff had a right to appropriate an unspecified payment made in this way towards interest That he had this right is undoubted vide *Nemi Chand* v. *Radha Kishen* (1) and *Meka Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (2).

There can be no question but that for account purposes the plaintiff would have had a perfect right to appropriate this payment towards interest. The question remains, however, whether this payment made in this general manner was a "payment towards interest as such" I have been referred to *Nga Twe* v. *Nga Ba* (3), in which it is held that to save limitation

"there must be an intention on the debtor's part that the money should be paid on account of interest and something to indicate that intention."

The authority given in that ruling is *Muhammad Abdulla Khan* v. *Bank Instalment Co. Ltd.* (4). The headnote of this runs

"Under S 20, Lim Act, the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest, and there must be something to indicate that intention. The mere appropriation by the creditor of these payments to interest is not such an indication"

Again in *Kariyappa* v. *Rachappa* (5), I find at p. 499

"While the forms of payment may differ, the section provides that it must be a payment made as interest by the debtor to the creditor. Mere crediting by the debtor in his own account books of interest is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred."

It has been argued before me that the two later Privy Council rulings to which I have referred must be held to override the earlier Bombay and Allahabad rulings just quoted. In my opinion there is nothing in these Privy Council rulings to overrule the earlier ones. The point before the Privy Council was mainly one of accounting. The creditor was entitled, if the debtor made no stipulation at the time he made the payment, to credit the payment in such a way as would be most profitable to himself. If the debtor wished the payments to be credited in a way more in his own favour it was for him to stipulate that this should be done, and if the creditor refused he was at liberty to refuse to make the payment.

This, however, is quite a different matter from holding that when a debtor makes a payment, the creditor may by his own action and without any act of volition on the part of the debtor, start a fresh period for limitation The Limitation Act says that the debtor must make the payment of interest as such and it is the act of the debtor which gives limitation a fresh starting point. It is impossible for a creditor to make a fresh starting point for limitation. Time runs against him unless the debtor does something, and one thing which a debtor may do is to make a payment of interest definitely as interest In the present case there is nothing to show that the payment was made definitely as interest Plaintiff himself was not present when Amale came and paid the money. Ma Su in cross-examination definitely says that nothing was said as to whether the Rs. 50 was the principal or interest. Ma E Kin says that Amale and Ma Saing came and paid Rs. 50 towards the loan. They did not say anything definite as to how the payment should be appropriated. Amale denies making the payment. The rest of the evidence is with regard to the execution of the pro-note. I am of opinion, therefore, that there having been no definite payment of interest as such, the suit was barred by limitation as against both defendants, and the lower Court was quite correct in dismissing it. I therefore dismiss this application for revision The applicant to pay the respondent's costs in this Court.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1922 P. C. 26=48 Cal. 839 (P.C.).
(2) A. I. R. 1922 P. C. 233=44 Mad. 570=48 I. A. 150 (P.C.).
(3) [1915] 2 U. B. R. 80=31 I. C. 101.
(4) [1909] 31 All. 495=2 I. C. 379=6 A.L.J. 611.
(5) [1900] 24 Bom. 493=2 Bom. L. R. 378.

A. I. R. 1929 Rangoon 341

BROWN, J.

Maung Kyi and *others*—Appellants.

v.

Ma Shwe Baw—Respondent.

Special Second Appeals Nos 85 to 87 of 1929, Decided on 7th August 1929, from decree of the Dist Judge, Thaywtmye, in Civil Appeal No 97 of 1928.

(a) Mahomedan Law—Marriage—If there is evidence of cohabitation and repute, burden is on person denying marriage to prove that it did not take place—Evidence Act, S. 114.

Where a man and woman are living together as husband and wife for a large number of years and have always treated each other as husband and wife have always been looked on as husband and wife, and there is no obstacle to the marriage, the burden is on the person who denies the marriage to prove that it did not take place : 3 *M. I. A.* 295 (*P. C.*) ; *A. I. R.* 1922 *P. C.* 159 ; *A. I. R.* 1918 *P. C.* 11 and 31 *Cal.* 849, *Rel. on.* [P 342 C 2]

(b) Practice—New plea.

Case not set up in the lower Courts cannot ordinarily be allowed to be raised in second appeal. [P 343 C 1, 2]

E. Maung—for Appellants

Rafi—for Respondent.

Judgment—The main question in issue in these appeals is whether the appellant Ma Chit May was legally married to Dawood, the deceased. According to Ma Chit May, Dawood first eloped with her, and then took her to the house of his mother Ma Shwe Baw. Ma Chit May herself was a Burman, and had hitherto been a Buddhist. But when she reached Ma Shwe Baw's house, a Moulvi was called in and she was first of all converted to Mahomedanism, and was then formally married to Dawood, according to Mahomedan Law. After that, she and Dawood lived together as husband and wife until his death She now has two children by him, one aged about eight and the other about five. Most of the facts alleged by Ma Chit May are admitted. It is admitted that Ma Chit May and Dawood lived together as husband and wife Ma Saw Ki, the daughter and agent of the respondent Ma Shwe Baw says that Ma Chit May and Dawood were living as man and wife for about nine years and during that period there was nothing against her character. She also says :

"I have treated the children of Dawood as my nephew and niece."

Ma Shwe Baw herself giving evidence, says :

"They were living as husband and wife in my house... ..They were living as man and wife for about nine years The two children are the son and daughter of Dawood. Ma Chit May performed the formalities of the Mahomedan custom as I have done now. I treated her as my daughter-in-law, during her coverture with Dawood and I consider his children as my gandchildren, my son Dawood treated Ma Chit May as his wife and her children as his children."

It is also admitted by the respondent that the ceremony of conversion to Mahomedanism did take place.

The only dispute is as to whether the formalities required by Mahomedan Law for a valid marriage were observed. According to the principles of Mahomedan Law by D. F. Mulla, Ninth Edition, para. 196, it is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male, or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting ; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. It is admitted that no religious ceremony is necessary at all, and although it may be customary to call in a Moulvi for the purpose of celebration, it is not necessary to do so for the purpose of a valid marriage. In the case of *Khajah Hidayut Collah* v. *Rai Jan Khanam* (1) the following passages from the work of Mr. Macnaughten on Mahomedan Law are cited and apparently approved :

"The Mahomedan lawyers carry this distinction (that is against bastardizing) much further , they consider it the legitimate reasoning to infer the existence of marriage from the proof of cohabitation. None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would in other cases, be considered incompetent witnesses is admitted to prove wedlock, and in short, where by any possibility a marriage must be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void ab-initio the offspring of it will be deemed legitimate."

It had not been proved in that case that a ceremony of marriage had been gone through, but it is nevertheless held that there had been a legal marriage.

(1) [1841-46] 3 M.I.A. 295=6 W.R. 52 (P.C.).

In the case *Habibur Rahman* v. *Altaf Ali* (2) their Lordships of the Privy Council remark, with reference to Mahomedan Law :

"the term "wife" necessarily connotes marriage, but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice."

Their Lordships proceeded to point out that the presumption to be drawn from such indirect proof may be rebutted, but that unless and until it is rebutted, the presumption must prevail. The question of Mahomedan Law of marriage was also considered by their Lordships of the Privy Council in the case of *Imambandi* v *Mutsaddi* (3) In that case their Lordships found that the oral testimony regarding the solemnization of marriage was unsatisfactory, but that the marriage was nevertheless proved by the subsequent acknowledgment by the husband of the legitimacy of his children, At p. 889 (of 45 *Cal*) of the report the following passage occurs :

"In the absence of any statutory provision making compulsory the registration of Mahomedan marriages, the Indian Courts, in case of a dispute as to the factum of a marriage, are usually left to discover or attempt to discover the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses."

There are a number of other cases in which the principle has been followed, that marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgment of the children as the legal children. In the case of *Aklamannessa Bibi* v. *Mahomed Hatem* (4), the High Court of Calcutta held that as pointed out in Wilson's Digest of Anglo-Mahomedan Law, although neither writing nor any religious ceremony is necessary to the validity of a marriage contract :

"words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Moslems, and the whole transaction must be completed at one meeting."

(2) A. I. R. 1922 P. C. 159=48 Cal. 856=48 I. A. 114 (P.C.).
(3) A. I. R. (1918) P. C. 11=45 Cal. 878=45 I. A. 73 (P.C.).
(4) [1904] 31 Cal. 849=8 C. W. N. 705.

But the question as to the necessity for insisting on these requirements when there was strong evidence of subsequent living together as man and wife was not discussed Nor have I been able to find any case in which it has been held that although a man and woman have been living together as husband and wife for a large number of years and have always treated each other as husband and wife and have always been looked on as husband and wife the marriage is invalid, if in fact the proposal and its acceptance has not taken place in a formal manner.

It is at any rate quite clear from the ruling that once proof has been given, such as has been given in this case as to cohabitation and repute, the burden is on the person who denies the marriage, to prove that it did not take place. In the present case there was no obstacle to the marriage Can it therefore be held as proved on the evidence that the requirements of the Mahomedan Law as to offer and acceptance did not take place ? Ma Chit May herself says in this point that when the Moulvi came to the house Ma Shwe Baw and Ko Eusoof requested the Moulvi to convert her and then perform the marriage ceremony, according to Mahomedan Law :

"Then I was converted by the Moulvi. He also asked me if I agreed to marry Dawood. Dawood and I had to reply thrice saying that I agreed to marry Dawood. He (Dawood) was also asked if he agree to marry me and he had also to reply thrice that he agreed to marry me. Then the Moulvi gave me a cup of Sherbat saying that it was "thetsaye."

The Moulvi Ferozorali himself has been called. He says that he converted Ma Chit May but denies that Dawood and Ma Chit May were legally married He does not say what he means by saying that they were not legally married nor has he definitely denied that they formally agreed to the marriage in the presence of witnesses and it may be that by a ceremony of marriage he had in mind some special rite such as would ordinarily be followed in such cases. It is difficult to imagine a case in which the evidence of cohabitation and repute could be stronger than in this case. Ma Chit May came to the house, and was formally converted to Mahomedanism. She was accepted by her mother-in-law and has admittedly been treated by her mother-in-law as the legally married wife of

Dawood ever since, she and Dawood lived together as husband and wife for nine years. It is admitted by the very relatives, who now challange the legitimacy of the marriage that she behaved in every way as a wife that she was looked on as a wife by them, that her children were treated as Dawood's children, and that they had no complaint whatsoever to make as to her conduct as a wife Her children are quite clearly treated as Dawood's children, and the evidence to rebut the presumption arising on the circumstances would have to be very strong indeed, before the Court could come to a conclusion "bastardizing" the issue.

It must be remembered that the marriage is alleged to have taken place some nine or ten years before the witnesses gave evidence and the production of oral evidence as to what took place would be a matter of great difficulty. In the circumstances I am not satisfied that it has been proved substantially that the requirements of the Mahomedan Law as to proposal and acceptance were not satisfied in the present case. I therefore hold that Ma Chit May was legally married to Dawood, and that her children are legitimate. It is suggested on behalf of the respondent that even if this be so, Ma Shwe Baw is nevertheless an heir under the Mahomedan Law That would appear to be correct, but in none of the cases has Ma Shwe Baw's claim ever been based on her right as one of the several heirs. In the first case, she has sued to have a deed of sale by Ma Chit May of property which belonged to Dawood, set aside. Her case as set forth in her plaint was that Ma Chit May was not married to Dawood, and had no right whatsoever to transfer the property. It may be that Ma Cit May had no power to transfer the rights of her minor children and it may also be that the transfer would be subject to the claims of Ma Shwe Baw as one of the heirs of the estate. But these were points which were not raised in the lower Courts. Ma Shwe Baw's suit was dismissed by the trial Court. Although there was appeal in the District Court, the appeal was not taken on those grounds. That Ma Shwe Baw was not entitled to a cancellation of the registered deed is clear. The suit was based on the claim that Ma Chit May was not entitled to deal with the property at all and that the deed was wholly void. I am not satisfied that there is sufficient reason for allowing Ma Shwe Baw to raise a fresh case in this appeal

As regards the other two cases, in one of them, Ma Shwe Baw sues for possession of certain jewellery. This claim of hers must obviously fail on the finding that Ma Chit May was the wife of Dawood The third case is a suit by Ma Chit May and her children against Ma Shwe Baw for recovery of household furniture and clothings. Those properties were apparently in the possession of Ma Chit May and her children after her husband's death, and have since reached the possession of Ma Shwe Baw because Ma Chit May went into her house to live and took the properties with her She and her children are merely suing for properties which they allege have been wrongfully taken from their possession by Ma Shwe Baw. In this case also it was never suggested in either of the lower Courts that even if Ma Chit May were the wife of Dawood, the suit must fail because Ma Shwe Baw was also an heir, and here too, I do not see sufficient reason for allowing a fresh case to be made in this Court. The result is I allow all those appeals and I set aside the decree of the District Court in each case, and restore that of the trial Court in each case. The respondent will pay the costs of the appellants in all three Courts

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 343

MAUNG BA, J.

Ma Hpan and *others*—Appellants.

v

Ma Ngwe Sa and *another* — Respondents.

Special Second Appeal No. 265 of 1928, Decided on 1st May 1929.

Buddhist Law (Burmese) — Succession — Person marrying second wife on death of first—But divorcing second and marrying third—He had children by first and third wives only—He had also divorced third wife —Suit after person's death by children by third wife against children by first wife for share in first wife's inherited property —Children by first wife are entitled to 3/4th and children by third to 1/4th share.

If a person has more wives than one, property inherited by one of the wives during marriage, if still in existence at the death of the husband and wife, descends to the children by that wife and the children by

the other wives can lay no claim to succeed to it. But this rule does not apply where a person marries wives in succession after death or divorce of his former wife.

On the death of his first wife a person married a second wife. He divorced his second wife and married third. He had children by his first and third wives and no children by his second wife. He divorced the third wife also but her children lived with him. After the person's death the children by third wife sued children by first wife for a share in the inherited property of the first wife.

Held . that the rule of partition to be applied was the ordinary rule applicable to partition between children of different wives and that the children by the first wife were entitled to 3/4th share and the children by third wife to 1/4th share : 1 *I. R.* 1921 *U. B.* 23, *Ref.* [P 344 C 2]

Chari—for Appellants.

K. C. Bose—for Respondents

Judgment —U Teik Lon, a Burman Buddhist, married three wives in succession. His first wife was Ma Pa and by her he had four children (present appellants). On her death he married Ma Kyaing but he divorced her and married Ma Paw U. He had no children by the second wife but he had two children (present respondents) by the third wife. He divorced Ma Paw U also but her children remained behind with their father. About 13 years afterwards he died leaving children by the first and third wives A piece of paddy land was acquired during the first marriage. Respondents claimed a half share in that property The Sub-Divisional Judge of Pyinmana gave them two-fifths and the District Judge of Pyinmana on appeal reduced it to one-third. Appellants now contend that respondents are not entitled to any share in that property as it was the property inherited by their mother during her coverture with U Teik Lon. Both the lower Courts have referred to the property simply as the property acquired during the first marriage but they have not considered how it was acquired Appellants in their written statement clearly stated that it was the inherited property of their mother. I find that appellants also tendered evidence to that effect. That evidence has in no way been rebutted. I will, therefore, hold that it was the inherited property of the first wife who was the mother of the appellants.

In an Upper Burma case *Ma Kin* v *Kin Kin* (1), Mr. Brown as Judicial Commissioner held that where a Burman Buddhist husband has had more wives than one, property inherited by one of the wives during marriage if still in existence at the death of the husband and wife, descends to the children by that wife, and the children by other wives can lay no claim to succeed to it.

That rule of law applies to a case where a Burman Buddhist husband has more than one wife at the same time. An extract from the Manugye in S. 207, of Kinwun Mingyi's Digest reads :

"The rule of partition among several wives who live in the same house and eat out of the same dish with the husband shall apply, mutatis mutandis to partition among their sons. So says Rishi Manu."

As regards the rule of partition among such wives extract in S. 286 of the same Digest reads :

"Several wives live together in the same house and eat out of the same dish with the husband. Each of them shall retain the property brought by her to the marriage or the property acquired by inheritance from her parents subsequent to the marriage or the property given her by the husband as a marriage portion."

In the present case the second wife was married after the death of the first and the third was married after the divorce of the second. The deceased did not have the three wives at the same time. When the appellants' mother died, their father became her heir subject to the claim of an orasa daughter, if any. There appears to have been no such orasa daughter. On his remarriage the atet children became entitled to their mother's share It would be two-thirds. That right lapsed after 12 years. When the father died a fresh cause of action arose and the rule of partition to be applied is the ordinary rule applicable to partition between children of different marriages. S 7 Book 10 of Manugye says :

"If the father had property at the time of his marriage and the second wife none and if none has been acquired during their marriage, let the property be divided into four shares ; let the son of the first marriage have three, and the son of the second one share",

It follows that appellants should get three-fourths and respondents one-fourth. The decree of the District Court will be modified by reducing respondents' share to one-fourth. Each party to bear its own costs

P.N./R.K. *Decree modified.*

(1) A. I. R. 1921 U. B. 23=4 U. B. R. 11.

* A. I. R. 1929 Rangoon 345

CARR, J.

A. M. Malumiar & Co.—Appellants.

v.

Finlay Fleming & Co.—Respondents.

Criminal Appeal No 163 of 1928, Decided on 6th February 1929, from order of Western Sub-Divl. Magistrate, Rangoon, in Criminal Regular Trial No. 442 of 1927.

*** (a) Penal Code, S. 482—Test for determining infringement of trade-mark — No person shown to be misled—Prominent and substantial portion of both marks not same —Trade-marks called by same name by same only—No offence held to be committed.**

The proper test in case of an infringement of a trade-mark is whether the "get up" of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get up" but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought: 8 *L. B. R* 561, *Rel. on.* [P 351 C 1]

In a prosecution under S. 482, looking at the two marks together, it could be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person, who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other for it, nor was it suggested that there was anything in the appearance of the two marks to lead to confusion. There was no evidence to show that any person had in fact been deceived and had been led to purchase the goods of the accused believing them to be the merchandise of the complainant. Any prominent and substantial part of the complainant's trade-mark did not appear as a prominent and substantial part of the accused's trade-mark. The evidence though perhaps sufficient to show that some people may call the accused's trade-mark by the same name as that of the complainant, was not sufficient to show that every one would do so nor that the mark of accused must inevitably lead to the attribution to their goods the same name as that of the complainant's.

Held: that the complainants had not made out a good case for protection and the accused must be acquitted: (*English Cases, Referred*). [P 349 C 2]

(b) Penal Code, S. 482—Intent to defraud is necessary ingredient—Intention is presumed when trade-mark false—Burden of proving absence of intention is upon accused—Burden whether discharged depends upon consideration of whole evidence.

On the wording of S. 482 an intent to defraud is an ingredient of the offence, but, when it has been proved that a trade-mark is a false trade-mark, then, it is to be presumed that the accused person had that intent unless and until he rebuts the presumption when the accused person is entitled to an acquittal. The burden of proving the absence of such intent is upon the accused, but the question whether that burden has been discharged must be answered on a consideration of the whole of the evidence in the case: *A. I. R.* 1929 *Rang.* 322, *Diss. from.* [P 351 C 2]

Patker—for Appellants.

McDonnell—for Respondents.

Judgment.—The appellant has been convicted under S. 482, I. P. C. of using a false trade-mark, and has been fined Rs. 750. Before dealing with the facts of the present case, I think it is desirable to refer to an earlier case in which the Manager of R. E. Mohammad Kassim & Co., was convicted under the same section by the District Magistrate of Rangoon on the complaint of The Trading Co, (late Hegt & Co.). The conviction in that case was upheld by Otter, J., in *Pakir Mahomed* v. *Emperor* (1).

In that case the complainants had for many years been using a trade-mark on blankets, consisting of a crown enclosed in a double oval The accused had recently put on the market blankets of a somewhat similar kind bearing a trade-mark representing a Fez. The original trade-marks are not now to be found on the trial record of that case, but have been shown to me by Mr. McDonnell who appeared for the complainants both in that case and in this. There was to my mind a fair degree of similarity in the get up of the marks in that case. Both were in black in both cases the central device was enclosed in a double oval, and the only essential difference was in the device itself.

It was found, on the evidence in that case, that Hegt & Co 's mark, which was, in fact, a Crown, was known in the market in Hindustani as the 'topee" mark, and in Burmese as the "oktok" mark. The natural consequence of the introduction of the accused's mark would be that it would be called by its proper name, that is, in Hindustani "topee," and in Burmese "oktok." The trying Magistrate came to the conclusion that the result of this was that the accused's mark was reasonably calculated to cause it to be believed that the accused's blankets were, in fact, the merchandise of Hegt & Co.

(1) A. I. R. 1929 Rang. 322=1929 Cr. C. 498

Coming now to the present case, it is desirable to look first at the two marks in question. In this case the merchandise dealt in by both parties is cotton longyis of a cheap quality Those of the complainants are machine woven and those of the accused are hand woven. There are certain external similarities between the two marks now in question. Both are rectangular in shape both have a margin round the inner rectangle in which there is lettering, and both represent articles which are, or may be, worn on the head There, so far as I can see, the resemblance ceases

The complainant's mark is one of the class of highly coloured and glazed trademarks which are very common. It has an outer margin of pink The inner margin has decorations at the corners. The lettering in it is black At the top and bottom are the name of the firm. " Finlay, Fleming & Co.," and the word " Rangoon." On one side there is black lettering in Burmese and on other side there is black lettering in what I take to be Urdu and Chinese. The inner rectangle has floral decorations at the corners. Its ground work is dark red on which is represented a " fez " in gold. On the side of the " fez " are a star and crescent in white.

The appellant's mark is very dissimilar. It has no ground colour at all, The lettering in the margin between the inner and outer rectangles is in red and is all in English. It merely gives the name of the firm with the word " Rangoon " at the bottom. On the right-hand side is the address of the firm " 312-13 S.B. Bazaar;'. and on the left the words " best quality " In the centre is a neat representation of a Crown in gold, with straight lines radiating from the lower half of it. There are two stars in the body of the Crown, which is surmounted by a similar third star.

It has not throughout the case been suggested that the presence of a star or stars in each of the two marks gives any cause for complaint. I may add, although the " fez " in the one case and the " Crown " in the other are both represented in gold, yet, the gold in the two cases is very different in appearance, Looking at the two marks together, it can be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person, who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other one for it. It has not, in fact, been suggested that there is anything in the appearance of the two marks to lead to confusion.

The complainant's case is that his mark is known as the "topee" or "oktok" mark, and that the appellant's mark, although it does not, in fact, represent either a " topee " or an " oktok," is likely to be known by those names in the market, and has, in fact, become known by those marks The prosecution is, in fact, based on *R E. Mahammad Kassim's* case (1), which I have alread mentioned. Coming now to the evidence, I will first say what evidence there is not.

There is the evidence of Mr Forrester of the complainant firm that his firm has been using his mark not only on these quality longyis but on piecegoods generally for a long period of years He does not know, in fact, when the accused's mark was first introduced into the market He does not himself say nor does any other witness, that the complainant's longyis sold under this mark have attained any considerable reputation for quality, nor is there any evidence that the use of the appellant's mark on longyis has led to any decrease in the complainant's business There is no evidence, indeed, no attempt to produce evidence, to show that any person has, in fact, been deceived, and has been led to purchase the appellant's longyis believing them to be the merchandise of the complainant. The complainant examined altogether seventeen witnesses, the main effect of whose evidence is that, in the case of Hegt & Co.'s " Crown " mark on blankets and one or two other marks, the marks are, in fact, known by dealers in the bazaar as the " topee " or " oktok " mark

There is also a certain amount of evidence that the accused's mark is also known by those names. Perhaps witness 8, Maung Po Thaw, may be referred to in a little more detail. He says that once the witness, Moosa, came to him with the witness, Sultan Sahib, and asked if he had any longyis with the " oktok tazeik," He had some with the appellant's mark (Ex. 1), and showed these longyis to them. He is supported

in this by Moosa but not by Sultan Sahib, who says nothing on this subject at all, and it is to be noted that Moosa is the Bazaar Clerk of the complainant firm and has admittedlly been seeking for evidence for them in this case. Maung Po Thaw himself says that, if people asked for "taraphu" (that is the correct Burmese word for "Crown"), he would show them Ex 1, but he adds that no one has asked for it. He says also that, if people asked for the "oktok" mark, he would show Ex 1, also. He does not now sell the complainant's goods, but formerly he used to do so and, if, when he was doing so, anyone had asked for the "oktok" mark, he would have shown them the complainant's longyis and not the appellant's. In other words, not stocking what is properly known as the "oktok" mark, he would show them longyis bearing the "Crown" mark, which he actually had in stock. That, I think, is what one would expect any shop-keeper to do. Not having what the customer asked for, he would naturally try to get the customer to buy what he had The witness, however, does not give any concrete case in which he showed the appellant's longyis to a customer except that of Moosa.

For the defence there are some fifteen witnesses, most of whom are dealers in different kinds of goods which are sold with a trade-mark depicting a Crown.

The first witness speaks of woollen goods, others of ready made shirts, of voile, of face powder, of aluminium goods, of nails and corrugated iron, of soap, of butter, of lace and of cloth, all sold with "Crown" trade marks. They say that these marks are known in Hindustani as "taj" and in Burmese as "taraphu," and in one or two cases that occasionally the marks might be referred to by the words "topee" or "oktok."

Defence witness 6 is a Chinese trader of Thaton. He says that he sells longyis with both the complainant's and the appellant's mark, and that the complainant's mark is known in Burmese as "oktok" and in Hindustani as "topee," while the appellant's mark is called "taraphu" by Burmese customers and "taj" by Indian customers. Witness 8, Ba O, is a trader at Moulmeingyun, who sells longyis with the appellant's marks. This witness perhaps is not very reliable.

Witness 9, Maung Ba Tin, is also a trader at Moulmeingyun. He says that he sells longyis with the mark Ex. 1, which is known as "taraphu" mark. The total effect of the evidence seems to me to be that, although the appellant's mark would properly be known in Hindustani as the "taj" mark and in Burmese as the "Taraphu," there are some people who would refer to it as, in Hindustani the "topee" mark and and in Burmese the "oktok" mark But I think that the defence does succeed in showing that there are very many "Crown" marks in use, which are generally called by their proper name.

The whole question is whether, on this evidence, it can be held that the use of the appellant's mark is reasonably calculated to cause it to be believed that his goods are, in fact, the merchandise of the complainant's: and, in view of the extreme difference between the two marks, as already described this question if it is to be answered in the affirmative, can be so answered only on the finding that purchasers are likely to be deceived by the mark being though quite incorrectly, referred to by the same name name as the complainant's mark. I have been referred to a very large number of reported cases, all of which I have examined, but I do not propose to refer to all of them. I think we can at once rule out of consideration all cases in which it was held that there was such similarity between the two marks that purchasers would reasonably be deceived.

The first case quoted, and the one on which the complainants mostly rely, is the case of *Seixo* v. *Provezende* (2). In view of the fact that such great reliance is placed on this case, I think it desirable to give somewhat lengthy extracts from it. In his judgment the Lord Chancellor, Lord Cranworth, said: (pp. 196-197).

"It is obvious that, in these cases, questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that in order to entitle a party to relief, it is by

(2) [1866] 1 Ch. 192=14 W. R. 357=14 L T. 314=12 Jur. (n. s.) 215.

no means necessary that there should be absolute identity. What degree of resemblance is necessary from the nature of things is a matter incapable of definition a priori. All that Courts of Justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival, as that ordinary purchasers, purchasing with ordinary caution are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use.

If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used, become known in the market by a particular name I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device. It is mainly on this ground that I have come to the conclusion that the decision of the Vice-Chancellor in the present case was correct.

Ever since the year 1848, the plaintiff Baron Seixo, had caused his casks to be stamped with his coronet and the word "seixo," and the evidence shows that his wines had thus acquired in the market the name of "Crown Seixo wine." When, therefore, the defendants, in the year 1862, adopted as their device a coronet, with the words "Seixo de Cima", meaning 'Upper Seixo,' below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from Oporto would suppose that, in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as 'Crown Seixo wine.' The present case is thus brought distinctly within the principle on which all these cases rest. The plaintiff had adopted a device or trade-mark which had caused his wines to obtain celebrity under a name descriptive of that trade-mark The defendants have adopted a trade-mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known, and so to believe that in purchasing them they would be purchasing the wines of the plaintiff. Against the use of such a trade-mark the plaintiff has, I think, a right to have the injunction of this Court."

The parts of this judgment that are mainly relied upon are where the Lord Chancellor said :

"I do not consider the actual physical resemblance of the two marks to be the sole question for consideration,"

and where in the next following sentence he said :

" * * * that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device * * *."

I wish to lay stress on these two sentences and on the words "sole" and "may be." It is quite obvious that the Lord Chancellor did not go so far as to lay down the proposition that the physical resemblance between the two marks was not to be taken into consideration at all, nor did he lay down the proposition that the fact that one mark might in the market be known under the same name as another necessarily was a violation of the rights of the owner of the first mark. It seems to me quite clear that there is a very great distinction between that case and the one now before me. The whole of that case, as reported in the judgment, really turned on the use of the word "seixo," which had been used by the plaintiff for many years as descriptive of his wines and apparently had not, in England at any rate, been used as descriptive of anyone else's wines until the defendant used it for his. That, of course, was not an English word and, therefore, not in common use, and I think that it would be an unwarrantable extension of the principle laid down in this judgment to apply it to the use of names of common articles, such as hats, or of articles which, in pictorial representation at any rate, are exceedingly common, such as "Crowns"

I wish also to quote the concluding portion of the Lord Chancellor's judgment (pp. 198-199) :

"The defendants rested their argument in part on the case of *Leather Cloth Co.* v. *American Leather Cloth Co.* (3), But the facts of that case bear no resemblance to the present. There, both parties, plaintiffs and defendants, were manufacturing and dealing in the same article, known in the market as American Leather Cloth , neither party had an exclusive right to that name, and the plaintiffs had not acquired any particular name for their American Cloth, unless indeed the name of Crockett & Co., the persons from whom they had purchased their business, could be so considered. But no one, looking at the defendants' trade-mark, could be led to suppose he was purchasing goods from what was originally Crockett's manufactory. Unless a purchaser could be deceived by the similarity of the

(3) [1865] 11 H.L.C. 523=11 Jur. (n.s.) 513=6 N.R. 209=13 W.R. 873=35 L.J. Ch. 53 =12 L.T. 742.

trade-marks, he could not be deceived at all, and the House of Lords thought that the two trade-marks were so different that no one could suppose them the same. This case, therefore, affords no support to the defendants. In order to assimilate that case to the present we must suppose that the plaintiffs there had so marked their goods with the name of 'Crockett' as to have obtained for it in the market the name of 'Crockets' 'American Leather Cloth,' and then that the defendants had adopted a device which would lead purchasers to suppose that their cloth was not merely American Leather Cloth, which it was, but Crockett's American Leather Cloth, which it was not."

It seems to me that the case referred to in this extract is much more similar to the present case than is the case of *Seixo* v. *Provezende* (2) itself. The next case is that of *Cope* v. *Evans* (4). In that case it was found that the defendant's trade-mark was not such an imitation of the plaintiff's trade-mark as, in the opinion of the Court, made deception probable. It is evident from the report that the two marks in question were certainly much less different than those in question in the case before me.

In the following passage from the learned Vice-Chancellor's judgment it would seem that, if the two trade-marks in dispute are not so similar that the Court considers the difference unsubstantial, the plaintiff must prove to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendant's goods being taken for his (p. 141) :

"In cases where it appears that defendants have adopted a plaintiff's trade-mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the Court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appear that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade-marks are not to the eye of the Court either altogether identical, or so similar that the Court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the Court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (plaintiff's). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient Thus, in the case of *Bradbury* v. *Evans*, in which the proprietors of Punch sought unsuccessfully to restrain the sale of a weekly publication which had adopted the name of Punch and Judy, the Court, looking at the two publications, and considering that the later publication would not be taken by purchasers for the earlier one, refused to interfere. The two were so dissimilar in appearance, that, whether the two publications were seen side by side or were seen separately the one would not be taken for the other."

Applying that test to the present case, I find it exceedingly difficult to hold that the complainants in the present case have made out a good case for protection. The Vice-Chancellor in his judgment discussed the case of *Seixo* v. *Provezende* (2), and said p 150 :

"Lord Cranworth here says that if the rival trader adopts a mark which will cause his goods to bear the same name in the market, this may be a violation. He then proceeds to examine the case before him, and says that, the mark being adopted, the consequence was almost inevitable that persons would suppose that in purchasing a cask of the defendant's wine they were purchasing that of the plaintiff, that the defendant's mark could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known. Have the plaintiffs in the present case shown that the defendant's user of their mark will cause their goods to be taken for the plaintiffs'? Will it be the inevitable consequence of the use by the defendants of their mark that purchasers in purchasing the defendants' cigars will believe that they are purchasing the plaintiffs' ? Is it true that the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs' ? Upon the evidence in this case I answer all these questions in the negative."

Putting to oneself the questions which the Vice-Chancellor there set out, it seems to me that, on the facts of the present case, it is very difficult to answer either of them in the affirmative The evidence is perhaps sufficient to show that some people may call the appellant's trade-mark by the same name as that of the complainant, but I am certainly not satisfied that every one would do so, or that the use of the appellant's mark cannot fail to have this effect.

The next case quoted is that of *R Johnston & Co.* v. *Archibald Orr Ewing & Co.* (5). I do not think it is necessary to discuss this case, the facts of which are so entirely different from those of the case before me as to make it useless as an authority I would, however, quote the following extract from Lord Blackburn's judgment (pp 228 and 229) :

"I think the true guide is given by Lord Kingsdown in the *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co.* (3), at 538 where he says: 'The fundamental rule is that one

(4) [1874] 18 Eq. 139=22 W.R. 450=30 L.T. 292.

(5) [1881] 7 A. C. 219.

man has no right to put off his goods for sale as the goods of a rival trader; and he cannot therefore, in the language of Lord Langdale in the case of *Perry* v. *Truefit* (6), be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. Then he proceeds to say what he thinks any person is at perfect liberty to do, and adds, speaking of the particular case *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co. Ltd.* (3) at p. 539. On the other hand they had no right directly or indirectly to represent that the article which they sold was manufactured by Crocketts or by any person to whom Crocketts had assigned their business or their rights. They had no right to do this either by positive statement or by adopting the trade-mark of Crocketts & Co., or of the plaintiffs to whom Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers. These being, as I conceive, the rights of the defendants and the limit of those rights, what is it that they have actually done and in what respect have they infringed the rights of the plaintiffs? That depends upon the question how far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers. That, I apprehend, is precisely the question which is to be asked here. In the case from which I have been citing that question was answered in favour of the defendants, in the present case I think it must be answered in favour of the plaintiffs."

And the following from the judgment of Lord Watson (p. 231).

"When a prominent and a substantial part of a long and well known trade-mark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belongs."

I give this latter extract because it is quoted by the Magistrate in his judgment in this case, but it seems to me that it is not relevant to the present case at all. It is impossible to say in this case that any prominent and substantial part of the complainant's trade-mark appears as a prominent and substantial part of the appellant's trade-mark.

The next case to which I wish to refer is that of *Payton & Co. Ltd* v. *Snelling Lawpard & Co., Ltd.* (7) and, in particular I wish to refer to the following passage in the judgment of Lord Justice Romer (p 57, Lines 19—29):

"It seems to be a sort of popular notion of some witnesses that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one knowing who, what is fairly common to the trade, knows of the plaintiff's goods by reason of these distinguishing characteristics. If he does not know that, he is not a customer whose views can properly, or will be, regarded by this Court."

This judgment of Romer, L J., was expressly approved by Lord Macnaghten in the House of Lords at p. 635 of the report of the appeal (in the same Volume of the *R. P C*), and it was also quoted with approval by Kekewich, J., in *Alaska Packers' Association* v. *Crocke & Co* (8).

In the case of *Tatem & Co., Ltd.* v. *Gaumant Co., Ltd* (9) it was held by the Court of Appeal that the defendant's trade-mark was not an infringement of that of the plaintiff, although both contained representations of a black cat and were applied to the same kind of goods. Obviously, there was a much greater resemblance between the trade-marks in that case than in the one now before me. In the case of *Wilkinson* v. *Griffith* (10), it is evident that there was considerable evidence of actual intent to defraud, and the similarity between the marks in question was at any rate sufficient to put it in a different class from the present case.

A number of Indian cases have also been cited, but I do not think that any of them is of any assistance, except perhaps *Emperor* v. *Bakarullah Malik* (11) which was a criminal case coming under the same section as the present case, and in which the Court held, on what seems to me a very much stronger case than the present one, that the conviction could not be upheld. I come now to certain Burma cases: *Emperor* v. *Po Saing* (12). That was a case in which the accused had been selling kerosine oil in tins of the Burma Oil Company, and it was held that it had been sufficiently indi-

(6) [1842] 6 Beav. 66.
(7) [1901] 17 R. P. C. 48 and 628=(1901) A. C. 308=70 L. J. Ch. 644=85 L. T. 287.
(8) [1901] 18 R. P. C. 129.
(9) [1917] 34 R P. C. 181.
(10) [1891] 8 R. P. C. 370.
(11) [1904] 31 Cal. 411.
(12) [1907] 4 L. B. R. 192.

cated on the tins that the oil sold was the Burma Oil Company's oil, and, therefore, fell within the section. This case seems to me of very little help. The same remark applies to *Abdul Majid* v. *Emperor* (13), in which it is clear from the judgment that there was at any rate a certain degree of similarity between the two marks, and that both could properly be called in Burmese by the name "bawlon taseik" This case also does not seem to me to be any authority for the present conviction.

Byramjee Cowasjee v. *Vera Somabhai* (14), was a civil case relating to butter in tins. I am told that in fact it related to one of the marks produced in evidence by the defence in this case In this case the late Sir Charles Fox said (p. 65) :

"The proper test is whether the "get up" of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's "get up" but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed and the Court must also have regard to the class of purchaser by whom the goods would normally be bought. 27 *Halsbury's Laws of England* 766."

That seems to me to be a correct statement of the test and it is a test which, to my mind, is not satisfied by the facts of the present case.

I am left now only with the case of *R E Mohammed Kassim & Co.* (1), which I mentioned at the beginning of this judgment. It is urged for the complainants that that case is ample authority for the present conviction, and that, if I feel inclined to differ from the judgment of my learned brother, Otter, it is most desirable that I should make a reference to a Bench or Full Bench. In my opinion there is a considerable difference between the two cases sufficient to make it unnecessary for me to say either that I agree with my learned brother, or that I differ from him

As I said before, the complainants' mark in that case was a "Crown," but it was, in fact, known as the "topee" mark, and consequently the introduction of the accused's mark, which, in fact, represented what would properly be called a "topee," inevitably led to the result that the accused's blankets were described by the same mark name as those of the complainant, and, thus, there were certainly much stronger grounds for holding that his mark fell within the mischief of S 480, I. P. C., than there are in the present case.

I do, however, differ from my brother, Otter, but it is on a minor point of not very great importance. At the bottom of p. 11 of his judgment he remarked :

" * * * the present case is a criminal prosecution and intent to defraud is not an ingredient in the offence."

In my opinion on the wording of S. 482, an intent to defraud is an ingredient of the offence, but, when it has been proved that a trade-mark is a false trade-mark, then, it is to be presumed that the accused person had that intent unless and until he rebuts the presumption, when the accused person is entitled to an acquittal. When he is entitled to an acquittal if he can prove the absence of a certain intent, it seems to me obvious that that intent is an essential ingredient of the offence

On the two trade-marks in question themselves, and on the evidence in the case, the only conclusion that seems to me possible in the present case is that the appellant's use of his trade-mark is not reasonably calculated to cause it to be believed that his goods are, in fact, the merchandise of the complainants, and, on that ground, I think that the conviction cannot stand. But I would say further that, even if I am not correct in that view, I still think that the appellant is entitled to an acquittal on the ground that he had no intent to defraud. The burden of proving the absence of such intent is indeed up on him, but the question whether that burden has been discharged must be answered on a consideration of the whole of the evidence in the case, and, in my opinion, the facts of this case are such that it would be quite impossible to hold with any semblance of reason that the appellant in making use of the mark complained of, had any intent to defraud On this ground also I should acquit him. I allow this appeal, set aside the conviction and sentence passsd upon the appellant, and direct that the fine be refunded to him.

P.N /R.K. *Conviction set aside.*

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(13) [1916] 9 L. B. R. 31=36 I. C. 168=10 Bur. L. T. 19.

(14) [1916] 8 L. B. R. 561=36 I. C. 965=10 Bur. L. T. 63.

A. R. I. 1929 Rangoon 352(1)

BROWN AND MAUNG BA, JJ.

G, a pleader, In the matter of.

Civil Misc. Appln No. 78 of 1929, Decided on 28th August 1929.

(a) Legal Practitioners Act, S. 12—Conviction under Gambling Act is not sufficient for disciplinary action.

The conviction of a pleader under the Gambling Act can hardly be looked upon by itself as sufficient reason for disciplinary action. [P 352 C 2]

(b) Legal Practitioners Act, Ss 12 and 13—Conviction of pleader for intimidating and assaulting woman does not by itself amount to defect in character and is not sufficient for suspending him from practice.

A pleader was convicted under Penal Code for intimidating and assaulting a woman in a most reprehensible manner. It was the first occasion on which disciplinary action was called against him

Held that the conviction was not by itself sufficient to show defect of character which unfits him to be a pleader within the meaning of S. 12,

Held further : that though the words " any other reasonable cause in S. 13 seem to be wide enough to include the case, still the conduct was not such as to justify suspending him from practice. [P 352 C 2]

A J Darwood—for Respondent.

Judgment.—*G*, a lower grade pleader at Einme in the Myaungmya District has been called on to answer certain charges framed against him, under the provisions of S. 14, Legal Practitioners Act. The third charge is with reference to Criminal Regular Trial No. 220 of 1928 of the Fourth Additional Magistrate, Myaungmya. In that case one Maung Ba Th was sentenced to six months' rigorous imprisonment for causing grevious hurt. The District Magistrate, who has reported the matter to this Court states :

"If the evidence of Maung Maung (P. W. 2) in this case be believed, Mr. Stanley might have been assaulted by Ba Tha at the instigation of the pleader.

The assault apparently was the outcome of a drunken brawl, and the Sessions Judge in his judgment on appeal remarked that the case reflected no credit whatsoever, on all the parties concerned. There is nothing, however, in the judgments implicating *G.* in the assault, nor can we read the evidence of U Maung Maung as implicating him. There does not seem to be anything in this charge, which we can consider against the respondent.

There remain for consideration the other two charges. The first of these charges is that he was convicted under S 11, Burma Gambling Act and sentenced to pay a fine of Rs. 25 and the second charge is of insulting the modesty of a woman. He was convicted under Ss. 506 and 509, I. P C, and sentenced to pay a fine of Rs. 50. The conviction under the Gambling Act could hardly be looked on by itself as sufficient reason for disciplinary action. The other case is more serious. According to the judgments in that case, the respondent and others intimidated a woman and assaulted her in a most reprehensible manner. Such conduct certainly reflects no credit on the persons concerned and is not conduct such as is to be expected from a pleader in the Courts. We are unable, however, to say that from this conviction by itself we can infer a defect of character which unfits the respondent to be a pleader within the meaning of S. 12, Legal Practitioners Act. Under S. 13 of the Act, disciplinary action can under Cl. (f) be taken for " any other reasonable cause." The words seem to be wide enough to cover the present case. We regard the conduct of the respondent as most reprehensible, but we are not satisfied that it is such as to justify us in suspending him from practice. The respondent has been a third grade pleader for about 22 years, and this appears to be the first occasion in which disciplinary action has been called for against him We direct that the respondent be warned and that we consider his conduct as disclosed in Criminal Regular Trial No. 99/28 was most reprehensible, and that a repetition of such conduct may make it necessary to take severe disciplinary action against him.

P.N./R.K. *Order accordingly.*

A. I. R. 1929 Rangoon 352(2)

CHARI, J.

U San Hmway—Applicant.

v.

U Ohn Pe—Respondent.

Civil Revn. No 187 of 1929, Decided on 17th September 1929, from order of Dist. Judge, Toungoo, D/- 23rd May 1929, in Civil Misc. No. 45 of 1929.

Burma Rural Self Government Act (4 of 1921), Rr. 34, 36 and 39—District Judge acting under R 34, or Assistant Judge nominated by him to hear petition challenging election is persona designata and no revision lies to High Court against their order.

The provisions of R 36 which enables the District Judge to delegate his power to an Assistant Judge and the direction that petition challenging an election shall be tried in open Court do not show that the District Court through the District Judge functions in the disposal of the application The words "in open Court" in R 34 mean only that the matter should not be disposed of in camera. Therefore the District Judge functioning under R. 34 is a persona designata and an Assistant Judge who is directed by him to dispose of the petition is also a persona designata and so no revision lies to the High Court against their order *A. I. R* 1926 *Rang.* 25 (*F.B.*) and *A. I. R.* 1927 *Mad.* 93, *Rel. on.*

[P 354 C 1]

Paget—for Applicant.

Judgment.—This is a revision application against the order of the District Judge of Toungoo in the following circumstances· One U San Hmway was elected a member of the District Council by the Tantabin Circle Board. U Ohn Pe filed an application in the District Court challenging the election on certain grounds The application of U Ohn Pe was not accompanied by a deposit of Rs. 100 according to the rules, but this sum was paid in later. The learned District Judge acting presumably under S 36 of the Rules made by the Local Government to which I shall refer later directed that the petition be tried by Assistant Judge, U Aung Tun Gyaw. Before the said Assistant Judge the respondent filed objections, and one of the objections filed by him was that, as there was no previous deposit of Rs. 100 as required by R. 35, the Court had no jurisdiction to entertain the petition. The learned Assistant Judge U Aung Tha Gyaw, on 29th April disposed of this objection, and he in effect held that the deposit of Rs. 100 was not a condition precedent to the vesting of the jurisdiction in the Court; that that sum could be paid at any time within the limitation period; and that he had power to extend the time for payment. Against this order an application for review was made and disposed of by the District Judge himself and an appeal was also preferred against the order to the District Judge.

It is very doubtful if the application for review lies, but it is unnecessary to consider the point, as the District Judge agreed with the conclusion arrived at by the Assistant Judge and dismissed both the application and the appeal.

The application for revision to this Court is against these orders, and the first point for consideration is whether a revision lies to this Court. If the ruling in the *Municipal Corporation of Rangoon* v. *M. A. Shakur* (1) applies to this case, then the High Court is precluded frem entertaining the revision application In that case it was held by a Full Bench of this Court that the Chief Judge of the Court of Small Causes in disposing of petitions regarding elections to the Corporation of Rangoon acts as a persona designata aad that, therefore, no revision lies to this Court It is urged by the learned advocate for the petitioner that that ruling does not apply to the facts of this case because the provisions of the rules show that the District Judge in these matters is acting not as a parsona designata but as the presiding officer of the District Court. It will be convenient to refer to the relevant provisions of the rules at this stage.

Rule 34 enacts that the validity of an election may be questioned by petition to the District Judge on certain grounds. R. 35 is to the following the effect:

"No petition shall be admitted without a deposit of Rs. 100 and after 15 clear days (excluding judicial holidays) have elapsed from the date on which the result of the election was published (under R. 23) or declared (under R. 31)"

Rule 36 onacts that if after such enquiry as may be necessary the District Judge considers that there are not sufficient grounds for trying the petition, he shall make an order dismissing it and that order shall be final. If he considers that the petition ought to be tried he is empowered to make an order directing its trial either by himself or by such Assistant Judge as he may appoint. R 37 provides for the trial of petitions in open Court and R. 39 gives a right of appeal against the finding or order of an Assistant Judge to the District Judge whose orders on the appeal shall be final. Reliance is placed by the learned advocate for the petitioner on the provisions which enable the District Judge to delegate his power to an Assistant Judge and to the direction that the petition shall be tried in open Court as indicating that the

(1) A. I. R. 1926 Rang. 25=3 Rang. 560 (F.B.).

intention of the rule making power that the District Court through the District Judge functions in the disposal of these petitions. I cannot accept this contention.

The District Judge is undoubtedly a persona designata in respect of the functions exercised by him under R. 34 The power given to him as District Judge to delegate his jurisdiction to an Assistant Judge does not show that the District Judge is not a persona designata. The Assistant Judge to whom he delegates the power may be person entirely unconnected with his Court The use of the word "in open Court" in R. 37 in my opinion means nothing more than this that the matter is not to be disposed of in camera and are used for the purpose of ensuring an open trial in the Court house. The words "in open Court" are used in contradistinction to "in camera."

I am fortified in this opinion by a decision of the Madras High Court in *O. A. O K. Lakshmanan Chetty* v. *J. S. Kannappar* (2) where a somewhat similar argument was raised. In that case the Chief Judge of the Small Cause Court of Madras was the person to whom a petition for revision was allowed in the case of an objection to the nomination of a councillor It was urged in argument that accordiag to the rules of the High Court the Chief Judge was empowered to direct that any petition should be heard by a Bench consisting of two or more Judges of his Court. The Madras High Court held that notwithstanding this rule the Chief Judge of the Small Cause Court was a persona designata and that no revision application lay to it from his decision. I am, therefore, of opinion that the District Judge when functioning under R. 34 of the rules is a persona designata and that an Assistant Judge who is directed by him to dispose of the application is also a persona designata and that therefore this revision application against their order is incompetent. I, therefore, dismiss the application, but there will be no order as to costs as the respondent has not appeared.

P.N./R.K. *Revision dismissed.*

(2) A. I. R. 1927 Mad. 93=50 Mad. 121.

* * A. I. R. 1929 Rangoon 354

Full Bench

HEALD, Offg., C. J., CHARI, MYA BU, ORMISTON AND DAS, JJ.

on equal division between

RUTLEDGE, C. J., MAUNG BA BROWN AND CARR, JJ.

U Pyinnya and *others*—Appellants.

v.

Maung Law and *another*—Respondents.

Civil Ref. No. 9 of 1928, Decided on 6th September 1929, made by Carr, J., on 25th October 1928, in Second Appeal No. 24 of 1928.

*** * (a) Burma Laws Act (1898), S. 13 (1)—Buddhist Law—"Laws" defined—Rules of conduct in Vinaya cannot be law except when enforced by Burma Laws Act, S. 13 (1)—Sale is not a question regarding any religious usage—Buddhist monk is not disqualified from contracting within Contract Act, S. 11—(1915) 2 *U. B. R.* 61, 29 *I.C.* 613 and 5 *Rang.* 626=A. *I. R.* 1928 *Rang.* 3=106 *I. C.* 201, *Overruled.***

Per Full Bench.—The definition of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the State. From this it follows that the rules of conduct as laid in Vinaya for the guidance of Buddhist monks cannot be deemed to be "laws" unless they are enforced by the State. According to S. 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise. A sale being a pure matter of contract is not "a question regarding any religious usage or institution." A Buddhist monk, therefore, is not disqualified from contracting by law within the meaning of S. 11, Contract Act: **(1915) 2 U. B. R. 61; 29 I. C. 613 and 5 Rang. 626=A. I. R. 1928 Rang. 3=106 I. C. 201, Overruled.**

[P 358 C 2; P 362 C 1, 2]

*** * (b) Contract Act, S. 23—Sale to Buddhist monk is not immoral.**

Neither the object nor the consideration of a sale to a Buddhist monk is immoral within the meaning of S. 23: 9 *L. B. R.* 220, *Ref.*

[P 363 C 2]

*** * (c) Transfer of Property Act, S. 6 (h) (3)—Buddhist monk may be a transferee.**

A Buddhist monk may hold property such as paddy land and may be a transferee of such property within the meaning of S. 6 (h) (3):

[P 360 C 1]

(d) Evidence Act S. 115—Vendor is not estopped from suing to recover possession of property on ground of vendee's incapacity to contract.

(Per *Rutledge, C. J.* and *Maung Ba, J.*) Where the buyer of immovable property, is under disability tobuy there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability. The vendor, therefore, is not estop-

ped from suing to recover possession of the property on the ground of vendee's incapacity to contract. [P 358 C 2]

Ba Thein—for Appellants.

Ba Thin—for Respondents.

Order of Reference

Carr, J.—U Shwe Gon before his death disposed of the bulk of his estate by deeds of gift in favour of his children, but reserved some 22·69 acres of paddy land for his maintenance until his death. One of the beneficiaries under the deed of gift was his eldest son U Pyinnya who was at that time, and still is, a Burmese Buddhist Monk. Another was another son, Maung Byaw, father of the plaintiff-respondents in the present appeal, in which U Pyinnya is the principal appellant After U Shwe Gon's death his children, including U Pyinnya, raised money by mortgaging the 22·69 acres of land, together with the land that had been given to U Pyinnya. Later the other children including Maung Byaw, sold the 22 69 acres and a piece of garden land to U Pyinnya by a registered deed for a nominal consideration of Rs. 2,000. The actual consideration was that U Pyinnya took over liability for the debts incurred and paid only Rs 50 cash.

Maung Byaw has since died and his children, the plaintiff-respondents have brought this suit to administer U Shwe Gon's estate, claiming among other things that the 22·69 acres of paddy land is a part of that estate.

A number of questions arise in the appeal, but the only one on which I feel any difficulty is the question whether the sale to U Pyinnya is valid or not. Both the lower Courts have found that it is not valid, under the authority of *U Tilawka* v *Shwe Kan* (1). There is also a decision of one Judge of this Court in *U Teza* v. *Ma E Gywe* (2), which supports their findings.

I feel considerable doubt of the correctness of both these decisions. In the first of them Mr MacColl, J. C, suggested that if the Contract Act had applied to the transaction before him that transaction would have been void under S 23 of that Act as defeating the personal law of the phongyi concerned In the second case Maung Ba, J. held that the transaction was immoral and therefore void. I am strongly inclined to doubt the correctness of both propositions. They are based on the proposition that a Buddhist monk is prohibited by the rule of his order, as contained in the Vinaya, from engaging in such pecuniary transactions. That proposition I do not contest, but it seems to me at least doubtful whether the rules of the Vinaya form a part of the personal law of a Buddhist monk so as to bring the case within S 23, Contract Act. And I doubt also whether on that ground it can be said that either the object or the consideration of the agreement can be said to be immoral. The object was to transfer ownership of land, the consideration was in part, payment of money, and in part, an undertaking to pay money; both are in themselves perfectly lawful and moral. The only immoral part of the transaction was U Pyinnya's disregard of the rules of the religious order to which he belongs, which seems to me a matter between himself and his conscience and the heads of his order and not within the scope of the Contract Act.

Again it seems to me doubtful whether there is any question of a religious usage or institution "within the meaning of the Burma Laws Act, S. 13."

Another question is whether on the facts set out the plaintiffs are not estopped from questioning the validity of the sale by their father whose successors in interest they are. In *U Tilawkas'* case (1), Mr MacColl remarked that even if the plaintiff had no title the defendant might be estopped from denying his title. But he did not go further into this question, saying that the question was "a broader one than a mere question of title or estoppel". I do not think that this was a sufficient reason for shutting out the question of estoppel.

In the present case, the plaintiffs can claim only as heirs of Maung Byaw and if Maung Byaw would have been estopped from questioning the title of his vendee U Pyinnya, on the ground of the latter's incapacity to contract, the plaintiffs also must be estopped.

I refer the two following questions for decision by a Full Bench:

(1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a mouk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions ?

(1) [1915] 2 U. B. R. 61=29 I. C. 613.

(2) A.I.R. 1928 Rang. 3=5 Rang. 626.

(2) If such a sale is void is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract?

Opinion of First Full Bench

Rutledge, C J.—I have had the advantage of reading the judgment of my brother Maung Ba, and I agree with the conclusions which he has reached in this case.

Section 11, Contract Act, 1872 says

"Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

Then arise the following questions (a) Is the Vinaya a law within the meaning of this section? (b) Are Burmese Buddhist monks subject to the Vinaya? (c) Does observance of the provisions of the Vinaya render it impossible for Burmese Buddhist monks to enter into contracts for purely secular purposes?

Probably the most important of these questions is the first. The question is asked: in what way are the provisions of the Vinaya more in the position of the law of the land than the provisions of the great monastic orders of the Christendom such as the Benedictines or Dominicans The analogy at first seems plausible to minds formed under the Western modern systems of jurisprudence which do not recognise any personal laws as exceptions to the universal law of the land applying to all the inhabitants of a nation. But it was not always so in the West If the question had arisen in the Middle ages it would in all probability have come before an Ecclesiastical Court and the regulations of the particular order would have been given the force of law S. 11 clearly on the question of capacity to contract throws up back upon the personal laws governing the parties. The Court has to consider :is one of the parties disqualified from contracting under his personal law. As pointed out by a Full Bench of five Judges of the late Chief Court in *Shwe Ton* v. *Tun Lin* (3):

"The Vinaya and its commentaries form part of the Buddhist Law and where the devolution of the property of a phongyi is concerned, it seems right that this branch of the law should govern the decision."

There are many other cases where the Courts for a long series of years have treated the Vinaya as the part of Burmese Buddhist Law which governs the monkhood, but as this Full Bench ruling is so specific I do not think it necessary to refer to them.

I would consequently answer (a) and (b) in the affirmative. With regard to (c) from the quotations in the judgment of my brother Maung Ba and of the late Mr. McColl in *U Tilawka* v. *Nga Shwe Kan*(1),the Vinaya not only forbids monks from entering into contracts unconnected with the religious life, but contemplates that they are utterly incapable of so doing having died a civil death.

My brother Carr considers that the reference raises merely a question of contract and not a question regarding any religious usage or institution, and if it is not, S.13, Burma Laws Act 1898 abrogates all rules of Buddhist Law relating to contract, I am unable to agree with him on this point It will not be denied, I think, by any one that the fraternity of yellow robe is a religious institution Usage is as nearly as possible a synonym for custom. The provisions of the Vinaya are the religious usage governing the religious institution of the Buddhist monkhood The question then, whether the religious usages governing a monk render him incompetent to enter into a contract for secular purposes must in my opinion be considered by the Court by virtue of S. 13, Burma Laws Act. It is consequently a part of the Buddhist Law enforced by the State and these religious usages must be examined for the purpose of ascertaining whether the monk is

"disqualified from contracting by any law to which he is subject. S. 11, Contract Act."

As I have already said in my opinion the Vinaya considers that a monk is utterly incapable of entering into contracts unconnected with the religious life and I accordingly answer (c) in the affirmative and in my opinion, he is equally disqualified whether he purports to be a transferrer or a transferee.

Throughout this judgment I have taken the reference to be limited to transactions for a secular or personal and not for a religious purpose. It has been pointed out to me that the question referred does not so limit the reference. In my opinion it ought to be so limited. The judgments of the late McColl and Mya Bu, J. from which Carr, J. dissents does not question that a monk

(3) [1919] 9 L. B. R. 220=49 I. C. 317=11 Bur. L. T. 161 (F.B.).

was competent to contract for a purely religious object and so there is no controversy with regard to such contracts. If we turn to S. 23, Contract Act, we find that this deals with the lawfulness of the consideration or object of the agreement. While I think that the question naturally comes under the head of capacity to contract, it may be considered also as the offering of any consideration by a monk of a wordly nature not connected with the religious life or the object of which is to cause wordly gain of a personal and not a religious nature to accrue to a monk Thus stated it is forbidden by the Vinaya and is of such a nature that if permitted it would defeat the provisions of the Vinaya and a Court applying the principles by the Vinaya would be justified in regarding it as immoral.

I accordingly answer the first question in the affirmative. For the reasons given my brother Maung Ba, I answer the second question in the negative.

Maung Ba, J —Carr, J., has referred the two following questions for decision by a Full Bench :

(1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions ?

(2) If such a sale is void, is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract ?

He has made the reference because he doubted the correctness of the propositions laid down in the case of *U Tilawka* v. *Shwe Kan* (1) and in that of *U Teza* v. *Ma E Gywe* (2).

In *U Tilawka's* case (1), a Buddhist monk sought to redeem a mortgage effected by him. The question considered in that case was whether a Buddhist monk was capable of entering into a valid contract such as mortgage for his own personal profit. McColl, J C., answered the question in the negative.

In *U Teza's* case (2) another Buddhist monk sought to recover possession of a house bought by him with borrowed money. I held that the monk could not succeed in his suit.

Both the decisions were based upon the principle that the transactions in both cases offended the personal law of Buddhist monks viz., Vinaya, a code of disciplinary rules laid down by Lord Buddha for the Sangha.

Section 11, Contract Act, deals with competency to contract and it mentions three disqualifications, namely:(1) infancy, (2) insanity, (3) special disqualifications by personal law. S. 23 of the same Act deals with unlawful considerations. A consideration which the Court regards as immoral or opposed to public policy is unlawful. So also is a consideration which is forbidden by law and is of such a nature that if permitted would defeat the provisions of any law. Carr, J., has expressed doubt whether the rules of Vinaya form a part of the personal law of a Buddhist monk so as to bring a case within S. 23, Contract Act, and also whether on that ground it can be said that either the object or the consideration of an agreement is immoral. It cannot be disputed that an agreement that would defeat the provisions of Hindu Law or Mahomedan Law or Buddhist Law would be unlawful within the meaning of S. 23. A contract to give a son in adoption in consideration of an annual allowance to the natural parents would defeat the provisions of Hindu Law and a suit would not lie to recover any allowance on such a contract. Upon the same principle an agreement between a Mahomedan husband and his wife for a future separation is void. So also is a contract between a Buddhist husband and his first wife not to give the second wife of equal status any share in the lettetpwa property.

In the case of *Shwe Tun* v *Tun Lin* (3) the Thathanabaing has clearly stated that a matter concerning rahans which involves a dispute about property either between monks themselves or between monks on the one hand and laymen on the other would be decided according to the five books of Vinaya, and that the authority of the Dhammathats is not recognized. Of course the commentaries viz , Attakathas, Tikas, and Ganhandana are consulted for help in the interpretation of texts in the Vinaya.

The Vinaya contains rules promulgated by Lord Buddha from time to time as occasion arose. One of the rules prohibits a monk from having sexual intercourse. It follows that a monk cannot enter into a valid contract of marriage why, because it will defeat the provi-

sions of his Vinaya. If a monk contracts with a woman that he will marry her as a rahan and live with her as man and wife without leaving the order and breaks his contract, can the woman sue him in damages for breach of contract? Certainly not, as the contract is unlawful It may be argued that the contract is unlawful because it is immoral, why immoral? It is immoral because Vinaya prohibits sexual intercourse in the case of a rahan Marriage in itself is not immoral for in some religions ministers of religion can marry.

Since Dhammathats are not applicable to rahans, and since Vinaya applies to them, it follows that the latter is their personal law. The rules of Vinaya may even be viewed in the light of customary law or customs having the force of law. Now what does the Vinaya say about buying and selling? In the first book of Vinaya namely Parajkam, there is a rule dealing with "Kayaweikkaya" (buying and selling). It is said that while Buddha was residing at the Zetawun monastery in Thawutti, a rahan and a parabaik exchanged robes This was reported to Buddha. He condemned the transaction and made this rule. "A rahan who does buying and selling is guilty of Nissagi pacittayam." The rahan can escape from the consequences of this sin only by confession and discarding the thing. Buddha applied this rule to all things from Kyaungs down to the most insignificant things such as soap powder, and tooth pick

A layman entering the order "dies a civil death" He severs himself from the world and is divested of all he possessed in the world. Can such a man who has taken the vows to lead a holy life in accordance with Vinaya employ himself as a layman while he is still a rahan and transact business for his personal benefit in violation of Vinaya, his personal law, and be permitted to enforce or to reap the benefits of contracts which would defeat that law? I would certainly say, No. Such conduct on the part of the rahans is immoral from the point of view of Buddhist, and morality is but a relative term. What appears to be moral according to one religion may not be so according to another. For the Buddhists, a rahan who violates his Vinaya is an "alijji" and his conduct in violation of Vinaya is immoral.

I hold that Vinaya is the personal law of a Buddhist monk within the meaning of S. 13, Burma Laws Act, so as to bring a case within S. 23, Contract Act, and that his buying and selling for his own benefit offends that law and is immoral. So I would, therefore, answer the first question in the negative. I wish to make it clear that this answer is to be restricted to transactions of a purely secular nature unconnected with religion. A monk may accept a religious gift in accordance with Vinaya. Of course the party dealing with him is protected by the provisions of S. 65, Contract Act. If the rahan received any advantage under such a contract, he is bound to restore it or to make compensation for it to the person from whom he received it.

As regards the second question about estoppel the answer depends upon whether the rahan is the buyer or whether he is the seller. If he is the buyer, as in the present case, he being the party under disability to buy there can hardly be any question of his being induced to buy by misrepresentation that he was under no such disability But if he is the seller and if he has induced the other party to buy under the belief that he was under no disability to sell he would certainly be estopped from denying his capacity to sell. I would, therefore, answer this question in the negative.

Carr, J —The first question referred is:

"Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions?"

The question implies that the rules of the Vinaya do prohibit a monk from entering into such pecuniary transactions and it may further be admitted that a Burmese Buddhist monk is subject to those rules in that they are rules of conduct by which he, as a member of the Sangha should be guided. The real question in issue is whether those rules are "laws."

The best definition that I know of the word "laws" in its juridical sense is that "laws" are rules of civil conduct enforced by the "State."

Accepting that definition, a rule of conduct is not a "law" unless it is also enforced by the State, and the rules of conduct prescribed in the Vinaya are, therefore, laws only if they are enforced

by the State. To determine whether they are so enforced one must turn to S. 13, Burma Laws Act (13 of 1898) which reads:

"(1) Where in any suit or other proceedings in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution :

(a) The Buddhist Law in cases where the parties are Buddhists, ... shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S. (1) or sub S. (2) or by any other enactment for the time being in force the decision shall be according to justice, equity and good conscience."

My view of the effect of that section is that from the time of the enactment the rules of Buddhist Law regarding the subject specified in sub-S (1) were adopted by the State as the law which it would enforce as between Buddhists but all other rules of Buddhist Law were abrogated and ceased to be law in the proper juridical sense of the word, because the State by necessary implication from the terms of the section declared that it would not enforce them.

Turning now to S. 23, Contract Act, I am of opinion that it cannot be said that either the consideration or the object of the sale of the property in question in this case was immoral. The object was the sale of land, the consideration was the payment of money, both are in themselves perfectly moral. The disregard by U Pyinnya of the rules of the Vinaya by which as a member of the monastic order, he should be guided was no doubt in a sense immoral. But that had nothing to do with either the object or the consideration of the agreement. Admittedly a monk may hold property and may receive it as a gift. The object was to transfer land to him, and since he may hold land there was nothing in that object that was immoral. Nor can it be said that it is forbidden by law or if permitted would defeat the provisions of any law. In my opinion, therefore there is nothing to make the transfer void under this section.

In S. 11, Contract Act, we find that :

"Every person is competent to contract who is not disqualified from contracting by any law to which he is subject."

Under this section if a monk is disqualified by law from contracting, any contract entered into by him is void : see *Mohori Bibi* v. *Dharmo Das Ghose* (5).

If the rule of the Vinaya under discussion is law, I think it would have to be held that a monk is disqualified from contracting, but if it is not law there is no such disqualification

In order to find that the rule is law it would be necessary to find :

(1) that it was a rule of Buddhist law, that is, that it was a rule enforced by the State even before the enactment of the Burma Laws Act, and

(2) that it is one of the rules of the Buddhist Law which by S. 13 of that Act, the State has declared that it will enforce.

As regards the first point I am not altogether satisfied that this rule ever was law in the juridical sense, I do not, however, think it necessary to go into this question, which would involve a very long and difficult research.

In my opinion the rule is not law because it does not come within S. 13 of the Act. The question before us is whether a Buddhist monk is competent to contract or not, and in my view that it is not "a question regarding any religious usage or institution." It is a question regarding contract and the effect of S. 13, Burma Laws Act is, as I have said before, to abrogate all rules of Buddhist Law relating to contract.

In my opinion therefore a Buddhist monk is not incompetent to contract.

I would say further that even if he were held to be incompetent to contract, it would be necessary to find further that he is legally disqualified to be a transferee within the meaning of S. 6 (h) (3) T. P. Act.

The following cases : *Ulfat Rai* v. *Gauri Shanker* (5), *Narain Das* v. *Mt. Dhania* (6), *Munni Konwer* v. *Madan*

(4) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P, C.).

(5) [1911] 33 All. 657=11 I. C. 20=8 A. L. J. 670.

(6) [1916] 38 All. 62=31 I. C. 792=13 A.L.J. 1084.

Gopal (7), *Munia Konan* v. *Perumal Konan* (8), *Raghava Chariar* v. *Srinivasa Raghava Chariar* (9), furnish ample authority for the proposition that a competent sale to a minor is valid in spite of his incompetence to contract.

The sale would therefore be void only if we could find that a monk is legally disqualified to be a transferee. Now it is admitted that a monk may hold property such as paddy land and that he may be transferee of such property ; it cannot therefore be held that the rule in question even if it be law, disqualifies him from being a transferee.

I would therefore answer the first question referred in the negative.

On that answer the second question does not arise, but I am satisfied that if the first question were answered in the affirmative there would be no estoppel.

Brown, J.—I concur with the judgment of my brother Carr. (On equal division between the four Judges the case was referred to another Full Bench of five Judges who gave the following opinion.)

Opinion.

Heald, Offg. C.J.—The relevant facts of this case are shortly as follows :

Shwe Gon had several children and before his death he executed certain deeds of gift by which he distributed his estate among his children reserving only 22·69 acres of paddy land for his own maintenance during life and for the expenses of his funeral when he died. This area of 22·69 acres was part of a holding of 46·69 the other part of which had been given by registered deed of gift to his eldest son U Pyinnya, a Buddhist monk. When Shwe Gon died his children including U Pyinnya mortgaged the whole of that holding in order to raise money for the funeral and not long afterwards the rest of the children sold to U Pyinnya by registered deed whatsoever interest they still had in the 22·69 acres.

Now the children of one of Shwe Gon's sons Mg Byaw who has since died, claim administration of Shwe Gon's estate by the Court and this suit raises questions of the validity of the gift of 24 acres to U Pyinnya and of the validity of U Pyinnya's purchase of the rights of the other heirs in the 22·69 acres.

The learned Judge of this Court who dealt with the case on appeal came to the conclusion that the gift to U Pyinna was valid, and with his decision on that point we are not now concerned.

On the question of the validity of U Pyinnaya's purchase of the rights of the other children the learned Judge said that he felt some difficulty. Both the lower Courts had found that the purchase was invalid on the authority of the cases of *U. Tilawka* v. *Shwe Kan* (1) and *U. Teza* v. *Ma E Gywe* (2) but the learned Judge said that he felt considerable doubt of the correctness of those decisions. He accordingly referred the following two questions for decision by a Full Bench.

(1) Is the sale of immovable property to a Burmese Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions ?

(2) If such a sale is void is the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract,

The reference came before a Bench of four Judges, including the learned Judge who had decided *U Teza's* case (2) and the Bench was equally divided in opinion.

The reference has therefore been heard before a Full Bench of five other Judges.

The provisions of law, which seem to be necessary to consider in connexion with the first of the second questions referred are S. 11, Contract Act, which says that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. S. 23, Contract Act, which says that the consideration or object of an agreement is lawful unless it is forbidden by any law or is of such a nature that if permitted it would defeat the provisions of any law or . . . . the Court regards it as immoral or opposed to public policy, that in these cases the consideration or object of an agreement is said to be unlawful and that every agreement of which the object or consideration is unlawful is void : S. 13, Burma Laws Act, which says that

(7) [1916] 38 All. 154=35 I. C. 23=14 A.L.J. 65.
(8) [1914] 37 Mad. 390=26 I. C. 195.
(9) [1917] 40 Mad. 808=31 M. L. J. 515=33 I. C. 721=(1916) 2 M. W. N. 369 (F.B.).

where any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution the Buddhist Law in case where the parties are Buddhists shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

The cases to which it is necessary to refer in addition to those already mentioned are the following, namely *Ma Pwe* v. *Myat Tha* (10) and *Shwe Ton* v. *Tun Lin* (3).

The earlier of these two cases is important because it introduced for the first time in Burmese Buddhist law the idea that a Buddhist monk is civiliter mortuus, and that idea which I consider to be mistaken has in my opinion been the cause of much of the subsequent misunderstanding The question for decision in that case was whether a Buddhist monk has power to make a gift of property which he owned before he became a monk and it was held that when a monk enters the order he divests himself of all his property except of course the "Arhites" which a monk is permitted to possess and that therefore the monk in that case was no longer owner of the property of which he purported to make a gift. The latter case is important because it has been relied on for the position that the Vinaya and its commentaries form part of the Buddhist Law and that where the devolution of the property of a monk is concerned it seems right that this branch of the law should govern the decision. All that need be said about that case is that it was a case of succession or inheritance in respect of which under S 13, Burma Laws Act, Burmese Buddhist Law is the law which is to be applied and that it had no connexion with contract.

In the case of *U Tilawka* (1), a Buddhist monk sued to redeem certain property which he had joined in mortgaging and the defence was raised that being a monk he could not be owner of the land. The Court said that the question raised was a broader one than a mere question of title or estoppel and was whether a Buddhist monk is capable of entering into a valid contract such as a mortgage for his personal profit. The mortgage in that case was made at a time when the Indian Contract Act was not in force in Upper Burma, but the learned Judicial Commissioner said that if the Contract Act had been in force at the time, the alleged mortgage would have been void so far as the monk was concerned under S. 23 as defeating his personal law and that although Contract Act could not be applied, as the question for decision was one regarding religious usages, the Buddhist Law must form the rule for decision and it must be held that a Buddhist monk could not contract a valid marriage or sue for restitution of conjugal rights so long as he remained in the priesthood. The propositions in that judgment which seem to me to be open to doubt are the statements that the making or redemption of a mortgage by a monk is a matter of religious usage, and the suggestion that such a transaction would defeat the provisions of law.

In *U Teza's* case (2), a Buddhist monk sued to recover immovable property which had been conveyed to him by way of sale and a defence was raised that, being a monk, he could not own secular property. The learned Judge who decided the case said :

> "It is needless to say that it has generally been accepted that a Buddhist layman embracing religious life dies a civil death,"

and in support of that statement he cited the case of *Ma Pwe* v. *Myat Tha* (10). As I have already said I do not accept that view. He also cited with approval the decision in *U Tilawka's* case (1), which I have dealt with above, and he held that because by the rules of his order a Buddhist monk is prohibited from engaging in wordly transactions the monk's purchase of the house which was the subject of that suit was void by reason of the provisions of S. 23, Contract Act, relating to agreements the consideration or object of which is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is regarded by the Court as immoral or opposed to public policy.

The learned Judge adhered to that view in dealing with the present reference, and said that he held that the Vinaya is the personal law of a Buddhist monk within the meaning of S. 13, Burma Laws Act, so as to bring the

(10) [1897-1901] 2 U. B. R. 54.

case within S. 23, Contract Act, and that his buying and selling for his own benefit is immoral.

The contrary view was taken by Carr, J., and I accept his view and have little to add to it It seems to me that matters of contract cannot be regarded as matters of religious usage, and that therefore Burmese Buddhist Law does not apply to them by reason of the provisions of S. 13, Burma Laws Act. I do not think that the rules of conduct applicable to Burmese Buddhist monks are "law" to which a monk is subject in respect of matters of contract because they are not the law which is to be enforced by the Courts. For similar reasons, I do not think that the object or consideration of such an agreement as that with which the present reference is concerned is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or ought to be regarded by the Courts as immoral or opposed to public policy. To put the matter shortly I would say that I do not regard the Vinaya or its commentaries as "law" except to the extent that they are recognized as law by S. 13, Burma Laws Act, that is, in cases where the Court has to decide any question of any religious usage or institution and that because I hold that in a suit regarding the validity of a sale to a monk the Court has not to decide any question of religious usage or institution I do not regard the Vinaya or its commentaries as the "law" applicable in such a suit.

I would therefore answer the 1st question in the negative and on that answer the second question does not arise.

I would direct the respondents Mg. Law and Mg Myaing to pay the costs of this reference. Advocate's fee to be 10 gold mohurs.

Chari, J.—I concur in the reasoning of Carr, J and the answers given by him and have nothing to add to what he has said in his judgment. I agree to the proposed order for costs.

Das, J.—I agree with the judgment delivered by Carr, J. and have nothing further to add, I also agree with the proposed order for costs.

Mya Bu, J.—The idea of the Buddhist monk entering into pecuniary transactions such as buying and selling for secular purposes is opposed to rules of conduct, promulgated by Buddha by which Buddhist monks profess to be governed, and which are contained in the Buddhist sacred literature called the Vinaya, and the first question in this reference recognize that such rules prohibit Buddhist monks from entering into such transactions

The rules in question are contained in Ss. 18, 19 and 20 of Patimokkha Nissaggiya Pakittiya, and run as follows:

"(1) Whatsoever Bhikku shall receive gold or silver or get some one to receive it for him or allow it to be kept in deposit for him that is Pakittiya offence involving forfeiture.

(2) Whatsoever Bhikku shall engage in any one of the various transactions in which silver is used that is a Pakittiya offence involving forfeiture.

(3) Whatsoever Bhikku shall engage in any one of the various kinds of buying and selling that is a Pakittya offence involving forfeiture.

A monk who infringes any of these rules is guilty of Nissaggiya Apat, and he may be pardoned for it, if he confesses to it and discards the property acquired by the transaction

The first point for consideration is whether in view of the provisions of S 13 (1), Burma Laws Act, the Vinaya forms the rule of decision of the first question in this reference, and resolves itself into whether the question as to the validity of a sale of immovable property to a Buddhist monk for secular purposes is a question regarding a religious usage or institution

If the question for decision be as to the effect of a sale to a Buddhist monk or his membership of the order as to the penalties to which he is liable as such member or as to whether the property acquired by him is capable of being held by him for his personal enjoyment or for the benefit of the religious order, it may then be said to be a question regarding a religious usage or institution No such analogous question is raised by this reference

A sale is a pure matter of contract, and I fail to see that this reference gives rise to a question regarding a religious usage or institution.

The provisions of law with reference to which the question is to be decided are contained in Ss. 11 and 23, Contract Act, 1872. In my opinion the correctness of the definition of the term "laws" adopted by Carr, J. is not open to question. From this it follows that the rules of conduct in question cannot be deemed

to be "laws" unless they are enforced by the State. According to S 13 (1), Burma Laws Act, they are not enforced by the State except in cases in which questions regarding any religious usage or institution arise A sale being a pure matter of contract, the rules in question cannot be said to be enforced by the State since the enactment of S 13, Burma Laws Act, and it appears from the fact that the Dhammathats collected in S 409 of the Kin Wun Mingyi's Digest lay down certain rules regarding the disposal of property acquired, by a monk by agriculture, or trade or by usury that these rules were not enforced by the State except in cases of a purely ecclesiastical nature, even before the passing of the Burma Laws Act. For these reasons, I hold that a Buddhist monk is not disqualified from contracting by law within the meaning of S. 11, Contract Act.

The questions which arise with reference to S. 23 are whether the consideration or object of the sale under consideration is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is immoral.

The foregoing remarks show that neither the consideration nor the object of the sale can be deemed to be forbidden by law or is of such a nature that it would defeat the provisions of any law.

It remains to consider whether it is immoral. The mere fact that an act is sinful does not show that it is immoral. The offences falling within the class of Nissaggiya Pakittiya are not the heaviest of the offences under the Vinaya. The heaviest offences are the Paragika, consisting of 4 offences by the commission of which a monk becomes ipso facto excluded from the order. They are:

(1) Murder, (2) Theft, (3) Sexual intercourse, (4) False profession of attainment of Arahatship.

The direct result of the commission of any of these four offences is that the offender ceases to be a monk and is no longer eligible for ordination. It is true that a Buddhist monk who has taken the vows of poverty and who professes to have abandoned the pleasures of the world taking part in wordly transactions such as buying and selling is not an edifying spectacle. On the other hand it is equally true that for very many years the Burmese Buddhist monk's vows of poverty sit lightly on him. Nissaggiya Apat is not an unpardonable sin.

I agree with the following remarks of Twomey, J in *U Shwe Ton* v. *Tun Lin* (3):

"We find individual monks infringing the Vinaya rules by holding paddy lands and the Burmese Buddhist law books recognize the practice."

The Full Bench in that case very pertinetly remarked:

"that the rigid monastic rule contemplated in the canonical text has long since become only a pious memory and a counsel of perfection."

In all these circumstances I see no good ground for holding that either the object or the consideration of a sale to a Buddhist monk is immoral within the meaning of S. 23, Contract Act.

For the above reasons, I would answer the first question in the negative. As a Burmese Buddhist I would loath to see Buddhist monks indulge in wordly transactions and would have liked to preserve the rulings in *U Tilauka* v. *Nga Shwe Kan* (1) and *U Teza* v. *Ma E Gywe* (2). If individual monks take advantage of the non-interference by the civil laws of the state in their practice of taking part in wordly transactions they will lose not only the veneration of the laymen, but also the brotherly regard of their puritan brothers, and also lower the tone of purity and reverence of the Buddhist monkhood in the estimation of the public. However since this Court has to administer the law as it stands, I am constrained to dissent from the rulings in these cases, and to give the first question in this reference the answer which I have proposed.

As pointed out by the Full Bench of the late Chief Court in *U Shue Ton's* case (3) at p 244:

"If reform is desirable it must come from within the order itself and must be brought about by pressure of lay Buddhist opinion."

Since my answer to the first question in this reference is in the negative, the second question does not call for an answer.

I agree with the proposed order in respect of the costs of this reference.

Ormiston, J.—Two questions were referred by Carr, J, for decision by Full Bench:

(1) Is the sale of immovable property to a Burman Buddhist monk void on the ground that a monk is prohibited by the rules of the Vinaya from entering into such pecuniary transactions?

(2) If such a sale is void in the vendor estopped from suing to recover possession of the property on the ground of the vendee's incapacity to contract ?

Carr, J., with whom Brown, J., concurring answered the first question in the negative, and if necessary would have been prepared to hold that there was no estoppel. Maung Ba, J., with whom Rutledge, C. J., agreed in a separate concurring judgment, answered the first question in the affirmative, but agreed with Carr and Brown, JJ., in holding that the answer to the second question should be in the negative. The Court being equally divided on the first question, the reference was further heard by a Full Bench differently constituted

The facts so far as material are set out with sufficient particularity in the order of reference of Carr, J., whose reasoning in the answer to the first question is so cogent that I have little to add to what he has said. As pointed out by the learned Chief Justice, it is not questioned that a monk has capacity to contract for a purely religious object, and the reference should be taken as limited to transactions for a secular or personal and not for a religious purpose.

The answer to the first question appears to depend on the construction to be placed on S 13(1), Burma Laws Act (13 of 1898) which provides that in regard to any question regarding succession, inheritance, marriage or caste or religious usage or institution

" the Buddhist Law in cases where the parties are Buddhists shall form the rule of decision "

The section clearly contemplates that unless the question does fall within the category, the Buddhist Law is not to form the rule of decision. It is immaterial, therefore, whether by the rules of the Vinaya, a monk is prohibited from entering into the transactions or whether prior to the passing of the Act, those rules would, in such a case, have been enforced as laid by a civil Court. They may be binding on a monk, in foro conscientiae, but unless they fall within the ambit of the subsection, they are not to be enforced as law by a civil Court. The only ground on which it can be suggested that a sale of immovable property to a Buddhist monk is covered by the subsection is that it is a question relating to a religious usage or institution. I agree with my brother Carr in holding that the reference involves merely a question of contract and does not involve a question relating to a religious institution or usage It is to my mind immaterial that a monk is a member of a religious institution, whose rules forbid him to enter into a particular contract The question before us is not in regard to institution itself, but whether a member of it may contract. To describe a rule whereby he is forbidden to enter into a particular class of contracts as a religious usage is to give a strained and unnatural meaning to that expression

Section 11, Contract Act, ommitting immaterial portions, enacts that every person is competent to contract who is not disqualified from contracting by any law to which he is subject. If it be the case, as I have held that by the rule of the Vinaya under which a monk may not enter into a contract for a secular purpose is not a rule to be enforced by a civil Court, it is not a law to which he is subject. So far as this section is concerned, therefore, a monk is not disqualified from entering into a contract, and a sale of land to him is not void.

The application of S. 23, Contract Act, rendering void an agreement of which the consideration and object is unlawful remains to be considered. It follows from what I have said that a contract entered into for a secular purpose by a monk is not in itself forbidden by law or of such a nature, that, if permitted, it would defeat the provisions of any law It is suggested that it is immoral or opposed to public policy. In my view it is neither. It can only be immoral on the ground that the monk in entering into it violates an obligation which is binding on his conscience. If this be so, every contract entered into by a man against the dictates of his conscience would be immoral To so hold would be to reduce the law to an absurdity. On the question of public policy, I would say that it is the policy of the law to promote rather than to restrict freedom of contract.

I would answer the first question in the negative. The second question does not arise, and in my opinion, should not be answered.

The decision of the Court of the Judicial Commissioner in *U Tilawka* v. *Nga Shwe Kan* (1), that a Buddhist monk is

prohibited by his personal law from engaging in any monetary transactions and of this Court in *U Teza* v. *Ma E Gywe* (2), that a purchase of property by a Buddhist monk is contrary to his personal law and is immoral within the meaning of S 23, Contract Act, should in my view be overruled.

The respondents will pay the costs of the reference, advocate's fees 10 gold mohurs.

V.S./R.K. *Reference answered.*

A. I. R 1929 Rangoon 365

RUTLEDGE, C. J., AND BROWN, J.

Ma Aye Yin and *others*—Appellants

v.

Ma Mi Mi and *others*—Respondents.

First Appeal No 249 of 1928, Decided on 13th June 1929, from judgment of Dist. Judge, Amherst, in Civil Regular No 11 of 1928.

Buddhist Law (Burmese)—Eldest born daughter dying in infancy—Second child son dying at 40—He living separately from his parents with their consent and never failing them in any family crisis—He is entitled to status of orasa even though he does not live with his parents and does not actively assist them in their business.

Where an eldest born daughter dies in infancy and the second child who is a son dies at the age of 40 and where he lives separately from his parents in accordance with their wishes and never fails them in any way in any family crisis, the mere fact of his not living with his parents and not having actively assisted in their business is no sufficient reason for depriving him of the status of orasa *A. I. R.* 1924 *P. C.* 238 *Expl.*, 2 *L. B. R.* 292 and *A. I. R.* 1923 *Rang.* 271, *Rel. on.*, 6 *L. B. R.* 77, *not Foll.*

[[P 368 C 1]

Anklesaria—for Appellants.

Htoon Aung Gyaw—for Respondents.

Judgment.—The property in dispute in this case is the estate of one U Aung Min deceased. U Aung Min married one Daw Ma Ma and they had in all 10 children. The eldest child was a girl Ma May, who died at the age of four. The second child was Maung Kin Maung, the father of the respondents in this case. Maung Kin Maung predeceased U Aung Min. The appellants are the five surviving children of U Aung Min. The respondents brought a suit for the administration of the estate claiming that Maung Kin Maung was the orasa child, and that they were, therefore, entitled to share equally with the surviving sons and daughters They claimed, therefore, an one-sixth share in the estate. It is admitted that, if Maung Kin Maung had the status of orasa, they are entitled to this one-sixth share, and that if he had not, they are entitled only to a 1/24th share. The trial Judge has found the plaintiffs established the orasa status of their father, and has passed a decree, declaring them entitled to a one-sixth share in his estate. Against this decree the defendants have appealed.

The appellants claim that Maung Kin Maung could not be the orasa child, because he was not the first born child, even if he did acquire the status of orasa his children have forfeited the right to base their claim on that status by reason of the fact that he did not live with his parents or helped in the acquisition of the family estate The question of the rights of an orasa was dealt with at very great length by a Full Bench of the late Chief Court of Lower Burma and subsequently by their Lordships of the Privy Council in the case of *Kirkwood* v. *Maung Sin* (1) It is pointed out in that case that the rights of an orasa have to be considered in two different aspects. There are first of all the rights of a son claiming a quarter share of the estate on his mother's death or of a daughter claiming a similar share on the death of the father There are secondly the rights of the children of an orasa, who predeceased the parents, claiming a share in the inheritance equal to that of the younger brothers and sisters. *Kirkwood's* case (1) dealt with the claims of an orasa in the latter aspect. The finding was that the orasa must be the eldest born child capable of undertaking the responsibilities of the deceased parents, and that that status should be attained during the lifetime of both parents by a son, if he was the eldest born child, and by a daughter, if she was the eldest born. Once the status has been attained either by the son or the daughter, no one else can claim that status

It was suggested in argument before us in the present case that, as U Aung Min was predeceased by his wife, it would be a daughter, and not a son, who

(1) A. I. R. 1924 P. C. 238=2 Rang. 693=51 I. A. 334 (P.C.).

could claim as orasa. This contention was in our opinion disposed of in *Kirkwood's* case (1). Maung Kin Maung attained the age of majority during the lifetime of both his parents, and was capable, therefore, of attaining the status of an orasa, If he did attain that status, then it makes no difference to his status that it was his mother, and not his father, who died first. On his mother's death he would not be entitled to claim a quarter share of the estate, but his status so far as the claims of the children are concerned would not be affected It is further contended, however, that Maung Kin Maung never did attain the status of orasa, and that he could not do so, as he was not the eldest born child. In the case of *Tun Myaing* v. *Ba Tun* (2), at p. 294 the following principles were enunciated :

" The eldest born son is the orasa by right; but he does not attain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then his next younger brother, subject to the same conditions, succeeds to his position as orasa. If, however, the eldest son attains his majority and fulfils the prescribed conditions, and then dies before his parents, his position as orasa remains unfilled and the next brother does not succeed to it."

If this enunciation of the law is correct, then it is clear that for the status of orasa to be attained it is not in all cases necessary for the child, for whom that status is claimed, to have been the eldest born if the eldest born died in infancy.

It is contended, however, that this decision and any other decision of a like nature were overruled by the the decision of the Privy Council in *Kirkwood's* case (1). In their discussion of the relevant passages from the Dhammathats in their judgment in that case their Lordships pointed out the insistence on the orasa child being the eldest born child of the wedded pair Thus at p. 783 (of 2 *Rang.*) they remark :

" The Vilasa declares that on the death of the father the rule of partition between mother and son is as follows. It specifically states . " If the son is the eldest born," and " if he helped the parents in the acquisition of the family property, he shall get his father's elephant, etc. The remainder of the estate shall be divided into four shares the mother shall get three shares and the son one share" and to the question. "Why should the eldest born child get a fourth share?" The answer is ; "The parents obtained the child at the commencement of their wedded life by their earnest prayer and acquired the property with his or her assistance," What can all this mean, except that " the eldest son " referred to in all this Dhammathats is the eldest born child of the wedded pair,"

In the case before them their Lordships had not for consideration a case in which the eldest born child had died in infancy, and we do not think that their decision directly or impliedly involved a finding that, if the eldest born child died in infancy, no other child could ever attain the status of an orasa It is true that in summing up the decision, their Lordships remark at p. 786 (of 2 *Rang.*) :

" The status does not depend on the decease of the father, where the child is a son, or of the mother, where it is a daughter, it comes into existence on the fulfilment of three conditions, viz. : (1) that he or she is the first-born child; (2) that it attains majority, and (3) helps either in the acquisition of the family property and the discharge of the father's responsibilities; or, if a daughter, helps the mother in the care of the property and the control and management of the household, which lie particularly within the mother's duties."

But as we have said there is no question in that case of the first born child having died in infancy, nor did their Lordships in any part of their judgment deal with such a case. In their final conclusion their Lordships expressed general assent with the observations of the Judges of the Chief Court, and on this point Heald, J., expressed his opinion clearly in the course of his judgment. At p. 746 he remarks :

" The question then arises whether if the eldest child dies in infancy, the next child succeeds as auratha. The Dhammathats, so far as I know, give no answer to this question though as I have said the Attasankhepa considers the possibility of a case in which there is no auratha but only younger children. I think from my experience of cases under Burmese Buddhist Law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as auratha."

Again at p. 759 (of 2 *Rang.*) of his judgment he remarks:

"The case of *Ma Em Thu* v. *Maung Hla Dun* (3), was one in which the question of the rights of grandchildren arose and it was held

(2) [1906] 2 L. B. R. 292.

(3) [1912] 5 Bur. L. T. 73=15 I. C. 360.

that where the eldest child was a son who died in infancy, the son of the next eldest child, who was a daughter and who grew up, was entitled to share equally with his mother's younger sister. That decision was in my opinion correct, but the judgment seems to suggest that if there had been a son surviving instead of two daughters, the son might possibly have been auratha to the exclusion of the elder sister, and that view, I think, would be mistaken. The ruling was not, however, officially reported."

He then proceeded to quote the case of *Ma Su* v. *Ma Tin* (4), in which the same view as to the effect of the eldest born child dying in infancy was considered. Certain remarks of Duckworth, J., suggest that he might have taken a contrary view. He states at pp. 770 and 771 (of 2 *Rang.*) :

"The point is that, if a son is not the first born child, he can never be auratha, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful whether, according to the Dhammathats, another can become auratha in place of the deceased eldest daughter."

But he cites no authority in support of his view. The tendency of judicial decisions of recent years has been to place the sexes on a status of absolute equality with regard to their claims of inheritance in the estate of their deceased parents, and we know of no authority in the Dhammathats for the view that, if the eldest born child is a daughter and dies in infancy, no other child can attain the status of an orasa. The views of Heald, J., on this point are generally in accord with previous decisions in Burma and we agree in those views. The result is that Maung Kin Maung, who did not die apparently till he was over 40 years of age,did attain the status of orasa, and that he retained that status until his death unless it be held that he failed to fulfil certain other requisite conditions besides that of being the eldest child. We have already referred to the passage in their judgment in *Kirkwood's* case (1), where their Lordships set forth the three conditions necessary for the coming into existence of the status of orasa by a son or daughter : (1) that he or she is the first born child; (2) that it attains majority; and (3) helps in the acquisition of the family property and the discharge of the father's responsibilities if a son. In our view of the reasons we have already given, the first two requisities are satisfied in this case, and in stating the third requisite we do not think that their Lordships intended to lay down a definite rule which must be rigorously followed in every case

In deciding on the applicability of these remarks to the present case, it must be remembered that in the case before their Lordships there was no question of the orasa not having helped in the acquisition of the family property, and on this point the remarks of their Lordships amount to little more than that these requisites are set forth in the Kyetyo Dhammathat. The remarks on the point are a summary of the result of extracts from the Dhammathats and cannot in our opinion be interpreted as intended to lay down any definite law on this point. There are certain passages in the Dhammathats which suggest that a child loses its rights of inheritance on failure to live with its parents, and it is contended that this rule has still greater force when the rights claimed are the special rights of the orasa. In the case of *Ma Hla U* v *Maung Shwe Yin* (5), the eldest daughter on the death of the mother claimed a quarter share in the joint estate. It was held that the mere fact that she had lived separately from her father and that she had never assumed the duties of her deceased mother in the family was not sufficient reason for denying her rights.

In the present case U Aung Min was a goldsmith. He sent his son Kin Maung to an English school and after leaving the school Kin Maung first became a clerk in a lawyer's office Subsequently he became a teacher and then a clerk in the Deputy Commissioner's office,Thaton. He was subsequently transferred to Pa-an as Sub-Accountant and later joined the establishment of the Divisional and Sessions Judge, Moulmein. He was then appointed a Myook. It is quite clear from his training and his subsequent occupation that he could not well assist his father in his business as a goldsmith, and indeed that his father never expected him to do so. There is no evidence that his relations with his parents were other than normal In the course of his work he had been transferred away from Moulmein where his parents lived. But he never ceased to maintain filial

(4) [1912] 6 L. B. R. 77=18 I. C. 466=5 Bur. L. T. 291 (F.B.).

(5) A. I. R. 1923 Rang. 271=1 Rang. 370.

relations with them, and there is evidence to the effect that he did at times help them with presents of money. Certain remarks by Heald, J., in *Kirkwood's* case (1), on this point at pp. 746 and 747 (of 2 *Rang.*), have been cited by the trial Judge:

"There can, I think be no doubt that the Dhammathats which give a special share to the eldest child who is competent to take the place of father or mother contemplate a family in which the auratha is living in the family house and does actually take the place of the parent. Indeed I doubt whether the Dhammathats contemplated the auratha's taking away the special share unless he or she was ousted from the position of head of the family by the surviving parents marrying again. Some of the Dhammathats would deprive a son or daughter, who does not live with the family and take the father's or mother's place of the auratha child's share, vide the texts cited in Ss. 36, 37, 40, 41 and 62 of the Digest, but I think that in this case, as in certain other cases, e. g., the cases of adopted and stepchildren, the necessity for joint living may now be considered as archaic and obsolete and may be disregarded."

With these remarks we agree. There is nothing to show that Kin Maung's special help was ever asked for by his father or refused by him. His working first as a clerk in a lawyer's office and later on as a clerk in the Government service was apparently in accordance with the wishes of his parents. There is nothing to show that he ever failed his parents in any way in any family crisis and that being so, we do not consider that the mere fact of his not living with his parents and not having actively assisted in their business is sufficient reason for depriving him of the status of orasa. We are, therefore, of opinion that the case has been rightly decided by the trial Court, and that the respondents collectively are entitled to share equally in the estate of U Aung Min with the five appellants. We accordingly dismiss this appeal. The trial Court directed the costs in that Court to come out of the estate, and we think that, in the circumstances, a similar order might fairly be passed here. We, therefore, direct that the costs of this appeal be awarded out of the estate.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Rangoon 368

BROWN, J.

Maung Ba Oh—Appellant.

v.

Motor House Co Ltd.—Respondent.

Special First Appeal No. 128 of 1928, Decided on 26th March 1929, from judgment of Small Cause Court, Judge, Rangoon, in Civil Regular No. 6659 of 1927.

Contract Act, S. 74—Contract by *M* for purchase of Motor truck from *D*—Truck delivered to *M*—Part of purchase money paid and with regard to balance *M* entering into hire purchase agreement about truck in which *M* was described as hirer and *D* as owner—Under agreement balance was to be paid in instalments and on payment of whole sum *M* had option to purchase truck by paying one rupee—Agreement containing clause that on failure by *M* of any instalment as it became due *D* could seize car and credit its value as against amount due by *M* but *M* was not to be credited with more sum than then due—Agreement though in form of hire, object of parties in drawing it up was to enter into contract for sale—Stipulation that *M* was not to be credited with more sum than then due was by way of penalty which Court can and ought to relieve against under S. 74.

M entered into a contract with *D* for purchase of a motor truck for a certain sum. The truck was delivered to *M*. *M* paid only part of the sum and entered into a hire purchase agreement about truck in which *M* was described as hirer and *D* was described as owner for the sum still due. Under the agreement *M* was to pay the balance by instalments and on payment of the whole sum had the option of purchasing the truck for one rupee. The agreement contained a clause to the effect that on failure by *M* of any instalment as it became due *D* was entitled to seize the car and credit its value as against the amount due but subject to a condition that in no case should he credit *M* with more than the amount still due on the contract.

Held that though the agreement was in form one of hire, the object of the parties in drawing up the agreement was to enter into a contract for sale providing at the same time security to the seller for due payment of the purchase money. [P 371 C 1]

Held further that the stipulation in the agreement that *D* could seize the car and keep it without making any payment to *M* even though the value of the car might be greatly in excess of the amount due under the agreement was a stipulation by way of penalty which the Court could and ought to relieve against under S. 74: 5 *L. B. R.* 201, *Dist.*; 2 *U. B. R.* 291, *Rel. on.* [P 371 C 2]

Dantra—for Appellant.

Dhar—for Respondent.

Judgment.—In April 1926 the appellant Maung Ba Oh entered into a contract with the defendant company for the

purchase by him of a Graham Brothers' Motor Truck for the sum of Rs 3,850. The truck was delivered to the appellant on 30th April on his paying Rs. 1 000 as a first instalment towards the price. At the same time he wrote a letter to the defendant company agreeing to pay the balance within three months by instalments. On 7th June 1926, Maung Ba Oh paid the defendant-company a further sum of Rs 800. He claims that he made another payment of Rs 165 at the close of June but this payment is not admitted. No other payment was made before October. On 12th October the respondent company wrote to the appellant pointing out that payments were overdue and saying that unless payments were made by 20th, legal action for the recovery of what was due would have to be taken. On 28th October the appellant went to the Motor House Company and talked to them about the matter. He had Rs. 127 with him and he paid that sum towards the amount due. The next day he again visited the office of the company and on that day he signed a hire purchase agreement with reference to the truck. The document is filed as Ex. K It is an ordinary hire purchase agreement in which the Motor House Company are described as the owners of the truck and the appellant is described as the hirer. A total sum of Rs. 2,143 was to be paid in nine months in instalments of Rs. 238 on 29th day of each month beginning on 29th November. On failure on the part of Maung Ba Oh to pay any instalment as it became due, the respondents were entitled to seize the car and credit its value as against the amount due but subject to a condition that in no case should they credit the appellant with more than the amount still due on the contract.

Since that date the appellant has paid one instalment of Rs. 238 only and in the month of February 1927 the defendant company seized the truck. They subsequently sold it to one Binjraj for Rs. 2,750. The appellant filed a suit against the Motor House Company in which he claimed that they had no right to seize the car. He stated that the value of the car when seized was Rs. 3,500 and that at that time there was a sum of Rs. 1,520 only due from him towards the purchase money. He asked for a decree for the difference between these two sums, Rs. 1,980. The defendant company denied that they were in any way liable to the plaintiff. They pleaded that under the agreement Ex. K they were entitled to seize the car and that the plaintiff was not entitled to claim anything from them. The trial Judge dismissed the plaintiff's suit and the plaintiff has now appealed.

The document Ex. K, as I have said, is an ordinary one of hire purchase agreement. The plaintiff, however, pleads that when he signed it he did not understand what he was signing. It was represented to him by the defendant company that he was merely signing an agreement to pay the balance of the purchase money due on the car by monthly instalments of Rs 200. It is admitted that the appellant made two visits to the office of the Motor House Company, one on 28th October and, one on 29th. The plaintiff says that his visit on 29th was not made in order to come to terms about the car but merely in order to have something done to the carburettor. Whilst he was there the document (Ex. K) was given to him without the blanks being filled in and at the defendant's request he signed it.

He has called two witnesses to support his version of what occurred, Maung Than Sein and his motor driver Maung Tha Byaw. Than Sein says that at the time he was reading a document which was blank, and whilst he was doing so the plaintiff came in. He gave the document up to a "bo," presumably the Manager of the Company or one of the Assistants, and the "bo" gave it to the plaintiff who thereupon signed it. Tha Byaw says he saw the "bo" hand a paper to the plaintiff and the plaintiff write on it. But he admits that he was some distance off The trial Judge has not accepted this evidence and it does not seem to me to be very convincing. It is extremely unlikely that the appellant, a business man, would blindly sign a document of this sort Mr. Bertie, the Manager of the Motor House Company and Mr. Morley, his Assistant, both say that the terms of the document were explained to the appellant before he signed it, and that the blanks in it were filled up. I agree with the learned trial Judge that it is extremely unlikely that the Motor House Company would in the

circumstances have agreed not to take any further action for the recovery of what was due on the car in return for the plaintiff's merely signing an agreement to pay what he was already bound to pay. It is prima facie unlikely that the appellant would have signed a blank document and I think that the evidence of Mr. Bertie and Mr. Morley that the document was not blank when it was signed may be accepted

Two alterations have been made in the document. In the first clause the period of hire was first of all written down as 12 months; this was subsequently altered to nine, and the date for the payment of instalment was first of all entered as the 15th of each month, but this figure was subsequently altered to the 29th. Mr. Morley says that both these alterations were made before the agreement was accepted by Mr. Bertie. Mr. Bertie says the alterations from 12 to 9 were not then made. The trial Judge has accepted Mr. Morley's statement on this point. The total sum due on the document was shown as Rs. 2,143 and the monthly instalment shown as Rs. 238. These figures were clearly entered in the first instance. Nine times Rs. 238 amounts to Rs. 2,142 and it is clear therefore that the document originally contemplated a period of nine months, and, whenever the alteration to nine months was made, it clearly represents the original intention of the parties. I am of opinion that the document (Ex K) was signed by the plaintiff of his own free will, that he must be presumed to have understood what he was signing and that it does represent the terms of the contract agreed on between the parties.

As regards the amounts which have been already paid towards the price of the car, I also agree with the finding of the trial Judge The plaintiff claims to have paid the sum of Rs. 165. The defendant says that this payment was made not towards the price of the car but towards the insurance premium thereon. The plaintiff admits that Rs. 165 was paid towards insurance and he has failed to prove that he made more than one payment of that amount. The amount that was due therefore under the original contract at the time of the execution of Ex. K was the sum of Rs. 3,850 less the three instalments of Rs. 1,000, 800 and 127, or a total of Rs. 1,927. The defendant says that the Rs 220 was by consent added to this sum to represent interest. The interest would work out at a somewhat high rate but not at a rate unusually high for such agreements. Between the purchase and the Ex. K the plaintiff claims that he spent Rs. 557 in having a body made for the car That he did spend some money for this has been proved, but I agree with the trial Judge that he has not proved that the value of the truck was increased by the whole amount of the money he spent on this body. If the terms of the contract, Ex. K, are to be enforced in their entirety, then it seems to me that the suit was rightly dismissed. But the question remains whether the terms of the contract should be enforced in full. Exhibit K is headed :

" Memorandum of Agreement between Messrs. The Motor House Co. Ltd., called the owners and Maung Ba Oh, called the Hirer, "

Clause 1 of the agreement reads :

" The owners agree to let, and the hirer agrees to hire a truck and accessories as described on the back hereof for the term of nine months, for the sum of Rs. 2,143 payable down and the balance in monthly instalments of Rs. 238 on 29th day of each month at Rangoon, the first instalment to be paid on 29th November next 1926. "

Clause 2, amongst other things, recites that

" it is agreed that the truck shall remain the property of the owners until and unless the hirer exercises the option. contained in Cl. 9"

Clause 3 reads

"Should the hirer make default in any monthly payment as agreed, or commit any breach of any provision of this agreement or should he die or have a receiver order made against him or make any arrangement or composition with his creditors, or should the said truck be seized under execution or legal process, the whole sum then remaining unpaid of the full amount of Rs. 2,143 shall become due and payable forthwith, and the owners shall have the right at any time to retake possession of the said truck and accessories, and to credit the account of the hirer (as against the balance of the said full amount) with an amount representing the fair market value of the machine and accessories in their then condition but such amount shall not be greater than the whole sum then owing by the hirer to the owner."

Clause 6 says :

"The hirer shall be at liberty at any time during the continuance of the agreement to return the said truck and accessories to the owners, carriage paid, and upon the same being safely received by the owners, they shall be credited to the hirer's account in the same manner and with the same effect as is provided in para 3 hereof, provided that the owners shall not be compelled to allow for

the said truck and accessories a greater sum than the balance of the whole sum owing by the hirer to the owners. It is the intention of this agreement that on the determination of the hiring under this clause the hirer shall at once pay the balance of the full amount named in Cl. 1, less an allowance for the fair market value as aforesaid.

And the agreement concludes with Cl. 9 :

"It is further agreed that if and when the full amount firstly above named shall have been paid to the owners, the hirer shall have the option of purchasing the said truck and accessories for the sum of one rupee, but no such option shall arise in case of termination of hiring under Cls. 3 or 6 hereof.

The construction of a hire purchase agreement with reference to a sewing machine was discussed in the case of *Musa Mia* v *Dorabjee* (1), and also in the Upper Burma case of *Singer Manufacturing Co.* v. *Elahi Khan* (2). In each of those two cases the claim made was for hire long after the period when if the amount payable had been paid on the dates due, the machine would have become the property of the hirer. The two cases are not, therefore, analogous to the present case But in the *Upper Burma* case, it was held that the circumstances of the case appeared to bring it within the intended application of S. 74, Contract Act, and I think the same view may be taken as regards the present case.

Section 74, Contract Act provides :

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for."

Now the agreement in the present case is on the face of it an agreement to hire with an option of purchase, but, as pointed out in the Upper Burma case of *Singer Manufacturing Company* (2) at p. 294 :

"In construing a contract it is, of course, the duty of the Courts to look not merely at the surface and form, but also into the heart of the matter and to ascertain its true meaning and the actual intention of the parties."

Although the agreement is in form one of hire the object of the parties in drawing up the agreement was to enter into a contract for sale providing at the same time security to the seller for due payment of the purchase price

Clause 9 provides that on the whole Rs 2,142 being paid the hirer shall be entitled to purchase it on paying another one rupee ; that is to say, he would become the purchaser for 2,143 In Cl. 1 the hirer undertakes to pay the instalments of Rs. 238 a month on the 29th of each month, Cl. 3, under which the defendant-company has acted in this case, contains the penalty for failure to carry out this promise of paying the instalments as they fall due. Under that clause the owners can seize the car and keep it without making any payment to the plaintiff even though the value of the car may be very greatly in excess of the amount due under the agreement. It seems to me that this is clearly a stipulation by way of penalty, and, further, that it is a stipulation which if strictly enforced might have the most inequitable results.

Mr. Bertie, the Manager of the Motor House Company admits that if a party had to pay Rs 4,000 under a hire purchase agreement and only Rs. 5 was left unpaid, strictly speaking, they could seize the car and make any profit they like over it, that is to say, in such circumstances the would-be purchaser who had paid practically the whole of the car would merely have had the use of it as a hirer for a period of months. If both parties to the agreement. Ex. K, performed their part of the contract, the agreement would be fair enough. But the penalty provided in case of default by the purchaser is clearly in the highest degree inequitable. In my opinion, the provisions of Cl. 3 amount to a stipulation by way of penalty which the Courts can and ought to relieve against under the provisions of S. 74, Contract Act

The sum of Rs. 2,143 shown in Ex K is not the amount actually due at the time the agreement was drawn up, but in view of the failure of the plaintiff to make payment under the original contract the defendant company could fairly claim interest on their money, and I am not satisfied that in the amount fixed, Rs. 2,143, the rate of interest allowed is so unreasonably high as to be exorbitant. But having allowed this sum it is not necessary to allow anything further for interest as in calc-

(1) [1910] 5 L. B. R. 201=8 I. C. 969.
(2) [1892-96] 2 U. B. R. 291.

ulating this amount interest was clearly allowed for up to the expiry of the nine months. Of this sum of Rs. 2,143, Rs 238 has been paid leaving a balance of Rs. 1905. The respondent-company has sold the truck for Rs. 2,750 so that they have obtained Rs 845 more than was due to them for the truck. The sale took place on 5th March, several months before the instalments under agreement were due. As far as interest is concerned, the defendant company was therefore amply compensated by fixing the value of the car in the agreement at Rs 2,143 I think, they might reasonably claim something above this for costs incurred in getting the car back and selling it But Rs. 45 should be a sufficient allowance for this, I am of opinion that the part of Cl. 3 of the agreement which says that .

"the amount to the credit of the hirer shall not be greater than the whole sum then owing by the hirer."

should not be enforced and that the defendant company may be reasonably compensated for the breach by the plaintiff of his agreement, by allowing them the money they have received for the truck, less the sum of Rs. 800 On points of fact the defendant company have been successful in both Courts and the greater part of the cost of litigation should be borne by the plaintiff. I set aside the decree of the trial Court and pass a decree for the payment by the defendants to the plaintiff of Rs. 800, The plaintiff will pay the defendants half their costs in both Courts.

P.N./R.K. *Decree set aside.*

A. I. R. 1929 Rangoon 372

RUTLEDGE, C, J., AND BROWN, J

U Pyinnya and *another*—Plaintiffs—Appellants.

v.

V. Dipa—Defendant—Respondent

First Appeal No. 176 of 1928, Decided on 19th March 1929, from judgment of High Court on original side in Civil Regular Suit No 225 of 1927.

(a) Buddhist Law (Burmese)—Thinghika property dedicated to rahans of Kyaungdaik is vested in head of monastery as trustees.

Where thinghika property is dedicated to the rahans of kyaungdaik and, not to the whole monkhood throughout the world, the property is vested in the head or heads of the monastery as trustees. [P 373 C 1]

(b) Buddhist Law (Burmese)—Scheme giving power to trustees to settle or decide disputes relating to possession of kyaung — Power to appoint successor to head of kyaung vests in trustees.

Where a scheme regarding land granted by Government for religious purposes is settled, giving to the trustees all powers of control to settle disputes relating to the possession of kyaungs and to decide who should be in possession of the same, then on the death of a monk holding the kyaungs, the trustees and trustees alone have the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant has nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice is not narrowed down to such an individual, and they are justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it, are justified in appointing other monks to take possession of kyaung: (1912 1836) 2 *U. B. R.* 78 and (1892-1896) 2 *U. B. R.* 72, *Ref.* [P 374 C 2]

Maung Kun—for Appellants.

Maung Mya Gaing—for Respondent.

Rutledge, C. J. — This is an appeal from the Original Side of this Court dismissing the plaintiff-appellants' suit for possession of a kyaung in the Thayettaw Kyaungdaik, Rangoon, of which the defendant-respondent is at present in possession. Disputes from time to time had arisen in connexion with this kyaungdaik and at the suggestion of the Court application was made to the late Chief Court for the settlement of a scheme for the management of the kyaungdaik in 1912. An appeal, First Civil Appeal No. 129 of 1913, was preferred against the scheme settled by the Original Side and the appellate Court, consisting of the late Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, gave the scheme their very careful consideration and referred it to the Mahasangharaja the Thathanabaing, who gave his opinion after consultation with the Sayadaws present at the Soodima Convocation.

We may mention that the several parties in the kyaungdaik profess to belong to the body of monks who acknowledge the Thathanabaing as their religious head. The scheme was accordingly settled by the appellate Bench of the Chief Court in accordance with the advice of the highest ecclesiastical authority acknowledged by the several monks of the kyaungdaik. This, however, did not prevent a considerable number of monks in the kyaungdaik refusing to acknowledge the scheme and in particular the appel-

lants, who in pursuance of the scheme were elected as trustees of the kyaungdaik with a council of five. U Kethaya, the monk in charge of the Hmangin kyaung was one of those who refused to acknowledge the scheme, and it is on record that the appellants, the present trustees, sued U Kethaya for ejectment in the late Chief Court in Civil Regular No. 218 of 1918, alleging disobedience and harbouring a considerable number of monks hostile to the trustees. In those proceedings, it was not disputed that U Kethaya was in lawful possession of the kyaung In such circumstances, a strong case would have to be made out to justify ejectment by the trustees, and the suit was dismissed by consent as not disclosing sufficient cause of action. U Kethaya died early in 1926 and the defendant, who seems to have been his senior disciple, claims to be in lawful possession of the kyaung as his successor. The learned trial Judge has held that the defendant is in lawful possession of the kyaung and after a full discussion of the breaches of the bye-laws alleged by the plaintiffs has held that they are insufficient to justify eviction and so has dismissed the suit.

If we were able to share the learned Judge's finding that defendant was in lawful possession of the kyaung as successor to the late U Kethaya, we would not be disposed to differ with his findings as regards the sufficiency of the alleged breaches to justify eviction, but, for reasons which we hereafter set out, we are not satisfied. If it had been established that the kyaung was poggalika property, the learned Judge's findings might well be correct, but it is common ground that the kyaung in fact is thinghika property. No doubt thinghika property varies in character according to its original dedication. It may be dedicated to the rahans of the four quarters of the earth, i. e., to the whole monkhood throughout the world, or, as is more usually the case to the rahans of the particular kyaungdaik in which the kyaung is situated. There is no evidence on the record as to the particular form of the dedication, but we consider ourselves justified in presuming that the more usual form was followed in this case and that the dedication was to the rahans of the kyaungdaik. In such cases, the property is vested in the head or heads of the monastery, no doubt as trustees : see the Manugye Dhammathat : Book 8 (Richardson), para 3, 236 :

"Of these six, as regards the gift having reference to a future state of existence, they are of two kinds, poggalika and thinghaika. In poggalika gifts, the person to whom the offering is made has a right to keep it. In thinghaika gifts, it becomes the property of the chief of the assembly of priests : see *Maung Talok* v. *Mo Kun* (1)."

The land on which the kyaungdaik is situated was granted by Government for religious purposes to trustees and the present trustees' names have been inserted in this grant, which is in their possession This fact is mentioned by the first plaintiff in his evidence. The scheme does not vest the land in the trustees, but by its terms seems to take for granted that this has already been done. Had it been otherwise, it would be difficult to explain the very extensive powers given to the trustees by S. 8, Cls. (a) to (f) By Cl. (a) they are given all the powers of control which the head of a monastery has by Burmese Ecclesiastical Law—to settle disputes relating to the possession of kyaungs, rayats or religious buildings and to decide who should be in possession (of kyaungs). As I read this clause, they have not merely the power to decide disputes between lawful claimants to a kyaung, but they are given expressly the power to decide who should be in possession of any thinghika kyaung. This power is probably given to them as heads of the kyaungdaik by Burmese Ecclesiastical Law, but it is expressly given to them by the scheme as settled by the Chief Court on the advice of the Thathanabaing.

The position taken up by the defendant throughout was that he was not bound by the scheme and would not obey its provisions. The learned trial Judge has held that the defendant, as well as all other monks in the kyaungdaik are bound by this scheme. I am in full agreement with this finding, but I do not think that the learned Judge correctly appreciated the consequences of this finding and he seems to have been led away from the main issue by other matters raised by the pleadings such as breaches of bye-laws and the committing of dupassa. From the evidence it seems clear that the trustees had no objection to the defendant if he acknoweledged himself bound by the scheme and recog-

(1) [1892-1896] 2 U B.R. 78.

nized the trustees as the heads of the kyaungdaik, and it is perfectly clear that the defendant refused to acknowledge the scheme or the trustees as the heads of the kyaungdaik.

It has been contended that the trustees and council had no option but to recognize the defendant as the lawful successor of the late U Kethaya as custodian of the Hmangin kyaung as he was his senior disciple, was well qualified to teach the Buddhist scriptures and had been nominated by U Kethaya. No doubt these are qualifications which in ordinary circumstances would lead the heads of the kyaungdaik to appoint a candidate so well qualified, but I cannot read them as taking away the discretion of the trustees. The very object of the scheme was to promote harmony in the kyaungdaik and not to continue indefinitely the strife and bickerings of one faction with another, which is most inimical to the Buddhist religion, and the requirements of the trustees that the defendant should ackowledge the scheme as a condition precedent to their entrusting him with the charge of the Hmangin kyaung seems to me to be perfectly reasonable. It is clear from the record that the trustees asked him for such acknowledgment and it is clear that the defendant declined to give it. Instead of acknowledging the trustees, the defendant called in D. W. No. 1, U Kothanla, referred to as the Aletawya Sayadaw. The learned advocates agree that his kyaungdaik is on boundary road in a different part of the city, and he himself was forced to admit that he had no connexion whatever with Thayettaw kyaungdaik. The defendant states that he entrusted the arrangements for U Kethaya's pongyibyan to this monk, but it is also clear that he presided at the meeting, the Hmangin kyaung, which the defendant alleges appointed him the lawful custodian of the kyaung. The record does not show how many of the rahans present at that meeting were strangers to the kyaungdaik like the presiding monk, nor does it really matter. The scheme did not entrust U Kothanla or a gathering of defendant's sympathisers with the power to decide who should be in possession of the Hmangin kyaung. This power was given to the trustees by S. 8, Cl. (d) of the scheme. The learned trial Judge seems to have been much impressed by the demeanour of U Kothanla. We have not had the advantage of the learned Judge on this point, but the impression seems to have been so favourable that he does not seem to have noticed that this monk was actively mixing himself up in the concerns of a kyaungdaik with which he was not connected, and not as a peacemaker but as a partisan, and that he was backing up the defendant in his disregard for the scheme which the learned Judge himself has found to be binding upon him, the defendants, as well as the other monks of the kyaungdaik

To put the matter shortly, I am satisfied that on the death of U Kethaya the trustees and the trustees alone had the power to appoint his successor and that though ordinarily in making such appointment, they should consider whether the deceased occupant had nominated a successor who was his senior pupil and well qualified to teach the Buddhist scriptures, the trustees' choice was not narrowed down to such an individual, and they were justified in asking him to acknowledge the scheme settled for the management of the kyaungdaik and on his refusal to acknowledge it were justified in appointing other monks to take possession of the kyaung

I have very little further to add in connexion with the case. The trustees appointed two disciples of the late U Kethaya : namely U Zatila and U Tezeniya to take charge of the kyaung as they agreed to acknowledge the scheme. This was done about May 1926. These monks ran away from the kyaung some time later and neither of them gave evidence at the trial. The defendant, however, filed a copy of U Zatila's evidence in Criminal Regular Trial No. 336 of 1926 before the Eastern Sub-Divisional Magistrate, Rangoon, relying on the admission in cross-examination that the defendant was senior to him and had a right to take the deceased U Kethaya's place. In the earlier part of U Zatila's evidence, he states that on the day that they were given the custody of the kyaung, four Zerbadis abused them and attempted to stab another monk, while the defendant and his twenty disciples refused to leave the kyaung. From these circumstances, the reasons for the flight of U Zatila and his companion are not far to seek. The learned Judge has

decided that certain of the bye-laws made under the scheme are ultra vires. As I do not base my judgment on any question arising on these bye-laws, it is not necessary for me to express any opinion

For these reasons, I would allow the appeal and set aside the judgment and decree appealed from, and would grant a decree that the defendant yield up possession of the Hmangin kyaung and premises to the plaintiffs within fourteen days, failing which he will be evicted therefrom. As there is no layman associated with the defendant-respondent on the record in this appeal, I would make no order as to costs.

Brown, J.—I agree that the decision in this case must depend on the answer to the question whether under a reasonable construction of the scheme for the management of the kyaungdaik as framed the trustees have the right to fill any vacancy occurring in the headship of the kyaung by death of the previous head. On this point the learned trial Judge remarked :

"In the present case, it is not alleged that the defendant has set up such a claim, and the trustees and the council appear to take up the position that they are invested in all cases with the right of nominating the successor of a deceased head pongyi. Such a right appears to be opposed to the well recognised methods of appointing such a successor and, therefore, to be opposed to the rules of Vinaya with which the scheme is intended to be consistent."

He then goes on to cite a passage from the deposition of the plaintiff U Pyinnya himself. U Pyinnya stated in the course of his cross-examination :

"usually the head of a gaing in consultation with the members of the gaing selects as to who should succeed to a deceased presiding monk."

But when further questioned by the Court on the point he added :

"We the sanghas being in charge of the kyaung will be the proper persons to select a successor."

The learned Judge also relies on the evidence of the Aletawya Sayadaw, U Kothanla, for the defence. This witness states in one part of the examination :

"On the death of presiding monk of a sanghika kyaung and if the deceased monk had confidence in his disciple that he could take charge of the kyaung and that he would be able to control the other disciples, and if he (the junior) monk is replete with aforesaid qualification he becomes the successor of the deceased presiding monk. If he has not been so enstrusted, a successor is elected by the sanghas of the kyaung who have been associating with one another, i. e, the sanghas who are of the same mind and who had associated with the deceased presiding monk."

But later on in his cross-examination he states :

"It is true that in the case of a kyaung (Tinghika kyaung) like the Hmangin kyaung the trustees of the kyaungdaik could nominate a successor if the said kyaung is situated within the compound of the said kyaungdaik and if situated outside the kyaungdaik solitarily by itself the deceased presiding monk could nominate a successor. The first answer is true provided there is no monk in the kyaung competent to succeed the deceased."

This answer is somewhat confused, but I do not think it can be held to be established that the general recognised custom is that only the rahans of a particular kyaung in a kyaungdaik have the power of selecting a successor.

In Manugye, Vol. 8, S. 3, it is laid down that in poggalika gifts, the person to whom the offering is made has a right to keep it. In sanghika gifts, it becomes the property of the chief of the assembly of priests. The property here is sanghika property and, therefore, may be held to be the property of the chief of the assembly of priests. This by itself does not carry us very far, as it leaves open the question of what exactly is meant by "assembly of priests". In the case of *U Te Zeinda* v *U Teze* (2), it was held that in Upper Burma a monk or rahan with the knowledge and authority of the Thathanabaing ecclesiastical authorities under him or a Taikok had the power to evict the resident rahan from a kyaung. The following passage occurs in the judgment on p 75.

"But, besides this, they claim to be the ecclesiastical heads of a sort of abbey or priory called a kyaungdaik, in which the defendant is one of the monks. There are separate buildings, but all are within the same precincts and constitute a monastery of which the plaintiffs are Taikok and Taikkyat."

It was held that the plaintiffs had the power of eviction. This ruling has of course no direct bearing in the present case, dealing with a kyaungdaik in Rangoon where there are no Taikoks and other ecclesiastical members of the Buddhist hierarchy subordinate to the Thathanabaing. But it does suggest that in accordance with the ordinary rules of the Buddhist Ecclesiastical Law

(2) (1892-96) 2 U. B. R. 72.

the head of a kyaung laik would have the power claimed on behalf of the trustees in the present case.

Rule 8 (a) of the scheme lays down that the trustees shall control the behaviour of all persons in the kyaungdaik and shall have all the powers, for enforcing such control, as are allowed to the head of a monastery by the Buddhist Ecclesiastical Law; and sub-Cl. (d) lays down that they shall settle disputes relating to the possession of kyaungs or zayats or religious buildings and decide who should be in possession. This sub-clause appears to suggest that before they can exercise their power under it there must be a dispute relating to possession. In the scheme as framed in the decree of the late Chief Court it might be posible to construe the words "decide who should be in possession" as referring to any case in which a vacancy occurred. But from the Burmese version of the scheme it would appear that the sub-clause refers entirely to the question of disputes. The intention of the scheme under R. 8, sub-Cl. (a), appears to be that the trustees should have the general powers that would vest in the Taikok, and if the decision in *U Te Zeinda's* case (7) is correct, that would appear to include the power to decide as to the possession of the kyaung.

It is quite clear in this case that a vacancy did occur in the headship of this particular kyaung on the death of U Kethaya and that very shortly after his death the trustees named two pongyis to succeed him. The kyaung is a sanghika property and it is therefore for the sanghas to decide as to possession. The difficulty is as to who is to represent the sangha. No doubt in many cases the rahan chosen by the deceased takes his place without any opposition. There does not seem to be any established rule of law by which the deceased has any power to elect his successor, and it appears clear that that is not really claimed by either party in this case. It is clear, however, that a vacancy has occurred in the management of the kyaung, and it is not clear that the defendant has the right to fill the vacancy. That being so, we are of opinion that in accordance with the general principles of the Ecclesiastical Law and of the scheme as framed, the provisions of R. 8, sub-Cl. (d) must apply and that the trustees must decide who is to fill the vacancy. That being so, they were clearly justified in evicting the defendant from the kyaung, the defendant having refused to acknowledge their authority in the matter. The plaintiffs ask in their plaint that the defendant may be evicted from the whole kyaungdaik, but it does not seem to me that they have established any good case for such an order. I, therefore, agree with the order proposed and that a decree should be passed evicting the defendant from the kyaung in dispute. I also agree that no order should be passed as to costs in this appeal.

V.S./R.K. *Appeal allowed*

THE

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1929

SIND SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE **SIND JUDICIAL COMMISSIONER'S COURT** REPORTED IN

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(2) 30 CRIMINAL LAW JOURNAL
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1929

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(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1929 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing Seriatim the pages of SIND LAW REPORTER, for the year 1929 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 23 SIND LAW REPORTER.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

23 Sind Law Reporter=All India Reporter

SLR)	A. I. R.			SLR)	A. I. R.			SLR)	A. I. R.			SLR)	A. I. R.			SLR)	A. I. R.		
1	1929	*S*	5	87	1928	*S*	100	222	1929	*S*	52	340	1929	*S*	137	417	1929	*S*	168
5	"	"	9	91	"	"	87	225	"	"	115	349	"	"	107	422	"	"	28
13	1928	"	106	97	"	"	179	229	"	"	24	359	"	"	177	427	1928	"	169
29	1929	"	13	125	1929	"	50	237	1928	"	61	365	"	"	170	432	1929	"	248
37	"	"	50	128	1928	"	126	245	1929	"	121	370	1928	"	103	438	"	"	166
39	1928	"	191	137	1927	"	130	277	1927	"	251	375	1929	"	98	441	1930	"	59
43	1929	"	61	192	1928	"	90	285	1929	"	132	389	1928	"	146	445	1929	"	154
46	1927	"	160	196	"	"	175	294	"	"	153	397	1929	"	145	456	"	"	167
49	"	"	230	200	1929	"	114	299	"	"	1	403	"	"	92	461	"	"	212
54	1928	"	57	205	"	"	45												
63	"	"	114	207	"	"	52	313	1928	"	133	409	"	"	219	471	"	"	85
75	"	"	129	216	"	"	90	325	"	"	137	411	"	"	43	479	"	"	172

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1929 with corresponding references of the ALL INDIA REPORTER.

***For* 11 and 12 All India Criminal Reports=All India Reporter.**
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Allahabad.**

***For* 30 Cr. L. J., 113 to 120 I. C. and I. R. 1929 Sind=All India Reporter.**
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Lahore.**

***For* 1929 Criminal Cases=All India Reporter.**
Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1929 Nagpur.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1929, SIND SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the SIND LAW REPORTER.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1929 SIND.
Column No. 2 denotes corresponding references of other REPORTS JOURNALS AND PERIODICALS.

A. I. R. 1929 Sind=Other Journals.

A I R	Other Journals		A I R	Other Journals		A I R	Other Journals		A.I.R.	Other Journals	
1	111 *I C*	421	50 (2)	115 *I C*	307	121	23 *S L R*	245	170	23 *S L R*	365
	23 *S L R*	290		30 *Cr L J*	442	FB	115 *I C*	318	172 (1)	117 *I C*	160
5	111 *I C*	852		12 *A I Cr R*	260		30 *Cr L J*	445		23 *S L R*	479
	29 *Cr L J*	932	52 (1)	23 *S L R*	222		12 *A I Cr*	274	172 (2)	117 *I C*	155
	23 *S L R*	1		115 *I C*	308	132	23 *S L R*	285	175	1929 *Cr C*	453
7	113 *I C*	370		30 *Cr L J*	443		117 *I C*	147	176	118 *I C*	245
9	111 *I C*	732		12 *A I Cr R*	424		30 *Cr L J*	732		30 *Cr L J*	905
	29 *Cr L J*	924	52 (2)	111 *I C*	882		1929 *Cr C*	160		1929 *Cr C*	452
	23 *S L R*	5		23 *S L R*	207	135	114 *I C*	112	177	23 *S L R*	359
12	111 *I C*	619	55	107 *I C*	435	136	116 *I C*	111		117 *I C*	151
13	111 *I C*	530	58	100 *I C*	202	137	117 *I C*	773		1929 *Cr C*	447
	23 *S L R*	29	61 (1)	23 *S L R*	43		23 *S L R*	340	179 (1)	118 *I C*	224
15	22 *S L R*	458		29 *Cr L J*	1007		30 *Cr L J*	845		30 *Cr L J*	907
	112 *I C*	50		112 *I C*	681		1929 *Cr C*	337		1929 *Cr C*	452
	29 *Cr L J*	952		11 *A I Cr R*	366	140	116 *I C*	581	179 (2)	1929 *Cr C*	414
17 (1)	115 *I C*	335	61 (2)	.		145	118 *I C*	195	182	...	
	30 *Cr L J*	451	69	113 *I C*	397		30 *Cr L J*	877	192	.	
	12 *A I Cr R*	372	83	118 *I C*	220		1929 *Cr C*	313	195	. .	
17 (2)	22 *S L R*	466	85	110 *I C*	630		23 *S L R*	397	200	119 *I C*	529
	29 *Cr L J*	875		23 *S L R*	471	147	118 *I C*	193	204	120 *I C*	84
	111 *I C*	459	90	23 *S L R*	216		30 *Cr L J*	875	206	118 *I C*	212
19	111 *I C*	105		116 *I C*	90		1929 *Cr C*	315	209	119 *I C*	543
20	22 *S L R*	472		30 *Cr L J*	548	149	115 *I C*	328	211	...	
	29 *Cr L J*	721		12 *A I Cr R*	365		30 *Cr L J*	456	212	118 *I C*	207
	110 *I C*	577	92	116 *I C*	97		1929 *Cr C*	317		23 *S L R*	461
24	112 *I C*	131		23 *S L R*	403	150	118 *I C*	223	217	120 *I C*	499
	23 *S L R*	229	94	115 *I C*	330		30 *Cr L J*	906	220	119 *I C*	748
26	22 *S L R*	453	98	116 *I C*	577		1929 *Cr C*	318	221	.	
	29 *Cr L J*	936		23 *S L R*	375	151	118 *I C*	200	225	119 *I C*	537
	111 *I C*	856	102	116 *I C*	105		30 *Cr L J*	880	227	. .	
28	112 *I C*	126	107	116 *I C*	102		1929 *Cr C*	319	230	118 *I C*	741
	23 *S L R*	422		23 *S L R*	349	153	23 *S L R*	291	235	120 *I C*	91
30	22 *S L R*	404	110	116 *I C*	101		114 *I C*	97	238	117 *I C*	769
	30 *Cr L J*	219	112	..		154	118 *I C*	216	242	1929 *Cr C*	536
	114 *I C*	99	113	115 *I C*	334		23 *S L R*	445	243	1929 *Cr C*	537
32	114 *I C*	101		30 *Cr L J*	458	158	116 *I C*	591		30 *Cr L J*	970
36	22 *S L R*	417		1929 *Cr C*	107		24 *S L R*	1		118 *I C*	747
	115 *I C*	316		12 *A I Cr R*	425	159	116 *I C*	586		23 *S L R*	432
38	115 *I C*	314	114	23 *S L R*	209	161 (1)	116 *I C*	110	245	1929 *Cr C*	539
40	112 *I C*	539		115 *I C*	303	161 (2)	116 *I C*	588	249 (1)	23 *S L R*	409
41	112 *I C*	452	115	23 *S L R*	225	163	116 *I C*	597		1929 *Cr C*	542
43	112 *I C*	11		115 *I C*	313	164 (1)	116 *I C*	111		30 *Cr L J*	879
	23 *S L R*	411		30 *Cr L J*	309	164 (2)	116 *I C*	590		118 *I C*	197
44	115 *I C*	336		1929 *Cr C*	106	165	117 *I C*	777	249 (2)	1929 *Cr C*	543
45	114 *I C*	98	117	114 *I C*	111		30 *Cr L J*	849	250	120 *I C*	81
	23 *S L R*	205	118	118 *I C*	206		23 *S L R*	488		30 *Cr L J*	1121
46	115 *I C*	310		30 *Cr L J*	881		1929 *Cr C*	335		1929 *Cr C*	678
49	114 *I C*	100		1929 *Cr C*	104	167	117 *I C*	158	253	1929 *Cr C*	682
50 (1)	23 *S L R*	37	119	117 *I C*	157		23 *S L R*	456	255	30 *Cr L J*	1135
	29 *Cr L*	1051		30 *Cr L J*	735	168	117 *I C*	153		120 *I C*	95
	112 *I C*	475		1929 *Cr C*	104		23 *S L R*	417		24 *S L R*	19
	11 *A I Cr R*	960	120	115 *I C*	305	170	117 *I C*	150		1929 *Cr C*	689
50 (2)	23 *S L R*	125									

Note—Cases not bearing parallel references against them are not reported elsewhere

THE
ALL INDIA REPORTER
1929
SIND J. C's. COURT

* A. I. R. 1929 Sind 1

RUPCHAND BILARAM, A. J. C.

Naraindas Assanmal and *others* — Plaintiffs.

v.

Valabdas Vishandas and *others*—Defendants.

Original Civil Suit No. 843 of 1926, Decided on 30th April 1928.

*** Civil P. C., S. 9—Member of panchayat, breaking its rule not to marry second wife during lifetime of first—Dispute referred to arbitration and award made—Member consenting to award—Dispute involves purely caste question and no suit would lie—Award cannot be enforced as it relates to questions for which no suit lies—Consent of parties not to challenge award cannot enable Court to enforce it if otherwise unenforceable—Civil P. C., Sch. 2, para. 20 (1).**

A certain panchayat had passed a resolution to the effect that no member of the panchayat should marry a second wife in the lifetime of his first wife, and whosoever would do so disregarding the resolution of the panchayat, shall not be considered as a member of the brotherhood. A member married a second time when his first wife was living, and at a meeting of the panchayat an arbitrator was appointed to settle the dispute, who decided that the member should pay a certain sum as fine. The decision was accepted by the member as binding on him. When he refused to pay, a suit was brought to enforce the award.

Held : that a suit of this nature would clearly relate to matters affecting the internal autonomy of the caste and its social relations and it will not be open to the Court to go into the question of the validity or otherwise of a rule laid down by the Panchayat that a person marrying a second wife during the lifetime of a first wife would cease to be a member of the panchayat or with the adequacy or propriety of a fine imposed on a person breaking that rule as an alternative punishment. Although the delinquent here agreed to pay the fine, yet the agreement involved a caste question and, therefore, no suit would lie to enforce it : 20 *Bom.* 190, *Foll.* [P 3 C 2]

Held further: that as the disputes referred to arbitration related to caste questions which could not be made the subject of a suit, they could not also be the subject of an award enforceable in a Court of law, and even if the parties affected by such an award would agree not to challenge it, their consent cannot confer jurisdiction on a Court, where it has none, to enforce the award. [P 3 C 2 ; P 4 C 1, 2]

Kimatrai Bhojraj—for Plaintiffs.

Dipchand Chandumal, *G. A. Kikla* and *Pahlajsing B. Advani*—for Defendents.

Judgment.—This is a dispute between two influential members of the Hindu Lahona community of Tatta over certain caste matters which have caused a serious split in the community. Plaintiff 1 and defendant 1 who are the real parties to the suit are both men of means. Both of them carry on business in Bombay.

Defendant 1 has married a second wife during the lifetime of his first wife. It is alleged on behalf of the plaintiff that this second marriage was contrary to the resolution of the panchayat passed on 4th June 1921, which reads as follows :

"If any one makes a second marriage during the lifetime of his first wife without the consent (permission) of the panchayat whether in his town or in any other community he shall not be considered as a member of the brotherhood."

It is said that as defendant 1 had by his second marriage violated the above resolution notwithstanding an express warning given to him in that behalf a panchayat meeting was held on 15th February 1925, when twenty-eight members of the panchayat including defendant 1 were present, that at that meeting one Tikamdas Satramdas was appointed as sole arbitrator to settle the dispute, that Tikamdas decided that defendant 1 should contribute Rs. 5,001 to the poor fund of the panchayat which decision

defendant 1 accepted as binding on him and promised to keep the money in deposit with himself and pay interest every year and that when the demand was made on him for payment of interest he denied his liability either for the principal or interest It is further said that in consequence of his refusal to pay the money the panchayat at a meeting convened on 24th Vesakh, 1982/18th May 1925, at which thirty persons attended, the four plaintiffs and one Laloomal the mukhi of the community were empowered to enforce payment of the amount and it is on the strength of that resolution that the plaintiffs have now come to Court

Several defences have been raised on behalf of defendant 1 and certain other members of the community who have been made co-defendants on their own application and who dispute the right of the plaintiffs to institute this suit as representatives of the panchayat and also dispute the right of the plaintiffs to spend panchayat funds on this litigation On the pleadings of the parties the following issues have been raised·

1. Did the panchayat validly pass the resolution referred to in para 1 of the plaint, and if so, is it binding on defendant 1?
2. Was the alleged resolution cancelled as alleged in para 7 of the written statement ?
3. Is the panchayat estopped from contending that the second marriage was in contravention of its resolution or permission for reasons stated in para 8 of the written statement ?
4. Was Tikamdas validly appointed as an arbitrator and if so what was his decision ?
5. Did defendant 1 accept the decision of Tikamdas and agree to keep the money in deposit with himself and to pay the interest every year ?
6. Was such acceptance agreed to by the panchayat at any time and if so what is its effect ?
7. Is the decision of Tikamdas, if any, by itself, or by virtue of the acceptance, if any, enforceable as against defendant 1 in a Court of law ?
8. Were the plaintiffs and mukhi Laloomal validly appointed by the panchayat to enforce payment of the amount allowed to be due to the panchayat by defendant 1 ?
9. Were the plaintiffs justified in drawing a hundi for Rs. 300 as interest due by defendant 1 for the first year and was his refusal unjustified ?
10. Have the plaintiffs any cause of action against defendant, and if so, is such cause of action for recovery of the whole amount or for interest which has accrued due up to the date of suit ?
11. Has this Court jurisdiction to decide all or any of the issues raised on the ground that they relate to caste questions ?
12. General.

Attempts made in Court to bring about a settlement have failed and from the attitude taken by the parties it was clear that each party had its partisans who were prepared to step into the witness-box to support the version given by such party unmindful of the consequences As, however, I am of opinion that this case can be disposed of on certain legal issues, I have stopped further evidence in the case and propose to give my findings on such legal issues

Now the record of what happened at the meeting of 15th February 1925, has been reduced to writing and is Ex 10 in the case It reads as follows

" A panchayat meeting was held in the Mahajan Haveli on Sunday dated 21st Magh, 1981, at 9 p. m. to consider over the matter of the second marriage by Bhai Valabdas Bhai Vishendas and the complaint filed by Bhai Valabdas Vidhani against three persons, viz., (1) Bhai Dewanmal Dhadhumal, (2) Bhai Dharamdas Mulchandani and (3) Bhai Jamnadas Bhai Pahlajdasani. Bhai Tikamdas Bhai Satramdas was appointed arbitrator by the majority of votes in the panchayat meeting to decide all the matters. He shall give his decision after hearing all the things and considering over all the written documentary evidence. . . . . "

Then follow signatures of twenty-eight persons One of the signatures is not that of defendant 1 but of Goverdhandas Valabdas, i e , the signature of the firm which consists of defendant 1 and his elder brother Goverdhandas, defendant 1's name being Valabdas. There is likewise no signature of Jamnadas one of the three persons complained of by defendant 1 but the signature purports to be that of his deceased ancestor " Puj Oodhawdas Puj Lakhmichand " in whose name the panchayat bhaji was given to him and the descendants of Oodhawdas jointly At the foot of the signatures the following notes have been made by the arbitrator Tikamdas and bear his signature.

" Bhai Valabdas should pay Rs. 5,001 to the poor fund of Puj Mahajan (panchayat).

" Bhai Dewanmal should be warned not to do so in future.

" Bhai Dhamumal is also warned not to behave in such harsh manner in future.

"Bhai Jamimal should pay Re. 1-4-0 to the poor fund of Mahajan panchayat.

" The following arrangement is made for the above amount. Bhai Valabdas should pay Rs. 5,001 towards the marriage rejoicings. Bhai Valabadas should again credit the amount with himself in the name of Puj Lohana Mahajan Poor Fund and pay interest thereon every year. He shall supply with copy of the account every year.

(Sd.) Tikam Puj Satramdas. "

This writing has been exhibited by the plaintiffs as an award on payment of Rs 220 as stamp-fee and penalty

It is contended on behalf of the plaintiffs that Ex. 10 forms a valid reference and a valid award which are enforceable in a Court of law and that even if the award is held to be invalid defendant 1 having agreed to pay the amount he is bound to make good his promise

Now, whatever may have transpired at that meeting on which each party offers his own version there can be no doubt that the award if any as also the subsequent variation of it are unenforceable in a Court of law

The questions in issue at that meeting were purely caste questions

Assuming for the purpose of this case that the panchayat resolution of 1921, Ex 8 had not been superseded or cancelled by a subsequent resolution Ex 16 which also finds place in the panchayat book though it bears no signature the question before the panchayat on that day was whether defendant 1 had ceased to be a bember of the panchayat by marrying in defiance of the "Ukase" of the panchayat and if so whether he should not be penalized for it His one complaint against the three persons referred to was that they had misbehaved in not treating him as a member of the panchayat

Now, there can be no doubt that if the members of the panchayat who met on that day had without the intervention of an arbitrator passed a resolution that defendant 1 should continue as a member of the panchayat but that he should pay a fine of Rs 5,001 and without anything more being said or done an attempt was made to enforce the payment of the fine in this Court, it would fail in limine by virtue of S 9, Civil P C. read with S 21 (1) of Bombay Regn 2 of 1827 That clause reads as follows :

"First—The jurisdiction of the civil Court shall extend to the cognizance of all original suits and complaints between natives and others not British born subjects, respecting the right to moveable or immovable property, rents, Government revenues, debts, contracts, marriage, succession, damages for injuries, and generally of all suits and complaints of civil nature, it being understood that no interference on the part of the Court in caste questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party."

The portion in brackets has been repealed but the rest of it still remains on the Statute Book and is applicable to this Province

A suit of this nature would clearly relate to matters affecting the internal autonomy of the caste and its social relations and it will not be open to the Court to go into the question of the validity or otherwise of a rule laid down by the panchayat that a person marrying a second wife during the lifetime of his first wife without the consent of the panchayat would cease to be a member of the panchayat or with the adequacy and propriety of a fine of Rs 5,001 imposed on a person breaking that rule as an alternative punishment.

The only and the appropriate remedy of a panchayat to enforce its rules which are always wanting in a vinculum juris is by depriving the delinquent of his rights and privileges as a member of the panchayat, e g, receiving the panchayat bhaji, inviting and being invited on festive and other occasions helping and being helped on occasions of marriages and deaths and the like.

It has been argued that if the delinquent is a consenting party to a resolution of the panchayat requiring him to pay a certain sum of money there should be no objection to a suit being filed against him on the strength of his own agreement

A somewhat similar argument was raised in *Abdul Kadir* v *Dharma* (1) where the members of the jamait concerned had agreed to make certain contributions to the caste funds on certain ceremonial occasions for the avowed object of paying off out of such funds the debts due by the jamait and the defendant who was a consenting party to that agreement was sued on the strength of his agreement for recovery of his contribution the Court held that as the agreement referred to in the plaint simply embodied the arrangement come to between the members of the jamait for the purpose of paying off its debts out of contributions to its funds, it involved a caste question and the suit had, therefore, been rightly dismissed by the Court below

It has been argued that in the present case the parties had referred their disputes to arbitration, that it is the award

(1) [1896] 20 Bom. 190.

which is being enforced and that there is nothing in the Civil Procedure Code or in the Indian Arbitration Act to prevent the Court from filing and enforcing such an award

There is no substance in this argument

An arbitrator is a tribunal of the parties' own choice and before the Court gives effect to his award the Court must be satisfied that (a) the disputes referred to arbitration were such as could be made the subject of a suit ; (b) that the parties concerned were competent to refer the said disputes and (c) that they had agreed to do so

In the present case the disputes related to caste questions which could not be made the subject of a suit and could not, therefore, be the subject of an award enforceable in a Court of law The whole foundation of the award, therefore, goes and the suit must fail.

Apart from this there is no allegation and no possibility of proof that all the parties concerned were or could have been parties to the submission It is common ground that all the members of the panchayat were not present on that day There is no allegation much less proof that the absentees had notice that the disputes would be referred to arbitration or that they would be referred to a named arbitrator It is, therefore, difficult to see how much of them who were present on that day could purport to act as the authorized agents of the absentees or bind the panchayat as a whole with any award that might be passed by their nominee The position of the plaintiffs becomes much more absurd when it is realized that the panchayat consists of not only adult male members but of infants and females The head male member of each family alone attends the panchayat meeting but if any family has no adult male member living or if any family is not living at Tatta but elsewhere such family does not cease to be a member of the panchayat but continues to receive and give the customary bhaji or thalhi According to Dewanmal's evidence and the note Ex 14 prepared by him the membership of the panchayat consists of seventy-three families of which thirty-one have their adult male members living at Tatta, thirty-four families live outside Tatta and eight families have no adult male members living.

The persons who had congregated together on that day were only twenty-eight, Ex 10 shows that the arbitrator Tikamdas "was appointed by a majority of votes" of the persons present. Dewanmal states that this is a mistake and that all present had agreed to the appointment Had these twenty-eight persons power to refer so as to bind the panchayat ? Had each head of the family who attended power to refer to arbitration the dispute on behalf of the other members of his household including infants, on behalf of the families which consisted only of infants and also on behalf of the other absentee heads of families and their dependents Mr. Kimatrai has argued that in a panchayat the minority are bound by the will of the majority But did the twenty-eight persons assembled there form a majority and could they, therefore, bind the minority

I am not prepared to hold that twenty-eight adult persons who were present had authority to appoint an arbitrator so as to bind the panchayat

As there was no valid reference in favour of Tikamdas he could not act in the matter

Lastly, it has been argued that defendant 1 having consented to the award cannot now be permitted to challenge it

One of the obvious answers to that argument is that there is no allegation that defendant 1 consented not to challenge the award in the event of the panchayat attempting to enforce it in a Court of law

It would further appear that if the Court has no jurisdiction to enforce the award any consent by defendant 1 not to challenge it cannot confer jurisdiction on the Court for the purpose of enforcing it

But a reference to the minutes of the meeting, Ex 10, makes it abundantly clear that defendant 1 not only gave no consent to the award but vehemently objected to it and that if he at all consented to pay anything it was not as a fine imposed by the arbitrator for violating the resolution of the panchayat but as a voluntary donation in honour of his second marriage which carried with it the suggestion that he had done nothing of which he and the panchayat had reason to be ashamed of That he offered to pay money as a voluntary donation is clear not only from the express recitals in Ex 10 but

also from the half-hearted admissions of Dewanmal He states as follows :

"Tikamdas made his award. He held that Valabdas should pay Rs. 5,001 to the poor fund of the community. Valabdas said that the amount was too much and he took with himself Tolaram and Narumal outside the hall. They then sent for Tikamdas outside. Afterwards Tikamdas came in Then others came inside. Valabdas then said that it should be written that he was giving this amount in honour (khushali) of his marriage and that he would keep the money with himself on interest and will pay interest every year."

If this evidence is true it is open to the argument that the award was treated as null and void by mutual consent and in lieu thereof a gratuitous offer to pay this money by way of rejoicing was made by defendant 1 and accepted by the panchayat If that be so there is again an end to the award of Tikamdas which was thereby superseded by mutual consent of parties

This suit is not for the recovery of the alleged voluntary donation promised by defendant 1 in honour of his second marriage but is for the recovery of a penalty imposed on him by the award Defendant 1 has not been called upon to answer to the claim on a promise for a voluntary donation and on account of the split in the panchayat no application has been made to me for amendment of the plaint. It is not, therefore, necessary for me to go into the question whether such a promise was a mere nudum pactum and not being in writing and registered as provided by S 25, Contract Act, it could not be enforced

I am decidedly of the opinion that the suit as based on the award must fail

I now proceed to record my findings on issues 4 and 7 which go to the very root of the case For the reasons already given I hold on issue 4 that the appointment of Tikamdas as an arbitrator was not valid and on issue 7 that the award passed by him is invalid and is even otherwise not enforceable in a Court of law as it relates to a caste question, that defendant 1 did not accept the award and that even if he did it does not matter

The result is that the suit is dismissed. The plaintiffs should bear the costs of defendant 1 and that the other defendants who have been joined as parties to the suit on their application should bear their own costs.

S.N /R K. *Suit dismissed.*

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* A I.R 1929 Sind 5

DE SOUZA AND ASTON, A J Cs

Allah Dito—Accused—Applicant.

v.

Emperor—Opposite Party

Criminal Revn Appln No 306 of 1927, Decided on 23rd February 1928, from judgment of First Addl Sess Judge, D/- 17th October 1927

*** (a) Criminal P. C., S 342—Omission to examine accused after additional evidence called by Court after defence witnesses—Additional evidence not disclosing fresh facts—Omission is not fatal.**

Where after the defence evidence is concluded additional witnesses are called by Court and examined, and the accused is not examined on this evidence but the additional evidence did not disclose any fresh facts or affect the decision of the case, the omission to examine accused is not fatal. *A. I. R.* 1924 *Pat* 764, *Foll* [P 6 C 1]

(b) Criminal P C , S 342—No difference between prosecution witnesses and witnesses called by Court.

Under S. 342, the accused is to be examined for the purpose of enabling him to explain the evidence against him whether such evidence be tendered by the prosecution witnesses or by witnesses called by the Court. [P 5 C 2, P 6 C 1]

C M Lobo—for the Crown

Aston, A. J C—This is an application for the revision of an order of the learned Additional Sessions Judge, Hyderabad, confirming the conviction and sentence of the applicant by the Resident Magistrate, Nawabshah It appears that the applicant and a juvenile adult named Sidik were convicted of house-breaking by night and theft in a building and sentenced respectively to eight months' rigorous imprisonment and twelve months' rigorous imprisonment in the Dharwar Jail The application was admitted for consideration of the question of sentence and for consideration of the point whether accused had been examined by the Court after additional evidence was recorded by the Court

With regard to the second question, it appears that after the defence evidence had been concluded, the Court called and examined two witnesses and omitted to examine the accused on the additional evidence recorded. S 342, Criminal Procedure Code, does not refer specifically to such cases, it merely provides that an accused person must be examined generally on the case for the purpose of enabling him to explain circumstances appearing in evidence against him after the witnesses for the prosecution have been ex.

amined and before he is called on for his defence This provision appears to be based on the well-known principle that no man should be condemned unheard It seems to me that it makes no difference whether the additional evidence is introduced by a prosecutor or whether it is brought on the record by the Court itself and the general principle is the same that before the accused is condemned he should have an opportunity of making an explanation he wishes to make with regard to the circumstances appearing in evidence against him This, however, is open to the exception that where the additional evidence does not really disclose any fresh facts or does not affect the decision of the case, the accused is in no way prejudiced in not having had an opportunity to render a further explanation In the present case the facts deposed to by the additional witnesses had been referred to by a number of other persons and the accused at a prior stage had an ample opportunity of giving what explanation he wished to give with regard to the facts deposed to. The omission to examine the accused after the witnesses were examined by the Court has in no way prejudiced him and the case seems to me to be on all fours with the Patna case *Prayag Gope* v. *Emperor* (1) I, therefore, see no reason for interfering in the matter

As regards the question of sentence, the offence was the first offence of both these accused, the property stolen was worth only Rs 100 Speaking for myself I think the sentence has erred a little on the side of severity and I think the juvenile adult might well have been given the benefit of S 562, Criminal P C He has, however, not appealed and Allahdito who is sentenced to eight months has now undergone his sentence I do not think that this is a case in which any action is required in revision The application is, accordingly dismissed.

De Souza, A J C—I entirely agree.

With regard to the question whether S 342 imperatively requires that an accused person should be examined so as to explain any circumstances against him in the evidence given after the close of the case for the prosecution if the witness is a witness examined on behalf of the Court, I do not see any reason to discriminate between a witness examined on behalf of the prosecution and a witness examined on behalf of the Court If in the evidence given by a witness examined on behalf of the Court there are material statements incriminating the accused person which he has had so far no opportunity to explain, I think he should be given an opportunity to explain them The ruling in the case of *Prayag Gope* v *Emperor* (1) is generally quoted to support the opposite view It seems to me that the head note in that case is too broadly stated The head note is to the following effect :

"Where an accused person has been examined under S 342, Criminal P. C , after the close of the prosecution case, and subsequently the Court examines a person under S 540 (whether such person be one of the prosecution witnesses or another person), it is not necessary to re-examine the accused person under S 342

In the body of the judgment, however, the learned Judges are careful to explain that in the present instance the accused persons seemed to be in no way prejudiced partly because the questions put by the Court related not to the occurrence which was the subject-matter of the charge but to some matter in relation to the title of the lands and partly because the accused persons had a chance of cross-examining the witness but refrained from doing so The learned Judges added that if the accused were unwilling to cross-examine the witnesses as a Court witness it would be unlikely that they would have been anxious to make any statement to explain away any evidence given by the complainant as a Court witness

The general principle of Criminal Law that no person is to be condemned without having an opportunity of explaining the evidence against him, as pointed out by my learned brother, applies not only with regard to witnesses examined on behalf of the prosecution but also with regard to witnesses examined by the Court under S 540, Criminal P C But, as in the present case the applicant does not seem to have been prejudiced by the failure of the Magistrate to examine him after witnesses on behalf of the Court, were taken, I see no reason to interfere and concur in the order proposed by my learned brother

M N /R K *Application dismissed*

(1) A. I. R. 1924 Pat. 764=3 Pat. 1015.

A I R 1929 Sind 7

WILD, J C, AND RUPCHAND BILARAM, A J C

Choithram—Appellant.

v.

Khemchand and *others*—Respondents

First Appeal No 62 of 1925, Decided on 26th July 1928, from decision of 1st Class Sub-Judge, Sukkur

(a) Evidence Act, S 65—What evidence is sufficient to prove loss of document is discretionary with trial Court — Discretion should not be disturbed unless there is miscarriage of justice.

Whether or not sufficient proof of search for or loss of, an original document to lay a ground for the admission of secondary evidence has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage of justice. 19 *Cal.* 498, (*P C*), *Foll* [P 8 C 1]

(b) Civil P. C., O 8, R 5—Suit for partnership accounts — Defendants saying that shares are different but not specifying them —Evasive denial is admission of terms in plaint,

In a suit for partnership accounts, if the defendants allege that the shares of the partners were different from those stated in the plaint, it is incumbent on the defendants to specify what were the shares and on their failure to do so it is open to the Court to treat their evasive denial, as to the terms of the agreement, as an admission that its terms as stated in the plaint are correct. [P 8 C 2]

(c) Practice—Witness—Party personally knowing circumstances of the case—His not going into witness-box—His case should be discredited.

It is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his own behalf and to submit to cross-examination His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. *A. I R* 1927 *P C* 230, *Foll.* [P 8 C 2]

(d) Civil P. C, O. 30, R 1—Suit for partnership accounts—One of the defendants a firm—Names of partners of the firm need not be disclosed.

A suit for accounts on dissolution of a partnership existing between an individual on the one hand and a different partnership on the other, may be instituted against such partnership without disclosing in the plaint the names of its individual partners *A I. R* 1926 *Sind* 75, *Rel. on.* [P 9 C 1]

Tahilram Manıram—for Appellant

Dipchand Chandumal — for Respondents

Wild, J. C.—This is an appeal from the decision of the 1st Class Sub-Judge of Sukkur in a suit filed by the plaintiff for accounts of a partnership between himself and defendants 1 to 7.

The plaintiff in his plaint alleged that the deed of partnership was lost and the principal point which arises in this appeal is whether the learned Sub-Judge was right in allowing the plaintiff to give a secondary evidence of the contents of this partnership-deed

On this point, I find that not only did the plaintiff in his plaint and deposition state that the document was lost but he also swore an affidavit on this point On the other hand, none of the defendants went into the witness-box to swear that they had either seen the document or that it was not lost. I am, therefore, unable to say that the First Class Sub-Judge was wrong in allowing the plaintiff to give secondary evidence as to the contents of the document The defendants, when the plaintiff went into the witness-box, did not even cross-examine him as to the loss of the document.

As regards the terms of the partnership, the evidence as to that no doubt rests merely on the evidence of the plaintiff and his allegations in the plaint. But it must be remembered that most of these allegations are not categorically denied by the defendants in their written statements Nor have they ventured to go into the witness-box to deny them or to give evidence to contradict them

The chief question was as to the shares of the partnership As to that, the evidence of the plaintiff was in favour of the defendants

One more point is raised that all the partners in the firm of Kishinchand Metharam, defendant 7, should have been brought on the record But it appears that the firm is sufficiently represented by Kishinchand Metharam himself.

This question has also been discussed in the judgment in suit No 458 of 1920 of this Court, *Lakhmichand Ghandamal* v. *Gokuldas Ranchordas* (1).

I am of opinion that the conduct of the defendants showed that they had no real defence to the suit

The appeal is, therefore dismissed with costs, as also the cross-objections of defendant 6

Rupchand Bilaram, A. J. C—I concur It is no doubt true that the plaintiff has not produced the partnership deed which is alleged to have contained the terms on which the plaintiff and the defendants agreed to be partners and the

(1) A. I. R. 1926 Sind 75.

plaint does not specifically refer to the different contracts in which the parties had agreed to be partners.

Para 2 of the plaint reads as follows :

"That the parties by a written deed entered into a partnership on or about September 1919 with respect to one brick kiln and other works subsequently taken up which are mentioned in the books. The shares of the partners were as under."

Now at the time of the institution of the suit the plaintiff was in a difficult position. He was the capitalist partner and according to him some of the working partners had committed frauds for which he had prosecuted them in the Baroda Court His books were in that Court and with regard to the partnership deed his explanation was that it was lying with other documents at his place of business from where it had miraculously disappeared He suspected that one of his working partners had surreptitiously removed it from the bundle. He could not make a definite charge against any one of them and stated that it had been lost At that time he was also not in a position to specify in detail all the contracts taken up by the partnership unless he spent a considerable amount of money and time to have the accounts audited The working partners knew more about the contracts than the plaintiff. It has been contended that the plaintiff has failed to give evidence that he had made a proper search for the documents and has failed to prove that it was lost.

Now in the case of *Harripria Debi* v *Rukmani Debi* (2), their Lordships of the Privy Council have observed that the question :

"whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage."

We are not prepared to hold that in the present case the learned Judge below has not exercised his discretion properly or that the admission of secondary evidence has resulted in a miscarriage of justice.

The partnership was admitted and only two contentions were raised by the defendants in their pleadings. In the first place a vague statement was made by some of them that they did not admit the quantum of shares as stated in the plaint and in the next place some of them asserted that it was agreed that the working partners would be paid a certain commission in respect of the works managed by them in addition to their shares in the partnership

Now with regard to the first point it is sufficient to observe that if the shares of the partners were different from those stated in the plaint it was incumbent on the defendants to specify what were the shares Having failed to do so it was open to the Court to treat their evasive denial, as to the terms of the agreement, which was admittedly made, as an admission that its terms as stated in the plaint were correct cf O 8, R 5, Civil P C, O 19, R 13, 49 R S C *Ruther* v *Tregant* (3) Furthermore the plaintiff swore that the shares, as stated by him in the plaint were correct, and there was no cross-examination on that point

With regard to the commission claimed by the defendants again, they offered no evidence to prove it None of the defendants have ventured into the witness-box to contradict the evidence of the plaintiff. In *Gurbaksh Singh* v. *Gurdial Singh* (4) it is said :

"It is the bounden duty of a party personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstances going to discredit the truth of his case."

The failure of the defendants to go into the witness-box without any explanation whatsoever at once puts them out of Court

Mr Tahilram has contended that the findings of the learned Judge on issues 1 to 3 are vague These issues were as follows :

1 What were the shares of the partners and on what terms was the partnership entered and who were the partners ?

2 When did the partnership dissolve ?

3 What were the partnership works ?

The learned Judge has given his finding on each of these issues by stating as follows :

"As shown in the plaint".

Now no doubt at first sight these finding appear to be somewhat vague. But when they are read along with the plaint they become very specific The shares of the partners are shown in para 2 of the plaint. The date of the dissolution of

(2) [1892] 19 Cal 438=19 I A. 79=6 Sar 177 (P C).

(3) [1879] 12. C D. 758.

(4) A. I. R. 1927 P. C. 230.

the partnership is shown therein as 20th December 1920 and the partnership transactions are shown as those contained in the partnership books which were at that time in the criminal Court of Baroda. Reading the findings along with the plaint I do not find that there is any such ambiguity as to call for our interference

Another point raised by the learned pleader is that the learned Judge has given no direction to the commissioner how to proceed in the matter

With regard to that point again, we find all that the learned Judge has said in the judgment appealed against is that the commissioner should be nominated by both the parties on 24th October 1924 What directions were asked for by the parties after the commissioner was appointed or what instructions were given to the commissioner is not the subject-matter of the judgment appealed against We understand that there is an appeal against the final decree, we, therefore, refrain from saying anything on that point which might prejudice either party The plea that all the parties in the firm of Kishinchand Metharam were necessary parties to the suit is on the very face of it misconceived. A firm as such has no legal existence and the suit against the firm of Kishinchand Metharam was a suit against the individual partners comprising that firm They were parties to the suit. All of them as forming one entity were given a joint share in the partnership in suit and the only material ground on which possibly the defendants might have succeeded in nonsuiting the plaintiff was by showing that the total number of partners in the partnership in suit exceeded 20 rendering the partnership illegal in view of the provisions of the Indian Companies Act. That was, however, not their contention. Their object in raising this plea was to cause delay in the disposal of the suit In *Lakhmichand Ghandamal* v. *Gokaldas Ranchordas* (1), I have held that a suit for dissolution of a partnership existing between an individual on the one hand and a different partnership on the other, may be instituted against such partnership without disclosing in the plaint the names of its individual partners and nothing has been said at the Bar to make me alter that view.

For these reasons I agree that this appeal as also the cross-objections filed by defendant 6 in support of the appeal fail and that both the appeal and cross objections should be dismissed with costs

R K. *Appeal dismissed*

A I R. 1929 Sind 9

RUPCHAND BILARAM AND DE SOUZA, A J Cs

Mataro and *others*—Accused — Applicants.

v

Emperor—Opposite Party

Criminal Revn. Appln No 37 of 1928, Decided on 28th March 1928, from an order of Percival, J C , D/- 20th January 1928

(a) Penal Code, S. 107—Mere knowledge or standing while an offence under S 379 is being committed cannot be covered by the definition of abetment

Mere knowledge or standing while an offence under S 379 is being committed by others cannot be covered by the definition of abetment. It may well be that there is neither conspiracy nor instigation nor intentional aid by some act or illegal omission. [P 10 C 2]

(b) Penal Code, S. 379—Presumption from possession—Evidence Act (1 of 1872), S. 114, ill. (a)

In order to raise legitimately the presumption of theft, the possession of stolen property should be exclusive as well as recent. [P 10 C 1, 2]

(c) Penal Code, S. 379—Accused not in actual possession—Actual possession of his wife or servant or place of custody under his control must be proved.

If the accused is not in manual possession of the stolen article, there must be evidence to prove that the stolen property was found either in the manual possession of the wife, clerk or servant of the accused, or that it was found in a place and under circumstances so as to justify the inference that the accused knew of its existence at that place and that the same was under his effective control. [P 11 C 1]

(d) Penal Code, S. 379—Conviction against more persons than one on the ground of joint possession of stolen property can be secured only on proving actual possession of each or constructive possession with intention of joint exclusive use

To secure conviction against more persons than one on the ground that all such persons were in joint possession of the stolen property, it must be proved that the stolen property was either in the physical possession of each one of the accused or else that it was in the possession, physical or constructive, of one or more of them on behalf of and to the knowledge of the other accused persons and that each one of them intended to possess it for their joint use and to the exclusion of persons other than themselves. [P 11 C 1, 2]

Applicants with two other porters and a constable were travelling in a train. At the station, the van wss searched, A jar containing

ghee was found covered with bedding and clothing said to belong to applicants and other porters. On this evidence, the applicants were convicted of theft

Held that possession of the jar could not be attributed to any of the applicants, individually or jointly The conviction was, therefore, bad [P 12 C 1]

Hassomal M. Gurbuxani—for Applicants

T C Elphinston—for the Crown

De Souza, A J C—This is an application to revise an order passed by the learned Judicial Commissioner dismissing the appeal filed by the four applicants who were convicted by the learned Additional City Magistrate, Karachi, of an offence under S 379, I P C, and sentenced to rigorous imprisonment for a period of two months

The proved facts are that the applicants along with two other porters and a constable were travelling in an I. G Van train and when the train arrived at the Cantonment Station, Karachi, the van was searched by the Head Constable Sher Zaman in the presence of a mashir when an earthen jar containing 22½ seers of ghee valued at Rs 40 was found in the van covered over with the bedding and clothing said to belong to the applicants and other porters Both the trial Court as well as the Court of appeal has found that the ghee was stolen from certain tins which were loaded in the train at the Station of Jungshahi it being found that eight out of 58 tins were tampered with and the ghee measuring exactly 22½ seers removed from these tins

The only question in the case upon which this application was admitted was the question whether in the circumstances, the possession of stolen ghee in the earthen jar could be imputed to the applicants

It is pointed out by the learned pleader for the applicants that the earthen jar was found in the van to which all the porters as well as policemen had access, that there is nothing to show to whom the bedding belonged under which the jar is said to have been concealed or that the accused were aware of the presence of the jar or that the jar contained stolen ghee

No doubt possession of stolen ghee immediately after the theft raises the presumption of theft against the person in whose possession stolen ghee is found. But the law is clear that in order to raise this presumption legitimately, the possession of stolen property should be exclusive as well as recent. Possession implies not only the physical act of detention but also an intention to possess which is known to civil lawyers as the animus possidendi In the present case would the fact that the earthen jar was found in the van covered with the bedding belonging to some of the applicants, be sufficient to impute exclusive possession to the individual accused persons? The learned pleader for the applicants contends that it is possible that the theft of the ghee and the concealment of the jar might well have taken place without one or the other of the applicants being aware of it. It is equally plausible to argue that the theft and concealment might have been effected by one or more of the porters or the constable who had accompanied them without the other participating in it It seems to me impossible to impute possession merely because the applicants had knowledge

The learned Public Prosecutor while admitting that on this aspect of the case, exclusive possession may not perhaps be brought home to each of the applicants, yet, it would be impossible to exonerate them from abetment But it seems to me that mere knowledge or standing while an offence of this kind was being committed either by the constable or the other porters cannot be covered by the definition of abetment under the Indian Penal Code It may well have been that there was neither conspiracy nor instigation nor intentional aid by some act or illegal omission.

I am, therefore, not satisfied that exclusive possession which as the authorities show is necessary to attract the presumption of theft under S 114, Evidence Act can be imputed to the applicants in the present case,

The result is, that the conviction and sentence under S 379, I P C, recorded against them must be set aside and this application allowed.

Their bail-bonds to be cancelled

Rupchand Bilaram, A. J. C—I concur with my learned brother that the convictions of the appellants cannot possibly stand.

It is, no doubt, true that if all the appellants were in joint possession of the stolen property a presumption would arise that all of them were either thieves or receivers of stolen property: cf. Halsbury's Laws of England, Vol. 9, para. 1359: *R.*

v *Thomas Smith* (1), *R.* v. *Payne* (2) and *R* v *Cook* (3).

But before such a presumption could be raised it was incumbent on the Crown to prove (a) that each one of the appellants had either physical or constructive possession of the stolen property or any part of it or (b) that one or more of the appellants had possession of the stolen property or any part of it either physical or constructive on behalf of themselves and the other appellants and to the knowledge of the other appellants

Now possession *qua* the Criminal Law has been defined as under.

"A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need" Steph. Cr 210, 211 referred to in Stroud's Judicial Dictionary, p. 1516.

Where a person is in physical or manual possession of any stolen property immediately after its theft no difficulty whatsoever arises In such a case it goes without saying that in the absence of anything to the contrary he has the physical power of dealing with it as his own and, therefore, it is open to the Crown to rely upon the presumption that he intends to deal with it as his own to the exclusion of others if need be But if he is not in manual possession of the stolen article the case of the Crown is not so simple There must be evidence to prove that the stolen property was found either in the manual possession of the wife, clerk or servant of the accused see S. 27 of the Code, or that it was found in a place and under circumstances so as to justify the inference that the accused knew of its existence at that place and that the same was under his effective control It is only then that a legitimate presumption may be raised that the accused retained constructive possession of the property with the requisite intention of dealing with it as his own

If the Crown wishes to secure a conviction against more persons than one on the ground that all such persons were in joint possession of the stolen property its task is still more difficult It must further be proved that the stolen property was either in the physical possession of each one of the accused or else that it was in the possession, physical or constructive, of one or more of them on behalf of and to the knowledge of the other accused persons and that each one of them intended to possess it for their joint use and to the exclusion of persons other than themselves By way of simple illustration of the circumstances under which a presumption of guilt may or may not be raised it has been said that where stolen articles are found on the person of an accused person or in a locked up house or room or in a box of which he kept the key there would be fair ground for calling upon him for his defence, but if they are found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft or in an open box to which others had access, this would, in the absence of further evidence, raise no definite presumption of his guilt. Best on Evidence, para 212, and more so it would raise no definite presumption of the guilt of each of the other co-occupants or joint users of the house room or box either individually or collectively as being thieves or receivers of stolen property

Now in the present case there was no legal evidence to prove that the stolen ghee was in the possession of any one of the appellants and much less to prove that such possession as any of them might be presumed to have was on the joint account of himself and the other appellants or to their knowledge

The stolen ghee was found in a railway waggon where each of the appellants had an equal right to travel No one of them could exclude the others from getting into or getting out of the waggon or bringing any thing therein. If any person had effective control over the waggon or its contents it was the police constable whose duty it was to keep a watch over the train and he is not before us

At the railway stations where goods had to be loaded or unloaded the appellants were liable to be sent off to different waggons for work and when there was no work to be done they were at liberty to loiter about anywhere on the platform Without any further evidence it is difficult to raise a presumption that all or any one of them knew that the stolen ghee was brought into the waggon, and even if they knew of it, that the moment it was brought into the waggon all of

(1) [1855] 24 L. J. M. C. 134.
(2) [1900] 3 Cr. Ap. R. 259.
(3) 28 Cr. Ap. R. 91.

them came to possess it jointly or that they intended to deal with it jointly for their benefit so as to raise the further presumption that they were either thieves or receivers of the stolen ghee

With all respect I am constrained to hold that though a lot of suspicion might exist against all the appellants this was not a case in which they should have been put upon their defence For these reasons I agree that the convictions and sentences against all the accused should be quashed

S L./R K. *Application allowed*

A I R. 1929 Sind 12

WILD, J C, AND RUPCHAND BILARAM, A J C

Hassomal—Defendant—Appellant.

v

Sahibo—Plaintiff—Respondent.

Civil Revn. Appln No 16 of 1928, Decided on 26th July 1928, from order of 1st Asst. Judge, Hyderabad (Sind), in Civil Appeal No. 77 of 1925

Civil P. C., O. 23, R. 3—Petition of compromise accepted by parties—Judge ordering decree to be passed in terms of compromise, but omitting to order compromise to be recorded—Provisions of O. 23 are sufficiently complied with—Defect if any is cured by provisions of S. 99—Appellate Court cannot go behind compromise and order retrial on merits

Where the petition stating that the parties had arrived at a compromise was read out to both the parties who accepted its terms and the Judge made a note at the back of the petition as follows "Parties present. After hearing it they consent to its terms. Order that the decree be passed in terms of the compromise."

Held: that the order passed by the Sub-Judge was a sufficient compliance with the provisions of that order and even otherwise the defect if any was sufficiently cured by the provisions of S. 99, and that the failure of the Sub-Judge to add in his order the words "the compromise be recorded" gave no jurisdiction to the Judge of the appellate Court to go behind the compromise which had been validly made and to order that the suit be tried on the merits. [P 12 C 2]

Dipchand Chandumal—for Appellant.

Tahilram Manram—for Respondent

Judgment.—The facts giving rise to this application are simple.

The plaintiff-respondent instituted a suit against the defendant-appellant for recovery of Rs 2,700 for work done on the defendant's building His claim was disputed After one witness was examined both parties requested the presiding Judge to inspect the building. They took with themselves a written petition wherein it was stated that the parties had arrived at a compromise by which there was to be a decree in favour of the plaintiff for a sum of money which was left blank and that the defendant was to pay that sum within three months of the date of the decree At the premises there was a discussion between the parties as to the amount which the defendant should pay and the Judge suggested the figure of Rs 1,900 which was accepted by both parties That figure was inserted by the pleader of one of the parties in the petition which was handed over to the Judge The petition was then read out to both the parties who accepted its terms and the learned Judge made a note at the back of the petition which is as follows :

"Parties present After hearing it they consent to its terms. Order—that the decree be passed in terms of the compromise."

It appears that a few days later, the plaintiff felt that he should have received more than the figure given by the Judge and filed an appeal to the District Court purporting to be an appeal under O 43, R. 1, Cl (m), Civil P. C, denying that he had agreed to accept the figure of Rs 1,900 The learned Assistant Judge who heard the appeal sent for a report from the Sub-Judge and held that the story of the plaintiff was false, but set aside the compromise on the ground that the learned Sub-Judge had passed no formal order recording the compromise before passing the decree in favour of the plaintiff and that this omission was fatal to the decree which followed He accordingly, set aside the decree passed by the learned Sub-Judge and sent the case back to him for trial on the merits

In our opinion the order passed by the learned Sub-Judge was a sufficient compliance with the provisions of that order and even otherwise the defect if any was sufficiently cured by the provisions of S 99, Civil P C. The sections provides :

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

It would also appear that the failure of the learned Sub-Judge to add in his order the words "the compromise be recorded" gave no jurisdiction to the learned Judge of the appellate Court to go behind the compromise which had been validly made and to order that the suit be tried on the merits

We accordingly allow this revision application and maintain the judgment and decree passed by that Court The defendant to bear the costs of the first appellate Court and this Court

D.B /R.K. *Application allowed.*

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* A I R. 1929 Sind 13

RUPCHAND BILARAM, A J C

Allibhoy Adamji Sheikh Jiwanji — Plaintiff

v

Gordhandas Jeenabhoy—Defendant

Original Civil Suit No. 846 of 1927, Decided on 30th March 1928

(a) Bombay Rent (War Restrictions) Act (2 of 1918), S. 9 (2)—Tenant making default in payment of rent even when demanded—He harassing landlord by his conduct—He subsequently tendering overdue rent—His conduct is satisfactory cause within S 9, Cl (2) — Subsequent tender or payment in Court is of no avail.

A person *S* was in occupation of a tenement of small premises within the meaning of Bombay Rent (War Restrictions) Act, of 1918 Notice of ejectment was given to him by the landlord. He had made default in payment of rent for three months prior to the notice and had been very irregular in the payment of rent even before that. He failed to pay rent even when demands were made every month by the landlord's mehta on the tenant's premises His conduct in general showed that he was bent on harassing the landlord. He subsequently tendered the overdue rent and paid the same in the Court

Held that the conduct of the tenant was satisfactory cause within the meaning of S 9 (2) His subsequent tender or payment in Court was of no avail and it was not competent for any Court to condone his failure to pay rent either under S. 114, T P Act, or under any other Act *A I R.* 1923 *Bom* 387 and *Brewer v Jacobs*, (1923) 1 *K. B.* 528, *Rel on* [P 15 C 1]

*** (b) Transfer of Property Act, S. 108, Cl. (i) — S 108 does not require lessor to make demand of rent—Proper place for payment of rent is landlord's residence or place of business.**

Section 108, Cl. (i), T. P. Act, makes it obligatory on the tenant to pay or tender at the proper time and place the rent due to the lessor or his agent and there is nothing in the section to require the lessor to make a demand. Further so far as this country is concerned in the absence of any controlling agreement, the customary place for payment of rent is the landlord's residence or other usual place of his business 4 *C. W. N.* 324, *Rel. on.* [P 14 C 2]

Pahlajsing B Advani—for Plaintiff.

E V Castellino—for Defendant

Judgment—This is a suit for ejectment of the defendant who is in occupation of a tenement which falls within the definition of small premises within the meaning of the Bombay Rent (War Restrictions) Act of 1918 It is based on two grounds: first, that the defendant had made default in payment of rent for three months prior to the notice of ejectment on which the present suit is based, and secondly, that the defendant had been very irregular in payment of rent even before that notice and was troublesome in several respects, and that his conduct in general afforded the plaintiff a satisfactory cause within the meaning of Cl (2), S. 9 of the principal Act 2 of 1918 to ask for his ejectment The evidence in this case is mostly documentary From the account produced by the plaintiff's mehta it is abundantly clear that prior to 1st November 1926, the defendant very often paid his rent at the end of two months and sometimes at the end of three months The rent from November 1926, to February 1928, was overdue On 7th March 1927, the plaintiff gave the first notice of ejectment, Ex. 4, wherein he complained of the non-payment of rent for the preceding four months and asked for Rs 38-8-0 being paid to him as overdue rent This amount was slightly in excess of the standard rent From November 1926, the plaintiff was entitled to charge ten per cent more than the rent payable before that date which was Rs. 7-14-9 The rent due to him for four months was, therefore, Rs 36-11-0 and not Rs 38-8-0 Apparently, there was a mistake made by the plaintiff's mehta in calculating the overdue rent There is no allegation much less proof that the plaintiff intended to claim more than the authorized rent Instead of pointing out the mistake to the plaintiff, or paying such amount as the defendant admitted to be due, he applied to the Rent Controller to fix the standard rent: vide his application Ex 19-A dated 19th March 1927, and pending the decision of the Rent Controller withheld payment of rent

On 30th April 1927, the pleaders sent a letter in Ex 5 intimating to the plaintiff

that the standard rent had been fixed at Rs 9-7-0 and that they were enclosing a cheque for Rs 56-10-0 being the rent for six months which was due up to that date. The cheque was not honoured by the bank on which it was drawn on the ground that the alterations and figures in the cheque required full signatures of the drawer. The cheque was returned to the defendant and a demand made on him on 25th May, to pay up the overdue rent in cash, vide Ex 7 He made payment on or about 7th June but allowed the rent of the month of May to remain again in arrears On 9th June, he and certain other tenants sent a petition to the Rent Controller complaining against the conduct of the plaintiff in closing the door leading up to the roof of the building with the object of preventing the tenants from sleeping on the roof This was a serious allegation to be made against the landlord as it exposed him to a penalty under S. 8 of the Act for disturbing the convenience of the tenants of small premises and the plaintiff was ordered to remove the lock : vide the application Ex. 12-A and the order Ex. 19 There is no doubt whatsoever that this application was engineered by the defendant. The plaintiff appealed to the Rent Controller against that order denying that the tenants had any right to the use of the roof and asked for an inquiry into the matter and for inspection of the premises by the Rent Controller The result of the inquiry and the visit was that the complaint of the defendant was found to be absolutely unjustified and the previous order was cancelled: vide the endorsement in Ex. 12-A, dated 17th July 1927.

During the pendency of this inquiry and subsequently thereafter up to 15th September, the defendant failed to pay rent, when a second notice of ejectment, Ex. 9, on which the present suit is based, was sent to the defendant In answer to that notice the defendant's pleader sent a reply, Ex 10, dated 22nd September. (After reproducing the contents of the reply the judgment proceeded). The plaintiff refused to accept the overdue rent and instituted this suit.

With regard to the first ground on which this suit is based, it is abundantly clear from the documents and the admission of the defendant that he did not pay rent for four months ending with 31st August 1927. But his plea is that no demand was made on him during these months and that in the absence of a demand there was no obligation on him to pay rent

Now S. 108, Cl (i), T. P. Act, makes it obligatory on the tenant to pay or tender at the proper time and place the rent due to the lessor or his agent There is no question here that the proper time for payment of rent for each month was at the expiry of the month It is said that this obligation does not arise until a demand is made There is nothing in the section to require the lessor to make a demand. The English rule which requires the lessor to give a notice of demand before exercising his right of reentry has no application here And again so far as this country is concerned, in the absence of any controlling agreement the customary place for payment of the rent is the landlord's residence or other usual place of his business : *Fakir Lal* v *W. C. Bonnerji* (1). It is admitted that no tender was made at the plaintiff's place of business, but it is contended that as it was usual and customary for the plaintiff's mehta to demand payment of rent from the defendant on the leased land and as no such demand was made during these four months there was no default. Assuming for the moment that that is so, I hold on the evidence that the plaintiff's mehta did make a demand every month for payment of rent from the defendant on the premises and that the defendant failed to pay the same. On this point there is the word of the plaintiff's mehta a banya 60 years old, as against the word of the defendant himself. It is clear from the evidence of the mehta that his sole duty is to recover rents of the building a portion of which is in the occupation of the defendant and of other buildings owned by the plaintiff, and that he made several demands on the defendant for payment of rent but with no success. In his cross-examination an attempt was made to show that during these four months he had left Karachi. But he denied that he had left Karachi even for a day. As a matter of fact he had recovered rents from other tenants, and that if he had been out, it would not have been difficult for the defendant to prove it to the hilt by calling the other tenants as his witnesses. Whatever reason he may have had to delay payment of rent as it became due, the

(1) [1900] 4 C.W.N. 324.

defendant appeared to me to be cantankerous and his demeanour in the witness-box impressed me very unfavourably It appears that having made a complaint to the Rent Controller that his access to the roof to which he claimed a right had been stopped he intentionally declined to pay rent and it was only when he received the second notice of ejectment that he realized that his default would be availed of in ejecting him. It is not unlikely that in order to forestall this suit he instructed his pleaders to state in Ex 10 that no demand had been made to him for payment of rent There has been, in my opinion, a clear failure on the part of the defendant to pay rent for four months notwithstanding a demand made by the mehta in each of the months Assuming, therefore, that there was no obligation on the defendant to pay rent unless it was demanded, the defendant has committed a breach of one of the essential obligations imposed on him under S 9 (1) of the principal Act and has, therefore, lost his right to continue in possession as a statutory tenant. The subsequent tender by him of the overdue rent or its payment into Court is of no avail, and it is not competent for the Court to condone such failure either under S. 114, T P Act, or any other Act · *Mathuradas Maganlal* v. *Nathubai Vithaldas* (2) and *Brewer* v. *Jacobs* (3), where likewise the somewhat similar provisions of S 212, Common Law Procedure Act of 1852, were held not to apply to the case of a statutory tenant who had broken the conditions of his tenancy.

I hold, therefore, that the first ground has been fully made out.

It is equally clear from the correspondence and the conduct of the defendant that he is bent upon harassing the plaintiff. He has not only filed two applications before the Rent Controller but in his last reply, Ex. 10, he has raised further contentious points. He has complained that no repairs have been done to his tenement for years past, that the plaintiff is not bearing the cost of supplying water, and that he has prevented the defendant from sleeping on the roof In respect of the last complaint of his though the Rent Controller has decided against him once he threatens to move him again. What is satisfactory cause within the meaning of S. 9, Cl. (2) of the principal Act must necessarily depend on the facts of each particular case, and taking the facts of this case as a whole, I am of opinion that the plaintiff is entitled to succeed on the second ground as well, and I hold accordingly.

There will, therefore, be a decree for ejectment for arrears of rent and mesne profits as claimed and costs, the amount deposited in Court should be paid to the plaintiff in part satisfaction of the money-decree.

S N /R K *Suit decreed*

(2) A.I.R. 1923 Bom. 387=47 Bom 756.
(3) [1923] 1 K.B. 528=92 L J K B. 359=67 S.J. 458=128 L.T. 687=21 L.G.R. 230.

A. I. R 1929 Sind 15

PERCIVAL, A. J. C.

Emperor

v.

E C D. Wheeler—Accused

Original Criminal Sessions Case No 35 of 1927, Decided on 16th February 1928

Evidence Act, Ss. 17 and 21—Evidence by accused, on his own behalf, in extradition proceedings is admissible as admission unless barred by proviso to Evidence Act S. 132.

Evidence given by an accused on his own behalf in extradition proceedings is an admission by an accused person and is, therefore, prima facie admissible in evidence under S. 21; and it is, therefore, for the accused to show why it should not be so admitted. No particular formality is required to enable an admission by an accused person to go in as an admission. A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to S. 132. 39 *Cal.* 164 and 45 *Cal.* 720, *Rel. on.* [P 16 C 1, 2]

T. G. Elphinston—for the Crown

Osborne—for Accused.

Order.—In this case, accused 6 Wheeler, as an accused in the extradition proceedings in London, which led to his being sent here for trial, gave evidence on his own behalf When the Public Prosecutor proposed to put in that evidence as evidence here, the learned counsel for accused 6 stated that he did not object to its going in. That evidence was accordingly exhibited and read out to the jury. On the following day, the learned counsel for accused 6 stated that he had not previously seen the evidence, and that on hastily looking through it in Court he had not seen the evidence recorded after the first part of that evidence; and that on going through it at his leisure, he wished to take objection to the part of

the evidence which was given under cross-examination. He also contended that the accused is not bound by a statement made by the learned counsel himself on the spur of the moment ; and that it is for the Court to decide whether in fact such evidence is legally admissible against the accused or not. On behalf of the Crown it is contended that :—1. The evidence is admissible in evidence and 2. It is too late to reject evidence which has already been exhibited and read to the jury.

I think on consideration that it is desirable to examine the question of the admissibility of the evidence, apart from the fact that the evidence has already been placed on the record ; because it would still be open to the Court while addressing the jury, to ask the jury to disregard the evidence in question on the ground that it was admitted by some oversight or mistake As to the admissibility of the evidence there the learned Public Prosecutor relies on S 21, Evidence Act and S 1, English Criminal Evidence Act, 1898, and on certain cases, namely, *In re Rudolph Stallman* (1) *Emperor* v. *Banarsi* (2), *Akhoy Kumar Mukerjee* v *Emperor* (3) and *Emperor* v. *Noni Gopal Gupta* (4) On behalf of accused 6, the main contention is that, as an accused person cannot be examined on oath and cross-examined in India, his evidence given under cross-examination in England as an accused person in connexion with the same offence cannot be admitted in evidence here

A reference, however, to S. 17 and S. 21, Evidence Act, shows that the wording is very wide The evidence in question is an admission by an accused person and is, therefore, prima facie admissible in evidence under S. 21 ; and it is, therefore, for the accused to show why it should not be so admitted In regard to confessions (which are a form of admission) to police officers, and in certain other cases such admissions are specifically excluded by the Evidence Act, and, therefore, in respect of them, the general provisions of S 21 are superseded ; but there is no such special provision superseding S. 21 in this case.

The cases cited by the learned Public Prosecutor do not refer to the exact point now under consideration The case reported as *In re Rudolph Stallman* (1), however, shows that the evidence recorded in the extradition proceedings is admissible; and, therefore, it is for the defence to show affirmatively why a particular admission included in evidence which is legally admissible here should be excluded It may be noted that no particular formality under the Indian Law is required to enable an admission by an accused person to go in as an admission; for instance in this very case a letter by accused 6 has been put in by the prosecution

If it is contended that evidence on oath by an accused person cannot be used against him in connexion which the same offence, there are plenty of cases to show that that can be done, for instance *Akhoy Kumar Mukarjee* v. *Emperor* (3) cited above. It is there laid down that

> " a previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to S, 132, Evidence Act"

(this exception has not been contended in the case). If, therefore, *A* gives evidence against *B* in connexion with an offence committed by *A* and *B* together that admission of *A* can be used against *A* himself if he is put on his trial There is, therefore, no inherent reason why an admission given in evidence by an accused person should not be used against him in respect of the same offence The only difference between the two cases is that in that case *A* has given evidence against *B*. In this case *A* has given evidence on his own behalf in certain judicial proceedings connected with his own case

I have already held that the evidence of Anstey in the extradition proceeding cannot be used against the present accused 6. But in respect of Anstey, certain other sections are to be considered, namely, S 33 and to some extent S. 21, Evidence Act. Here S 21, Evidence Act applies ; and the provisions of that section are not superseded by any other section applicable in this case. I hold therefore, that the evidence in question which has already been exhibited and read to the jury, is admissible in evidence in this case as against accused only.

S.L /R K *Order accordingly.*

(1) [1912] 39 Cal. 164 = 15 C. W. N. 1053 = 12 I. C. 273 = 14 C. L. J. 375.
(2) A. I. R. 1924 All. 381 = 46 All. 254.
(3) [1918] 45 Cal. 720 = 27 C. L. J. 91 = 45 I. C. 999 = 22 C. W. N. 405.
(4) [1911] 38 Cal. 559 = 10 I. C. 582 = 15 C. W. N. 593.

A. I. R. 1929 Sind 17 (1)

WILD, J. C., AND ASTON, A. J. C.

Sher Mahomed—Accused—Applicant.

v.

Emperor—Opposite Party

Criminal Revn Appln No 201 of 1928, Decided on 19th November 1928, from order of Resident Mag., Rohri.

Criminal P. C., S. 190 (1) (b)—Proceedings for murder started against *A* — Some witnesses stating the murderer to be *M* and not *A*—Magistrate suspending proceedings against *A* and directing proceedings against *M* — Procedure is not illegal but not suitable — *A* should be discharged or acquitted before proceeding against *M* — Criminal P. C., S. 209

One *A* was challaned by the police for murder. In the course of committal proceedings the Magistrate found that there were some witnesses who said that the murderer was not *A* but *M*. The Magistrate therefore proposed to suspend further proceedings against *A* and directed that proceedings on the charge of murder should be started against *M* with the intention of committing one or the other to the Sessions Court.

Held that the procedure, though not illegal, was not suitable. The Magistrate should either commit *A* to the Sessions Court or, if he is not satisfied that there are sufficient grounds for committing him to the Sessions Court, should discharge him, and that further proceedings should not be taken against *M* until *A* is either convicted, acquitted, or discharged. [P 17 C 2]

Nihchaldas T. Vazirani — for Applicant

C. M Lobo—for the Crown.

Judgment — The facts which give rise to this revision application are as follows :

A murder was committed on 22nd March of this year and one Sadar was challaned by the police The case against him was heard but in the course of it, the learned Resident Magistrate, Rohri, found that there were three witnesses who said that the murderer was not Sadar but the present applicant Sher Mahomed The learned Magistrate thinks that these three witnesses are entitled to as much credence as the prosecution witnesses against Sadar He is therefore proposing to suspend further proceedings against Sadar and is directing that proceedings on the charge of murder should be started against the applicant Sher Mahomed The intention of the learned Magistrate is that after recording the evidence against Sher Mahomed, he will be in a position either to commit one or the other to the Sessions Court.

It is argued that this procedure is not legal. But we are not prepared to hold that this procedure is not allowed under S. 190 (1) (b), Criminal P. C At the same time, it seems to us that the procedure proposed is not suitable The evidence against Sadar has been fully recorded and it is improper that there should be any further delay The evidence which the learned Magistrate may record in the proceedings against Sher Mahomed would not be strictly speaking relevant and he therefore ought to make up his mind without having recourse to them.

We therefore direct that the learned Magistrate should either commit Sadar to the Sessions Court or if he is not satisfied that there are sufficient grounds for committing him to the Sessions Court should discharge him, and that further proceedings should not be taken aguinst Sher Mahomed until Sadar is either convicted, acquitted or discharged

R K. *Order accordingly.*

A. I R. 1929 Sind 17 (2)

DE SOUZA AND RUPCHAND BILARAM, A J. CS.

Wali Mahomed—Accused—Appellant

v

Emperor—Opposite Party.

Criminal Appeal No. 237 of 1927, Decided on 29th March 1928, from judgment of Sess Judge, Sukkur, D/- 21st November 1927

(a) Penal Code, Ss. 380 and 442—"Building includes structure whether covered or not and made of any material.

A building within the meaning of Ss. 380 and 442, includes a structure whether covered or not and made of any materials whatsoever. The limitations imposed by the legislature on buildings referred to in Ss. 380 and 442 are not as to the nature of their structures or the materials of which they are made but to the use to which such structures are intended to be put. [P 18 C 2]

A court-yard attached to the living rooms walled in on all sides and provided by a door leading to the street comes within the purview of the section : *Moir* v. *Williams*, (1892) 1 *Q. B.* 264, *Ref.*; 35 *P. R.* 1879 *Cr*; *A. I. R.* 1926 *Lah.* 28, 6 *N. W. P. R.* 307 and *A. I. R.* 1925 *Lah.* 117, *Foll.* 57 *P. R* 1897 *Cr*; 28 *P. R.* 1905 *Cr*, 24 *P. R.* 1914 *Cr.* and 11 *P. W. R.* 1919 *Cr.*, *Dist.* [P 19 C 1]

(b) Penal Code, S. 442—Intention as to use of particular structure depends upon particular facts.

Whether any particular structure or any part of it was intended as a human dwelling

or as a place of worship or for custody of property must necessarily depend on the facts of each case. [P 18 C 2]

C. M Lobo—for the Crown.

Judgment.—The facts of this case are simple and have been proved beyond doubt.

It appears that the complainant was aroused by a sound in his court-yard and on going out found the accused there Thereupon the accused threw at him an iron bar which struck the complainant on the right side under his arm pit In spite of it he grappled with the accused and after a struggle overpowered him Two of the tenants who lived in the same part of the building came up on his cries and helped him to tie up the accused who was thereafter handed over to the police

On these facts the accused has been convicted and sentenced to ten years' rigorous imprisonment under S 458, I P C, as he had certain previous convictions.

The accused has appealed to us from jail and his appeal has been admitted for consideration of the following two points :

(1) Whether the court-yard was a building within the definition of S. 442, I. P. C, and

(2) Whether there was preparation by him, to cause hurt within the meaning of S 458, I P C, when he committed house-breaking ?

Now S 442 defines house-trespass as criminal trespass in any building, tent, or vessel used .

(a) as a human dwelling, or

(b) as a place of worship, or

(c) as a place for the custody of property.

The expression " building" is used in several other sections of the Code, e. g , S. 288 negligence in pulling down or repairing a building, S 380 theft in a building and S 436 mischief intending to cause destruction of a building.

But it has not been defined anywhere in the Code and has been the subject of divergent judicial decisions.

A few of the decided cases appear to have proceeded on the assumption that " a building" must necessarily be an enclosure made of bricks or stones and covered over by a roof. That was the definition given by Lord Esher, M. R , in *Moir* v. *Williams* (1) in a civil suit where the question before the Court was whether the plaintiff in that case was entitled to one fee or to separate fees for supervising a building consisting of separate chambers, and the answer to that question depended on whether or not each of those separate chambers was a separate building within the meaning of the Metropolitan Building Act, 1855

The expression "building" has received a much more comprehensive meaning in statutes both English and Indian relating to the powers and duties of public and local bodies such as the municipalities and is said to include a structure whether covered or not and made of any materials whatsoever.

A bare reading of the different sections of the Code makes it abundantly clear that this expression has been used in the Code in its more comprehensive sense

In S 288, I P C, a building would include a bare wall negligently pulled down.

In Ss 380 and 442, I P C, a building, a tent and a vessel have all been put on the same level If an offence committed in or with respect to a tent made of unsubstantial and inflammable materials and that committed on the deck of a vessel though open to the sky require a severe punishment, there is no reason why a similar offence committed in a building which is made of matting or is open to the sky should not receive the same punishment.

The limitations which appear to have been imposed by the legislature on buildings referred to in Ss 380 and 442 are not as to the nature of their structures or the materials of which they are made but to the use to which such structures are intended to be put Whether any particular structure or any part of it was intended as a human dwelling or as a place of worship or for custody of property must necessarily depend on the facts of each case

Viewed from this light several of the divergent rulings are easily reconcilable.

A small court-yard consisting of a walled enclosure with four kothis or chambers opening into it and an outer gate leading into a side street as in *Shera* v. *Empress* (2) or an unroofed 'warah' adjoining the living room of the complainant as in *Ismail* v *Emperor* (3) were

(1) [1892] 1 Q. B. 264=61 L. J. M. C. 33=56 J. P. 197=56 L. T. 215=40 W. R. 69.

(2) [1879] 35 P. R 1879 Cr.

(3) A. I. R. 1926 Lah. 28=6 Lah. 463.

pre-eminently intended as part of a human dwelling or for custody of household property and were rightly held to come within the sections.

Similarly a cattle yard enclosed by walls on all four sides with a gap in the wall which has been caused by disrepair and was stopped by thorn brushes as in *Queen* v *Dullee* (4) or a warah or a cattle shed surrounded by walls as in *Niamat* v. *Emperor* (5) were constructions pre-eminently intended for custody of property. On the other hand, a cattle enclosure made of thorn hedges on all sides as in *Sucha Singh* v *Empress* (6) or in *Emperor* v *Ramzan* (7) or a cattle enclosure not attached to any house, but made of one single wall on one side and of thorn hedges on the remaining three sides as in *Kohmi* v *Emperor* (8) or a Court-yard partly surrounded by a mud wall and partly open with one door or gateway, separating it from the street as in *Sunder* v *Emperor* (9) are all cases where it may fairly be presumed that such semi-enclosed places were not intended to be used as human dwelling or as places for custody of property

In the present case the court-yard scaled over by the accused was attached to the living rooms walled in on all sides and was provided by a door leading to the street which was secured and there can be no doubt that it came within the purview of the section

With regard to the second point, it would appear that the proper section to be applied to the circumstances of this case was S 457, I P C, as the iron bar with which the accused hit the complainant was evidently brought in by the accused for the purpose of house-breaking and not for the purpose of causing hurt in the course of his depredations. It is, however, immaterial whether the accused is convicted under S. 457 or S. 458, I. P. C, as it would have made no difference in the sentence which has been awarded to him. It is, therefore, not necessary that the charge should be amended

For. these reasons, we confirm the conviction and sentence and dismiss this appeal

D.B./R K. *Appeal dismissed.*

(4) 6 N. W. P. R. 307.
(5) A. I. R. 1925 Lah. 117.
(6) [1887] 57 P. R. 1887 Cr.
(7) [1905] 118 P. L. R. 1905 = 28 P. R. 1905 Cr.=2 Cr. L. J. 420.
(8) [1914] 24 P. R. 1914 Cr. =208 P. L. R. 1915 = 26 I. C. 305=16 Cr. L. J. 1.
(9) [1919] 11 P. W. R. 1919 Cr.=49 I. C. 864 =20 Cr. L. J. 240.

A. I. R. 1929 Sind 19

WILD, J. C. AND RUPCHAND BILARAM, A J. C

Papurbai—Appellant

v.

Chuhermal Mulchand and *others*—Respondents

First Appeal No 18 of 1927, Decided on 19th November 1928.

Will—Construction—Hindu disposing by will both ancestral and self-acquired property—Legacies in favour of widow and daughters—Residue to be divided between two sons—Elder son a stepson of the widow—Condition in the will that elder son should continue to manage property and will need not be enforced if he would look after his brother, sisters and stepmother properly—Younger son dying subsequently—Sons will come in only if there would be residue of property over which testator had disposing power—Vesting of legacies was not intended to be prevented—Only distribution was postponed—Though legacies not assented to by executors, mother is entitled to her son's half share in the residue

One *M*, a Hindu, died on 24th October 1919 leaving behind him two sons *C* and *B*, a widow *P* and three daughters. *C* was the stepson of *P M* disposed of by will all property including some ancestral property. He bequeathed Rs 10,000 to each daughter and his widow. The residue was to be divided between the two sons equally. Two executors were appointed to enforce the will. There was also a provision that if *C* would continue to look after his stepmother, brother and sisters properly it was not necessary to enforce the will and *C* should continue to manage the property. If *P* appeared dissatisfied the will was to be enforced at once. *B* died without issue on 10th May 1920. *P* sued for her Rs 10,000 and Rs. 30,000 on behalf of her daughters and half of the residue as the mother of *B*.

Held further: was nothing in the will to suggest that the sons of the testator were a special object of his bounty or that he wished to leave to them a substantial part of his self-acquired property in addition to their shares in the ancestral property which devolved on them by right of survivorship. [P 21 C 2]

Held further: there was also no question of any uncertainty about the intentions of the testator as expressed by him in his will. In unambiguous and express terms the testator bequeathed to *C* and *B* only the residue of his estate and they can only come in if there is such residue of the property over which the testator had a disposing power and in respect of which he had not made any other testamentary disposition which was capable of taking effect. [P 21 C 2]

Held further : that the clause permitting *C* to deal with the property so long as he behaved well towards the other beneficiaries was capable of the construction that it merely postponed the distribution of the legacies and did not in any way intend to prevent or aim at preventing the vesting of the legacies. [P 22, C 1]

Held further : that though the executors had not assented to the residuary bequest in favour of *B* before his death, such bequest was transmissible to *P* as *B's* heir. [P 22, C 2]

(b) Will—Construction—Court should lean against intestacy.

One of the cardinal canons of construction applicable to wills is that the Court will lean against intestacy and will not presume that the testator meant to die intestate if on a fair construction there is no reason for saying the contrary. *Kark Smith* v. *Parnell*, (1903) 1 *Ch* 483 and *Re Harrison*, (1885) 3 *Ch. D.* 390, *Rel. on.* [P 21, C 2]

(c) Succession Act (1925), S. 332—Legatee dying before executors' assent—His heirs are entitled to his legacy.

No doubt as a protection to the executor the law ordains that every legatee whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it is paid or delivered. *A. I. R.* 1923 *Cal* 21, *Foll.* [P 22, C 2]

(d) Succession Act (1925), S. 59—Legatees' assent does not give testator power to dispose property over which he has no disposing power.

Any assent by the legatee to abide by the will would not clothe the testator with authority to deal with property over which he had no disposing power. [P 22, C 2]

(e) Succession Act (1925), Ss. 303 and 304—Ss. 303 and 304 apply to Hindus.

A legatee who is in possession of the property of the deceased or at any rate a major portion of it and is holding it adversely to the widow and the other legatees is liable to be sued as an executor de son tort. Ss. 303 and 304 now apply to Hindus as well. *A. I. R.* 1922 *Mad.* 457, *Foll.* [P 22, C 1]

Gopal Das Jhamatmal—for Appellant.

Tojumal Hassomal, Javhermal Vilaitrai and *Tolasing Khushalsing*—for Respondents

Rupchand Bilaram, A. J. C.—The plaintiff-appellant is the widow of one Mulchand a Hindu resident of Hyderabad who died there on 24th October 1919. The chief contesting defendant-respondent Chuhermal is her stepson. The other defendants-respondents Gopibai, Mathribai and Kalawantibai are her minor daughters.

Mulchand made a will dated 22nd September 1919, in the Sindhi language, which has been translated as follows :

" I maintain and give effect to this will as follows .—That out of whatever property is my own, Rs. 30,000 (thirty thousand) be set apart and utilized for the marriage expenses of my three daughters, namely Gopi. Mathri and Kalawanti, and Rs. 10,000 (ten thousand) should be given in cash to my wife, because according to the custom of Hyderabad City, a mother of daughters requires money in order to please the relations of her daughters' husbands. The remaining property shall all be divided into two equal shares, one of which should be given to my eldest son, Chuhermal, and other to my youngest son Bhagwani. To enforce the above will, I have appointed Mr. Rewachand Idanmal Mansughani and Bhai Lokumal Satramdas Mahtani. If Chuhermal continues to look after his stepmother Papurbai and his stepsisters, Gopi Mathri and Kalawanti, and his stepbrother, Bhagwani, properly, just as full and true brothers, sisters and mothers are looked after, then it is not necessary to enforce the will. But an inquiry about this should be made from Papurbai. If she appears dissatisfied, the above will should be enforced at once.

My property is approximately worth as under

Rs. 1,33,000-0-0 "

" Besides the above the ornaments which are with Devibai and Papurbai will be worth about ten thousand rupees. The same shall remain in their possession. The furniture is worth about Rs. 3000 which shall be considered as joint property.

Sd. Mulchand A. 22-9-19."

The plaintiff's son Bhagwani referred to in the will died a minor and without issue on 21st May 1920. Three years later the plaintiff instituted this suit alleging that Chuhermal had mismanaged the property of the deceased, and had improperly stopped supplying her with funds. She prayed (a) for payment to her of the sum of Rs. 10,000 bequeathed to her under the will; (b) for payment to her of Rs. 10,997-9-4 with interest due thereon said to have been deposited by her with her husband; (c) for the sum of Rs. 30,000, reserved for the marriages of her three daughters being set apart, and (d) for the residue of the estate being divided into two equal shares, and the share which would have been given to Bhagwani, if he were alive being handed over to her as his heir.

With her plaint she filed two schedules of the property of the deceased The first schedule referred to three immovable properties which were admitted by her to be ancestral properties of the deceased, but which were treated by him in the will as his own. These properties are (a) the shop in the main bazar, (b) the shop in Khatuband Lane, and (c) the residential house. Chuhermal denied the

validity of the will and resisted the claim on that and several other grounds. The learned Judge below has dealt with only some of the issues in the case and has dismissed the plaintiff's suit. The following issues arise for our consideration : (1) Is the will bad in form or otherwise ineffective on the ground of uncertainty? (2) Have Bhagwani's rights under the will devolved on the plaintiff? (3) Did Chuhermal assent to the will, and if so, what is its effect? (4) Is the suit bad in form, and if so, what order should be made in that behalf?

Issue 1 :—The learned Judge declined to give effect to the will on two grounds. He was of the opinion that as the testator dealt with the property a part of which was admittedly ancestral, it it was not certain what he might or might not have done had he known that he had no disposing power over such part of it as was ancestral. He has observed that the testator

" would surely have made a different will at least so far as the extent of the lagacies go" and " he might probably not have made the defendant 1 and Bhagwani as more residuary legatees knowing that there might be left no residue for them to enjoy."

He has further held that as there was no evidence to show that it was certain that there would be some residue for the residuary legatees, the will was void for uncertainty.

We are unable to appreciate this line of reasoning. It appears to us to be fallacious and contrary to the fundamental canons of construction applicable to wills. It is too much to assume that the testator did not know that some of the property dealt with by him in his will was his ancestral property He may have had motives of his own to deal with it as his own property. But assuming that he was under a mistaken belief that he could deal with the whole property as his own, it is not within the province of the Court to speculate what the testator might or might not have done, had he known of his alleged mistake In the *Earl of Scarborough* v. *Doe D Savile* (1), at p. 962, Tindal, C. J. has said :

" Whilst the intention of the testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will. No surmise of conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will unless such object can be collected from the plain language of the will itself.

" We hold it to be a necessary rule in the investigation of the intention of a testator, not only that we ought to look to the words of the will alone, to determine the operation and effect of the desire, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate when such estate is once collected from the will itself."

There is nothing in the will, in this case to suggest that the sons of the testator were a special object of his bounty, or that he wished to leave to them a substantial part of his self-acquired property in addition to their shares in the ancestral property which devolved on them by right of survivorship, so as to justify the observation of the learned Judge that the testator probably might not have made his sons mere residuary legatees. There is also no question of any uncertainty about the intentions of the testator as expressed by him in his will. In unambiguous and express terms the testator has bequeathed to them only the residue of his estate and they can only come in if there is such residue of the property over which the testator had a disposing power and in respect of which he has not made any other testamentary disposition which is capable of taking effect. cf. S 103, Indian Succession Act

The finding of the learned Judge that there is no evidence to prove that there would be some residue for the residuary legatees, though that finding is of no consequence whatsoever is not supported by the record. The very schedule filed by Chuhermal himself shows that the stock in trade in his possession is valued by him at Rs 50,000 The second ground on which the learned Judge has proceeded is equally unsustainable. According to the interpretation put upon the will by him, it would appear that he considered that its terms prevented the vesting of the property of the testator in any person whatsoever "until and unless the testator's widow had decided to give effect to the will," and that in so far as it created a vacuum or intestacy pending such decision the will was bad in law Now one of the cardinal canons of construction applicable to wills is that the Court will lean against intestacy and will not presume that the testator meant to die intestate if on a fair construction there is no reason for saying the contrary.

(1) [1836] 3 A. & E. 897.

Kirk-Smith v. *Parnell* (2). In an earlier case *in re Harrison* (3) Lord Esher, M. R. very aptly stated the same rule as follows :

"There is one rule of construction which to my mind is a golden rule, viz.,that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible to read the will so as to lead to a testacy, not to an intestacy."

There are no express words preventing the vesting of property on the legatees pending the decision of the widow. The will appears to have been written without legal advice. The clauses which may at first sight appear to be contradictory are easily reconcilable The latter clause which permits Chuhermal to deal with the property so long as he behaved well towards the other beneficiaries is capable of the construction that it merely postpones the distribution of the legacies and does not in any way intend to prevent or aim at preventing the vesting of the legacies. It would appear abundantly clear from the context that the testator had no objection to permit Chuhermal to manage the property for the benefit of all the beneficiaries, so long as he managed the estate properly. The marriages of the testator's daughters were not likely to take place at once, and the withdrawal of large sums of money from the business of the testator, which was a going concern might have seriously hampered it This consideration sufficiently accounts for the desire of the testator to permit Chuhermal to continue to manage it

As so interpreted, there appears to be no vacuum between the death of the testator and the decision of the testator's widow that the distribution of the estate should take place at a particular time and no question of intestacy arises. We hold that the will is a valid will in respect of that part of the property over which the testator had a disposing power

Issue 2 : The learned Judge seemed to be of the opinion that as the executors had not assented to the residuary bequest in favour of Bhagwani before his death such bequest was not transmissible to the plaintiff as heir. In this he was clearly mistaken It will be sufficient to refer to the case of *Khagendranath Mookerjee* v. *Khetranath Pal* (4) where Mookerjee, J. has discussed the law on the subject with his usual thoroughness and has pointed out that as a protection to the executor the law ordains that every legatee whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect before such assent, however the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered." The plaintiff has therefore, every right to the residuary bequest left to Bhagwani by his father, and that the plaintiff is entitled to sue for recovery thereof.

Issue 3· In his evidence the witness Revachand stated ·

"I informed him (i. e. Chuhermal) of the will. He accepted the will and agreed to abide by it "

The learned Judge has accepted this evidence as true but has held that it does not go far enough to prove conclusively that Rewachand explained the will to Chuhermal before he gave his assent In doing so the learned Judge has not taken into consideration the clear and unambiguous admission of Chuhermal himself (line 100 of his evidence) that Rewachand told him what the contents of the will were. We have no hesitation in holding on the first part of this issue against Chuhermal.

In dealing with the second part of this issue, the learned Judge has very rightly observed that any assent by Chuhermal to abide by the will would not clothe the testator with authority to deal with property over which he had no disposing power But that is not the only aspect of the case put forward on behalf of the plaintiff. It is contended that the defendant is estopped from disputing that any part of the property dealt with under the will was ancestral property as in consequence of his assenting to treat the whole property as having been validly bequeathed and his agreeing to give effect to it, he was permitted to deal with it as manager or agent of the beneficiaries and that it was likewise in consequence of this assent that no suit was filed on behalf of Bhagwani during his lifetime for partition of the ancestral property It is further contended that Chuhermal's assent operated as a family

(2) [1903] 1 Ch. 483.
(3) [1885] 3 Ch. D. 300.
(4) A. I. R. 1923 Cal. 21=50 Cal. 171.

arrangement between the parties by which the parties are bound. No specific issues have been raised on these points and we decline to go into them, but leave it to the parties to raise proper issues before the lower Court and to have them decided by that Court in the first instance

Issue 4 Now, there can be no doubt that Chuhermal was in possession of the property of the deceased. or at any rate a major portion of it He was holding it adversely to the widow and the other legatees, and he was therefore liable to be sued as an executor de son tort· *Parthasarathy Appa Rao* v *Venkatadri Appa Rao* (5) and Ss 303 and 304, Succession Act 39 of 1925 which sections now apply to Hindus as well. Two objections which seemed to have prevailed with the lower Court are· (1) that the suit is not a suit for the administration of the estate, and (2) that as there is no clear proof that the executors appointed under the will had refused to act as such, they were necessary parties to the suit.

Now, there can be no doubt that the suit is in effect a suit for the administration of the estate of the deceased though the prayer clause does not comply strictly with the form prescribed in that behalf in the Civil Procedure Code All that can be said is that the suit is at most technically bad in form. It is also clear that the executors have not moved in the matter, and is not unlikely that they do not wish to intermeddle with the estate However, in order to meet these technical difficulties, we permit the plaintiff to amend the plaint firstly by bringing the executors on the record as pro forma defendants, and secondly by bringing out more clearly the pleas of estoppel, of Chuhermal's assent operating as a family arrangement and lastly by amending the prayer clause and bringing it strictly in accordance with one of the alternative forms given under form No. 43, Appendix A, Civil Procedure Code. Amended plaint to be filed within fifteen days The case to be called up for further orders on 13th December

R K. *Case remanded.*

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(5) A. I. R. 1922 Mad. 457=46 Mad. 190.

A. I. R. 1929 Sind 23

RUPCHAND BILARAM, A. J C.

Emperor.

v.

Soomar Abdulla—Accused

Sessions Case No. 25 of 1927, Decided on 18th January 1928

Criminal P. C., Ss. 528-A and 528-B—Accused must claim his right before Magistrate—If not, he is barred from raising it subsequently.

It is a condition precedent to the determination of the status of an accused person that he should assert his right to be tried as a person belonging to a particular nationality before the Magistrate to whom he is sent up for trial. It is the assertion of that claim which gives jurisdiction to the Magistrate to inquire into the matter and to give a finding thereon, which, if adverse to the accused, may be challenged in the subsequent proceedings. But if the accused has failed to assert the plea at the proper time, the provisions of S. 528-B in express terms prevent him from asserting it in any subsequent stage of the case

[P 23 C 2, P 24 C 1]

Parasram Tolaram—for the Crown.

Tulsidas Amanmal—for Accused

Order—The accused asserts that he is an Indian British subject and claims the privilege of being tried by a jury consisting of a majority of his own countrymen

Now S 275, Criminal P C, which deals with that privilege provides that the accused should not merely assert that he belongs to a particular nationality but he should be one who has been found under the provisions of the Criminal Procedure Code to belong to that nationality. It is, therefore, necessary to see what those provisions are Chs 33 and 44 (A) are the only chapters to which my attention has been invited, and which deal with an enquiry into the nationality of an accused person Ch 33 has no application in the circumstances of the present case, as persons belonging to different nationalities are not concerned in the trial. Now Ch. 44 (A) which deals with cases not falling under Ch 33 of the Code makes it a condition precedent to the determination of the status of an accused person that he should assert his right to be tried as a person belonging to a particular nationality before the Magistrate to whom he is sent up for trial. It is the assertion of that claim which gives jurisdiction to the Magistrate to inquire into the matter and to give a finding thereon, which, if adverse to the accused

may be challenged in the subsequent proceedings. S. 528-B which falls within that chapter reads as follows:

"528-B. If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the Committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall not assert it in any subsequent stage of the case."

The accused admittedly failed to claim the privilege of being tried as an Indian British subject before the Committing Magistrate There has been no inquiry and no finding as to his status There is, therefore, a two-fold answer to the plea raised by the learned pleader In the first place, as the accused has failed to assert the plea at the proper time, I have no jurisdiction now to determine his status, and in the second place, he is expressly debarred from asserting that claim by the provisions of S 528-B which in express terms prevents him from asserting it in any subsequent stage of the case I, therefore, disallow this plea

R.K. *Plea disallowed*

A I. R. 1929 Sind 24

RUPCHAND BILARAM, A. J. C

In re Reloomal Tolaram—Insolvent.

Original Civil Case No. 22 of 1928, Decided on 28th March 1928

(a) Presidency Towns Insolvency Act, S. 11—Business by general agent, acting for diverse constituents on commission basis is not contemplated.

The business contemplated by the section should be carried on within the limits of the Court either personally by the defendant or by his agent properly and strictly so-called and under his effective control, but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission : 8 *M. H. C.* 146. 1 *B.H. C. R.* 220; 8 *B. H. C. R.* 119. 4 *Mad.* 209; 23 *Mad.* 458 and 26 *Mad.* 544, *Rel. on.* [P 25 C 2]

(b) Contract Act, S. 231—Liability of undisclosed principal for contracts entered into by agent is only secondary.

Business done by a commission agent in his own name though for the benefit of an undisclosed principal, who is liable to indemnify the commission agent against loss, is not business done by such undisclosed principal through the agent, but business done by the agent : 18 *Bom.* 294 (*P.C.*), *Expl.* and *Dist.* [P 26 C 1]

(c) Provincial Insolvency Act, S. 11 (b) (d)—Words "either personally or through agent" remove doubt as to insolvency Court's jurisdiction over foreigners, dealing through agents—Sales or purchases through commission agent are not included.

The words "either personally or through an agent" were introduced for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the insolvency Court over foreigners carrying on business within the jurisdiction of the insolvency Court by the employment of agents or managers properly and strictly so-called, and not for including purchases and sales made by employing a commission agent [P 26 C 2]

Srikrishendas H. Lulla—for Applicants.

Order.—This is an application by a firm of commission agents carrying on business here, to declare one of their up-country constituents as insolvents. It is admitted that the debtors reside and till lately carried on business outside the jurisdiction of this Court, but it is contended that in so far they employed the petitioning creditors as their commission agents to buy and sell commodities for them in the Karachi market, they must be deemed to have carried on business at Karachi through their agents, the petitioning creditors, within the meaning of S. 11, Cl. (b), Presidency Towns Insolvency Act.

I think that this argument is entirely misconcieved The expression "carrying on business" within the jurisdiction to a Court has been the subject of several judicial decisions both here and in England and has received a much narrower interpretation than the one which has been suggested by the learned pleader. In *Chinnammal* v. *Tulukannatammal* (1), it was held that in S 12, Letters Patent, the expression "carrying on business" was not intended to be used in its most general sense but referred to a defendant who at the time of the commencement of the suit carried on within the local limits of the Court's jurisdiction some independent regular business in person, as in the case of *Mitchel* v. *Hender* (2), or at any office or other fixed place of business: see *Rolfe* v. *Learmouth* (3), either personally or by clerks or servants

(1) 3 M. H. C. 146.
(2) [1854] 23 L. J. Q. B. 279=18 Jur. 430= 2 C. L. R. 460=3 W. R. 411.
(3) [1849] 14 Q. B. 196=19 L. J. Q. B. 10= 13 Jur. 986.

employed by the defendant and conducting the business under his control and in his individual or partnership name. In that case the defendant had no place of business in Madras, and the sales were effected on his behalf by one Narayan in his independent trade or business name of a general broker and the Court declined to entertain the suit for want of jurisdiction.

In *Frdmji Kavasji* v. *Hormasji Kavasji* (4), the Bombay High Court declined jurisdiction under S. 12, Letters Patent, against a retail dealer in European goods residing and carrying on business in an up-country station though he had an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade.

In *Khimji Chaturbhuj* v. *Charles Forbes* (5) the Bombay High Court likewise declined jurisdiction against an English firm having in their employment a Bombay firm as their commission agents for the purpose of transacting their business on usual terms.

In *Muthaya Chetti* v. *John Harrison Allan* (6) an up-country trader who habitually sent goods to Madras for sale by a firm of commission agents whose business it was to sell goods for others on commission was said not to carry on business in Madras so as to give jurisdiction to that Court.

In *Murugesa Chetti* v. *Annamalai Chetti* (7), a case governed by S. 17, Civil P. C. of 1882, corresponding to S 20 of the present Code, the Madras High Court held that a person acting as agent within the jurisdiction of the Court should be an agent in the strict sense of the term, and that the mere fact that the defendant was, as a member of a joint Hindu family, entitled to claim an interest in a business carried on within the jurisdiction of the Court by a person who was also the manager of the family was not sufficient to bring him within the purview of the words " carries on business " within the meaning of that section. A distinction was, however, drawn between such a person and a member of a joint Hindu family who had consented to a trade being carried on on his behalf or by his conduct put himself in the position of a joint trader.

The decision on this point was confirmed in *Annamalai Chetty* v *Murugesa Chetty* (8) and in delivering the judgment of their Lordships of the Privy Council, Lord Lindley says :

" After carefully considering the evidence their Lordships have come to the conclusion that the District Judge fell into the error of treating Kandasami Chetty as the agent of the defendant. This mistake is clearly pointed out by the High Court. Kandasami Chetty's acts and his payments to the defendant are all attributable to his being the manager of joint family property, of which the defendant had a share, and their Lordships entirely concur with the High Court in holding that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners, it is much more like that of trustee and cestui que trust.

It is clear from these rulings that in order to give jurisdiction either under the Letters Patent or the Code of Civil Procedure the business should be carried on within the limits of the Court either personally by the defendant or by his agent properly and strictly so-called and under his effective control, but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission as in the present case

The present application is against the firm and not an individual carrying on business It, therefore, falls within the purview of Cl (d), S 11, which contains the identical expression as in the Letters Patent and the Civil Procedure Code with the further limitation that such business should have been carried on within the period of one year preceding the date of the application. Prima facie, therefore, this expression should receive the same meaning as that contained in the other two statutes.

My attention has been invited to the following observations of Lord Morris in *Goswami Shri Girdharji Mahraj* v. *Govardhanlalji Mahraj* (9).

" The phrase " carry on business " as has been often said, is a very elastic one, and is almost incapable of definition. The tribunal must in each case look to the particular circumstances. It appears to their Lordships that the Letters Patent intended it to relate

(4) 1 B. H. C. R. 220.
(5) 8 B. H. C. R. 113.
(6) [1882] 4 Mad. 209.
(7) [1900] 23 Mad. 458=10 M. L. J. 99.
(8) [1903] 26 Mad. 544=30 I. A. 220=13 M. L. J. 287=8 Sar. 523 (P.C.).
(9) [1894] 18 Bom. 294=21 I. A. 13=6 Sar. 396 (P.C.).

to business in which a man might contract debts and ought to be liable to be sued by persons who had business transactions with him."

It has been argued that if this test be applied to the present case, the debtors having made contracts through the petitioning creditors on katcha addat system exposed themselves to suits being filed by local dealers against them as the undisclosed principals of the petitioning creditors. The obvious answer to that argument is that they are not liable to be sued on business transactions entered into with them, but with the petitioning creditors as principals and their liability is only secondary. Business done by a commission agent in his own name though for the benefit of an undisclosed principal who is liable to indemnify the commission agent against loss is not business done by such undisclosed principal through the agent, but business done by the agent. It is pertinent to note that the observations referred to above were made in a case where the point at issue was whether transactions which were said to give jurisdiction to the Court, namely, receiving of offerings, amounted to "business" within the meaning of S. 12, Letters Patent, or not and that point having been answered in the negative, whether the receiving of such offerings by local agents amounted to business carried on through agents or not did not arise.

It has further been argued that the words of Cl (b), S. 11, are not identical with those of either S. 12, Letters Patent, or S 20, Civil P. C., and that the addition of the words "either personally or through an agent" was intended to give a more extended jurisdiction to the insolvency Court than that conferred on Courts of ordinary original civil jurisdiction and that the words "through an agent" include purchases and sales made by employing a commission agent as in the present case. I am not prepared to accede to that view.

The jurisdiction over foreigners of British Indian Courts sitting as Courts of original side jurisdiction had been left undecided in *Annamalai Chetty* v. *Murugesa Chetty* (8) notwithstanding the divergence of opinion on that point in *Keshowji Damodar Jairam* v. *Khimji Jairam* (10) and *Girdhar Damodhar* v. *Kassigar Hiragar* (11). I am of opinion that the words "either personally or through an agent" were introduced for the purpose of removing a doubt which might otherwise have existed as to the jurisdiction of the insolvency Court over foreigners carrying on business within the jurisdiction of the insolvency Court by the employment of agents or managers properly and strictly so-called.

Prior to the Act of 1913, the English Bankruptcy Courts exercised only a limited jurisdiction over foreigners. This jurisdiction was extended by Ss. 8 and 9 of the Act of 1913, which are now reproduced in S. 1 (2) and S. 4, Cl. (d) of the Bankruptcy Act of 1914. In S. 4, Cl. (d), inter alia, the following words appear :

"Or has carried on business in England personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners or an agent or manager"

These words are more explict than Cls (b) and (d), S 11, of our Act, but I think the provisions of both these statutes bear the same meaning and confer the same jurisdiction over debtors and confer jurisdiction over all debtors including foreigners, who carry on business either as individuals or as partners in a firm within the jurisdiction of the Court, provided they carry on such business either personally or through a manager or an agent properly so-called and not otherwise For these reasons I reject this application as incompetent.

S L/R K *Application rejected.*

(10) [1888] 12 Bom. 507.

(11) [1893] 17 Bom. 662.

A. I R. 1929 Sind 26

ASTON AND DE SOUZA, A J. Cs.

Emperor.

v

Shidoo and *another*—Accused.

Criminal Appeal No 311 of 1927, Decided on 24th February 1928, from order of Spl. 1st Cl Mag., Karachi.

(a) Criminal P. C., S. 439 (6)—Appeal against conviction dismissed—When showing cause against enhancement of sentence, accused cannot show cause against conviction on same grounds.

Where an accused person appeals against his conviction and his appeal has been dismissed, it is not open to him in showing cause why his sentence should not be enhanced to

show cause against his conviction except to the extent that the conviction was based on no legal evidence or was manifestly erroneous : *A. I. R.* 1927 *Sind* 39 and *A. I. R.* 1926 *Bom.* 555, *Foll.* [P 27 C 2]

(b) Criminal P. C., Ss. 421 and 424—Orders under S. 421 and under S. 424 cannot be discriminated for S. 439, Cl. (5).

De Souza, A. J. C.—The order summarily dismissing the appeal virtually amounts to an order affirming the findings both of fact and of law recorded by the lower Court and there is no reason to discriminate between an order summarily dismissing the appeal under S. 421 and an order dismissing the appeal after hearing under S. 424 so far as its liability to attack in revision for purposes of S. 439, Cl. (6), is concerned. [P 28 C 1]

(c) Criminal P. C., S. 439—Interference on findings of fact in revision is permissible only for manifest and gross miscarriage of justice.

If the Court, sitting in revision, decides to interfere on findings of fact, it must be only because it is convinced that there has been a manifest and gross miscarriage of justice. [P 28 C 1, 2]

C. M. Lobo—for the Crown.

I. Castellino—for Accused

Aston, A. J. C.—This is a case in which the record and proceeding have been called for suo motu and a notice issued to the accused to show cause why their sentences should not be enhanced.

It appears that the two accused Shidoo and Nagji were tried by the learned Special First Class Magistrate, Karachi, for having committed an unnatural offence on the complainant Ugaji, a boy of 13 or 14 years. They were convicted under S. 377 and sentenced to nine months' rigorous imprisonment each. They appealed to the Sessions Court. But their appeals were summarily dismissed by the learned Judicial Commissioner.

In showing cause against enhancement their pleader has pointed out that the medical evidence is at best neutral, that circumstances show that sodomy may or may not have been committed and that the learned Magistrate was of opinion that the complainant Ugaji was probably a passive willing agent as well as a habitual catamite. On the other hand, the evidence of Ugaji was corroborated by Jamnadas a boy who was present and the fact that Ugaji and Jamnadas, met the two accused and a third person who is at large and accompanied Ugaji is deposed to by Velo.

Quite apart from these facts, Rupchand, A. J. C. in *Emperor* v. *Lukman* (1) has held "Section 439 (6), Criminal P. C., does not enable an accused person, who has exercised his right of appeal and failed, to challenge the findings of facts of the appellate Court, while showing cause why his sentence should not be enhanced except in the same manner as in any ordinary revision application."

This view is also in accordance with the decision of the Bombay High Court in the case of *Emperor* v. *Jorabhai Kisanbhai* (2).

We are of opinion that grounds for setting aside the conviction of the accused in the exercise of our revisional jurisdiction are not established.

As regards the sentence, it is necessary to take into consideration the fact that Ugaji was probably a willing passive agent and a catamite. At the same time it is a fact that consent on his part is no defence though it makes the crime less serious than where an infant is kidnapped and subjected to unnatural lust.

I think that the sentence of nine months was too light. In the case of Shidoo, I would enhance the sentence to twelve months' rigorous imprisonment and in the case of Nagji who is older, to eighteen months' rigorous imprisonment.

De Souza, A. J. C.—A distinction was sought to be made by the learned pleader who argued the case for the applicants between the case of the *Emperor* v *Lukman* (1) and the present case. The ruling of Rupchand, A. J. C., that where an accused person appeals against his conviction and his appeal has been dismissed, it is not open to him in showing cause why his sentence should not be enhanced, to show cause against his conviction except to the extent that the conviction was based on no legal evidence or was manifestly erroneous, was given in a case where the appeal had been heard and decided on the merits. And Kincaid, J. C., who concurred with Rupchand, A. J. C., expressly bassed his view on the fact that in that case the conviction was supported by the findings of fact of the Magistrate and a Sessions Judge and the Magistrate had tried the case with great care and both the Magistrate and the Sessions Judge had written excellently considered judgments. In the case of *Emperor* v *Jorabhai Kisanbhai* (2) the appeal had also been heard and decided on the merits.

The point made out by the learned pleader for the applicants is that the

(1) A. I. R. 1927 Sind 39=21 S. L. R. 107.

(2) A. I. R. 1926 Bom. 555=50 Bom. 783.

present appeal had been summarily dismissed by the learned Judicial Commissioner and, therefore, the same weight should not be attached to the findings of fact of the two Courts as would have attached to them, if the appeal had been heard and decided on the merits. The learned pleader argued that the order summarily dismissing an appeal under the provisions of S 421, Criminal P C. does not amount to a judgment within the meaning of S 424 as a judgment under S 424 implies a trial. The learned pleader suggests that the final judgment in this case is not the judgment of the Court of appeal because there was none but the judgment of the trial Court and that there is no reason why the findings of fact of the trial Court should be treated as if they were the findings of Court of appeal.

I was at first impressed with this argument but on a more careful consideration, it seems to me that the order summarily dismissing the appeal virtually amounts to an order affirming the findings both of fact and of law recorded by the lower Court and there is no reason to discriminate between an order summarily dismissing the appeal under S 421, Criminal P. C and an order dismissing the appeal after hearing under S. 424, Criminal P. C. so far as its liability to attack in revision for the purposes of S. 439 Cl. (6) is concerned As pointed out by Rupchand, A. J C., it is only where there is no legal evidence at all or when there is a manifest failure of justice that the Court sitting in revision will re-open the findings of fact recorded by the two lower Courts

The learned Public Prosecutor admitted that in the present case evidence had been taken into consideration by the trial Court which was not admissible at all or which, if admissible, required corroboration. The learned pleader for the opponents, pointed out that the only corroboration of the evidence of Ugaji, the victim of sodomy, was the statement of the boy of 12 years of age and in whose statements there are several contradictions and inconsistencies. And he contended that Jumo's evidence is not sufficient corroboration of Ugaji who is after all an accomplice in the eye of the law.

It must be remembered that we are here sitting in revision and if we decide to interfere on findings of fact, it must be only because we are convinced that there had been a manifest and gross miscarriage of justice. I am unable to say that in the present case, having regard to the facts and the surrounding circumstances there has been such a miscarriage of justice It is hardly likely that a false charge of sodomy would be got up by Ugaji and that he would have complained about it to his master who immediately gave information at the police thana

In my opinion, therefore, there would be no justification for interfering with the findings of fact and for the reasons given in the judgment of my learned colleague, I would concur in enhancing the sentences as proposed

S L /R.K *Sentences enhanced.*

A I R. 1929 Sind 28

RUPCHAND BILARAM, A. J. C.

Mangairmal Tekchand—Respondents 1.

v.

Akbarali and Co.—Respondents 2.

Original Civil Misc Case No. 47 of 1928, Decided on 4th July 1928

Civil P. C., O., 21, R. 50—Rule applies to award against firm, filed under the Arbitration Act—Such award has status of decree—Courts cannot refuse enforcement of award, owing to mandatory nature of Arbitration Act S. 15.

Rule 50 applies to an award obtained without the intervention of the Court against a firm and made rule of the Court under the provisions of Arbitration Act. An award filed under the Arbitration Act has the status of a decree of the Court, though it is not a decree of the Court, The provisions of S. 15 of the Act are mandatory. They afford no scope to the Court to refuse to enforce an award in the same manner as a decree of the Court, except in cases when the Court either remits the award back to the arbitrator for re-consideration or sets it aside · *A. I. R* 1927 *Bom.* 428. *Diss. from*, 47 *Cal.* 29, *Foll.* , *A. I. R.* 1924 *Cal.* 117 and *A. I. R.* 1921 *All.* 199, *Rel. on.*

[P 29 C 2]

Suganlal Hassanand—for Respondents No. 1.

Javhermal Villiatrai — for Respondents No. 2.

Order.—The only point raised in this case is one of law.

It has been argued that O. 21, R. 50, Civil P. C , does not apply to an award obtained without the intervention of the Court against a firm and made rule of the Court under the provisions of the Indian Arbitration Act.

Reliance has been placed on the following passage in the judgment of Mirza, J., in *Valabhdas Narandas and Co.* v. *Keshavalal Himatlal* (1): at p. 664 (of 29 *Bom. L R*)

"To entitle the applicants to the benefit of O. 21, R. 50, Civil P. C., they must show that a decree has been passed against a firm. I hold that here there is no decree passed against a firm, but there is an award purporting to be made against a firm. O. 21, R. 50, Civil P. C., is taken from the rules of the Supreme Court O. 48-A, R. 8 . . . . . The provisions of O.48-A have been held to form a Code by themselves requiring that they should be read together and each rule in the light of the rest *Worcester City Banking Co* v. *Firbank* (2) and per Lindley, L. J., in *Mc Iver* v. *Burns* (3). Under the English Law, there is no provision for the execution of an award against a firm under the provisions of O. 48-A, R. 8. Mr. Wadia has called my attention to several precedents of Chamber Judges of this Court, who have accepted awards on the file against firms and granted execution against the partners . . . . . With great respect, I am unable to follow these precedents."

From the above passage, it is abundantly clear that, prior to this case, the practice of the Bombay High Court was to entertain applications under O. 21, R 50, Civil P C, in proceedings taken by way of execution to enforce awards filed under the Indian Arbitration Act. The same pratice has prevailed in this Court for the last twenty years It would also appear that the same practice prevails in the Calcutta and the Allahabad High Courts · see the cases of *Louis Dreyfus and Co.* v. *Purusottum Das Narain Das* (4), *Gladstone Wyllie and Co* v *Joosub Peer Mahomed and Co.* (5) and *Sital Prasad* v. *Clements Robson and Co*, (6) In *Louis Dreyfus'* case (4) Rankin, J. (now Sir George Rankin, C J.) has said :

"It is perfectly well-known in India, just as it has been known for many years in England, that a large proportion of awards in commercial cases are made in favour of or against the firm. Business cannot be carried on unless commercial men who have constituted themselves into firms can be allowed to deal with firms, and I shall be doing something that I should be extremely sorry to do, causing much inconvenience and trouble, giving much opportunity for fraud and collusion, if I give my assent to the argument which has been put before me. Under the Indian Arbitration Act, the award is not a decree, but it is to be enforced as though it were a decree and a decree of this Court. I certainly hold—and I have held in Chambers before to-day—that the provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed, the award having been made against the firm . . . . . In this case the machinery is provided by which you can for all the purposes of execution ascertain who are the partners in the firm, and I am not going to deprive the commercial community of the system of arbitration and award by reason of a technical objection which, I think, is unfounded in principle and has got no commercial substance."

With these observations I respectfully agree, and in the absence of strong, clear and cogent reasons for holding that the long standing practice which is now well-known to the commercial community is wrong in principle and that O 21, R 50, Civil P.C., has no application whatsoever, I am not prepared to give it a go-bye. The cases of the Calcutta and the Allahabad High Courts have not been referred to or distinguished in the Bombay case, and the reasons on which the judgment in that case has proceeded do not, with all respect, appear to me to be convincing.

An award filed under the Indian Arbitration Act has the status of a decree of the Court though it is not a decree of the Court ; *In re Bankruptcy Notice* (7) ; and may be enforced in the same manner, and to the same extent as a decree of the Court. That being so, I can find nothing in O. 21, R. 50, Civil P. C, to suggest why its provisions should not apply to awards in the same way as the provisions of any other rule in that Order. In interpreting the language of R. 50, so far as its applicability to awards filed under the Indian Arbitration Act is concerned, no analogy can, in my opinion, be drawn from the alleged English practice. In the first place, the provisions of S. 15, Indian Arbitration Act, are unlike the corresponding provisions of S 12, English Arbitration Act, mandatory. They afford no scope to the Court to refuse to enforce an award in the same manner as a decree of the Court, except in cases when the Court either remits the award back to the arbitrator for reconsideration or sets it aside Under the English Act, it is within the competence of the Court to refuse to afford the claimant a summary remedy and to refer him to a regular suit based on the award I am not at present con-

(1) A. I. R. 1927 Bom. 428
(2) [1894] 1 Q. B. 784 (788)=70 L. T. 443=63 L. J. Q. B. 542=42 W. R. 402.
(3) [1895] 2 Ch. 630=64 L. J. Ch. 681=44 W. R. 40=73 L. T. 39.
(4) [1920] 47 Cal. 29=56 I. C. 325.
(5) A. I. R. 1924 Cal. 117.
(6) A. I. R. 1921 All. 199=43 All. 394.
(7) [1907] 1 K. B. 478 (482)=76 L. J. K. B. 171=23 T. L. R. 214=14 Manson. 1=96 L. T. 131.

cerned with the rights of a claimant to enforce an award passed in his favour by a regular suit, but with his rights to enforce it by way of execution, and I can find nothing in the Act to justify the Court to refuse to enforce an award as a decree and thereby compel a party to file a suit on the award.

In the next place, the provisions relating to execution of decrees obtained against firms do not form part of O 30, Civil Procedure Code, which corresponds to O. 48-A, Rules of the Supreme Court They have been made part of O 21, which relates to execution of decrees generally, and, therefore, the argument that O 48A, Rules of the Supreme Court is self-contained, and that all the rules in that order should be read together and each rule in the light of the other loses much of its force, R. 50 is not in O. 30, but in O. 21, and there is no reason why it should not at the same time be read in the light of the other rules in O. 21 In my opinion and with all respect, these reasons are insufficient for the Court to hold that the applicability of O. 21, R. 50, Civil P. C, has not been extended to awards filed under the Indian Arbitration Act or that it is limited only to decrees passed in suits instituted under O. 30, Civil P. C. I accordingly disallow the objection and grant the application for permission to enforce the award against Akbarali with costs

S.L./R.K. *Application granted.*

** A. I. R. 1929 Sind 30

PERCIVAL, J. C., AND ASTON, A.J.C.

Govindsing—Accused—Applicant

v

Emperor—Opposite Party.

Criminal Revn. Appln No 89 of 1927-Decided on 23rd June 1927, for quash, ing of proceedings before City Mag., Karachi.

**** Criminal P. C., S. 179—Company at Karachi employing agent to sell their goods in Punjab—Agent committing breach of trust—S. 179 would govern question regarding jurisdiction of Court—Karachi Court would have jurisdiction for word "consequence" here need not be taken in strict legal sense—Criminal P. C. S. 181.**

The word "consequence" in S. 179 is to be understood in its ordinary grammatical meaning and need not be restricted to mean a consequence which is necessary ingredient of the offence. [P 31 C 2]

A company at Karachi employed an agent to sell their goods in the Punjab who committed criminal breach of trust.

Held: that with regard to jurisdiction of Court S. 179 would govern the case and Karachi Court would have jurisdiction as "consequence" in its grammatical sense had ensued at Karachi. *A.I.R.* 1922 *Bom.* 39, *Foll.* [P 31 C 2]

Hassaram Jashanmal—for Applicant.

T. G Elphinston—for the Crown.

Aston, A J. C—This is an application under S 439, Criminal P C asking this Court to set aside an order of the learned City Magistrate, Karachi, deciding that he has jurisdiction to try the charge of criminal breach of trust against the applicant.

It appears that the Asiatic Petroleum Co. appointed the applicant Gobindsing as their agent at Gujarkhan in the Punjab. The agent undertook to sell kerosene oil at the prices fixed from time to time by the company and to submit from Gujarkhan a true and correct daily account He also undertook to remit the full proceeds of the sales whether realized from customers or not for each week not later than at the end of the succeeding 14 days and at the end of each calendar month to render to the company accurate and sufficient account sales in duplicate showing the full details of sales made and of the proceeds to be remitted All remittances were to be made direct from Gujarkhan to the company in Karachi

A large number of authorities have been cited to show that the Karachi Court would or would not have jurisdiction

The Crown has relied on *Emperor* v. *Ramratan Chunilal* (1), *Emperor* v. *Laxman* (2), *Rumsahai* v. *Lala Krishnalal* (3), *Gunananda Dhone* v. *Santi Prakash* (4), *Queen-Empress* v. *O'Brien* (5), *Langridge* v *Atkins* (6), *Bajrangalal* v. *King-Emperor* (7), *Abdul Latiff Yusuff* v. *Abu Mahomed* (8), *Emperor* v. *Jamnadas Vasanji* (9).

For the applicant, the following cases have been cited:

(1) A. I. R. 1922 Bom. 39=46 Bom. 641.
(2) A. I. R. 1927 Bom. 38=51 Bom. 101.
(3) A. I. R. 1926 Lah. 119.
(4) A. I. R. 1925 Cal. 613.
(5) [1896] 19 All. 111=(1896) A. W. N. 191.
(6) [1913] 35 All. 29=17 I. C. 792=10 A.L.J. 491.
(7) A. I. R. 1921 Cal. 719.
(8) A. I. R. 1922 Cal. 46.
(9) [1915] 17 Bom. L. R. 339=29 I. C. 65=16 Cr. L. J. 489.

Allah Baksh v. *Emperor* (10), *Topandas* v. *Emperor* (11), *Bannerji* v. *Potnis* (12) *Krishnmachari* v. *Shaw Wallace & Co.* (13), *Maung Shwe Ku* v. *Emperor* (14), *Ahmed Ebrahim* v. *A A Ganee* (15), *Ganeshi Lal* v *Nand Kishore* (16), *Simhachalam* v. *Emperor* (17), *Emperor* v. *Fateh Chand* (18), *Gowa Karan Lal* v. *Sarzoo Saw* (19).

It will be seen that *Emperor* v *Ramratan* (1) draws a distinction between the words "consequence which has ensued" applied in the usual grammatical sense and the same words applied in a strictly legal sense The learned Chief Justice drew attention to the inconvenience which would result to firms which employed agents up-country if they went from place to place and misappropriated property belonging to the firm In such a case it would be difficult for the firm to establish where any property was actually received or retained by the agent or where the actual offence was committed unless the words "consequence which has ensued" were applied in the wider sense. There have been contrary rulings in different High Courts themselves notably in Allahabad and Calcutta And the argument for the contrary view to that in *Emperor* v. *Ramratan* (1), seems to be that the illustrations to S. 179 do not deal with the offences of criminal breach of trust but rather such offences as homicide or extortion. Whereas in S 181 the offence of criminal misappropriation and criminal breach of trust is specifically referred to and provision is made with regard to the Court which is to have jurisdiction to try the offences The main argument, however, of the cases which take the view opposite to that contained in *Emperor* v *Ramratan* (1), is, I think that S. 179, provides that when a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, the Court, within whose jurisdiction any such thing has been done or any such consequence has ensued, has jurisdiction

Now, it has been urged that the person is not charged with criminal breach of trust by reason of the fact that loss has ensued at a particular place but by reason of the fact that he has done certain acts with a certain intention, the fact of loss not being an ingredient

I am of opinion, however, that this is a matter in which an over-precise application of the letter of the law would confound legal certainty and result in hardship and defeat the intention of the legislature which is that wrong-doers should be brought to justice

It is the practice of the Courts in Sind to follow the decisions of the Bombay High Court and apart from that I think the decision in (1) is founded on right principles and that it is a decision which this Court should follow

I would therefore dismiss this application for revision and return the record to the learned Magistrate for disposal according to law

Percival, J. C—I agree.

Two alternative arguments have been used by the learned Public Prosecutor, namely, that the case may fall under S 179, or under S 181 (2), Criminal P C. I should like to say that according to my view, the case falls under S 179, and that the best interpretation of the section is that which is contained in *Emperor* v. *Ramratan* (1).

In that case the learned Chief Justice said:

"The whole question seems to me to depend on whether we must give to the word 'consequence' in S 179 its ordinary grammatical meaning or whether we are bound to restrict it to meaning a consequence which is a necessary ingredient of the offence. I see no justification for holding that the ordinary meaning should not be given to the word 'consequence' in S. 179 and the argument in *Queen-Empress* v. *O'Brien* (6) seems clearly pertinent in reference to this point. For instance an agent might be given goods by his employer to sell at various places, and if he performed the trust imposed upon him he would be bound to pay the proceeds of the goods which had been sold to his employer. If he did not, and employer charged him with criminal misappropriation, it would be exceedingly difficult to prove at what place he had sold any part of the goods and misappropriated the proceeds. It seems to me that S. 179 was intended to apply to such cases so as to enable an employer to file his complaint in the Court within whose

(10) A. I. R. 1924 Lah 670.
(11) A. I. R. 1925 Sind 116.
(12) A. I. R 1924 Nag. 258.
(13) [1916] 39 Mad. 576=29 M. L. J. 178=29 I.C. 331=(1915) M. W. N. 418.
(14) A. I. R. 1923 Rang. 157.
(15) A. I. R 1923 Rang. 209=1 Rang. 56.
(16) [1912] 34 All. 487=15 I C 319=10 A.L.J. 45.
(17) [1917] 44 Cal. 912=25 C. L. J. 451=41 I.C. 198=21 C.W.N. 573.
(18) [1917] 44 Cal. 477 (505)=24 C. L. J. 400=38 I.C. 945=21 C.W.N. 33 (F.B.).
(19) A. I. R. 1921 Pat. 85.

jurisdiction the loss was alleged to have been incurred."

It is to be noted that the words in S. 179 are "any consequence" not "any consequence which is a necessary ingredient of the offence."

S.N./R.K. *Revision dismissed.*

** A. I R. 1929 Sind 32

WILD, J. C., AND RUPCHAND BILARAM, A. J. C.

Mt. Ummakulsum—Appellant.

v.

Ghulam Rasul Khan Burgri and *another*—Respondents.

Misc. Appeal No 42 of 1925, Decided on 26th October 1928.

(a) Limitation Act, S. 5—Pleader's carelessness is no ground for extension.

The carelessness of the pleader is no ground for extending the period of limitation. [P 34 C 1]

(b) Civil P. C., O. 32, R. 3 (4)—Near relations parties to suit and having interests adverse to minor—Notice need not be issued against them.

When all the near relatives of the minors are parties to the suit and their interests are likely to clash with those of the minors, no notice need be issued on such relations. [P 34 C 2]

(c) Civil P. C., O. 32, R. 3 (4)—Scope.

Since the amendment in 1927 in Sind no notice to minors is essential. [P 34 C 2]

**** (d) Civil P. C., S. 96 (3)—Person denying to be party to compromise can appeal—Civil P. C., O. 23, R. 3, and O. 43, R. 1 (m).**

There is nothing in O 23, R 3, or in O. 43, R. 1, Cl. (m) to suggest that if the Court fails to demand satisfactory proof of the alleged compromise, a party to the suit who is deprived of his right to contest the compromise, is also deprived of his right to appeal against the order. S. 96, Cl. (3) presupposes that the party appealing has consented to the decree being passed. It does not purport to deal with a case where the aggrieved party was not a consenting party and had never been asked by the Court whether he had consented to a decree being passed or not. In such a case he does not appeal against the decree passed by consent, but attacks the very foundation on which the decree is passed. S. 96 (3) does not bar a right of appeal by a person who denies that he was a party to the alleged compromise. *A. I. R.* 1926 *Bom.* 39, *Dist.* [P 35 C 1]

*** (e) Civil P. C., S. 96 (3)—Decree not limited to subject-matter of suit is appealable.**

Where a compromise relates not only to property in dispute in the suit but also to other property, the order directing that a decree be passed in terms of the compromise not limited merely to the subject-matter of the suit, can be appealed against. [P 36 C 1]

(f) Civil P. C., O. 23, R. 3—Court failing to order the recording of compromise—Aggrieved party can still appeal.

The provisions of the law requiring the Court to order that the compromise be recorded are not a mere matter of form, but it is intended to afford an aggrieved party to appeal against the compromise and the failure of the Court to comply with its provisions cannot deprive the aggrieved party of the right of appeal expressly conferred on such aggrieved party by statute: 43 *Cal.* 85, *Rel. on.* [P 36 C 1]

*** (g) Civil P. C., O. 41, R 22—Compromise sanctioned—Some defendants minors—Compromise alleged to be obtained by fraud—Major defendant appealing—Minor's remedy is not by way of cross-objection—Minor.**

Where a compromise is effected between the parties to a suit in which some defendants are minors and it is obtained by fraud or under some other circumstances as to render it invalid, the remedy of the minors is not by filing cross-objections in an appeal by one of the defendants. [P 36 C 1]

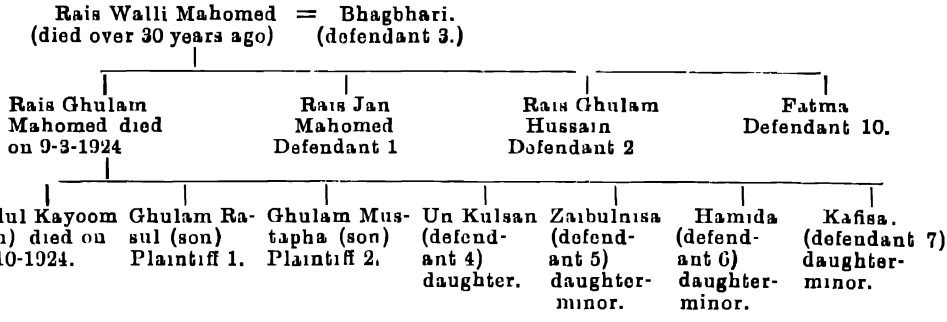
(h) Appeal—Right of—Appeal from consent decree—Review also filed—Appellate Court should grant relief in appeal if party is entitled, although same can be obtained in review.

Where a person after preferring an appeal against a consent decree has also filed an application for review, the appellate Court should not refuse the person the relief by way of appeal if he is entitled to it merely because it is open to him to get the same relief by way of review. [P 36 C 1]

Rupchand Bilaram, A. J. C.—This appeal arises out of a partition suit which is said to have been compromised. The compromise petitions were presented to the Court. The first compromise petition is dated 7th May 1925 and purports to be a compromise between (a) plaintiffs, (b) defendant 3 acting on her own behalf and on behalf of the minor defendants 5 to 7 and (c) defeudant 10. The second compromise petition is dated 11th May 1925, and purports to be a compromise between the plaintiffs and defendants 1, 2 and 4 accepting the validity of the first compromise and providing for partition of property between them in certain shares and on certain conditions. The second compromise petition is signed by (a) plaintiff 1 on behalf of himself and on behalf of his minor brother plaintiff 2 and by their pleaders, (b) by the defendants 1 and 2 (c) by the pleader of defendants 3 to 7 and (d) by the pleader of the other defendants.

Both these compromises were accepted by the Court and a decree ordered to be drawn up in terms thereof.

Defendant 4 has come to us in appeal and has contended that she was not a party to the second compromise, and that her pleader had no authority from her to agree to it The guardian ad litem appointed by this Court on behalf of the minor defendants 5 to 7 has also filed cross-objections urging that the first compromise was in no way for the benefit of the minors and was one which should never have been sanctioned The following is a tabular statement showing the relationship of the chief contesting parties to the suit :



The plaintiffs filed the suit for partition of property which they alleged was possessed by their father as a co-owner with defendants 1 and 2 in certain defined shares. They joined defendants 3 and 4 to 7 as proper parties to the suit, but denied that they had any share therein, on the ground that as female members of the family they were excluded by the custom of the family from inheriting. They did not implead defendant 10 as a party to the suit but impleaded certain strangers to the family as defendants 8 and 9 as being co-owners in certain parcels of land along with the plaintiffs and defendants 1 and 2 They also did not bring into the suit the property exclusively owned and possessed by their father Rais Ghulam Mahomed at the time of his death

Defendant 10 was joined as a party a day before the compromise petitions were accepted by the Court. According to the first compromise petition it was agreed that the names of defendants 3 and 5 to 7 were to be entered in the Record-of-Rights as cosharers in such lands in which Rais Ghulam Mahomed was shown as possessing Re. 0-8-9 pies share and that as the share of defendant 3 was to be Re. 0-2-3 pies while that of each of the defendants 5 to 7 was to be Re. 0-4-2/3 pies out of the said share of Re. 0-8-9 pies, that they had no right to have their shares partitioned or to alienate them by way of gift or otherwise, than on the deaths of any one of them, her share would devolve on the plaintiffs, that on the marriage of any of the defendants 5 to 7, all that such defendant would be entitled to was to receive a money value of her share, and that none of them would have any right to share in any other property which Rais Ghulam Mahomed died possessed of, and which was not the subject-matter of the suit.

The second compromise petition awarded to defendant 4. Re 0-0-5 pies instead of Re 0-4-2/3 pies in the same property and on the same terms and conditions on which Rs. 0-4-2/3 pies share was awarded to defendants 5 to 7 It also dealt with a settlement of disputes between plaintiffs and defendants 1 and 2 inter se.

Several objections have been raised against the maintainability of the appeal and they may be dealt with in the order in which they have been urged Through the inadvertance of the legal advisers of defendant 4 the memo of appeal as originally filed did not include the name of defendant 10 as a co-respondent Her name was brought on the record after the period of limitation for filing the appeal had expired. An application has been filed asking us to condone the delay under S. 5, Limitation Act.

It is no doubt true that the pleaders of defendant 4 were misled by the plaint of which they had a copy into the belief that the parties to the suit consisted of two plaintiffs and nine defendants only. But in our opinion that is not enough. The learned pleaders had before them the certified copy of the compromise petition which clearly specified the name of Fatma, as defendant 10 and it was their duty to have ascertained whether the plaint had not been amended by the addition of

Fatma as defendant. The carelessness of the pleader is no ground for extending the period of limitation. We accordingly hold that the appellant has failed to make out a sufficient cause for the nonjoinder of Fatma within the meaning of S 5, Lim. Act.

The failure of defendant 4 to join defendant 10 as a party to the appeal is, however, not fatal to its maintainability. It is open to any two parties to a suit to enter into a valid compromise between themselves. But such compromise cannot affect the rights of other persons who are parties to the suit, but are not parties to the compromise. Defendant 4's complaint is that as between herself and the plaintiffs 1 and 2 there has been no valid compromise and that she is entitled to get from them her legitimate share in the estate deft by her deceased father Rais Ghulam Mahomed.

If plaintiffs 1 and 2 have agreed to give a certain share in their father's property to any of the defendants and such defendants have agreed not to seek partition thereof from plaintiffs 1 and 2 it is open to defendant 4 to appeal against the alleged compromise as between herself and plaintiffs 1 and 2 impleading plaintiffs 1 and 2 only as parties to the appeal. It would also appear that so far as the rights of defendant 4 is concerned, it is limited to her right as the heir of her father, and if at all any persons other than plaintiffs 1 and 2 should have been joined as parties to the appeal such persons were the other heirs of Rais Ghulam Mahomed and such heirs were made parties to the appeal within the time allowed by law.

The third point urged on behalf of the contesting respondents was that the appointment of the nazir of this Court as guardian ad litem of the minor defendants 5 to 7 was irregular and contrary to the provisions of O 32, R. 3, Cl. (4), Civil P C., and that the appeal should not proceed until a proper guardian was appointed. It appears that the appellant was duly appointed, as guardian ad litem of defendants 5 to 7 in the lower Court, but at the time of the first compromise petition, defendant 3, grandmother of the minors, a lady said to be 80 years old, was substituted in her place. Through the inadvertance of the pleaders in the memo of appeal the appellant was shown as the guardian ad litem of her minor sisters, but that mistake was rectified by bringing on the record the Court of Wards as their guardian as the Court of Wards had assumed superintendence of their property and the property of the plaintiffs.

The Court of Wards declined to act as guardian of the minor defendants, their interests being in conflict with those of the minor plaintiffs. The nazir of the Court was therefore substituted as guardian of the minor defendants. It has been argued that this appointment should not have been made without an attempt having been made to appoint a near relative of the minors as guardian and without notice to the minors But it is clear that all the near relatives of the minors were parties to the suit and their interests were likely to clash with those of the minors, and no notice to the minors is essential in view of the amendment of O. 32, R. 3, Cl. (4), effected by notification No 925 of 1927 published at p. 1092 of the Sind Official Gazette of 1927.

The fourth point urged is that this appeal is incompetent in view of the provisions of S 96, Cl. (3), Civil P C., and the proper remedy open to the appellant is either by an application for review or by a suit. Reliance has been placed on the case of *Gulabchand* v. *Ramsukh* (1).

In dealing with this point, it is necessary to bear in mind the provisions of S 96, Cl. (3) and O 23, R 3, Civil P. C., read with O 43, R (1), Cl. (m). S 96, Cl. 3 provides that no appeal shall lie from a decree passed by the Court with the consent of parties.

Order 23, R. 3, Civil P C, reads as follows :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

Order 43, R. 1, Cl (m) provides that an order under R 3, O 23 recording or refusing to record an agreement, compromise or satisfaction shall be appealable.

On a comparison of these provisions, it is abundantly clear that where a compromise petition is presented to the Court, it should be proved to the satisfaction of the Court that the suit has been adjusted by a lawful compromise and it is on such

(1) A.I.R. 1926 Bom. 39.

proof that the Court has jurisdiction to order that the compromise so far as it relates to the suit be recorded and a decree be passed in terms there of. If a party to a suit who is alleged to have entered into the compromise challenges the compromise it is prima facie open to him to appeal against the order recording it.

In my opinion there is nothing in O. 23, R 3 or in O. 43, R 1, Cl (m) to suggest that if the Court fails to demand satisfactory proof of the alleged compromise a party to the suit who is deprived of his right to contest the compromise, before the lower Court is also deprived of his rights to appeal against the order, in Courts other than High Courts, the remedy by way of review is limited to an application for review being necessarily presented to the Judge who passed the decree, and it cannot be contested with any force that the legislature intended to deprive the aggrieved party of his remedy to challenge in the same proceedings an order passed under O. 23, R. 3, Civil P. C, unless the same judges who passed the decree continued in office.

Section 96, Cl. (3), pre-supposes that the party appealing has consented to the decree being passed. It does not purport to deal with a case where the aggrieved party was not a consenting party and had never been asked by the Court whether he had consented to a decree being passed or not. In such a case he does not appeal against the decree passed by consent, but attacks the very foundation on which the decree is based. Thereby he challenges the jurisdiction of the Court to pass the decree on the assumption that there was such consent. It would therefore appear that S. 96 (3) does not bar a right of appeal by a person who denies that he was a party to the alleged compromise

The facts of the case of *Gulabchand* v. *Ramsukh* (1) were peculiar. The appellant never disputed that he was a consenting party to the compromise, and the decree which followed, but pleaded inter alia that his consent was obtained from him by his pleader under threats

There is no such allegation in the present case, and that decision is therefore not on all fours with the present case.

The compromise petition in this case was signed by the plaintiff and defendants 1 and 2 and their pleaders and only by the pleader for the other parties.

The order of the Court reads as follows:

"Present plaintiffs 1 and 2 and defendants 1 and 2 and pleaders for the defendants.

Mr. Gopaldas states that he has authority to enter into this compromise on behalf of his clients.

A decree to be drawn in terms of this compromise and on the terms of that drawn between plaintiffs and defendants 3, 5, 6, 7 and 10. Parties to bear their own costs."

It has been argued on behalf of the appellant that the reference in the order to Mr Gopaldas is a mistake for Mr. Mulchand, that Mr. Gopaldas appeared for defendants 1 and 2 and that it was Mr. Mulchand who appeared for defendants 4 to 7 who stated to the Court that he had authority to compromise the suit inter alia on behalf of defendant 4, and that as he had no express authority in writing in that behalf, the compromise was of no effect as against defendant 4. In support of this argument reliance has been placed on the dictum of their Lordships of the Privy Council in *Sourindranath Mittra* v. *Heramba Nath Bandopadhya* (2), that a pleader who does not hold and has not filed in the suit before the Court his client's general power-of-attorney authorizing him generally to compromise suits on behalf of his client, cannot be recognized by a Court as having any authority to compromise the suit unless he has filed in the suit his client's vakalatnama giving him authority to compromise the suit before the Court.

On the other hand it has been contended that there is no mistake in the names, that Mr Gopaldas also represented defendants 8 and 9 and that the statement refers to the consent given by Mr. Gopaldas on their behalf that the appellant had compromised the suit personally and that Mr. Mulchand had only signed the compromise petition on her behalf. But we have nothing on the record to show one way or the other whether Mr Mulchand put his signature to the compromise petition in token of his having arrived at the compromise on behalf of his client or in consequence of the compromise having been arrived at personally by his client. Under the circumstances the proof required by O 23, R 3, as a preliminary to the recording of the compromise was wanting. The order passed by the learned Judge below was therefore without jurisdiction and the appellant is entitled to an enquiry being held into the

(2) A. I. R. 1923 P. C. 98.

matter for the purpose of ascertaining whether she had given her consent to the compromise or not

It would also appear that the compromise related not only to property in dispute in the suit, but also to other property left by Rais Ghulam Mahomed which was not the subject-matter of the suit and in so far as the order directed that a decree be passed in terms of the compromise not limited merely to the subject-matter of the suit, it was an order which could be appealed against even on that ground

The appellant has ex majoure cautila applied for a review of the order appealed against and that application has been allowed to stand over pending the appeal We, however, see no reason why we should not grant the appellant relief by way of an appeal if she is entitled to it merely because it is open to her to get the same relief by way of review

In the end it was finally suggested that as the learned Judge had not passed an order recording the compromise no appeal could lie. But in our opinion the failure of the learned Judge to record the compromise is a strong argument for allowing the appeal. The provisions of the law requiring the Court to order that the compromise be recorded are not a mere matter of form but it is intended to afford an aggrieved party to appeal against the compromise *Pabansardar* v. *Bhupendranath* (3) and the failure of the Court to comply with its provisions cannot possibly deprive the aggrieved party of the right of appeal expressly conferred on such aggrieved party by statute

We set aside the order recording the compromise as between the plaintiff and defendant 4 and direct the Court below to take evidence whether the alleged compromise was validly made by defendant 4 herself or not, and to dispose of the second petition of compromise so far as it pertains to defendant 4 according to law. Costs to be costs in the cause

With regard to the cross-objections filed on behalf of the minor defendants, it is sufficient to observe that they do not come within the purview of O 41, R 22, Civil P. C. and are entirely misconceived. The compromise was sanctioned by the Court. It was obtained by fraud or under such other circumstances as to render it invalid; the remedy of the minors was not by filing cross-objections in the present appeal which only brings into question a separate compromise between plaintiff and defendant 4. We accordingly disallow these objections as incompetent but make no order as to costs.

R.K. *Case remanded.*

(3) [1916] 43 Cal. 85=33 I. C. 769.

A. I. R. 1929 Sind 36

RUPCHAND BILARAM, A. J C

Kanji Ladha—Plaintiff

v

Kanji Gowa—Defendant.

Suit No 74 of 1925, Decided on 16th April 1925

Bombay Rent Act (2 of 1918 as amended by Act 3 of 1923), S. 2 (b) (2)—Premises let mainly and substantially for purpose of shop—Tenant will not be protected.

Where the real, main and substantial purpose for which certain premises were let, was the purpose of a shop and not of a dwelling house, the tenant cannot be protected. *Espon's case*, (1919) *W. N.* 171, *Dist.*, *Waller* v. *Thomas*, (1921) 1 *K. B.* 541, *Colls* v. *Parnham*, (1922) 1 *K.B.* 325, *Duke of Richmond* v. *Dawes*, (1924) 38 *T. L. R.* 151 and *Greig* v *Francis*, (1922) 38 *T. L. R* 519, *Rel. on.* [P 37 C 2]

Kalumal Pahlumal—for Plaintiff.

Hiranand Motiram—for Defendant.

Judgment—This suit has been instituted by the plaintiff landlord for ejectment and for recovery of overdue rent The defendant is a monthly tenant. There is now no dispute between the parties as to the overdue rent A sum of Rs 26-6-0 was paid by the defendant to the plaintiff's pleaders after he was served with a notice to vacate the premises, This sum was through some mistake not given credit for in the suit. The plaintiff is prepared to do so

The relief for ejectment is based on the ground that the premises are business premises, and as such ceased to be under the protection of Bombay Rent (War) Restriction Act 2 of 1918, as amended by Bombay Act 3 of 1923 after 31st August 1924. The defendant has demurred to this plea. He contends that the premises in suit were let for being used both as business premises and a dwelling house, and that even otherwise they have been so used for over two years to the knowledge of the plaintiff, and being partly used as a shop and partly as a dwelling house, the premises are as much a dwelling house as business premises, and, therefore, come within the Act which still

affords protection in respect of dwelling houses. The defendant further contends that the plaintiff having acquiesced in the use of the premises for both purposes, is estopped now from denying that it is a dwelling house. (The judgment then discussed evidence and after concluding that the premises were till recently used as a shop proceeded.) Even if it be assumed that for the last two years the premises have been used both as a shop and a dwelling house, the defendant is, in my opinion, not entitled to the protection claimed by him

Mr. Hiranand has referred to some English cases, and the recent decision of my brother Aston in *Ghulamali G. Chagla* v. *Motoomal Vassantmal* (1), which is now pending appeal

The decisions of English Courts, though entitled to great respect, can only be applied to the present case with great caution. Not only are such decisions authoritative for what was actually decided in those cases, but they are based on the English Statute containing several clauses which find no place in the Indian Statute. All those decisions refer to cases where the premises were intended to be used inter alia as dwelling houses at the time they were let. If carefully scrutinized, those decisions support the plaintiff's case and not that of the defendant. *Epsom's* case (2), decided on the old increase of Rent and Mortgage Interest (War Restriction) Act 1915, and which probably was the cause of the introduction of S. 12, sub-S. (2) (ii) in the subsequent Act of 1920 (10 and 11 Geo 5 C. 17) proceeds on the assumption that the premises were being used as a dwelling house in accordance with the terms of the tenancy. This is clear from the following observations of Banks, L. J., at p. 171

"Then is this hotel a dwelling house? The Act contains no definition of a dwelling house . . . . . Were these premises let as a dwelling house? If an agreement were to let premises as a barn, the tenant even though he lived there could not be heard to say they were let as a dwelling house. But these premises were let for occupation. The defendants and their family and servants have resided continually there, and their residence is in accordance with the agreement of tenancy. The house was dwelt in by the defendants and let to them for that purpose. It is in the fullest sense a dwelling house and none the less so, because it is also a public house."

The defendant has not proved that the premises were let for this double purpose, and his case does not, therefore, come within the purview of *Epsom's* case (1).

The English Act of 1920 conferred certain privileges and gave protection to tenants of a dwelling house, and the proviso to S. 12, Cl. (2) expressly provided that a tenant of a dwelling house was none the less entitled to that protection because part of the house was used for business purposes. This Act, by S. 13, further gave privileges and protection, but on a restricted scale to tenants of business premises And the question which is the subject-matter of decision in some of the later English rulings referred to at the Bar is whether the letting where it was for both purposes, was a substantial letting for residential purposes or for business purposes. If the former, it came within the purview of S. 12, sub-S. 2 (ii) of the Act, and if the latter, it constituted business premises under S. 13 of the Act. *Waller* v. *Thomas* (3); *Colls* v. *Parnham* (4); *Duke of Richmond* v. *Dewar* (5) and *Grieg* v *Francis* (6). As pointed out by Swift, J., in *Grieg's* case (6), it has to be determined as a question of fact what was the real, main and substantial purpose of the premises

The proviso to S 12, Cl. (2) finds no place in the Indian Statute, but assuming that the dicta in the English decisions are a safe guide in finding whether particular premises let for occupation as a shop and as residence as a dwelling house or business premises, the question which a Court must answer in each case is what was the real, main and substantial purpose for which they were let, and in the present case, that question can only be answered in one way and that is that they were let for purposes of a shop. I would prefer not to discuss the decision of Aston, A. J. C., as it is now pending appeal. Each case depends on its own facts. I would only observe that if this decision purports to lay down that because a shopkeeper sleeps in his shop or has been so doing for a number of years, the shop thereby becomes a dwelling house within the meaning of the Act, I would respectfully demur to it The plea of estoppel by acquiescence raised by the defendant has no substance in it Prior to 31st August 1924, the plaintiff could not eject

(1) Suit No. 1004 of 1924.
(2) [1919] W. N. 171.
(3) [1921] 1 K. B. 541.
(4) [1922] 1 K. B. 325.
(5) [1924] 38 T. L. R. 151.
(6) [1922] 38 T. L. R. 519.

the defendant. He has given him notice in December 1924. He is not a resident of this place, and probably did not know to what use the premises were being put if at all they were used as alleged. The defendant has in no way been prejudiced by the alleged acquiescence There can be no estoppel on a question of law, whether this dual use by the defendant makes the tenement a dwelling house under the Act or not The defendant has had four months already to find out another shop. He is not entitled to further time to give up possession. I decree immediate ejectment with costs. I also award to the plaintiff overdue rent and mesne profits at the rate of Rs. 13-8-0 per mensem from 1st October 1924, upto possession less Rs. 26-6-6 received by him.

S.N./R.K. *Suit decreed.*

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* A. I. R. 1929 Sind 38

WILD, J. C , AND RUPCHAND BILARAM, A. J C.

Khasomal and *another*—Applicants.

v

Bacho and *another*—Opposite Parties

Revn. Appln No 143 of 1925, Decided on 26th October 1928

(a) Civil P. C., O. 47—Application after limitation for alternate remedies is not incompetent.

There is nothing in O. 47 to suggest that the application for review must necessarily be made within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of a suit which has been dismissed for default of appearance . 2 *C. W. N.* 918, *Dist.* 26 *Cal.* 598, *Rel. on.* [P 39 C 1]

*** (b) Civil P. C., O. 47—Orders disallowing review application are revisable.**

The discretionary powers of revision vested in the High Court by S. 115 are not in any way controlled by the provisions of O. 47 ; such powers are intended to apply even to orders disallowing a review application : 26 *All.* 572, *Diss. from.* ; 29 *All.* 468 and 31 *All.* 610, *Rel. on.* [P 39 C 2]

*** (c) Civil P. C., O. 47—Application for adjournment by plaintiff's pleader refused —Order passed on application, in presence of pleaders in dismissing suit and another order on plaint dismissing suit ex parte—Case is fit one for review.**

On the day of hearing, plaintiff's pleader applied for adjournment as only one witness out of six was present. The application was heard in the presence of the pleaders of the parties and was dismissed. The order passed thereon was one dismissing the suit. A separate order was written on the plaint dismissing the suit ex parte for plaintiff's default. Plaintiff filed an application for review.

Held : that although the Court had jurisdiction to refuse an adjournment, it had no jurisdiction to dismiss the suit in the presence of the pleader without giving the pleader an opportunity of either arguing the case or of examining the witness who was present and asking for warrants to issue against the absent witnesses. Having dismissed the suit in the presence of the pleaders for the plaintiff, the Court had no jurisdiction to pass a second order of dismissal for default of appearance by the plaintiff after the plaintiff's pleader had left the Court. It was, therefore, a fit case for granting an application for review. [P 39 C 1]

Mahomedbux and *Chandumal* — for Defendants 1 to 5.

Judgment —The facts of this case are somewhat peculiar.

It appears that on 9th September 1924, the plaintiffs' pleader put an application to the Court asking that the hearing of the suit which was fixed for that day be postponed on the ground that out of six witnesses who had received bhatta for that day only one was present. The diary of the case shows that the application was heard in the presence of the pleaders of the parties and was dismissed. But on looking to the application itself and the order passed thereon, we find that the order states as follows :

" Messrs. Mahomedbux for defendant 1 and Chandumal for defendants 2, 3, 4 and 5 objects to this application and states that the same is malafide. The plaintiff who belongs to Naushahro Feroze has purposely remained absent as the witnesses are not to support. Two witnesses Hiranand and brother of witness Valarmal are present.

I accordingly dismiss the suit with costs as against defendant 1 only. Defendants 2 to 5 to bear their own costs."

It also appears that on the same day the learned Judge passed an order which is written on the plaint itself, and which reads as follows :

" Plaintiff absent. Mr. Mahomed Bux for defendant 1 and Mr. Chandumal for defendants 2 to 5 present. Suit dismissed with cost against defendant 1 only. Suit dismissed against defendants 2 to 5 who to bear their own costs."

On 8th December 1925 an application was filed before the same Judge for review of the order made by him on the application for adjournment No mention appears to have been made in that application for review of the subsequent order made on the plaint. The learned Judge admitted the application for review and ordered notice to issue to the defendants. That application came up

for hearing before his successor in office who held that as it was discretionary with the Judge to grant or refuse an adjournment he was not competent to grant the application for review though he expressed it as his opinion that his predecessor should not have dismissed the suit without affording in the first instance an opportunity to the plaintiff's pleader of examining the only witness who was present Now there can be no doubt that the learned Judge below failed to consider the effect of each order separately, with the result that he came to an erroneous conclusion, that he had no power to grant the review application. The first order passed by the trial Judge was passed in presence of the parties, or their pleaders This is clear from the diary of the case. Though the learned Judge had jurisdiction to refuse an adjournment, he had no jurisdiction to dismiss the suit in the presence of the pleader without giving the pleader an opportunity of either arguing the case or of examining the witness who was present and asking for warrants to issue against the absent witnesses

The second order which purports to have been passed on the same day was equally without jurisdiction The learned Judge, having dismissed the suit in the presence of the pleaders for the plaintiff, had no jurisdiction to pass a second order of dismissal for default of appearance by the plaintiff after the plaintiff's pleader had left the Court. It was, therefore, a fit case for granting an application for review.

The learned pleader for the opponents has raised two technical objections before us But there is no substance in either of them. In the first place he has contended that as it was open to the plaintiff to apply for restoration of the suit or to appeal against the order of dismissal within 30 days of the order, an application for review after the expiry of that period was incompetent. There is nothing in O 47, Civil P. C, to suggest that the application for review must necessarily be made within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of a suit which has been dismissed for default of appearance. The case of *Koilosh Mondol* v. *Naba Dwip* (1) referred to by the learned pleader which supports that view was distinguished by the same High Court three years later in the case of *Raj Narain Purkait* v. *Ananga Mohan* (2). In that case the plaintiff's suit had been dismissed for default and he had failed to apply for its restoration within the period allowed by law, and the plea of limitation was not allowed to prevail.

The second point taken by him is that an order rejecting an application for review is not open to revision by the High Court. He has referred us to the case of *Ramlal* v *Ratanlal* (3) where it was said that it was the intention of the legislature that the Court which originally heard a case should be the Court to decide whether an application to review its former judgment should or should not be granted and when the Court rejects such an application its decision should not be open either to appeal or to revision by a higher Court. But this dictum so far as it refers to the power of the High Court to interfere in revision has not been accepted as sound by the same High Court in the cases of *J. G. Willis* v. *Jawad Husain* (4) and *Akbar Khan* v. *Mahomed Ali Khan* (5).

We can find nothing in the Code to suggest that the discretionary powers of revision vested in the High Court by S 115, are in any way controlled by the provisions of O 47, Civil P C, or that such powers are not intended to apply to orders disallowing a review application. Whether the Court will exercise its discretion in any particular case or not is quite another matter.

We think that this is a fit case for the exercise of our powers and we accordingly allow this application and set aside both the orders of dismissal and direct that the Subordinate Judge do take back the case on his file and dispose of it according to law.

Costs to be costs in the cause.

R.K. *Revision allowed.*

(1) [1896] 2 C. W. N. 318.

(2) [1899] 26 Cal. 598.
(3) [1904] 26 All. 572.
(4) [1907] 29 All. 468 = 4 A. L. J. 439 = (1907) A. W. N. 132.
(5) [1909] 31 All. 610 = 4 I. C. 23 = 6 A. L. J. 884.

A. I. R. 1929 Sind 40

WILD, J C. AND RUPCHAND BILARAM, A. J. C.

Mohanlal Kotumal and *another* — Appellants.

v.

Dalpatrai Isardas—Respondent.

Misc. Civil Appeal No. 52 of 1925, Decided on 20th July 1928, from an order of Asst. Judge, Hyderabad (Sind).

Bombay Regulation 2 of 1827, S. 54 — S. 54 still applies to Sind — Pleader ill and notifying his inability—Party is entitled to reasonable adjournment for engaging another pleader.

The provisions of S. 54 are still applicable to Sind. Where therefore the pleader for the appellant has notified to the Court his inability to proceed with the appeal on account of his illness, the appellant is entitled to an adjournment for a reasonable time to enable him to engage another pleader. [P 40 C 2]

Kimatrai Bhojraj—for Appellants.
Tahilram Maniram—for Respondent.

Judgment.—This is an appeal against an order passed by the learned Assistant Judge, Hyderabad, refusing to set aside the order passed by him dismissing the appeal filed by the appellants.

It appears that Mr. Santdas, Pleader for the appellants, was ill and on 9th January 1925, one day before the date fixed for the hearing, he put in a written application asking for an adjournment. On that application the learned Judge passed the following order:

"This is an old appeal of 1919, and a stay of execution has been obtained by the appellant against the respondents. Mr. Santdas has other partners who could attend to this appeal. If this cannot be proceeded with tomorrow, for any reason, cause may be shown why the stay order may not be discharged."

On 10th January 1925, Mr. Chuharmal, a junior working with Mr. Santdas, put in a formal appearance for the purpose of repeating the application for adjournment. The learned Judge again refused to adjourn the case, but allowed Mr. Chuharmal two hours' time to prepare the brief, and later on, in the day, when Mr. Chuharmal and the appellant absented themselves from Court, the learned Judge passed an order dismissing the appeal for default, and subsequently refused to restore it to the file.

It appears that the attention of the learned Judge was not drawn to the provisions of S. 54, Bombay Regn 2 of 1827 which are still applicable to this province. By applying for an adjournment on 9th January, Mr. Santdas had notified to the Court his inability to proceed with the appeal within the meaning of that section. It would, therefore, appear that the appellant was entitled to an adjournment for a reasonable time to enable him to engage another pleader. No doubt, it is true that in certain cases, an adjournment of 24 hours to transfer the brief is ample, and that if a pleader knows a day before that he will not be able to attend to the case on account of ill-health, he should endeavour to transfer his brief. The circumstances of this case were, however, peculiar. It was a heavy appeal which required more time for preparation and it was not certain if it would be ripe for hearing The respondent had died pending the appeal. His legal representatives who had been brought on the record were minors and represented by their mother, and though she had been served with the usual notice, the Court had not passed an order appointing her a guardian ad litem of the minors nor had any appearance been put in, on her behalf up to that day. Though the appeal was an old one, it was made ripe only on 10th January, and there was every chance of its being postponed It would also appear that the vakalatnama filed on behalf of the appellants was in favour of Mr. Santdas only, and that, therefore, there was no obligation either on Mr. Chuharmal to conduct the appeal or the appellant to engage him for the appeal in lieu of his senior partner. We think that this was a case in which greater indulgence might have been shown to the appellant.

We accordingly allow this appeal, and order the learned Judge of the first appellate Court to take back the appeal on his file and dispose of it according to law.

With regard to costs, we think, it is a fit case in which each party should bear his own costs of this appeal.

R K. *Appeal allowed.*

* A. I. R. 1929 Sind 41

ASTON, A J. C.

Lalchand-Gobindram and *others* — Plaintiffs.

v.

Tejbhandas-Jagannath and *others*— Defendants.

Original Civil Suit No. 127 of 1924, Decided on 16th July 1928.

*** Provincial Insolvency Act (1920), S. 59 Cl. (1) - Compromise by receiver without sanction is not invalid.**

A compromise (accepting a certain amount in full settlement of a claim) effected by the Official Receiver without sanction of the Court is not invalid. Sanction is taken by the Official Receiver for his own protection and the compromise is binding unless set aside. The provisions regarding sanctions are administrative only. 47 *Cal.* 555, 1 *Lah.* 237 and *English cases, Rel. on.* [P 42 C 2]

Tahilram Manıram—for Plaintiffs.

Suganlal H Jeswani—for Defendants.

Judgment.—This is a suit filed by the plaintiff to recover Rs. 1,154-5-0 from the defendant on an account alleged to have commenced on 8th June 1920, and to have terminated on 9th January 1923.

Plaintiffs' case is that cloth used to be supplied to the defendant, that the account used to be settled from time to time and the balance due treated as a dusti loan. He alleges that Rs. 1,154-5-0 is due on the account and he claims interest from date of suit.

Defendants deny that there were any dusti loans. They admit that a cloth account commenced on 8th June 1920, but say it terminated before May 1921, for plaintiff applied to be adjudicated insolvent in May 1921, and, thereafter defendant merely made payments in discharge of his indebtedness. Defendants' main defence is that they owe nothing to the plaintiffs, a sum of Rs. 949-11-6 having been paid to the Official Receiver in full settlement on 9th January 1923.

Mr. Pinto who was the Official Receiver at the time denied that the Rs. 949-11-6 was paid in full settlement, but he admitted that he did not remember the circumstances and that his only ground for denying it, was, that in a credit note sent by him to the Nazir the words "in full settlement" did not appear His clerk writes the credit note and he signs it. It is then sent with the debtor to the Nazir's office. The Nazir enters the amount in his books, endorses the credit note and returns it to the Official Receiver. The Nazir then gives a receipt to the debtor and keeps a counterfoil Against the solitary fact that the words "in full settlement" were not written in the receipt there is the direct oral evidence of Udhavdas, the manager of the defendants' firm supported by the entry Ex. 35 in his cash book, viz.,

"Rupees 949-11-6 debited to Bhai Lalchand-Gobindram cash paid in full settlement in the Court"

supported by the evidence of Dwarkadas who was employed by the Official Receiver on commission to recover outstandings and who says this amount was paid to the Official Receiver in full settlement. Defendants' story is further supported by the evidence of Tulsidas who was in the employ of the defendants' firm and who states that the Official Receiver told Lilaram he was accepting the amount in full settlement. If further support were needed it is to be found in the plaintiff's own book. For the latter contains an entry with the word Chucktoo afterwards erased. Rs. 949-11-6 credited to Bhai Tejbhandas-Jagannath on 9th January 1923, "Chucktoo" The word "Chucktoo" "means settled." Plaintiff says his deceased brother erased "Chucktoo" which had been written by Ridharai It is also in evidence that no demand was made by the Official Receiver on defendants' firm and no suit filed between 9th January 1923, the date of the alleged payment in full settlement and 15th February 1924, the date when the present suit was filed.

In addition to this, the evidence shows that one Lilaram kept books under the orders of the Official Receiver and recorded settlements After the adjudication order was annulled books were returned to the plaintiff The Official Receiver enquired from the plaintiff whether he had received all the books The reply was in the affirmative. Shortly afterwards the plaintiff alleged that he had not received one of the books. The only explanation which plaintiff was able to give of his previous answer to the Official Receiver was that he relied on to Mehtas giving the books to him When Mr. Suganlal on 7th July 1924, stated to the Court he wanted inspection of the khata prepared under the orders of the Official Receiver and also of the cash book, Mr Rewachand for the plaintiff replied that no such books had been prepared under the orders of the Official Receiver and that there were no

such books in existence. At a later hearing plaintiff resiled from the position taken up on 7th July, and alleged that the books had been prepared but that they had not been handed over to plaintiff It is, in my opinion, impossible to believe the plaintiff's contradictory explanations which appear to me anything but bona fide I disbelieve the allegation that the books were not returned to plaintiff The Court is entitled to draw the presumption that if plaintiff had produced the ledger it would not have supported the plaintiff's case : see *Jag Prasad Rai* v. *Singari* (1), *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (2) and *Debendra Narayan Singh* v. *Narendra Narayan Singh* (3). At the last minute before defendant closed his case plaintiff's pleader made a strenuous demand that defendant should examine Lilaram as a witness alleging he was present in Court and threatening to make a point in argument of his omission to examine Lilaram if he failed to do so. It appears to me that if plaintiff was so anxious that Lilaram should be examined he should have examined himself.

With regard to the power of the Official Receiver to settle the claim, without sanction of the Court, plaintiff admits that some amount was due to the defendant for brokerage and that in his claim before the Official Receiver he had not deducted the amount due The evidence further shows, that there had been another account before the account in suit and the defendants' firm had been allowed brokerage and mithai in the account. The receipt of Rs. 949-11-6 in full settlement does not appear to me to have been regarded by the Official Receiver as a compromise requiring sanction within the meaning of S 59 (1), Provincial Insolvency Act. Mr. Pinto himself admitted that in cases where brokerage and mithai were due and had not been allowed for in the schedule he would accept the smaller sum in settlement than that claimed in the schedule without reference to the Court. Apart from this, as Rankin, J., pointed out in a case referred to in *Laduram-Nathmull* v. *Nandalal Karuri* (4), the Official Receiver is the person in whom is vested the property of the bankrupt, by law, the provisions regarding leave of the Court as under the English Act are administrative provisions only · see *Lee* v. *Sangster* (5), *Leeming* v. *Murray* (6) and *In re Branson, Ex parte Trustee* (7). The same principle is also applicable to liquidators of companies · see *Cycle Makers' Co-operative Supply Co.* v. *Sinns* (8) an English decision, no doubt, but the provisions of S. 179, Companies Act, are similar to those of S. 151 of the English Act and to S. 59, Provincial Insolvency Act In that case it was held that a liquidator for his own protection may take the sanction of the Court but when he took the risk, the compromise was binding until set aside by the Court see, too, *Rup Ram* v. *Fazal Din* (9) a case under the Indian Companies Act where it is held by Shadi Lal, J., that leave is a "domestic" matter and that a Court dealing with the suit is not affected by it

In view of my finding on this issue my finding on the other issues is unnecessary but in case my finding on issue 3 is wrong my finding on the other issues is as follows.

With regard to issue 1 the evidence of plaintiff with regard to the hand loans is supported by documentary evidence, viz., Exs. 10 to 16, inclusive which are admittedly genuine My finding on this issue is in the affirmative.

With regard to issue 2 plaintiff and defendant 2 agree that the account in suit commenced on 8th January 1920. Since plaintiff applied to be adjudicated insolvent in 1921, the account, in my opinion was terminated on his adjudication in that year, the exact date of which is not disclosed. Thereafter, defendants merely made certain payments in discharge of their indebtedness to the insolvent.

In view of the evidence given by the defendant and the admission of the plaintiff my finding on issue 4 is in the affirmative.

(1) A. I. R. 1925 P. C. 98.
(2) A. I. R. 1917 P. C. 6=40 Mad. 402=44 I. A. 98 (P.C.).
(3) [1920] 24 C. W. N. 110=54 I. C. 636=30 C. L J. 417.
(4) [1920] 47 Cal. 555=55 I. C. 747=31 C. L. J. 150.
(5) [1857] 2 C. B. (n.s.) 1=5 W. R. 487=3 Jur. (n.s.) 156=26 L. J. C P. 151.
(6) [1879] 13 Ch. D. 123=28 W. R. 338=48 L. J. Ch. 737.
(7) [1914] 2 K. B. 701=83 L. J. K. B. 1316=58 S. J. 416=21 Manson. 160=110 L. T. 940.
(8) [1903] 1 K. B. 477=72 L. J. K. B. 160=19 T. L. R. 153=88 L. T. 360.
(9) [1920] 1 Lah. 237=57 I. C. 223=1 P. L. R. 1921.

With regard to the question of interest the evidence of plaintiff supported by that of Ganshamdas-Dialmal shows, in my opinion, that interest is payable. No rate of interest is shown in the plaint. The Court, however, can take judicial cognizance of the fact that 6 per. cent. is the lowest commercial rate of interest. As no account has been put in, however, no specific amount of interest is shown to be due. My finding on issue 6 is that plaintiff would be entitled to charge interest at 6 per cent but no specific sum is proved to be due as interest.

With regard to issue 5 the account not having been proved the defendants' liability for the items referred to in this issue is not established. My finding accordingly is in the negative.

My finding on issue 7 for the reasons mentioned with regard to issue 3 and the other issues is nil.

I dismiss the suit with costs.

R K. *Suit dismissed.*

A I R 1929 Sind 43

DE SOUZA, A. J C

Bansidhar Mangatrai—Plaintiffs

v.

Dinanath and *Co.*—Defendants

Original Civil Suit No. 213 of 1927, Decided on 4th April 1928.

Provincial Small Cause Courts Act, Sch. 2 Art 15—Suit for money due on award is cognizable by Small Cause Court—Provincial Small Cause Courts Act, S. 23, and Sch. 2, Art. 24.

A suit for recovery of money due on an award is not a suit for the specific performance of a contract. (*A I R.* 1924 *Mad* 485, 28 *Bom.* 1; *A. I. R.* 1921 *Bom.* 399 and *A. I. R.* 1926 *Rang.* 198, *Foll.*) Nor is such a suit one for contesting an award, though incidentally the validity of the award may have to be considered. (*A. I. R.* 1926 *Rang.* 198; 42 *All.* 169 and 6 *S. L. R.* 85, *Foll.*). Such a suit is maintainable in the Court of Small Causes. [P 43, C 2]

Tahilram Maniram—for Plaintiffs

Kodumal Lekhraj—for Defendants.

Judgment.—This is a suit to recover Rs 268-13-6 said to be due to the plaintiffs under an award passed under the Indian Arbitration Act 9 of 1899. A preliminary objection was raised by the learned pleader for the defendants that the Court has no jurisdiction to entertain the suit and that the proper Court in which the suit should be filed is the Court of Small Causes.

Mr. Tahilram on behalf of the plaintiffs contends that the jurisdiction of the Court of Small Causes to entertain the present suit is barred on various grounds In the first place, he argued that this was in essence a suit for specific performance of the contract, inasmuch as the agreement to refer implied an agreement to abide by the award and therefore, a suit to enforce the award was virtually a suit for specific performance of the implied agreement. This point has been considered in a series of authorities of which the latest is a decision of the High Court of Madras in the case of *Thirumurthy Chetty* v *Ponnan Chetty* (1) where the learned Judge dissenting from the view that a suit for enforcement of an award is in essence a suit for specific performance of a contract, remarked that a suit for the recovery of amount due under an award can in no sense be treated as a suit to enforce a contract. To the same effect are the decisions of the Bombay High Court in *Fardunji* v. *Jamsedji* (2) where it was held that a suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for specific performance of the award but a suit for the recovery of the money and for relief incidental thereto. This decision was followed by the same High Court in *Erachshaw Dosabhai* v *Bai Dinbai* (3). In fact, as pointed out by the Rangoon High Court in the case of *Maung Ni* v *Maung Aung Ba* (4), the payment of money is not regarded as specific relief under the Specific Relief Act: vide the provisions of S 21 (a) and S. 12 of that Act, the relief provided in that Act being relief in specie that is the performance of a specific act of the delivery of particular articles and not the payment of money unless, of course, the contract is for the delivery of particular coins.

It, therefore, seems to me on principle as well as authority impossible to maintain that a suit for recovery of money due on an award is a suit for specific performance of a contract The next contention urged by Mr. Tahilram is that the jurisdiction of the Small Cause Court is ousted by Art. 24 of Sch 2 and S 23, Provincial Small Cause Courts Act 9 of 1887.

(1) A. I. R. 1924 Mad. 485.
(2) [1904] 28 Bom. 1 = 5 Bom. L. R. 705.
(3) A. I. R. 1921 Bom. 399 = 45 Bom, 318.
(4) A. I. R. 1926 Rang. 198 = 4 Rang. 227.

Art. 24, of Sch. 2, bars a suit to contest award Mr Tahilram's argument is that the present suit which though in terms is a suit to enforce the award is bound to raise a question as to the validity of the award and, therefore, it is virtually a suit to contest an award in a more innocent guise.

Alternatively Mr. Tahilram argued that the jurisdiction of the Court of Small Causes is barred under S 23, Provincial Small Cause Court Act, inasmuch as the plaintiffs' claim depends upon the proof of the validity of the award, a matter which the Court of Small Causes cannot finally determine since under the Indian Arbitration Act the validity of the award has to be determined exclusively by the Judicial Commissioner's Court.

Turning to the first branch of the alternative, the consensus of authorities of all the High Courts which have been reviewed in the Rangoon case of *Maung Ni* v *Maung Aung Ba* (4), above cited, is stated in the words of the learned Judge who decided the case of *Mizaji Lal* v *Partab Kuar* (5) in the following words :

> " It is argued that the suit was barred by the provisions of Art. 24 under which a suit to contest an award is not triable by a Court of Small Causes. The answer to this argument is that the present suit was not a suit to contest an award. On the contrary it was a suit to enforce an award by asking for delivery of the money which was payable under the award."

No doubt as pointed out by the learned Judges it may seem to be anomalous or even illogical that a Small Causes Court should be debarred from entertaining a suit to contest an award but should not be debarred from entertaining a suit to enforce an award in which the award may be contested. The anomaly, if any, said the learned Judges, is the concern not of the Courts but of the legislature

The same view was taken by a Bench of this Court in the case of *Chimandas Mulchand* v *Manghoomal Hemraj* (6). It was a suit filed in the Court of Small Causes to recover a sum of money due on an award. The defendant sought to impugn the validity of the award but the learned Judge of the Court of Small Causes declined to hear evidence on this defence as he thought it was one that could only be raised in the Court of the Judicial Commissioner. The Judge apparently had in mind Art 24, Sch 2, Provincial Small Cause Courts Act, under which his Court had no jurisdiction to entertain a suit to contest an award. But this Court pointed out that this was not a suit to contest an award and the Judge had jurisdiction to adjudicate on the validity of the award when the question arose incidentally in a suit that was within his cognizance The same case furnishes an answer to the argument of Mr. Tahilram which is based on S. 23, Small Cause Courts Act. It is there observed by the learned Judges following the decisions in *Damodar Gopal* v *Chintaman Balakrishna* (7), *Narayan Bhaskar* v. *Balaji Bapuji* (8), *Kesrisang Banesang* v *Naransang Manabhai* (9) that Small Causes Court has jurisdiction to decide questions of title that arise incidentally.

For these reasons, I would hold that the proper Court to entertain this suit is the Court of Small Causes, Karachi. I accordingly direct that the plaint be returned to the plaintiffs for presentation to the proper Court

S.L./R K *Plaint returned*

(5) [1920] 42 All. 169 = 58 I. C. 546 = 18 A L. J. 70
(6) [1912] 6 S. L. R. 85 = 16 I. C 868.
(7) [1893] 17 Bom. 42.
(8) [1897] 21 Bom. 248.
(9) [1908] 32 Bom. 560=10 Bom L. R. 733.

* A I R 1929 Sind 44

ASTON, A J C

Karachi Bank, Ltd —Decree-holders—Plaintiffs.

v

Khemchand Mewaram and *others*—Defendants—Judgment-debtors

Suit No 685 of 1925, and Execution Appln. No 716 of 1928, Decided on 7th January 1929.

(a) Civil P. C., O. 34, R. 6—An award decree authorizing mortgagee to recover balance after sale from mortgagor's person is not invalid.

It is permissible for a Court in a mortgage suit while passing a decree to direct that the mortgagee shall recover personally any deficit which may be found due after the mortgaged property is sold and, therefore, an award decree containing such an order is valid . *A. I. R.* 1918 *P. C.* 159, *Appl.*; *A. I. R.* 1923 *Bom.* 32, *Diss. from.* [P 45, C 1]

*** (b) Civil P. C., O. 34, R. 6—Scope.**

The rights under a valid mortgage decree directing recovery of balance personally from judgment-debtor cannot be deemed as abandoned by presenting an application under O. 34, R. 6. [P 45, C 2]

E V. Costellino—for Decree-holders

Kodumal Lekhraj — for Judgment-debtors

Judgment.—The dispute between the plaintiffs and the defendants in this suit, in which the plaintiffs sued for a sum of Rs. 55,620-12-3 or sale of the mortgaged property, and a personal decree if necessary, against the defendants in case of a deficit, was referred to arbitration and an award was passed Thereafter on 8th March 1926, the Court passed an award decree, in which the decree-holders were authorized to recover the balance remaining due to them from the person or other property of the defendants in case the net proceeds of the sale were found insufficient to pay the amount due

The property was sold some time prior to August 1928 In August 1928 the decree-holder applied for attachment and sale of the properties belonging to the defendants Subsequently on 7th December 1928 on the application of the decree-holder an order was passed granting the decree-holder a personal decree against the judgment-debtors

Mr. Kodoomal (for the defendants) contends that the rights, if any, of the plaintiffs under the award decree were abandoned that the decree-holder is in any event, estopped from asserting these rights and since the personal decree under O. 34, R. 6 was not granted until 7th December 1928, after the present application was filed, the application is incompetent.

There appears to have been some doubt as to whether a Court in passing a decree could make an order that the deficit if any, was to be recovered from the judgment-debtors until such deficit was actually ascertained. In *Keshav Manja* v. *Govind Naga* (1), the Bombay High Court ruled that the proper form for a Court to pass was an order that the decree-holder should have liberty to apply for a personal decree Their Lordships of the Privy Council, however, in *Jeuna Bahu* v. *Parmeshwar Narayan* (2), have dissented from this view It is now permissible for a Court to direct that a a decree-holder shall recover any deficit which may be found due after the mortgaged property is sold In the circumstances there is nothing invalid in the form of the award decree, and this order that the decree-holder should recover the deficit was an order which could be executed, since the deficit had been ascertained by the sale of the property This being so there was nothing invalid or incompetent in the application which was made

As regards the contention that the rights of the plaintiffs were abandoned no authority has been brought to my notice that the rights under a valid decree can be abandoned by presenting another application I think the correct view is that the decree-holder *ex majori cautilla* applied for a personal decree under O. 34, R 6 also and that his rights under the award decree remain in existence As regards the contention that the decree-holder is estopped, it is clear that the present application was pending when the personal decree was passed on 7th December 1928. I am of the opinion that no estoppel has been established In the circumstances the attachment is confirmed with costs

R K. *Order accordingly.*

(1) A. I. R. 1923 Bom 32.
(2) A. I. R. 1918 P. C. 159=47 Cal. 370.

✻ A. I. R. 1929 Sind 45

WILD, J. C. AND
RUPCHAND BILARAM, A. J C.

Narsomal Jiwandas—Appellant.

v.

Pesumal and *others*—Respondents.

Misc Appeal No 39 of 1927, Decided on 24th October 1928, from order of Asst. Judge, Sukkur.

✻ (a) Civil P. C., S. 45 — Attachment before judgment—Property in Dutch territory—Mandate, issued to British Consul there, cannot be maintained.

An order of attachment before judgment issued by British Indian Court against the partnership property lying in Dutch territory is indubitably inconsistent with the supremacy of the Dutch Government and the mandate issued to the British Consul therein cannot be maintained. [P 45 C 2, P 46 C 1]

✻ (b) Civil P. C., S. 45—Scope.

The Courts contemplated by S. 45 are Courts in the Native Indian States in alliance with the British Government. [P 46 C 1]

Judgment.—In this suit the learned Assistant Judge, Sukkur, has issued an order of attachment before judgment against the partnership property lying at Soorbaya and has further ordered that a letter of request be sent to the British Consul of that place to take possession thereof

This order violates one of the fundamental principles of international jurisprudence and is without jurisdiction.

It is well settled that British Courts have no jurisdiction over matter which cannot be rendered effective or give effect to rights which cannot be enforced without interfering with the authority of a foreign Sovereign or the doing of acts inconsistent with his supremacy: Dicey on Conflict of Laws pp 39 and 42.

The enforcement of the order of attachment of property in Dutch Territory is indubitably inconsistent with the supremacy of the Dutch Government and the mandate issued by the learned Judge below to the British Consul cannot possibly be maintained.

It is hardly necessary for us to add that there is no provision in the Code of Civil Procedure to warrant the issue of such an order. S. 45, Civil P. C which empowers the transfer of decrees though not the transfer of orders of attachment before judgment is limited in its scope It empowers transfer only to those Courts which are established by the Governor-General-in-Council in the territories of any foreign Prince or State to which the Governor-General-in-Council has by notification in the Gazette of India declared that section applicable The Courts contemplated by this section are Courts in the Native Indian States in alliance with the British Government.

We accordingly set aside the order appealed against and allow the appeal with costs.

R K *Appeal allowed.*

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* A. I. R. 1929 Sind 46

ASTON, A J. C.

Gangaram Samandas—Plaintiffs.

v

Deoomal Nihalchand—Defendants.

Suit No. 14 of 1925, Decided on 21st January 1929.

*** Civil P. C., O. 9, Rr. 6 and 7—Defaulting defendant cannot as of right by appearing at any time before judgment intervene in ex-parte proceedings—He must show good cause.**

It is unreasonable to presume an inherent right in a defendant, to cause delay and inconvenience, without being able to establish good cause for his previous non-appearance. The right to delay or defeat justice is a right little worthy of respect. A defendant, therefore, who made default, is not entitled to appear and defend the suit, at any time before judgment, as of right, without assigning good cause, and without obtaining leave: *A. I. R.* 1926 *Sind* 181, *Cons.*; *A. I. R.* 1924 *Cal.* 806; *Dist*; *A. I. R.* 1922 *All.* 33 and *A. I. R.* 1922 *All.* 110, *Expl*, *A. I. R.* 1925 *Mad.* 1122 and *A. I. R.* 1927 *Mad.* 1197, *Rel. on.*

[P 46 C 2, P 48 C 2]

Balkishendas H Hulla—for Plaintiffs.

Kodumal Lekhraj—for Defendants

Judgment.—Defendant 3 was absent at a hearing on 10th February 1928 and the Court passed an order, that the case would proceed against him ex parte under O 9, R 6

It is now contended, on his behalf, that notwithstanding his previous absence, and the order passed by the Court, he is entitled to appear and defend the suit, at any time before judgment, as of right, without assigning good cause, and without obtaining leave

The uniform practice in these Courts, of which I believe I can take judicial cognizance, has been that where the Court passed an order, that it would proceed ex parte under O 9, R 6, Civil P C. The defendant, if he subsequently wished to appear and defend the suit on an adjourned date would make an application under O 9, R 7.

My brother Tyebji, however, in a case reported in *Kala Gella* v. *Shivji* (1), was of opinion, that the contention, that a Court was not only empowered, under O 9, R 6, to proceed ex parte, when the defendant is actually not in Court, but to order that the proceedings should thenceforward be ex parte was

"opposed to a fundamental principle, on which our Courts purport to proceed, viz, that no man is to be judged, without an opportunity being given to him of being heard."

The principle that no man should be condemned without an opportunity of being heard is no doubt fundamental. "The laws of God and man" as Fortescue, J., observed in *Dr Bantley's* case, *R. V. Chancellor & Co of Cambride* (2), referred to in Broom's Legal Maxims Edn. 3, p 109 "both give the party an opportunity to make his defence, if he has any" But it is a well-known principle, that if rights are not availed of, at the proper time, they may be lost.

Under the rules of the Supreme Court in England, if a defendant or defendants make default in delivering a defence within the time allowed, and the plaintiff's claim is for pecuniary damages only or for detention of goods with or without damages the plaintiff may under O. 27,

(1) A. I. R. 1926 Sind. 181.
(2) 1 Str. 557.

R. 5, enter an interlocutory judgment forthwith, against the defaulting defendant or defendants and then proceed with his action against the other defendants

This is an example of rights being lost by a defendant owing to his default in exercising them at the proper time No fundamental principle of justice has been infringed for defendant could have exercised his right of making a defence had he chosen to do so at the proper time, but he made default.

Similarly, if a party neglects to cross-examine a witness at the proper time, he cannot, as of right, and without the leave of the Court, recall him for cross-examination

In India, if a plaintiff appears and the defendant does not appear, when the suit is called on for hearing, the Court may, in certain circumstances proceed ex parte.

Three conditions only are laid down in O. 9, R 6.

1 The plaintiff must appear, when the suit is called on for hearing.

2 There must be a default on the part of the defendant to appear when the suit is called on for hearing, and,

3. The summons must have been duly served.

Under the rules of the Supreme Court in England provision is made for the case of a defendant, who appears after the time mentioned in the writ and before judgment.

Order 12, R 22, is as follows:

"A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ."

This provision has not been embodied in the Civil Procedure Code in India.

Order 9, R. 7, of that Code is as follows.

"Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

A comparison of the two rules, above set forth, shows that the defendant, under O. 9, R, 7, on showing "good cause" is permitted to defend, as if he had appeared on the date, when the case was called on for hearing, the defendant under O. 12, R 22 of the rules of the Supreme Court in England is permitted to defend but entitled to no further time for making his defence, or any other purpose without the leave of the Court, than if he had appeared, at the time mentioned in the writ. At first sight the scope of the defence would appear to be the same and restricted to the same limits But the expression "upon such terms as the Court directs as to costs or otherwise" in O 9 R 7 seems to indicate an intention that a wider latitude was to be given to a defendant who showed "good cause" under O 9. R 7 than would be enjoyed by a defendant who simply availed himself of his right to appear under O. 12, R 22 And a defendant, who succeeds in establishing "good cause," under O 9, R 7, has been allowed considerable freedom, in these Courts, in making his defence

A ruling of the High Court of Calcutta in *Satyendra Nath* v. *Narendra Nath* (3), is relied on by the defendant, but in that case the plaintiff was absent on the date when the case was called on for hearing, though an application was made by his pleader for a postponement for the purpose of calling evidence The case did not in the opinion of the Court fall within O 9, R. 6, in fact the suit might in the opinion of the Court have been dismissed under O 9, R. 3

In *Mannu* v. *Tulsi* (4) it was held by a Judge of the Allahabad High Court that an order that proceedings should be taken ex parte against a defendant for default of appearance did not preclude him from appearing at an adjourned date and joining in an agreement to refer the suit to arbitration and that it was not necessary for him to have the ex parte order set aside

In *Bhagwat Prasad* v *Shaikh Ahmad* (5) a Bench of which the same Judge was a member gave a similar decision but no reason was given in either of these cases beyond the fact that no ex-parte decree had been passed. Wallace, J , in *Appasamy Aiyar, In re* (6) observed, that there was a paucity of authority on the point He was of opinion, however, that it was a cardinal principle to be observed in trials by a Court that a party has

(3) A. I. R. 1924 Cal. 805.
(4) A. I. R. 1922 All. 33.
(5) A. I. R. 1922 All. 110.
(6) A. I. R. 1925 Mad. 1122.

"a right to appear and plead his cause on all occasions, when that cause comes on for hearing"

and the object of O. 9, R 7 is to enable a party who wishes to be relegated back to the position, which he would have been in, if he had appeared at a previous hearing, at which he was absent and who wishes the proceedings to be taken over again in his presence, so that he may regain the opportunities of cross-examination &c., which he lost by his absence

This decision was followed in *Pattanna v. Neeli Chetty-Ramiah Chetty* (7)

I agree with my brother Tyabji and with Wallace, J., that a defendant who shows 'good cause" under O. 9, R. 7 and complies with the terms, if any, directed by the Court as to costs may be given a wide latitude in making his defence. With great respect in the absence of a provision in the Civil Procedure Code similar to O 12, R 22 of the Rules of the Supreme Court in England, I am unable to agree, that a defendant is entitled, as of right, to terminate ex-parte proceedings at any time before judgment by appearing and that he is then entitled to a limited scope of defence based on the stage of the case at which he appears This alleged right is said to be based on a fundamental principle of law or a cardinal doctrine of justice that a party ought to have an opportunity of being heard.

But an opportunity to be heard must not, I think, be confounded with a continuous right to be heard. If a party sleeps on his rights and fails to exercise them at the time and in the manner prescribed by law, he has only himself to thank if they are lost No person has any vested right in any course of procedure · see Maxwell, Interpretation of Statutes, p 400 He has only the right of prosecution and defence in the manner prescribed for the time being by or for the Court in which he sues and if that mode of procedure is altered by statute he has no other right than to proceed according to the altered mode . see Maxwell, p 400.

In many cases where the Court is proceeding ex parte the intervention of the defendant, even with a limited right of defence, at an adjourned hearing, would necessitate the recall of the plaintiff's witnesses for further examination-in-chief Again, in these cases in which the summons was for hearing and final disposal the plaintiff would be prejudiced, in that he had examined his evidence blindfold, without knowing the nature of the defence, while the defence evidence, introduced at a later stage, would be concentrated on specific points of defence, and the Court would be in the embarassing position of having to decide between one set of witnesses, examined blindfold, and not subjected to cross-examination, and another set examined with knowledge as to specific points of defence and cross-examined. It appears to me unreasonable that an inherent right should be presumed, in a defendant, to cause delay and inconvenience, without being able to establish good cause for his previous non-appearance The right to delay or defeat justice, as Mr. Maxwell points out in Interpretation of Statutes 6th Edn p 401 is a right little worthy of respect.

Both under O. 9, R 6 and O 9, R. 7 a discretion is conferred on the Court. The absence of the defendant under O 9, R 6 gives rise to the accrual of no right by the plaintiff It is the Court, which may proceed ex parte Similarly, even where the defendant shows "good cause" within the meaning of O. 9. R 7 the language is not imperative. The words are "he may" not "he shall" be heard in answer to the suit as if he had appeared &c." It seems to me a fortiori that a defendant who made default and is unable to establish "good cause" is not entitled, as of right to intervene in ex parte proceedings

Reliance lastly is placed on the principle "stare decisis." In this suit, however, all that my learned brother did was to dismiss an application by defendant 2 to set aside an ex-parte order without recording any reasons for his order

If the appeal is to stare decisis or to the maximum *Omnis innovatio plus novitate perturbat quam utilitate prodest* "every innovation occasions more harm and derangement of order by its novelty than by its abstract utility,"

by long established precedent maintained for many years in these Courts a construction has been placed on O. 9, R. 7 which is I believe in accordance with the views herein expressed and for the reasons mentioned in this judgment no reasonable grounds appear to me to be established for departing from the same Plaintiff's objection is therefore allowed.

R K, *Order accordingly.*

(7) A. I. R. 1927 Mad. 1197=51 Mad. 597.

* A. I. R. 1929 Sind 49

WILD, J. C. AND RUPCHAND, A. J. C.

Teoomal Rochaldas and *others* — Applicants.

v.

Dharamdas and *others*—Opposite Parties.

Civil Revn. Applns Nos. 130 and 133 of 1925, Decided on 22nd October 1928, from the decree of Small Cause Court Judge, Shikarpur.

*** (a) Contract Act, S. 62 — Composition bars creditor's action on original liability**

A composition between a debtor and his creditors operates as satisfaction of the debts and affords an answer to an action by the creditors upon the original liability. *Good* v. *Cheesman*, (1831) 9 *L. J. O. S. K. B.* 234, *Lewis* v. *Leanard*, (1880) 49 *L. J. Ex* 308, *A. I. R.* 1926 *Mad.* 184 and *Sind Revn. Appln.*63 *of* 1925, *Rel. on.* [P 49 C 2]

(b) Provincial Small Cause Courts Act, Sch 2, Art. 18—Composition effected between debtor and creditor and trustee appointed to collect outstandings—Creditors' only remedy against trustee is suit to enforce the trust—Such suit is barred under Art. 18.

Where a composition is effected between a debtor and his creditors, and a trustee is appointed to collect the outstandings and the trustee fails to carry out the terms of the deed, the only remedy of the creditors against the trustee is to file a suit against him for enforcing the trust. But such a suit is barred by Art. 18 from the cognizance of a Small Cause Court. A suit by the creditors on the original cause of action is incompetent against the trustee. [P 49 C 2]

Srikishindas H Lulla—for Applicants.

G A. Kikla and *Pahlagsing B. Advani*—for Opposite parties.

Rupchand, A J. C.—These connected applications have been filed againt the decree passed by the learned Small Cause Court Ju ge Shikarpur.

It appears that defendants 1 and 2 who carried on business as merchants were unable to pay their creditors in full. They proposed a composition under which defendants 3—6 were appointed as trustees to collect the outstandings due to defendants 1 and 2 and to distribute the same amongst the creditors. Under the terms of the deed they were required to deposit the moneys recovered by them with one Parmanand as banker before distribution The deed also provided that if the amount distributed amongst the creditors fell short of 12 annas in the rupee the debtor would make good such deficiency. The plaintiffs in these suits were parties to the composition. They instituted the present suits on the original causes of action and asked for decrees for the full amounts due to them less such amounts as had been paid to them by defendants 3—6. In these plaints they stated as follows:

"The defendants 3—6 have been joined for this reason that they have kept with themselves the moneys realized from defendants 1 and 2's property under the agreement through Parmanand and have not divided the same under the terms thereof. And even otherwise the said agreement has not been acted upon: so that it is ineffectual and the defendants also have behaved contrary to the agreement and the trustees too have disagreed among themselves."

The learned Judge was of opinion that each plaintiff was entitled to a decree in full against defendant 1 and was also entitled to a decree against defendants 3, 4 and 6 limited to the extent of 12 annas in the rupee less such amount as had been paid to him. Now it is well-settled that a composition between a debtor and his creditors operates as satisfaction of the debts and affords an answer to an action by the creditors upon the original liability: Leake on Contracts 6th Edn, p. 644 and *Good* v *Cheesman* (1); *Lewis* v *Leanard* (2), *Venkatasuami* v. *Kotelingam* (3), *Kalumal* v. *Kessomal*, *Revn. Appln.* 63 of 1925. The plaintiffs' suit as against defendants 1 and 2 as based on the original cause of action was therefore entirely misconcieved. As no relief was claimed against them on the basis of the compromise and no facts proved to entitle the plaintiffs to a decree against defendants 1 and 2 the learned Judge was in error in passing a decree against them. So far as the defendants 3-6 are concerned they were in the position of trustees. If they had failed to carry out the trust or if they had moneys in their hands which they were required to distribute amongst the creditors it was open to any one of the plaintiffs to file a suit against them for enforcing the trust. But such a suit was not cognizable by the Court of Small Causes in view of the provisions of Cl (18), Sch. 2, Provincial Small Cause Courts Act. The suits as framed against them were equally incompetent

(1) [1831] 9 L. J (o.s) K B. 234=2 B. & Ad. 328=4 Car. & P. 513.

(2) [1880] 49 L. J. Ex. 308=28 W. R. 719=42 L. T. 351=5 Ex. D. 165.

(3) A. I. R. 1926 Mad. 184.

and outside the jurisdiction of the Small Cause Court.

We hold that the suits as framed were incompetent and should be dismissed as such and that the plaintiffs should bear the cost throughout.

R K. *Suits dismissed.*

A. I. R. 1929 Sind 50 (1)

WILD, J. C., AND ASTON, A. J C

Vasudevmal—Accused—Applicant

v.

Emperor—Opposite Party

Criminal Revn Appln No. 125 of 1928, Decided on 22nd August 1928, from order of Dist. Judge, Hyderabad, (Sind), D/- 19th June 1928

Criminal P. C., S. 476-A — Lower Court allowing withdrawal of application without considering merits—Application is not rejected.

The word "rejected" in S. 476-A means rejected after consideration on the merits. Where, therefore, the lower Court has merely allowed the application to be withdrawn without consideration of its merits it cannot be said that the application is for the purposes of S. 476-A rejected. [P 50 C 2]

C M. Lobo—for Applicant

Partabrai D. Punwani — for the Crown

Judgment.— This is an application which arises from an order passed by the learned District Judge of Hyderabad calling upon the applicant to show cause why he should not be prosecuted for offences under Ss. 191, 193 and 209, I. P. C.

It is urged by the applicant's pleader that the District Judge had no jurisdiction to pass such an order as the alleged offences were committed in the Court of the Sub-Judge of Hyderabad. It is argued that S. 476-A, Criminal P. C., does not apply because a complaint was made in the Court of the Sub-Judge of Hyderabad and this application was rejected.

The facts of the matter are, however, that in the Court of the Sub-Judge both parties intimated that they had privately settled the matter between themselves and it was requested that the application to the Court to take action should be struck off. The order passed by the Sub-Judge was :

"Application disposed of."

Now we think that the word "rejected" in S. 476-A means rejected after consideration on the merits. S. 476-A gives power to the superior Court to take action when the lower Court has not taken action or when the lower Court has not rejected an application for taking action This seems to show that the superior Court cannot take action when either the lower Court has not taken action or after considering the matter before it, has rejected an application that action should be taken under S. 476, where, however, as here the lower Court has merely allowed the application to be withdrawn without consideration of its merits it cannot be said that the application is for the purposes of S 476-A rejected. Moreover, the order appears to us to be one of doubtful legality and one which we should treat as a nullity as the offences were not such as could be compounded. For these reasons we dismiss the application and we would deprecate a custom of applying to this Court when it is open to the party to apply to the lower Court. In this case the learned District Judge who passed the order merely asked the applicant to show cause and probably had not considered the matter about jurisdiction It was open to the applicant in the first place to go to the District Judge and put forward the arguments which he has put forward before us.

R K. *Application dismissed*

A. I. R. 1929 Sind 50 (2)

RUPCHAND AND DESOUZA, A. J. CS.

Hussain Haji Umar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 316 of 1927, Decided on 26th March 1928.

(a) Bombay District Muncipal Act (3 of 1901), S. 151 (1)—Person manufacturing oil by machinery without license can be convicted.

A manufactory or place of business where machinery is used for the purpose of extracting oil does involve a risk of fire. A person can, therefore, be convicted for manufacturing oil by means of machinery within the Municipal District without obtaining a license in respect thereof. [P 51 C 1]

(b) Bombay District Municipal Act (3 of 1901), S. 151—For awarding continuing fine it must be proved that accused was continuing offence after prior conviction—Unless such charge is specifically made and finding

is given as to number of days of continuing breach, an order awarding continuing fine is unwarranted.

Before a continuing fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days. This charge must be the subject of a separate prosecution, and a separate inquiry. It is only on proof of the charge so laid that the Magistrate is called upon to exercise his discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied. [P 51 C 2]

Balkishendas H. Lulla—for Applicant.

C. M. Lobo—for the Crown.

Rupchand, A J. C—In this case, the applicant has been convicted and sentenced to a fine of Rs. 50-0-0 for non-compliance with the rules of the Karachi Municipality in so far that he had manufactured oil by means of machinery within the Municipal District without obtaining a license in respect thereof and to a further fine of Rs. 10-0-0 per day, until he obtains a license. He has now come to us in revision

On his behalf, it has been contended that the bye-law framed under S. 48 (b), Sub-Cl. (3), Municipal Act, requiring a license was ultra vires as the manufacturing of oil by means of machinery was not a nuisance within the meaning of S 151, District Municipal Act. This argument loses sight of the very important words in Cl. (n) of that section which refer not only to a manufactory or place of business from which offensive or unwholesome smells arise but also to a manufactory or place of business which may involve risk of fire.

We are not prepared to hold that a manufactory or place of business where machinery is used for the purpose of extracting oil does not involve a risk of fire. The legislature has vested the discretion in the municipality to decide whether any particular manufactory involves a risk of fire and the exercise by the municipality of such discretion cannot be interfered with by the Court unless the Court is satisfied that such discretionary powers have been manifestly abused. There is no such allegation much less proof in the present case. We think therefore that the applicant has been rightly convicted of the breach of the rules requiring him to take out a license.

The only other question is the legality and propriety of the fines imposed on the applicant

Now the order requiring the applicant to pay a continuing fine of Rs. 10-0-0 per day is on the face of it bad and unmaintainable It is not the failure of the applicant to obtain a license, but the continued use by him of the premises without a license that is made punishable Furthermore, the section clothes the Magistrate with a discretion to impose any fine not exceeding Rs. 40 per day for each day the premises are used without a license.

On a plain reading of the section, it is abundantly clear that before a fine is imposed for a continuing offence it must be alleged and proved that the accused had continued to use the premises for a specific number of days after his conviction, and that he had no license during those days This charge must necessarily be the subject of a separate prosecution, and a separate inquiry. It is only on proof of the charge so laid that the Magistrate is called upon to exercise his discretion and to determine what would be the proper amount of fine per day which the accused should be made to pay and to give a finding as to the number of days for which such fine is to be levied. This order is at most a declaratory order as to the proper fine which the applicant will be required to pay for a prospective offence if he commits one and as such it is clearly unwarranted by law

With regard to the fine of Rs. 50-0-0 imposed on the applicant, it would again appear that this was a test case. The applicant was not the only person who had failed to obtain a license and that there had been no previous prosecution in respect of the manufactory of oil by machinery. We are also told that the applicant has since paid the license fee for that year.

Under the peculiar circumstances of this case, the learned Public Prosecutor has not pressed for a heavy fine. We accordingly reduce it to Rs. 15-0-0 only.

The result is that we uphold the conviction, but reduce the fine for the first offence from Rs. 50 to Rs. 15 and order that the balance of the fine, if paid, should be refunded, and we set aside the order of fine for the continuing offence and order that the fine, if recovered, should likewise be refunded.

R K. *Fine reduced.*

A. I. R 1929 Sind 52 (1)

PERCIVAL, J. C. AND RUPCHAND, A. J. C.

Jethanand—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln No 223 of 1928, Decided on 17th January 1929, against judgment of Bench of Hony Mags., Karachi.

(a) Bombay District Municipalities Act (3 of 1901), S. 155—For daily fine, person must be first convicted for principal breach and secondly conviction for continuing the same.

There must first be a conviction for the breach, and again a subsequent conviction for continuing the breach from the date of the first conviction, before an order can be passed inflicting a daily fine. *A. I. R.* 1929 *Sind* 50, *Foll.* [P 52, C 1]

(b) Bombay District Municipal Act (3 of 1901) S. 161 — Applications by accused under consideration—Time is not extended.

The delay caused by the fact that petitions made by the accused were under consideration cannot extend the period of six months allowed in such cases. [P 52, C 2]

U B. Chandiramani—for Applicant.

C. M Lobo—for the Crown.

Judgment.—This is a revision application against the conviction and sentence passed by a Bench of Honorary Magistrates, Karachi The accused was convicted for refusing to increase an air-well, as directed by the Karachi Municipal Authorities, under S. 96, Act 3 of 1901 and sentenced to pay a fine of Rs. 25 under S. 155 of the said Act, and was further warned to carry out the work before 24th October 1928, failing which he would be fined Rs. 5 per day after that day.

With regard to the second order, it has been laid down in *Hussain Haji Umar* v. *Emperor* (1), that there must first be a conviction for the breach, and again a subsequent conviction for continuing the breach from the date of the first conviction, before an order can be passed inflicting a daily fine.

As regards the first part of order, namely, the fine of Rs. 25 under S 155 of the Act, objection is taken on the ground of limitation. It is pointed out that in this case notice was issued in July 1927, and the first sanction was given on 17th September 1927, whereas the complaint was not filed till May 1928. The reason for the delay was that the applicant had made various petitions to the municipality, which were being considered before the complaint was filed

There is no authority, however, for holding that the delay caused by such petitions can extend the period of six months allowed in such cases.

The objection on the ground of limitation is therefore valid On this ground the conviction and the first part of the sentence, namely, the fine of Rs 25, must also be set aside.

The convictions and sentences are accordingly set aside and the fines, if paid, should be refunded to the applicant.

R.K. *Convictions set aside.*

(1) A. I. R. 1929 Sind 50.

A. I. R. 1929 Sind 52 (2)

RUPCHAND, A J. C.

Mahomedally Ebrahimji and *others* — Plaintiffs.

v.

Lakhmichand Issardas and *others* — Defendants.

Original Civil Suit No 626 of 1926, Decided on 25th April 1928.

(a) Mahomedan Law—Waqf.

A waqf created in favour of objects of khairat is void and unenforceable on the ground of vagueness and uncertainty 75 *P. R.* 1907 and *Sidik Hoosein* v. *Haji Sulleman Abdul Wahid*, *Bom. Suit No.* 604 *of* 1902 *Appr.*; *A. I. R.* 1929 *Bom.* 127 *Rel. on.* [P 55, C 1]

(b) Mussalman Waqf Validating Act (3 of 1913)—Act has no retrospective effect.

The Act has no retrospective effect and cannot be construed as validating deeds executed before its date: *A. I. R.* 1922 *P. C.* 107, *Rel. on.* [P 54, C 2]

(c) Mussalman Waqf Validating Act (3 of 1913), S. 2, Cl. (1)—Definition of 'Waqf' is given for the purposes of the Act.

The definition of waqf is given for the purposes of the Act. The Act does not purport to deal with the validity or otherwise of waqfs for objects which are indefinite and uncertain but declares that certain waqfs for the maintenance and support of the waqif, his family and descendants shall, under certain circumstances, be treated as valid. [P 55, C 1]

G A. Kikla—for Plaintiffs.

Kimatrai Bhojraj, *Issardas Oodharam*, *Tahilram Manram* and *Nadirshah Naoroji*—for Defendants.

Judgment.—The facts giving rise to this case are somewhat as follows:

One Ebrahimji, a Borah Mahomedan, resident of Karachi died in the year 1909, leaving behind him a widow Rahmatbai and seven sons—plaintiff 1, one Alibhoy since deceased and defendants 5 to 9.

He had also another son Abdul Hoosein who predeceased him whose son is defendant 4.

By his will he bequeathed the property in suit to Rahmatbai. She died in 1914 and by her will dated 29th June 1912, which is duly registered, she appointed defendants 5 to 9 as trustees of the property and bequeathed it for "khairati" purposes. The relevant clause in the will reads:

"Clause 7—I wish and direct that my said sons shall get the above-mentioned property transferred in my name in the Government records and they are and shall be at liberty to let the said property from time to time, to recover the rent thereof, to file suits in the proper Courts against the tenants for receiving rent or possession or to do any other thing from time to time that may have to be done. From the income of rent thereof, they shall deduct the expenditure on repairs, etc., and pay up the taxes, etc., and the balance money shall be utilised in "khairati" purposes in my name as my aforesaid sons deem fit."

It is said that after her death her heirs executed an agreement, which is not registered and bears no date agreeing to give effect to the will of Rahmatbai The property in suit is the family residential house of Ebrahimji and continues to be occupied by his sons other than plaintiff 1, who appears to have been living and trading separately from his other brothers both before and after the death of his father. In 1918 the deceased Alibhoy and defendants 4 to 9 created a mortgage on the property in favour of defendant 1. In 1924 they submitted to an award in respect of the mortgage which was made rule of the Court in Judicial Miscellaneous No 382 of 1924.

On 4th August 1926, the property was sold in proceedings taken to enforce the award and purchased for Rs. 15,200 by defendant 2.

On 12th August 1926, plaintiff 1 and his son plaintiff 2 instituted the present suit under S. 92, Civil P. C , after obtaining the necessary sanction of the Collector of Karachi for a declaration that the property was dedicated to "khairati" works, i. e., charitable purposes, and that the mortgagors had, therefore, no saleable interests therein and for a scheme being prepared for the due administration of the trust.

The chief contesting parties are the plaintiffs, on the one hand, and defendant 1, on the other

The auction-purchaser, defendant 2 in the case, is indifferent about the result of this litigation, as he has applied for setting aside the sale in the connected execution proceedings on the ground that the mortgagors had no saleable interest in the property and has obtained an order for the purchase-money being deposited in a Bank pending the disposal of this suit.

The main point in the case is as to the validity of the trust created by the deceased in favour of the objects of khairat which are left to be determined by the trustees. If such a trust is void and unenforceable under the Anglo-Mahomedan Law as administered by our Courts, there is an end of the whole case and in that event there will be no need for consideration of the other points in issue I have, therefore, heard the parties on this issue as a preliminary legal issue Now, it is, no doubt, open to a Mussalman whether he be a Sunni or a Shia to create a waqf by his will provided the property which is the subject of the waqf does not exceed one-third in value of his whole estate· *Baker Ali Khan* v *Anjuman Ara Begam* (1) and that where the subject of the waqf exceeds one-third in value of his property, it may, under certain circumstances, be rendered valid by the consent of his heirs. It will also not be seriously disputed that a waqf in favour of khairat is treated as lawful in ancient texts on Mahomedan Law, and is one which it was obligatory for the Qazi to give effect to In Chap 10 of Ameer Ali's Mahomedan Law, Vol 1, p. 273, (Edn. 4) which deals wit hthe *Nowkoof Alaihim* or the objects of a waqf, the learned commentator has said:

"According to all the Schools of Mussalman Law, a waqf may be created for the benefit of any person or class of persons, or for any object of piety or charity . . . . . The words 'piety' and 'charity' have a much wider signification in Mussalman Law and religion than in any other system. *Khair, birr, ihsan*, etc., include every purpose which is recognized as good or pious under the Mussalman religion and the Mussalman Law, and the test of what is 'good' or 'pious' or 'charitable' is the approval of the Almighty. Every 'good purpose' (wajah-ul-khair) which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful waqf or dedication."

It is, therefore, abundantly clear from this passage that a waqf in favour of khair is not limited to the specific objects of charity recognized in the contempla-

(1) [1903] 25 All. 236=30 I. A. 94=8 Sar. 997 (P.C.).

tion of the English decisions, and that it includes many more objects than those falling within the ambit of the expression "dharam" which finds place in Hindu wills and which is said to mean "charitable, religious or philanthropic purposes."

In *Ranchordas Vandravandas* v. *Parvatibai* (2) a devise to dharam was held to be void on the ground of uncertainty, and in delivering the judgment of their Lordships of the Privy Council, Sir Richard Couch said:

"It is not necessary for their Lordships to refer particularly to the cases in the Indian Courts, where it has been held that a devise or bequest for dharam is void for vagueness and uncertainty. They begin at an early period both in Bombay and Calcutta, and according to the judgment of the appeal Court, are numerous. The reasons for the decisions of the English Courts upon devises or bequests of a similar nature are stated by Lord Eldon in his judgment in the leading case of *Morice v. Bishop of Durham* (3). He says (10 Ves. 539): 'As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it be reviewed by the Court, or if the trustee dies the Court itself can execute the trust—a trust, therefore, which in case of maladministration could be reformed and a due administration directed, and then, unless the subject and objects can be ascertained upon principles familiar in other cases it must be decided that the Court can neither reform maladministration nor direct a due administration' Lindly, L. J., refers to this judgment and says [*In re Macduff* (4)]. 'That is the principle of that case and has been enunciated or repeated from time to time.' In the latter case the words of the bequest were 'purpose, charitable or philanthropic.' In Wilson's Dictionary 'dharam' is defined to be law, virtue, legal or moral duty, and the language of Lord Eldon applies as strongly, if not more so, to dharam as to the words used in the English cases. The objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control."

These observations apply with greater force to a waqf created in favour of khairat, that is to say, in favaur of all good purposes whatsoever be their nature and where such good purposes are not specified but left for determination by the trustees.

It is argued that the principle in the *Bishop of Durham's* case (3) should not apply to a waqf by a Mussalman which conforms to the ancient text and that the Judge who takes the place of the Qazi is equally bound to give effect to it, however indefinite and uncertain waqf may be according to English precedents. It is further argued that the Mussalman Waqf Validating Act 6 of 1913, gives statutory recognition to all waqfs which are recognized by the Mussalman Law as religious, pious or charitable, that the doubt if any, which existed as to the validity of waqfs for purposes of khair is removed by this Act and that all such waqfs should, therefore, be given effect to.

The first line of argument is based on the observations made in that behalf in Ameer Ali's Muhammadan Law, Vol. I, p 414, 4th Edition, and in Tyabji's Muhammadan Law, p. 596, Edn 2. With all respect, I prefer to accept and follow the view of Sir Roland Wilson in his notes to para. 322 at p. 345 (Edition of 1920), where the learned commentator has said:

"The assertion in Ameer Ali's Muhammadan Law, Vol. I p. 325, that the principle laid down in *Morice* v. *Bishop of Durham* (3) is not applicable to trusts or consecrations under that law, seems to be founded on a misapprehension of the principle, which, when rightly understood, is seen to be involved in the very nature of civil jurisdiction. To construe a trust 'for good purposes unspecified' as exempting the trustee from all judicial control would be in effect to construe it as no trust at all, but a beneficial bequest to him personally; on the other hand, to construe it, with the learned author, as empowering "the Hakim" to frame a scheme at his own discretion, is to confer upon the officer so designated a function which is not judicial but administrative. it is to make the so-called waqf in effect, a bequest to the State—only that the State is to estimate the goodness of different purposes by a Mahomadan standard. If this is realty Mahomadan Law, it is outside the province of that law in British India."

With regard to the second line of argument, it is sufficient to observe that the Mussalman Waqf Validating Act has no retropective effect and canuot, in the words of their Lordships of the Privy Council in *Khajeh Sulehman Quadir* v. *Salimullah Bahadur* (5), "be construed a validating deeds executed before its date.

As the will in issue was executed in 1912, it is not necessary for me to discuss the effect of S 2, Cl. (1), of that Act which reads as follows:

"'Waqf" means the permanent dedication by a person professing the Mussalman

(2) [1899] 23 Bom. 725=26 I. A. 71=1 Bom. L. R. 607=7 Sar. 543 (P.C.).
(3) [1804] 9 Ves. 399=10 Ves. 522.
(4) [1896] 2 Ch. 451=65 L. J. Ch. 700=45 W. R. 154=74 L. T. 706.
(5) A. I. R. 1922 P. C. 107=49 Cal. 820=49 I. A. 153 (P.C.).

faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable."

It is sufficient for me to observe that the definition of "waqf" is given for the purpose of that Act, and that that Act does not purport to deal with the validity or otherwise of waqfs for objects which are indefinite or uncertain, but declares that certain waqfs for the maintenance and support of the waqif, his family and descendants shall, under certain circumstances, be treated as valid.

Trusts created in favour of khairat have been held to be void for uncertainty by the Punjab Chief Court in *Sahab-ud-Din* v. *Sohan Lal* (6) and by the Bombay High Court in *Sidik Hoosein* v. *Haji Sulleman Abdul Wahid*. Suit No 604 of 1902 in the latter case Batty, J, has said on this point as follows:

"With reference to Cl. 30 it is, for the plaintiffs and defendants 6 and 7, contended that the phrase "some good charities which is in the vernacular expressed by the word "khairat" is so vague and uncertain as to include such purposes as would fall under the expression "dharam" which in respect of Hindu wills has been held too general and indefinite for the Court to enforce *Vandravandas Purshotamdas* v. *Cursondas Govindji* (7). The Chief Interpreter has given the Dictionary meaning of the phrase which appears to extend to "good works" generally being derived from "khair" excellent or good. For defendant 9 it is suggested that the testator's own enumeration of the specific charities which are to derive benefit from previously mentioned bequests defined the meaning of the phrases as used by him. But those bequests at most afford illustrations of some of the characteristics caused by the phrase, and cannot be taken as furnishing an exhaustive definition. Moreover, Cl. 18 apparently included in the same category a bequest which whether for the spiritual benefit of the testator or purely commemoration, could hardly be regarded as "charitable." I think the word "khairat" might, and probably was intended to include good works which might conduce to the credit of the testator by reason of some meritorious character in them unconnected with any secular benefit to others."

This judgment has been referred to with approval by Crump, J, in the case of *Mariambai* v. *Fatmabai* (8) which recently has been decided and has up to now only appeared in the "Times of India." The parties in the case of *Mariambai* v. *Fatmabai*(8) were Borahs, and belonged to same community as the testatrix in the present case.

I hold that the bequest in question is invalid for want of certainty, and that, therefore, this suit fails *in limine* and is dismissed The plaintiffs to bear costs of defendants 1 and 2. Separate sets of costs to be taxed. Other defendants to bear their own costs.

I may, however, note that in course of his arguments, Mr. Tahilram contended that he should be permitted to lead evidence that the word "khair" among Borahs refers to the giving of feasts to the jamayat. I have refused to allow this evidence to be led, as in the first place, the case as laid contains no such averment, and, in the second place, the will is written by a Hindu petition-writer who appears to have used the expression in the sense in which it is generally understood, and lastly, that though giving feasts to jamayat may be one of the objects of the alleged charity, it could not have been the sole object of the testatrix as is clear from the words which follow vesting the discretion in the trustees to apply the money to such "khairat" as they deemed fit.

S L./R.K. *Suit dismissed.*

(6) [1907] 75 P. R. 1907=139 P. W. R 1907=168 P. L. R. 1908.
(7) [1897] 21 Bom. 646.
(8) A. I. R. 1929 Bom. 127.

A I. R. 1929 Sind 55

PERCIVAL, J C. AND RUPCHAND A J. C

Uttamchand Brijlal—Applicants.

v.

Balmokand S L.—Opponents.

Civil Revn. No 111 of 1926, Decided on 26th September 1927, against order of Tyabji, A J. C., D/- 13th August 1926, reported in *A I. R* 1927 *Sind* 177.

(a) Arbitration Act (9 of 1899), S. 9—Arbitrator appointed sole arbitrator under S. 9 (b)—He refusing to act — Procedure to be applied is not that in S. 8 (1) (b) but procedure in S. 9 only will be repeated—Arbitration Act (9 of 1899), S. 8 (1) (b).

Where an arbitrator appointed by one party is made sole arbitrator under S. 9, the other party having refused to appoint its own, but he afterwards refuses to act, the procedure to be followed is not that laid down in S. 8 (1) (b); but that in S. 9 will be repeated and the party, who appointed the arbitrator, who became the sole arbitrator, may appoint a fresh arbitrator after giving notice to the other side: 43 *Bom.* 809, *Rel. on.* [P 56 C 2]

(b) Arbitration—Clause in contract—Suit on contract brought within time—Defen-

dant, however, relying on clause to refer in that contract and getting suit stayed—It is immaterial if reference is made beyond period of limitation.

Where on the basis of contract, which contained a clause to refer disputes to arbitration, the plaintiff sued and his suit was within time, but the defendant relying on the clause to refer, got the suit stayed and the matter was referred to arbitration, it is immaterial if the reference itself was made after the statutory period, the suit being within time. [P 57 C 1]

(c) Contract Act, S. 28, Excep. 1—Agreement to refer falling within scope of Excep. 1—No question of limitation arises.

Per Rupchand, A. J. C.—Where the agreement between the parties to refer to arbitration falls within the four corners of Excep. 1 to S. 28, no question of limitation can ever arise, for, in that case, the claimant has no cause of action for instituting a suit so long as his damages have not been ascertained by recourse to arbitration: *Cayzer, Irvine & Co. Ltd.* v. *Board of Trade*, (1927) 1 *K. B.* 269, *Relon.* [P 57 C 2, P 58 C 1]

(d) Arbitration—Clause in contract providing reference to arbitration but not barring suit to enforce claim—Claim not enforced either by suit or arbitration during limitation period—There subsists no dispute under contract to be enforced by arbitration.

Per Rupchand, A. J. C.—Where a contract provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof, but the claim is not enforced within time either by suit or arbitration, there subsists no dispute between parties under the contract which may be enforced by arbitration: *A. I. R.* 1926 *Sind* 209, *Foll.*; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, (1926) *A. C.* 497, *Ref.* [P 58 C 1]

Kundanmal Dayaram—for Applicants.

E. V. Castellino—for Opponents.

Percival, J. C.—This is a revision application against the order of Mr. Tyabji, A. J. C., directing that the award in the case should be filed. The facts of the case briefly, so far as they only refer to this application, are that there were three appointments made of an arbitrator. Respondents 1 (now opponents) first appointed Mr. Statham, arbitrator and they gave notice accordingly under S. 9 (b), Arbitration Act, to the other side, that is, to respondents 2 Respondents 2 failed to appoint their arbitrator, and Mr Statham became sole arbitrator, but afterwards refused to act. The same procedure was adopted in respect of Mr. Penn Simkins, and he also refused to act as arbitrator. Finally the same course was a second time adopted in the case of Mr. Statham. On this occasion Mr. Statham acted as a sole arbitrator, and made the award which is now under consideration.

The record also shows that respondents 1 filed a suit within three years of the date of the claim, which suit was admittedly in time. After the suit had proceeded for two years respondents 2 relied on the arbitration clause and had the suit stayed; and the suit was still pending when the order was passed by Mr Tyabji.

The two points raised in this application are, firstly, that the procedure adopted for the appointment of the arbitrator was not correct, and that the arbitration was, therefore, invalid; and, secondly, that the reference to the arbitration was made too late, and that the claim is, therefore, time barred.

On the first point, the question depends on Ss. 8 and 9, Arbitration Act. It is urged on behalf of the present applicant that S 8 (b) applies in this case, because, when a sole arbitrator has once been appointed under S. 9, then you have to turn back to S 8 to see what procedure is to be adopted in case the sole arbitrator refuses to act. I am, however, unable to accede to this argument, because, in S 8 of the Act, it is provided that, if the arbitrator neglects or refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator umpire, or third arbitrator I think that this makes it clear that S. 8 (1) (b) cannot refer to such a case as is dealt with in S. 9 where the submission provides for reference to two arbitrators, one to be appointed by each party. This view of the law, it appears, was approved in *Gopalji Kuverji* v. *Morarji Jeram Naranji* (1), at p 830. Where it was stated that S. 9 applies only to joint appointment by consent.

We come back, therefore, to the position that the procedure to be adopted is that laid down in S. 9. In respect of S. 9, it is argued by the learned pleader for the applicant that that section does not state what is to be done in case the person who becomes a sole arbitrator refuses to act. I think, however, that, when Cls. (a) and (b), S 9 are read together, it may fairly be inferred that the party who appointed the arbitrator,

(1) [1919] 43 Bom. 809=50 I. C. 411=21 Bom. L. R. 308.

who became a sole arbitrator, may appoint a fresh arbitrator, after giving fresh notice to the other side. That is to say the precedure provided by S. 9 is to be repeated, and that is exactly what was done in this case For these reasons, the objection based on Ss. 8 and 9, Arbitration Act does not appear to be valid.

Turning to the objection on the ground of limitation it is argued that the claim is time barred because reference to arbitration was made (it is contended) three years after the claim became due. It appears to me, however, that it is not necessary to go into the question whether the reference to arbitration was made after the requisite time or not. All that we have to consider here is whether the suit was filed within the requisite period of limitation. Here there is no doubt that the suit was so filed, and it was respondent 2 who relied on the arbitration clause and had the suit stayed

I do not propose to go into other points connected with the question of limitation. It appears to me that the claim cannot be held to be time barred because the suit was filed within a requisite period of limitation. The application is, accordingly, dismissed with costs.

Rupchand, A J. C—I concur The submission clause in the contract in dispute provides for the appointment of two arbitrators one by each party and contains no machinery for compelling one of the parties to the submission to make an appointment on behalf of the other.

It, therefore, falls clearly within the purview of S 9, Arbitration Act, which supplements the requisite machinery for enforcement of an agreement to submit disputes to arbitration of that nature. I can find nothing in S. 9 to suggest that the same machinery may not be invoked over again and the whole procedure gone through from the beginning to the end if on account of any unforeseen circumstance the nominee of one of the parties who is appointed as the sole arbitrator under the provisions of Cl (b) of that section refuses or neglects to act. The repetition of the procedure laid down by the section, on a refusal or neglect of the sole arbitrator so appointed, affords a fresh opportunity to the party who has made default in the first instance to reconsider his position and to appoint if he so wishes his own nominee when he is called upon to do so again.

Now, if Cls. (a) and (b), S. 8, Arbitration Act, are carefully analyzed they clearly show that neither of them applies to a submission which provides for the appointment of two arbitrators one by each party. Cl (a) clearly contemplates a submission to a single arbitrator from its very inception and does not apply to a submission which provides for more than one arbitrator acting in the matter at any time. Cl (b) which follows Cl. (a) deals with appointment of a substitute and prima facie refers to the substitute of a sole arbitrator appointed under a submission of the nature contemplated by Cl (a), that is to say, a sole arbitrator appointed in pursuance of a submission which does not contemplate the appointment of more than one arbitrator in any event. The words "the parties do not supply the vacancy" in that clause as also the words "concur in the appointment of an arbitrator" used in the latter part of that section indicate beyond doubt that the submission is one which requires the parties themselves to concur in the appointment of a sole arbitrator.

Our attention has not been drawn to any decided case in which a different view has been taken. On the contrary the case reported as *Gopalji Kuverji* v. *Moraji Jeram Naranji* (1) supports the view that Cls. (a) and (b), S 8, refer to submissions which provide for the appointment of a single arbitrator. The first ground, therefore, fails.

In dealing with the second objection the learned Additional Judicial Commissioner has proceeded on the broad ground that the Limitation Act does not apply to settlement of disputes by arbitration and, therefore, it is open in every case to a party to enforce the submission clause, notwithstanding the fact, that the claim in dispute is statute-barred on the date on which he claims to refer the dispute to arbitration. With all respect I am unable to accept this broad proposition of law. Where the agreement between the parties falls within the four corners of Exception I to S. 28, Contract Act, which exception is based upon the ruling in *Scott* v. *Avery* (2), no question of limitation can ever arise, for, in that case the claimant has no cause of action

(2) [1856] 5 H. L. C. 811=25 L. J. Ex. 308 = 4 W. R. 746=2 Jur. (N. S.) 815.

for instituting a suit so long as his damages have not been ascertained by recourse to arbitration. In such a case no question of limitation arises and the observation of the learned Additional Judicial Commissioner would indubitably apply. As an authority for that proposition reference may be made to the case of *Cayzer, Irvine & Co. Ltd.* v. *Board of Trade* (3).

But different considerations apply to an ordinary submission clause contained in a commercial contract which provides for a reference to arbitration of disputes arising out of the contract and does not purport to bar the right of a party to enforce his claim in Court before he has obtained an award in respect thereof. In that case a cause of action immediately arises to the aggrieved party and if he wishes to enforce his claim he should be vigilant. He may take early steps either to enforce his claim by arbitration or by a regular suit. If he sleeps over his right for over the statutory period prescribed for the institution of his suit he is liable to be defeated by the plea that as his claim is barred by limitation and as no suit is maintainable in respect thereof there is no subsisting dispute under or arising out of the contract which may be enforced by arbitration. This was the view taken by me in *In the matter of the Arbitration Act* (4).

As observed by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (5), the jurisdiction of an arbitrator depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute subsisting between the parties under the contract I think it goes without saying that if there is no dispute subsisting between the parties under the contract there can be no reference to arbitration in pursuance of the submission clause contained in such contract. Where a party is called upon to nominate his arbitrator after the expiry of the period of limitation and raises the plea that he is not prepared to go to arbitration as the claim is timebarred it is difficult to see how such a plea can be said to arise out of the contract which may be adjudicated upon by the arbitrator. His refusal to do so would, therefore, give no right to the opposite party to nominate an arbitrator on behalf of his opponent or to nominate his arbitrator as the sole arbitrator to settle such disputes. From this point of view no question arises as to the applicability of the Limitation Act to arbitrations. And there is no occasion, therefore, to consider whether the case of *In re Astley & Tyldesley Coal Co.* and *The Tyldesley Coal Co* (6), which held that an arbitrator was bound to give effect to the plea of the statute of limitation if it was raised before him as a defence, was rightly decided or not That point has been left undetermined in the more recent case of *Hirji Mulji* v. *Cheong Yue Steamship Co.* (5) referred to above, and may be dealt with when a proper case for its consideration arises. So far as the facts of this case are concerned the second objection is easily disposed of on a much narrower ground. The opponents' claim was not barred by the statute As a matter of fact, they had already instituted the suit. It was stayed under S. 19, Arbitration Act, and could easily be revived again by leave of the Court in the event of the arbitration proving infructuous. It was also not open to the applicant to approbate and reprobate. It was he who had asked for arbitration. Further more the application which was in writing contained a clear acknowledgment of the liability of the applicant to pay such amount as was found due by the arbitrators and revived the period of limitation. The second plea was, therefore, without any foundation whatsoever and was one which should never have been raised. The application will, therefore, stand dismissed with costs.

S N /R K. *Revision dismissed.*

(3) [1927] 1 K. B. 269.
(4) A. I. R. 1926 Sind 209=19 S. L. R. 24.
(5) [1926] A. C. 497=95 L. J. P. C. 121=31 Com. Cas. 199=134 L. T. 737.
(6) [1893] 68 L. J. Q. B. 252=15 T. L. R. 151=80 L. T. 116.

A. I. R. 1929 Sind 58

RUPCHAND A J. C.

Shaw Wallace and *Co.*—Respondents 1

v.

Gurbuxsing Beshensing—Respondents 2.

Misc. Case No. 275 of 1927, Decided on 22nd December 1927.

(a) Arbitration—Buyer and seller — Contract providing appointment of arbitrator by one party for the other after seven days from despatch of notice—Notice not delivered to other party for a fortnight—Sufficient cause for not enforcing terms of clause not shown —Terms must be enforced.

Where according to the terms of the indent the seven days, after which the other party should have power to appoint an arbitrator on behalf of the defaulting party, were to count not from the date of the receipt of the notice, but from the date of its posting; but the notice was actually delivered to the defaulting party after a fortnight and no sufficient ground had been urged why these provisions of reducing the period of notice to seven days from the date of despatch and agreed to by the parties with open eyes should not be given effect to.

Held : that the objection by the defaulting party to the appointment of arbitrator on their behalf by the other party on that ground must fail. [P 59 C 2, P 60 C 1]

(b) Contract Act, S. 52 — Party desiring to enforce submission clause must specify nature of dispute and nominate his arbitrator first—Arbitration Act, S. 9.

Where a party intended to enforced the clause providing submission of disputes to arbitration, he should in the first instance perform his own part of the contract for the proper and expeditious disposal of the arbitration proceedings. He should, therefore, not only specify the nature of the disputes which are to be referred but also intimate to the opposite party the name of the arbitrator selected by him so as to enable the opponent to choose another person as his nominee. [P 60 C 2]

Where according to the terms of the indent between sellers and buyers, there was no express provision that in case of failure by one party to appoint its arbitrator, the other party could appoint both arbitrators at once.

Held . that the party desiring to enforce the submission clause ought to nominate his own arbitrator first and if both arbitrators are appointed at once, the award is liable to be set aside : *A. I. R.* 1921 *Mad.* 58, *Dist.*, *Muir* v. *City of Glasgow Bank*, (1879) 4 *A. C.* 337 ; and *Burton* v. *English*, (1884) 53 *L. J. Q. B.* 133, *Rel. on.* [P 60 C 2]

Tahilram Maniram—for Respondents 1.

P. S. Shahani—for Respondents 2.

Judgment.—These are objections to an award filed under the Indian Arbitration Act. The disputes between the parties arose out of an ordinary commercial contract for sale by respondents 1 to respondents 2 of sugar.

On 9th June 1927, respondents 1 sent a notice to respondents 2 calling upon them to appoint an arbitrator within seven days of the date of the notice for the purpose of settling their claim arising out of the resale of sugar which was not taken delivery of, notice was actually delivered to respondents 2 on 25th June 1927.

On 21st June 1927, respondents 1 sent a further notice to respondents 2 intimating to them that as the requisition made by them in their first notice was not complied with they had appointed Mr. Gilks as arbitrator on behalf of respondents 2 and had also appointed Mr. Graham as arbitrator on their behalf.

Notwithstanding the protest by respondents 2 that the appointment was invalid and intimation being given by them that Mr. Clayton would act as their arbitrator, Messrs. Graham and Gilks proceeded with arbitration and passed an award, which is now challenged on two grounds : first, that the appointment of Mr. Gilks on behalf of respondents 2 before the expiry of seven days after the receipt of the notice to them, was bad in law and secondly, that the notice calling upon them to appoint their arbitrator was also bad as it did not contain the name of the person who was to act as arbitrator on behalf of respondents 1.

Now the material clauses of the indent which have a bearing upon these objections are Cls. 10 and 15 They run as follows :—

Clause 10 :

"All letters and notices given to the buyers by the sellers in connexion with this contract may be sent by prepaid post letters and addressed to the buyers at Amritsar, which the buyers hereby admit to be their address, and all notices so sent shall be considered to be served on the buyers at the time same ought to have been delivered in due course of post by the Post Office, etc."

Clause 15 :

"Disputes of whatever nature arising out of this contract. . . . shall be referred to the arbitration of two European merchants, residing in Karachi . , . One to be appointed by each party. If either party fail to nominate their arbitrator within seven days after notice calling upon them to appoint an arbitrator has been sent to them by registered post, the other party shall have power to appoint an arbitrator on behalf of the defaulting party. Should the two arbitrators be unable to agree, they shall refer the case to an umpire, who shall also be a European merchant, residing in Karachi."

It would appear from these clauses that the parties have provided in explicit and unequivocal terms that seven days were to count not from the date of the receipt of the notice, but from the date of its posting The underlying object of these provisions is clear They are intended to prevent parties, particularly those living in different places, from delaying the performance of their part of the contract, and in the event of its breach, of delaying,

likewise, the settlement of disputes by arbitration and payment, of the amount so found due, by the simple process of evading service of notices sent to them by post as appears to have been done in the present case. The registered cover in question was indubitably sent to the proper address as suggested by respondents 2. In the ordinary course of events it should have been delivered within two days of its despatch It was admittedly not delivered to them for a fortnight. The cause of inordinate delay may well be surmised

No sufficient ground has been urged why these provisions of reducing the period of notice to seven days from the date of despatch and agreed to by the parties with open eyes should not be given effect to.

The first objection, therefore, fails.

The second objection, however, stands on a firmer footing. The submission clause empowers each party to the contract to nomitate an arbitrator on behalf of his opponent in the event of default but is silent as to the order in which each party is required to perform the reciprocal promise of nominating an arbitrator on his own behalf On behalf of respondents 1 it is contended that it was open to them to nominate their own arbitrator at any time whatsoever and that they were quite in order in nominating both their own arbitrator and the arbitrator on behalf of respondents 2 at one and the same time Reliance has been placed on the case of *Shaw Wullace & Co* v. *Subbiar & Sons* (1), te which respondents 1 were parties. But that case is clearly distinguishable. There the submission clause was differently worded and was as follows :

"Should either party omit to nominate an arbitrator within seven days of the receipt of a notice calling on him so to do, the other party shall be at liberty to nominate both arbitrators."

In express terms, the above clause reserves liberty to respondents 1 to nominate both the arbitrators after default by their opponent to comply with a notice given on that behalf. Now S. 52, Contract Act, provides that when the order in which reciprocal promises are to be performed is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires and there can be no doubt that where a party intends to enforce the submission clause, he should in the first instance perform his own part of the con tract for the proper and expeditious disposal of the arbitration proceedings. He should, therefore, not only specify the nature of the disputes which are to be referred, but also intimate to the opposite party the name of the arbitrator selected by him so to enable to opponent to choose another person as his nominee. That this is the procedure is evident from the provisions of 9, Arbitration Act, which deals, inter alia with submissions which provide for appointment in the first instance of two arbitrators, one to be nominated by each party but contain no provision empowering one of them to nominate an arbitrator on behalf of his opponent in the event of default

There is also another reason why I am not prepared to accept the contention of respondents 1, assuming for the moment that the nature of the transaction does not necessarily indicate that the party claiming arbitration is in the first instance required to nominate his own arbitrator and that the submission clause is open to two alternative constructions.

The submission clause of which respondents 1 are indubitably the authors must be construed *fortius contra proferentum* as per Lord Blackburn in *Muir* v. *City of Glasgow Bank* (2) : see also the observations of Brett, M. R , in *Burton* v. *English* (3) If respondents 1 intended to reserve to themselves the right of appointing both the arbitrators simultaneously, it was for them to make their intention clear and having failed to do so, they have to thank themselves, if the present award is thereby rendered infructuous. Under these circumstances I am afraid I cannot uphold this award, and I accordingly set it aside Looking, however, to the conduct of respondents 2 and particularly the fact that this objection was not raised until a very late stage of the proceedings, I order that each party should bear his own costs of the proceedings

D.D. *Award set aside.*

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(1) A.I.R. 1921 Mad. 58=44 Mad. 406.

(2) [1879] 4 A.C. 337=27 W.R. 609=40 L.T. 332.

(3) [1884] 53 L.J. Q.B. 133=12 Q.B.D. 218= 32 W.R. 655=5 Asp. M.C. 187=49 L.T. 768.

A. I. R. 1929 Sind 61(1)

WILD, J. C. AND MILNE, A. J. C.

Mt. Tirathbai—Applicant.

v.

Mt. Sugnibai—Non-Applicant.

Criminal Revn. Applns Nos. 160 and 146 of 1928, Decided on 24th September 1928, against an order of 1st Class Magistrate, Sukkur.

Criminal P. C., S. 203—Previous similar complaint dismissed by co-ordinate Magistrate—Dismissal not set aside—New complaint cannot be entertained.

It is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co ordinate jurisdiction and the dismissal has not been set aside by higher authority 23 *Cal.* 983, 22 *All* 105 2) *All* 7 36 *All.* 120, *A I R.* 1922 *Sind* 23 and *A. I. R.* 1928 *Sind* 49, *Foll.* [P 61 C 2]

B. P. Samtani—for Applicant

C. M Lobo—for the Crown.

Judgment.—The first of these applications is to quash the proceedings instituted on complaint by opponent against applicant and others in the Court of the First Class Magistrate of Sukkur, and the second is to set aside an order passed in those proceedings.

The ground on which the first application is based, is that, a former complaint on the same facts by opponents against applicant in the Court of another Magistrate was dismissed under S. 203, Civil P C. It may be added that in the former proceedings process was issued against applicant's husband only but he was discharged under S 259, Criminal P. C. for failure of opponent to appear on one of the days of hearing.

The question therefore is whether it is open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority. In the case of *Queen Empress* v. *Adamkhan* (1) this question was answered in the negative on the ground that it is utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority This ruling was referred to in two subsequent cases of the Allahabad High Court, *Emperor* v. *Mehrban Hussain* (2) and *Ram Bharos* v. *Bahan* (3) and was not expressly dissented from In *Nilratan Sen* v. *Jogesh Chandra* (4) of the Calcutta High Court which was followed in *Queen Empress* v. *Adamkhan* (1) it was pointed out that the Criminal Procedure Code distinctly lays down a procedure for having an order dismissing a complaint or discharging an accused person set aside and that it seems reasonable to conclude that the legislature intended that such an order should be interfered with only in the manner provided by the Code.

The principle that no complaint can be entertained against a person formerly discharged in proceedings in connexion with the same offence has twice been approved by this Court in reported rulings: *Chandiram* v *Emperor* (5) and *Shah Mahomed* v *Emperor* (6). In the case of two hitherto unreported revision applications of this year the proceedings have been quashed owing to the dismissal of a prior complaint on the same facts.

The ratio decidendi in *Queen Empress* v. *Adamkhan* (1) and *Nilratan Sen* v. *Jogesh Chandra* (4) appears to be a sound one and embodies the principle which has been accepted by this Court. We therefore set aside the proceedings against the applicant and those against whom the complaint was lodged along with her. As the first application is granted, the second application is naturally not pressed.

R.K. *Proceedings set aside.*

(1) [1899] 22 All. 106=(1899) A.W.N. 211.

(2) [1906] 29 All. 7=4 Cr. L. J. 59=3 A.L.J. 562=(1906) A.W.N. 245.

(3) [1914] 36 All. 120=12 A. L. J. 106=22 I. C. 734=15 Cr. L. J. 153.

(4) [1896] 23 Cal. 983=1 C. W. N. 57.

(5) A. I. R. 1922 Sind 23=15 S. L. R. 131.

(6) A.I.R. 1928 Sind 49=21 S. L. R. 127.

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* A. I. R. 1929 Sind 61(2)

MILNE, A. J. C.

Thawerdas Sirumal and *another*—Plaintiffs.

v.

Secy of State and *others*—Defendants.

Civil Suit No 311 of 1924, Decided on 11th December 1928.

*** (a) Civil P. C., S. 80—Scope.**

A substantial compliance with the provisions of S. 80 is sufficient; *A. I. R.* 1928 *Cal.* 74, *Appl.* [P 63 C 1]

(b) Words—" Haq " and " Kabze."

" Haq " (right) and " kabze " (possession) would seem to denote the incidents of a permanent tenure. [P 65 C 2]

*** (c) Sind Commissioners circulars—Special circular 23—Land washed and reformed is property of proprietor and not of Government—Alluvion and diluvion.**

Lands washed away and afterwards reformed on an old site which can be clearly recognized remain the property of the original owner: 13 *M. I. A.* 467 (*P.C.*), *Rel. on.* This is the general law applicable throughout India including Sind. The law laid down in Special Circular No. 23 of the Commissioner in Sind is not different. [P 67 C 2]

(d) Sind Commissioner circulars—Special circular 23 para. 3—" Owner "—Meaning.

The owner referred to in para. 3 is the permanent occupant, who has permanent proprietary rights in the land for purposes of cultivation. [P 68 C 1]

(e) Alluvion and diluvion—Accretion.

Where it appeared that in ther eformed land there had been a definite change in each year, according to the actual course of the river after the inundation season, it cannot be held, that there was any accretion. 13 *M. I. A.* 467 (*P.C.*), *Appl.* [P 68 C 1, 2]

Kodumal Lakhraj—for Plaintiffs.

Choithram Lakhraj—for Defendant 1.

Milne, A J. C—This suit coming on for hearing issue 13 is tried as a preliminary issue.

Issue 13.—Is the suit bad for want of notice ?

For defendant 1.—(By consent notice exhibited Ex. 5 with accompaniments, petition to Commissioner-in-Sind of 14th June 1922 and a copy of the Collector's order of 8th May 1922).

Plaintiffs allege that they and the brother of defendant 3 became owners, by various transfers, of 122 acres in Deh Tangiani. Under S 13, General Clauses Act 4 of 1897, singular includes plural, plaintiff meaning plaintiffs and relief, reliefs. The notice is given by Thawerdas alone. The reliefs mentioned in the plaint are not stated.

In *Bhagchand Dagdusa* v. *Secy. of State* (1), it was laid down that the Act must be read in the natural meaning of the words, S. 80 is mandatory and no exceptions are indicated.

In *Bhola Nath Roy* v. *Secy. of State* (2), it was held that the notice should state names, descriptions and places of residence of all plaintiffs. This objection can be taken in a second written statement or later: *Secy. of State* v. *Dipchand Poddar* (3). The plea may be raised at the hearing The issue has been framed

The 24 *Mad* case was not followed by Calcutta, It is single Judge ruling. The Privy Council ruling: *Secy of State* v. *Dipchand Poddar* (3), lays down that there are no exceptions. Chandiram, plaintiff 2, made a petition asking for a separate allotment of land; he is not joint: the plaint does not show them to be joint.

Plaintiffs are not joint: they are suing separately. Ex 37 shows they were separate (after suit); Chandiram says they separated in 1925

Defendant 2—Nil

Plaintiffs.—In the first written statement no such defence was raised In para 17 of the plaint it was alleged that notice was duly given The plaint was amended to include a relief for possession: and I filed a sketch. Defendants filed a further written statement in which the question of notice was raised.

The suit is said to be bad for want of notice: not that the notice is defective. Notice is sufficient if it substantially fulfils the purpose: in *Secy of State* v. *Perumal Pillai* (4) notice was given by one of the two plaintiffs: cf. also *Jahangir* v. *Secy of State* (5).

Plaintiffs are a joint family and plaintiff 1 Thawerdas is the managing member. To the notice the petition to the Commissioner was appended: this raises all the questions in dispute. I rely on *Kessoram Poddar & Co.* v. *Secy. of State* (6). All the details need not be stated: *M. Venkatakrishnier* v. *Secy. of State* (7) and *Bholaram Chowdhury* v. *Administrator-General* (8) are to the same effect.

Thawerdas (Ex. 27) says they were joint: Chandiram corroborates Exs. 30, 112 and 113

In *Bhagchand Dagdusa* v. *Secy. of State* (1) the suit was filed before the two months notice expired.

Finding.—This issue was tried as a preliminary issue. Two grounds of objection were taken: (i) that in the notice

(1) A. I. R. 1927 P. C. 176=51 Bom. 725=54 I. A. 338 (P.C.).
(2) [1913] 40 Cal. 503=16 I. C. 849=17 C. W. N. 61.
(3) [1897] 24 Cal. 906.
(4) [1901] 24 Mad. 279=11 M. L. J. 117.
(5) [1903] 27 Bom. 189=5 Bom. L. R. 30,
(6) A. I. R. 1928 Cal. 74=54 Cal. 969.
(7) A. I. R. 1926 Mad, 408.
(8) [1904] 8 C. W. N. 913.

the reliefs claimed are not stated and (ii) the names, descriptions and places of residence of all the plaintiffs are not shown.

There is no force in the latter objection. There does not seem to be any substantial ground for disbelieving the evidence of the plaintiffs that at the time of the filing of the suit they were joint. Plaintiff 2 states that they became separate in 1925; the defendants point to a petition made by plaintiff 2 in 1924 in which he asked that his eight annas share in the suit land should be entered separately This petition was made after the suit was filed and it does not perhaps follow that the plaintiffs were then separate. The petition may merely indicate the state of mind which subsequently resulted in partition. But in any case even if plaintiffs were separate the case: *Kessoram Poddar & Co.* v *Secy of State* (6) would appear to apply: it would appear from that ruling and it is a reasonable proposition that a substantial compliance with the provisions of S 80, Civil P. C is sufficient In the present case, defendant 1 knew from the petitions that had been made to revenue officers from time to time, the area in dispute, whether there were 1 or 2 claimants was not very material, but they were aware that plaintiff 1 who carried on the correspondence with the revenue authorities claimed through his father and it would be natural to expect that plaintiff 1's brother was interested in the land. The revenue authorities have dealt with plaintiff 1 as representing the claim arising out of his father's interest in the land.

Nor is there any substance in the contention that the reliefs claimed have not been clearly stated in the notice To the notice was appended a copy of the last petition submitted by plaintiff 1 to the Commissioner-in-Sind in which the facts of the case are stated. The first relief claimed is a declaration of ownership and in para 5 (h) of that petition plaintiff 1 claimed all the kacha, 135 acres as his property. The second claim is, that plaintiffs are entitled to the first grant of new kacha land thrown up in front of their land; that claim is stated in para 5 (b) of the petition. The 3rd claim that the Collector's order of 8th May 1922 is illegal, is consequential; a copy of the order was attached to the notice and the petition itself was an appeal against that order. The claim for a declaration that the grant of 30 acres from the suit land to defendant 2 was void, was also consequential; as also the claim for a permament injunction against defendant 1 and the claim for mesne profits from defendant 2 The claim to 30 acres granted to defendant 2 is stated in para. 2 of the plaint. I hold therefore that defendant 1 had clear notice of all the reliefs claimed.

Plaintiffs' case.

Gamboshah in 1881-82 took up 184 acres of kacha land; he sold 49 acres to one Bachal; and in 1891 Gamboshah took up a further area of 50 acres and Bachal 30 acres. There had been erosion between 1881 and 1891 In 1892 Gamboshah sold 36 acres to Kewal and Sher Mahomed On 6th April 1897 plaintiffs' father, Sirumal purchased Sher Mahomed's half share in the 36 acres sold by Gamboshah. On 15th September 1897 plaintiffs' father purchased 36 acres from Gamboshah, being portion of the 184 acres taken by Gamboshah in auction in 1881-82 and still remaining with Gamboshah. On 30th June 1898 Sirumal and the brother of defendant 3 purchased the 50 acres purchased by Bachal from Gamboshah's original grant: thus plaintiffs were now owners of the land remaining from Gamboshah's original auction-purchase: Kewalmel having a half-share in 36 acres and the brother of defendant 3 a one-third share in 50 acres Kewalmel, father-in-law of plaintiffs in 1896 gifted his half share 36 acres to plaintiffs. Plaintiffs' father remained in possession of his share till 1919. Plaintiffs were a joint Hindu family; plaintiff 1 managed the lands as plaintiff 2 was a school master. The total area of the land purchased by plaintiffs' father or gifted to plaintiffs was 122 acres in which defendant 3 has a one-third share in 50 acres.

In 1922 the Collector granted 30 acres out of the suit land to plaintiffs for five years; and 30 acres to defendant 2 for five years; 44 acres were to be disposed of subsequently, a total of 104 acres. In 1922 out of the 122 acres about 18 acres had been eroded.

The Secretary of State contends that 8 acres of the 122 remain: the rest are under water. That is not correct: 104 acres remain. But if the land was eroded and new land was formed in its place,

plaintiffs are still the owners. Plaintiffs rely on S. 46, Land Revenue Code: Sathe pp. 99 to 103 : gradual accretions are the property of the riparian owners: *Thakurain Ritraj Koer* v *Thakurain Sarfaraz Koer* (9), where a river changes its bed the rights of the original owner of the new bed remain : *Haradas Acharjya Chowdhury* v. *Secy. of State* (10), private property submerged and then left bare belongs to the original owner: *Keshav Prasad Singh* v. *Secy. of State* (11); *Rahimaddhi Matabhar* v. *Niamaddi Howaldar* (11a), *Sher Bahadur Singh* v. *Tafazul Husain* (12), *Mt. Raj Kunvari* v *Uma Prasad* (13): *Sri Thakurji* v *Jaikali Kunwur* (14), (land capable of identification): *Lopez* v *Muddun Mohun Thakoor* (15) and *Nasarvanji Pestamji* v. *Nasarvanji Darasha* (16)

The following were exhibited by consent :

(Certified copy of Collector's order of 8th May 1922 exhibited Ex 6) (Certified copy of Commissioner's order 19th July 1922 Ex. 7), (letter from Mahalkari Manjhand to plaintiff 1 of 28th August 1922 Ex 8 with sketch Ex. 9); (letter of Mahalkari Manjhand to Jashanmal Ex 10), (agreement of Sirumal and Isardas regarding occupation of 50 acres of land purchased from Bachal, in favour of Government. Ex 11). Corresponding notice of relinquishment by Bachal, 1st July 1898 Ex. 12 Agreement regarding occupation of 18th September 1897 by Sirumal regarding 36 acres purchased from Gamboshah Ex 13. Corresponding notice of relinquishment by Gomboshah Ex. 14 Agreement of 6th April 1897, by Sirumal in respect of half of 30 acres purchased by him from Sher Mahomed Ex 15. Corresponding notice of relinquishment Ex 16. Register of persons taking up and resigning land in deh Tangiani Ex. 18, Extract from deh from 5 of 1881-82 Ex. 17. Letter from Mahalkari Manjhand of 20th December 1926, Exhibits 19 and 20, accompaniments: Maps of the course of the Indus near Manjhand from 1905-1906 to 1920-21, Exs 21 to 25.

Defendant admits transactions in paras. 1 to 7 of the plaint, the gift and partition in paras. 8 and 9 are not admitted.

(Report dated 5th December 1921 below Collector's endorsement, Ex. 26 The Government Pleader objects to the production of Ex. 26 as it is a Government record, S. 123, Evidence Act, but the document has been filed in Court by defendant 1.)

Defendant 1.—Under S 123, T. P Act, a gift must be in writing and registered Even if the Transfer of Property Act did not apply, transfer of possession is necessary *Vasudev Bhat* v. *Narayan Daji* (17): the donee must be put into possession ; *Bhaskar Purshotam* v *Saraswatibai* (18)

The question of partition is a matter of evidence ; also the question of possession of 122 acres Defendant 1 says that plaintiffs had originally in their possession 116 acres in deh kacha Tangiani of which 17 belonged to defendant 3, and 15 to Kewalmal.

The alleged gift does not convey any title to plaintiffs ; under S. 79, Land Revenue Code, the transfer must be recorded in revenue records The section was in force in 1896 when the transfer took place

The question of what area was eroded and what area was thrown up is a question of evidence. Only the southern portion of plaintiffs' land remains ; the statement in Ex 9 that 8 acres in the north remain alone of plaintiffs' land is a mistake. About 56 acres remain of plaintiffs' kacha land in deh Tangiani ; including 17 acres of defendant 3 and 18 acres of Kewalmal. The area of the whole kacha in 1921-22 was 135 acres 37 guntas The area of the original kacha in 1892 was 201 acres. We cannot state from any records the area of the kacha between 1892 and 1921 In 1921 of the 135 acres 79 belonged to Gamboshah and Bachal ; either they or Government were the owners ; Sirumal was not the owner His land was on the east of the Khan wah. It has to be proved that fresh land has appeared and

(9) (1905) 27 All. 655=8 C. C 293=32 I. A. 165=8 Sar. 873 (P.C.).
(10) A. I. R. 1917 P. C. 86.
(11) A. I. R. 1927 P. C. 80=6 Pat. 481=54 I A. 156 (P.C.).
(11a) A. I. R. 1927 Cal. 565.
(12) A. I. R. 1927 Oudh 368.
(13) A. I. R. 1927 Oudh 559.
(14) A. I. R 1927 All. 243=49 All. 328.
(15) [1870] 13 M. I. A. 467=14 W. R. 11=5 B. L. R. 521 (P.C.).
(16) [1864] 2 B. H. C. 347.
(17) (1892) 7 Bom. 131.
(18) (1892) 17 Bom. 486.

where. We say no land has been thrown up at all.

When land is eroded and re-appears, it vests in the Government. S. 3, Land Revenue Code, defines an occupant, holder of unalienated land. S. 46 applies to land thrown up in front of alienated land, S. 3 defines alienated land ; inam or jagir land. The law quoted by defendant Regn. 9 of 1825 regarding alluviated lands is in force in the U. P. and Bengal ; not in Sind. Sind is governed by Circular No. 23 of the Commissioner, no weight is to be given to pretended recognition of land, even though the situation is the same. Plaintiffs have abandoned their land, they have made applications for the suit land on one year's tenure ; *Maharaja of Vizianagram* v *Secy. of State* (19), mere submergence does not imply relinquishment, but the occupant must continue to pay the assessment due : cf S. 58, Land Revenue Code, occupancy is conditional on payment of assessment

Plaintiffs maintain now that none of the land is under water (Plaintiffs accept this position). (Plaintiffs admit that para 20 (b) of the plaint refers only to land thrown up at the date of suit ; " is " should be read as " has been.") Accretion can only occur where land is situated on the river bank Under S 64, Land Revenue Code, the occupant is entitled to land forming on the bank Accretion is slow and imperceptible : *Narendra Bahadur Singh* v. *Achhaibar Shukul* (20), *Sher Bahadur Singh* v *Tafazul Husain* (12), land washed away and then reappearing is not accretion The plaint is not properly stamped Plaintiffs are in possession of 30 acres only. The plaint was amended in respect only of the 30 acres given to defendant 2. The area is 135 acres ; 30 are in their possession ; 30 are in possession of defendant 2 ; stamp should be paid on the remaining 75.

Plaintiffs are not entitled to any declaration : S. 42, Specific Relief Act, a further relief could be claimed ; possession of the remaining 75 acres. In *Bikutti* v. *Kalendan* (21) if the consequential relief is deliberately not sued for, the suit should be dismissed. The five year's period has practically expired; the Collector may change his orders.

(*For issues and findings see p.* 66.)

(The judgment then discussed the evidence in respect of issue 3 and holding that plaintiffs proved their title to 122 acres in deh kacha Tangiani proceeded.) The mahalkari (Ex. 49) has stated that " haq kabze " tenure is not permanent tenure but is " like " eksali land (land granted for one year.) But if there were any such tenure there should be some more definite proof of its existence and incidents than this vague statement. " Haq " (right) and " Kabze " (possession) would seem to denote the incidents of a permanent tenure. (The judgment then discussed evidence as to possession and continued) I hold then that plaintiffs' allegation that only 18 acres of their land were eroded is more in accordance with the Government maps. They, therefore, remained in possession of the bulk of the land acquired by them , this is further proved by the details of cultivation by plaintiffs in each year from 1897-1898 given in Ex 26. The mahalkari (Ex 49) admits that no other person cultivated the kacha ; if there had been any other person it would have been easy for the revenue authorities to state the yearly area as they have done in the case of plaintiffs.

In the view, however, which I take of the law applicable to land re-forming in place of eroded land, the actual area eroded is not a question of any importance,

* * * * * * * * *

Issue 6.

Are the plaintiffs the owners or entitled to the first grant of the land which has re-appeared as alleged ?

Plaintiffs.—I have stated my grounds in opening Under S. 63, Land Revenue Code, if alluvial land is formed it must be offered first to the neighbouring owner. I rely on *Haradas Acharjya Chowdhuri* v *Secy of of State* (10), land submerged and re-appearing is the property of the original owner); *Keshav Prasad Singh* v. *Secy. of State* (11) (ditto; land washed away); *Thakurain Ritraj Koer* v. *Thakurain Sarfaraz* (9) (change of bed of river) ; *Lopez* v. *Muddun Mohun Thakoor* (15) (diluviated); *Sri Thakurji* v *Jaikali Kunwer* (14) (capable of identification) ; *Sher Bahadur Singh* v. *Tafazul Husain*

(19) A. I. R. 1926 P. C. 18=49 Mad. 249=53 I. A. 64 (P.C.).
(20) [1906] 28 All. 647=3 A. L. J. 453=(1906) A. W. N. 169.
(21) [1891] 14 Mad. 267=1 M. L. J. 227.

(12) (identified by measurement and level).

The Commissioner's Special Circular 23 has no force of law. Even under it the Collector is bound by the Land Revenue Code. Para. 3 does not relate to lands submerged and re-appearing ; but to new kacha thrown up.

Defendants say plaintiffs have abandoned the land : vide Exs. 33 to 37. No abandonment can be presumed from these applications. Plaintiffs, in these, have claimed the new lands on the strength of their original holding Defendant rely on *Maharaja of Vizianagram* v. *Secy. of State* (19) ; but that is a ruling under a Madras special law Ex. 49 the mahalkari admits this land is not assessed ; assessment is paid on the area cultivated.

Section 68, Land Revenue Code, does not apply to the present case. It is not alleged that I have not paid any assessment due. Exs. 11 to 15 show that the land is on permanent tenure Ex. 11 in perpetuity. Ex 12 is under S. 74, Land Revenue Code : *cf.* definition of occupancy in S. 3 (16) ; Exs. 13-16 are in the same form.

In Exs. 33 to 37 plaintiffs are said to have acknowledged that their land was eroded and abandoned their original rights. Ex. 32 refers to my frontage only. Ex. 34 is an application for 10 acres only. Ex. 35 is an application for 5 acres only ; which was granted by Ex. 32.

In Ex. 41 and Ex. 40 the northern boundary of Gumboshah's land is Dasomal's and Bachal's land. Ex. 41 gives the boundaries of the whole of Gumboshah's land though only half was sold.

Exhibit 9 shows I had land to the West of Khan Wah. Ex. 31 shows the position of Dasomal's land. Ex. 19 shows that a similar mistake was made regarding Dasomal's land.

Mr. Shivaldas (Ex. 49) admits no one else has claimed the land. Between 1881 and 1891, 63 acres of Gumboshah's land had been eroded : Ex. 17. This would be on the east. The new grant would be of the land thrown up in its place. When Ex. 10 was issued, the matter was threshed out ; I asked for the papers but they have not been produced. The Special Circulars are not applicable.

Issues.	*Findings.*
1. Did Kewalmal Ramchand gift away the land in deh Tangiani as alleged in para. 8 of W. S.?	Yes.
2. Was there any partition as alleged in para. 9 of the plaint ? If so, was the land allotted to defendant 3 as alleged ?	No finding necessary.
3. Have the plaintiffs and their predecessors-in-title been the owners and in possession of 122 acres of land as alleged in para. 10 of the plaint ?	Yes.
4. Do the said sale-deeds, gift and partition convey any right to the plaintiffs over the land in suit ?	Yes; except the partition.
5. What portion of the said 122 acres was eroded by the river Indus, and what portion, if any, has re-appeared ?	As alleged by plaintiffs.
6. Are plaintiffs the owners or entitled to the first grant of the land which has re-appeared as alleged?	They are entitled to the land re-appearing in the same position as their original land.
7. Is the Collector's order referred to in para. 13 of the plaint illegal, ultra vires and of no effect ?	Yes ; so far as it relates to plaintiffs' original land or land which has re-formed on the site thereof.
8. Are the plaintiffs owners in law or entitled to the grant of the land in suit ?	They are owners of and entitled to 122 acres of the land.
9. Does the land vest in defendant 1 for reasons given in para. 7 of the W. S.?	The aforesaid 122 acres do not vest in defendant 1.
10. Is any and if so what portion of the land in suit still under water and can the plaintiffs obtain the relief of declaration and injunction with regard to the same ?	No portion is under water.
11. Do the plaintiffs claim any and if so, what portion of the land in suit by accretion and can they do so ?	Yes; they cannot do so.
12. Has there been any accretion in fact and law ?	No, on both parts.
13. Is the suit bad for want of notice ?	No.
14. Is the suit properly stamped ?	Yes.
15. Are the plaintiffs entitled to any, and if so, which of the reliefs sought ?	As per final order.
16. General.	As per final order.

They do not apply to land which can be identified. The rulings quoted deal with the law apart from the Bengal Regulations. A zemindar is said not to be owner of the land S 73, Land Revenue Code shows the occupant is the proprietor. S. 37 refers to land not the property of individuals. Gumboshah paid malkano of the land There is no question of the identity of the land , the south-west and north boundaries are intact ; on the other side is the forest

Defendants.—The boundaries of Ex 41 could not be correct It is admitted that Dasomal's land is to the north. The eastern boundary would be Khan Wah with Bachal's land as well as the forest It was by mistake that Dasomal's land was shown as the northern boundary *Lopez* v. *Muddun Mohun Thakoor* (15) refers to (alluvial land) : it deals with the construction of S. 14, Act 11 of 1825 which deals with the land accruing by gradual accretion , such land becomes an increment to the land to which it accrues (The land diluviated and re-formed was held to belong to the original owner?) *Haradas Acharajya Chowdhuri* v. *Secy. of State* (10) refers also to erosion by the river Ganges ; *Keshava Prasad Singh* v *Secy of State* (11) refers also to S 4, Bengal Regulations. *Mt Raj Kunvari* v. *Chaudhri Uma Prasad* (13) and *Sher Bahadar Singh* v. *Malik Tafazul Husain* (12) refer to land capable of identification ; *Sri Thakurji* v. *Jaikali Kunwer and others* refers also the Bengal Regulations

Bombay Regulation 4 of 1827, S 26, lays down the law applicable in suits The law applicable to alluvion and diluvion is Special Circular 23 of the Commissioner in Sind. Under para 3 new land vests in Government, as Government is owner of the old land to which it is annexed Plaintiffs are only occupants : S. 37, Land Revenue Code This principle holds good even if plaintiffs are permanent occupants. Ordinary Circular 23 shows how such lands should be disposed of Para 5 of Special Circular 23 shows that mere re-appearance in the same place does not confer any right Mr Shivaldas (Ex. 49). L. 12 confirms this. Plaintiffs confirm ; they have applied for the regrant of the land : *cf.* Ex 33.

If the Special Circular does not apply the land should be identified and alluvion should be gradual. No body has seen the accretion being formed

Plaintiffs rely on S 63, Land Revenue Code. That pre-supposes a permanent occupant of the land The exchange entries in Government records do not confer any title Also under S 63 the matter is left to the Collector's discretion ; and the occupant has to pay the malkano demanded

Finding.—The law as regards alluvion is stated in *Lopez* v. *Mudun Mohun Thakoor* (15); the land in that case had been diluviated, that is to say, the surface soil was wholly washed away by reason of the continual encroachment of the river. The rule of English law was applied that if by its situation and extent the land can be known, the subject does not lose his property. The owner does not lose his property if he can make out where and what it was Lands washed away and afterwards re-formed on an old site which can be clearly recognized remain the property of the original owner. Bengal Regulation 11 of 1885 was considered in that case but the finding was not based on that Regulation. The ruling therefore is one generally applicable and not one based on a purely local regulation This case was followed in *Keshav Prasad Singh* v. *Secy of State* (11) which dealt with the land which had been washed away by the Ganges and on the site of which new land had formed. This is the general law applicable throughout India.

It is contended by the defendants that there is a special law applicable to Sind and that is contained Special Circular 23 of the Commissioner-in-Sind , these circulars have been declared to have the force of law by Government of India Notification No 1254 of 30th September 1880. Defendants rely in particular on para. 3.

"All new land not separated from the main land by a channel containing water throughout its length during the whole year is to be considered as the property of the owner of the old land to which it is annexed subject to the Government assessment in the cases provided for in the new rules below."

Defendants have contended that 'owner' in this para means Government, as Government is the ultimate owner of all land. But it would be difficult to accept this construction In para. 2 it is stated that lands newly thrown up by the river or sea are the property of Government ;

and if the land referred to in para 3 was to be considered the property of Government, that would have been said in para 3 as has been said in para. 2. It seems clear that whatever the land referred to in para 3 may be, the owner referred to therein is the permanent occupant ; who has permanent proprietary rights in the land for purposes of cultivation.

But it appears from para. 4 that para 3 applies only to land which has been thrown up by the river and which cannot be identified with any land which may have previously existed on the same spot and since been swept away. If the land can be identified with any such land para 3 does not apply. The land, if it can be identified, continues to be the property of the original owner The second sentence of para. 4 gives an illustration ; the general wording of the first sentence is not restricted by the example given. Para 5 contains a warning against the pretended recognition of lands which have been entirely swept away, merely because in situation they somewhat resemble the lands which have been previously swept away ; but if the situation not merely resembles but can be identified as the actual situation of the lands which were eroded, to my mind, according to the circular the lands reformed remain the property of the original owner. In this the law as laid down in the circulars and the general law of the land as stated in *Lopez* v *Muddun Mohun Thakoor* (15) is the same. It is a principle as stated in the case quoted founded on universal law and justice On the facts as I have found them the law propounded by defendants is a law of expropriation ; and for this there must be clear and unmistakable authority.

That the land which has appeared has re-formed in the place of land which previously belonged to plaintiffs, there is little doubt In the maps which have been put in by both parties (Exs. 55 & 56) to illustrate their argument the plot in the north-east corner sold by Bachal to Sirumal is the land of the plaintiffs. That plot, it is clear from the maps, is the plot that has been exposed to erosion. Plaintiffs, it is clear from the sale-deeds, have had approximately 16 acres of land eroded. It is a natural presumption that the eroded land was in continuation of plaintiffs' remaining land and extending towards the river. The northern boundary, the boundary of deh Manjhand, the southern boundary, the forest, the western boundary, the kacha paka land, the greater part of the eastern boundary, these are clear ; the area is known ; plaintiffs' land can therefore be determined with reasonable accuracy This strongly corroborates the oral evidence that the land which has re-appeared on the north-east boundary of plaintiffs' existing land has re-formed in place of land belonging to plaintiffs which had been eroded I hold therefore that plaintiffs' eroded land can be identified by its situation and that they are entitled to 18 acres of land originally belonging to them which was eroded and in place of which a new formation has appeared adjoining their existing land.

They are not, however, entitled to any further area. It appears from the sale-deeds that the eastern boundary of the land sold by Bachal to Sirumal was a forest *dhoro* The eastern boundary of their land, being a *dhoro* in forest land the further area that has appeared can be identified therefore not as plaintiffs' land but as land belonging to the forest department. Plaintiffs admit that the eastern boundary of their land was forest land.

Defendants have contended that plaintiffs have abandoned their right in this kacha land. They have made in recent years certain applications to be allowed to cultivate this land on one year's permission : vide applications Exs. 33 to 37. But there is nothing in these applications to show any intention to abandon Plaintiffs have asked for permission to cultivate as a right and they have since brought this civil suit as permission to cultivate was given to another person as well as to themselves They may have been ignorant of their rights or they may have thought it simpler to comply with the wishes of the revenue officers in the matter. But it is clear I think from the applications above referred to and from the present suit that plaintiffs have always claimed that they alone are entitled to cultivate this kacha and were prepared to maintain their rights. By Ex. 32 in 1919 permission was granted to take possession of 5 acres for 1 year "to which he (Sirumal) was entitled by virtue of his right of possession"; even the revenue authorities recognised that the permission to cultivate was asked on the strength of existing rights in plaintiffs.

Defendants' case is not based on any alleged custom or practice Ex. 49 states that it is the practice to treat land which has re-appeared in place of the land eroded as Government land. This would be no adequate proof of practice or of the manner in which the circumstance has been interpreted, if the defendants' case had rested on that basis The witness was not a very accurate or a precise witness.

* * * * * *

Issue 12.—Has there been any accretion in fact and law ?

Plaintiffs.—The measurements show accretion.

Defendants.—It is a re-formation.

Finding.—Accretion has been defined in *Lopez* v. *Muddun Mohun Thakoor* (15), as acquisition of land from a river by gradual, slow and imperceptible means. There is no proof as to how the land that has re-appeared was formed ; it seems from the maps to have been a definite change in each year, according to the actual course of the river, after the inundation season. It cannot be held therefore that there was any accretion.

* * * * * *

Order —Plaintiffs are declared to be owners of 122 acres of kacha land in deh Tangiani ; subject to the right of Isardas or persons claiming through him to a 1/3rd share in 50 acres , they are entitled as owners to land which has re-appeared in place of their land which has been eroded The Collector's order dated 8th May 1922 is ultra vires and void The grant of 30 acres for 5 years to defendant 2 is ultra vires and void Defendant 1 is enjoined not to interfere in any way with the said land of plaintiffs and from dealing with it as Government land Plaintiffs are entitled from defendant 2 to mesne profits from the date of suit till possession is given by defendant 2 ; mesne profits to be determined on enquiry by the Court Commissioner. Defendant 1 to pay all costs of the suit.

D D. *Suit decreed.*

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* A. I. R 1929 Sind 69

LOBO, A J. C.

Abraham Reuben—Plaintiff.

v.

The Karachi Municipality — Defendant.

Original Civil Suit No. 815 of 1921, Decided on 15th June 1927.

*** (a) Master and Servant—Test to determine voluntary or compulsory resignation—If servant's intention is not to be bound by contract, resignation is voluntary — If employer's conduct amounts to refusal to continue servant, resignation is compulsory—Language is immaterial.**

In determining whether a person has resigned or has been compelled to resign the correct test is to find whether the acts and conduct of the servant evince an intention no longer to be bound by the contract, or whether the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, in the latter case there is a wrongful dismissal and repudiation of the contract and the use of polite instead of peremptory language would not alter the conclusion *Stephenson* v. *London Joint Stock Bank, Ltd.*, 20 *T. L. R.* 9 , *General Bill Posting Co.* v. *Atkinson*, (1909) *A. C.* 118 ; *In re Rubel Bronze and Metal Co. & Vos* , (1918) 1 *K. B.* 315, *Rel. on.* [P 74 C 1, 2]

(b) Bombay District Municipal Act (3 of 1901), Ss. 184 & 46 (e) — Karachi Municipal Rules, R. 90 — Servant of Karachi Municipality cannot be dismissed without giving him opportunity of being heard.

A statutory power to appoint, fine, reduce, suspend or dismiss officers and servants is vested in the Karachi Municipality by reason of S. 184 and 46 (e). But the provisions of R. 90 of the Rules framed by the Karachi Municipality constitute a statutory restriction or limitation to the power given by Statute to the Municipality to dismiss their servants. R. 90 is manifestly for the protection and benefit of officers and servants of the Municipality and the existence of such a rule is inconsistent with the position that a servant of the Karachi Municipality is a servant who may be dismissed at pleasure at any time without notice and without reason . 18 C *W. N.* 106 , 6 *L. W.* 284 , *Gould* v. *Stuart*, (1896) *A. C.* 575 and *Bom. Civil Suit No.* 596 *of* 1917, *Dist.* , *A. I. R.* 1927 *Cal.* 311 , 27 *Bom.* 189 , *Rel. on.* (*Case law referred*). [P 75 C 2 , P 79 C 1]

(c) Bombay District Municipal Act (3 of 1901), S. 46—Karachi Municipality Rules — Dismissal in accordance with rules and bye-laws—Court cannot enquire further—But if dismissal is wanton or against rules and bye-laws, servant can succeed as in ordinary suit between master and servant — Civil P. C., S. 9.

In a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the Municipality, once the Court is satisfied that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the Municipality, it has no jurisdiction to probe any further into the question. If, however, the Court finds that the plaintiff's dismissal had been wanton and in utter disregard of the rules and byelaws of the Municipality, the Municipality would forfeit the protection and privileges afforded to them by Statute and the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal : *R.* v. *Darlington School Governors*, (1844) 6 *Q. B.* 682, *Rel. on.* (*Case law considered*). [P 82 C 1]

(d) Master and Servant — Extent of misconduct sufficient for dismissal varies according to circumstances.

There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service. Much will depend on the nature of the misconduct and the nature of the duties to be performed by the person dismissed. *Clouston & Co.* v. *Corry*, (1906) *A. C.* 122, *Foll.* [P 83 C 1]

*** (e) Master and Servant — Servant can be dismissed on reasonable notice — Reasonableness is question of fact — Measure of damages for dismissal is earnings for notice period.**

Every master has an inherent right to dispense with the services of his servant with reasonable notice As to what is reasonable notice depends on the nature, of the servant's employment. When this is determined, the measure of damages is what the servant would have earned in the employment of his master during the period of notice. The damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. *Maw* v. *Jones*, (1890) 25 *Q. B. D.* 107, *deemed overruled by Addis* v. *Gramophone Co.*, (1909) *A. C.* 488, *Foll.* [P 83 C 1, 2]

T G. Elphinston—for Plaintiff
Dipchand Chandumal—for Defendant

Judgment.—The plaintiff, Mr. Abraham Reuben, entered the service of the Karachi Municipality in the year 1893 He obtained a substantive appointment as surveyor in 1897 on a salary of Rs 100 per mensem with a conveyance allowance of Rs. 25 The plaintiff's services with the Karachi Municipality terminated about the end of December 1920, under circumstances which will be referred to hereafter He was then drawing a monthly salary of Rs. 260, Rs 45 as conveyance allowance, and Rs. 20 as War allowance ; he was also entitled to an annual increment of Rs 10 per month till his salary reached the sum of Rs. 300.

Between 1897 and 1911, Mr James Forrest Brunton was Chief Officer and Chief Engineer of the Karachi Municipality. He has been examined on commission as a witness for the plaintiff in the case (Ex. 33) and it would certainly appear from his evidence and from the letters and certificates (Ex. 33) (a) to 33 (g) put in through him, that the plaintiff, during this period was considered an excellent and entirely honest servant of the Municipality, at any rate by Mr. Brunton himself.

In June 1909, it would appear from Ex. 25, that some members of the Corporation entertained suspicions with regard to the honesty of the plaintiff in connexion with road metalling contracts. But Mr. Brunton put up a strong defence on his behalf and in March 1910, before proceeding on leave put on record his appreciation of the signal services in his opinion rendered by the plaintiff in connexion with a Drainage Extension Scheme which he stated were deserving of very special recognition (Ex 25*a*). On 31st March 1910, Mr. Brunton proposed that the plaintiff should be granted a bonus of Rs. 2,250 (Ex 25b) The proposal was accepted by the Municipality, and on 4th May 1910, the plaintiff was given the bonus in question

"in appreciation of services rendered in connexion with the Drainage Extension.(Ex.25c)"

Mr Brunton retired from the service of the Karachi Municipality towards the end of 1911, but before handing over charge again placed on record a glowing appreciation of the plaintiff's work as a Municipal servant stating in conclusion that he hoped that .

"before long the Municipality would see their way to pay the plaintiff a more adequate salary and recognize, by a substantial increase, the services of a valuable public servant. (Ex. 25d)."

On 3rd May 1913, again Mr Markwick (Ex. 32) in handing over charge of the Office of Municipal Engineer recorded a no less flattering appreciation of the plaintiff's work which he concluded by hoping that the Municipality would reward him "in some tangible form" (Ex 25e)

There is also on the record a certificate given to the plaintiff by Mr. Measham Lea, the Chief Officer and Chief Engineer of the Karachi Municipality, dated 22nd March 1912, wherein the plaintiff's services are commended in the highest terms (Ex 28).

That the Municipality accepted the recommendations and shared the opinions of Messrs. Brunton, Markwick and Measham Lea in regard to the plaintiff seems obvious from Exs. 26 and 27 dated June, 1914 The managing committee of the Municipality obtained the Commissioner-in-Sind's sanction not only to an increase of the plaintiff's salary to Rs 200—10—300 with a conveyance allowance of Rs. 30 but to an alteration of his designation from "Surveyor" to "Sub-Engineer" In their resolution dated 2nd June 1914, (Ex. 26) the Managing Committee state :

"with regard to para. 3 of the Commissioner-in-Sind's letter the Managing Committee are of opinion that having regard to the strenuous conditions under which the present incumbent of the post of surveyor works the remuneration proposed by the Municipality is in no way out of proportion to the services rendered. For many years Mr. Abraham has carried out his duties with distinct satisfaction and on many occasions he has been recommended for promotion by the officers under whom he has served. Despite this, however, no promotion has been given to him since 1907. The Municipality highly esteem the services rendered by Mr. Abraham and his untiring energies, and in submitting their proposal they were guided by a thorough knowledge of the value of the work which Mr. Abraham performs and the intelligence which he displays in the important matters and schemes in connexion with which his assistance is required."

Again on 12th May 1919 Mr. Measham Lea, the Chief Officer and Chief Engineer before proceeding on leave, considered it proper to place on record yet another glowing appreciation of the plaintiff's services and described him as "a most valuable servant of the Municipality" (Ex. 28*a*).

With the departure of Mr Lea, however, the plaintiff's troubles commenced. By their Resolution No. 140 dated 25th June 1919, Ex. 5 the Municipality appointed a sub-committee consisting of Messrs. Ghulam Hussein Kassim, Jamshed N. R Mehta, Dipchand T. Ojha, and M. Misquita:

"to investigate the charges of corruption laid against some members of the municipal establishment at a recent meeting of the Corporation; also to investigate the system of giving out contracts and making payments for them and suggest remedial measures."

Their report was to be submitted within three months

With the nature of the investigation made by this sub-committee hereinafter referred to as the Corruption Committee, I am not at present concerned. Between October 1919 and February 1920, the plaintiff was examined and cross-examined on several occasions especially with regard to the property moveable and immovable acquired by him during the period of his service with the Municipality Ex. 12 The report of the Corruption Committee of the Municipality dated 11th June 1920, Ex 6, was forwarded to the President of the Municipality by the Chairman of the Committee with his letter dated 12th June 1920, Ex 7.

As regards the plaintiff the Corruption Committee suggested he should be "seriously dealt with" as it was an open secret that he was not honest and had made plenty of money in municipal service If he could not be adequately punished by being reduced or placed in charge of a post where corruption was not possible, his services should be dispensed with.

On 1st July 1920, a copy of this report was forwarded to the plaintiff by the Chief Officer and Chief Engineer, Karachi Municipality:

"for any explanation he may have to give the same to be submitted within a week's time from the date of receipt." Ex. 8.

On 7th July 1920, the plaintiff submitted a brief statement in reply to Ex 8. Therein he pointed out that the Corruption Committee had laid no particular charge against him but has assumed that he had acquired his property and cash dishonestly That property he said was partly ancestral, partly saving during his service of over twenty-seven years and partly profits earned from the purchase and sale of landed property. He had submitted declaration in respect of his property as required by Municipal Rules since 1915 or 1916. He submitted copies of his testimonials and prayed for definite charges of corruption and bribery to be framed against him to enable him to refute the same and clear his reputation, Ex 9.

Mr. Measham Lea had in the meanwhile returned from leave and on 20th July 1920, in forwarding to the President of the Municipality Ex. 9 and the explanations offered by other servants of the Municipality affected by the report of the Corruption Committee, submitted his own spirited comments on the said report which he concluded as follows:

"In conclusion I would add that the committee had a full year with unlimited powers to carry on the enquiries, with a clerical staff provided, but they have absolutely failed to adduce one tittle of evidence as regards blackmail or anything of that kind although if the sweeping allegations were correct there must have been hundreds of concrete instances some of which surely would have come to the knowledge of councillors representing the public who were blackmailed, and intimately accessible to them. On the contrary the Committee's report bolsters up the irresponsible scandal of the bazaar, belittles the work of the Municipal staff, and besmirches the fair name of the Municipality" (Ex. 10).

The Corruption Committee's report was brought up at a special general meeting of the Municipality on 8th September 1920, much eloquence was expended

upon it, but ultimately the Corporation unanimously passed a resoluation remitting the report to the Managing Committee to take such steps as they deem suitable in the light of the remarks made in the report, and during this evening's debate Ex. 11. The Corporation could not but have been aware that the Corruption Committee formed four out of the nine members of the Managing Committee to whom they were delegating the power to take action on the report

At a meeting of the Managing Committee held on 25th November 1920, at which the report of the Corruption Committee was read and considered, it was resolved that the plaintiff should be asked to resign Municipal service, Ex. 13. This resolution was communicated to the plaintiff on 3rd December (Ex 14); on the same day the plaintiff by Ex. 15 informed the Chief Officer and Chief Engineer that the Managing Committee had not made any specific charges on which they based their decision. He added:

"I am quite prepared to defend and prove that the allegations made were quite false and without foundation. However, I shall feel obliged if you kindly let me know the terms on which the Managing Committee want me to resign the Municipal service. If necessary, I may kindly be allowed an interview with the Managing Committee. Ex. 15 was placed before the Managing Committee at a special meeting held on 16th December 1920. Eight out of the nine members thereof attended that meeting, including the four members of the Corruption Committee. It was resolved that "Mr. Abraham Reuben be informed that the Managing Committee will not enter into discussion with him. He must resign within one week of the receipt of notice and he must understand that if he fails to do so the Managing Committee will take such action as it deems fit." (Ex. 16).

This resolution was communicated to the plaintiff on 20th December (Ex. 17).

On 21st December the plaintiff wrote stating

"under protest I am prepared to obey the Managing Committee's order and hand over charge of my office from the end of the current month pending my appeal to the Municipality which will be submitted in due course (Ex. 18)."

On 23rd the Chief Officer endorsed on Ex. 18 "Mr. Shivdasani to take over charge from Mr. Abraham." On 27th December 1920, in compliance with the above office order the plaintiff and Mr. Shivdasani respectively delivered over and received charge of the office of Sub-Engineer Ex. 19. The plaintiff never again returned or was allowed to return to duty. On the same day he left for Poona to be present at the 7th day ceremonies for his brother-in-law who had died on 24th December.

On 17th January 1921, the plaintiff presented an appeal to the President and members of the Karachi Municipality against the orders of the Managing Committee dated 25th November and 16th December 1920 (Ex 20) The appeal came up for disposal at a meeting of the Municipality on 4th March 1921, when it was resolved

"that the appeal dated 17th January 1921, by Mr. Abraham Reuben against the Managing Committee's resolutions dated 25th November and 16th December 1920, be recorded and the Corporation confirm the action taken by the Managing Committee" (Ex. 24).

It is worthy of note that the resolution was carried by the casting vote of the President and that among the eight members of the Corporation who voted in favour of the resolution, Mr. Dipchand T. Ojha and Jamshed N. R Mehta were members of the Corruption Committee. In his memorandum dated 12 of March 1929, the Chief Officer communicated this resolution to the plaintiff (Ex. 22).

The plaintiff thereafter appears to have sought legal advice, for on 2nd May 1921, Messrs Ltttle & Co , Solicitors of Bombay, served a notice on the Municipality (Ex 23) demanding from them on behalf of the plaintiff the sum of Rs. 25,000 as damages for wrongful dismissal from service.

On 11th June 1921, the plaintiff filed the present suit. In his plaint the plaintiff alleges that he has been in the employment of the defendants for 27½ years, he refers to Exs. 13 to 18 and states on 21st December 1920, under compulsion he handed over charge of his office under protest and in obedience to the orders of the Managing Committee ; he contends that the defendants prevented him from continuing in their service after 31st December 1920, and in the alternative pleads that the defendants on 16th December 1920, refused to perform their part of the contract with him and compelled him to put an end to the same ; that in any event he was wrongfully and illegally dismissed by the defendants in December 1920. He recites his pay and emoluments at the time of his alleged dismissal and contends that at the time he was entitled to six month's privilege leave on

full pay, to twelve months furlough on half pay and thereafter to his full pension on medical certificate which he could easily have then obtained, that even otherwise he had not long to serve to entitle him to full pension; he attaches to the plaint a schedule showing damages sustained by him to the extent of Rs. 28,155 but limits his claim to Rs 25,000, only In their written statement filed on 16th September 1924, the defendants contend that the plaintiff in consequence of the report against him by the Corruption Committee and after a consideration of his explanation was given an opportunity of resigning his service, that he availed himself of the opportunity and resigned, and that he has, therefore, no cause of action against the defendants Somewhat inconsistently in the alternative they plead that if the Court holds that the plaintiff was dismissed from service they were entitled to dismiss him for misconduct and no appeal lies to a Court against such dismissal. They contend that the granting of privilege leave, furlough and pension are within the absolute discretion of the defendants, that the plaintiff cannot claim these as of right or base a claim to damages thereon. They deny the plaintiff's claim to damages and proceed in the subsequent paragraphs of their written statement to traverse the allegations and contentions of the plaintiff.

The following issues were framed on 8th November 1921.

1. Did the plaintiff resign service, and if so, did defendants compel him to resign ?

2. Can plaintiff maintain the present suit ?

3. Did defendants prevent plaintiff from continuing in their service ?

4. If the plaintiff was dismissed from service has this Court jurisdiction to decide whether he has been rightly or wrongly dismissed ?

5. Was the plaintiff wrongfully and illegally dismissed from service as alleged by him ?

6. Is the plaintiff estopped from contending that he was dismissed or that the defendants refused to perform their part of the contract or compelled him to put an end to it ?

7. Can plaintiff claim more than one month's pay in lieu of notice ?

8. Can plaintiff claim furlough, leave and pension as of right ?

9. Could the plaintiff have obtained a medical certificate to enable him to retire on pension ?

10 Is the plaintiff entitled to any of the sums mentioned in the schedule filed with the plaint ? If so, which ?

11. To what damages if any is plaintiff entitled ?

12. General.

Issues 1 to 3 in some degree overlap, they are certainly connected and may conveniently be dealt with together

On 3rd December 1920, the resolution of the Managing Committee that he should be asked to resign municipal service was communicated to the plaintiff (Exs 13 and 14). In his letter of the same date Ex 15 the plaintiff after protesting against the resolution of the Managing Committee asked to be informed of the terms on which the Managing Committee wished him to resign There can be little doubt that the plaintiff at this juncture felt that he was engaged in an unequal contest with the Managing Committee of the Municipality and that if he could strike a good bargain with them on the questions of leave, furlough and pension due to him it would be better for him to accept the suggestion and resign For this reason he asked for an interview with the Managing Committee On 20th December, however, on receipt of Ex. 17 peremptorily ordering him to resign within a week, the plaintiff must have realized that the Managing Committee were in no mood to bargain with him and that a resignation would entail the loss of his claims to leave, furlough and pension without even a fight This is clear from the language in which his reply Ex 18 is couched He states :

"I beg to inform you that under protest I am prepared to obey the Managing Committee's order and hand over charge of my office from the end of the current month pending my appeal to the Municipality."

The plaintiff studiously and of set purpose avoids the use of the word 'resignation'; under protest and pending his appeal to the Municipality he is prepared to hand over charge of his office. On 23rd December, the Chief Officer and Chief Engineer endorsed on Ex 18 an office order that Mr. Shivdasani should take over charge from the plaintiff, 24th to 26th December were the Christmas holidays and on 27th December the office order was carried out, Ex. 19. Again the concluding paragraph of Ex. 20, the plaintiff's appeal to the Karachi Municipality is very significant. It reads :

" under these circumstances I appeal to you, gentlemen, for justice as against the Managing Committee's resolution dated 16th December 1920, more especially *as under this order if I resign I cannot get my earned leave or pension.*"

The words I have underlined (italicized) indicate that the plaintiff wished it to be very clearly understood that he had not resigned. Mr Markwick Ex 32 was acting as Engineer in December 1920 and was the plaintiff's immediate superior at the time. He has repeatedly stated in his evidence that the plaintiff did not resign, that he handed over charge in obedience to the office order of the Chief Officer and Chief Engineer and under protest

Now, in these circumstances and in this state of facts, the question is, whether the acts of the plaintiff, especially the act of handing over charge on 27th December are to be interpreted as a voluntary resignation by him or whether the action of the Managing Committee considered as a whole, amounts to a dismissal of the plaintiff from municipal service. The case of *Stephenson* v *London Joint Stock Bank Ltd.* (1) bears considerably on the point In that case, the plaintiff, a clerk, in the defendant Bank had endorsed a promissory-note made by one Mr Sedger. On the Bank coming to know of this, the plaintiff was called upon for an explanation. On receipt of it the Secretary to the Bank wrote a letter to the plaintiff containing the words :

" you are required to resign your appointment in the Bank forthwith."

The plaintiff then wrote to the Bank resigning his appointment. The question was, whether the plaintiff had retired with the consent of the Directors or had been dismissed The Lord Chancellor in delivering the judgment of the Court of Appeal said he entertained no doubt upon the point. They had to look at the whole of the facts, and doing so there could be no doubt but that the plaintiff had been dismissed The use of polite instead of peremptory language did not alter the fact. In *General Bill Posting Co* v *Atkinson* (2) the House of Lords held, approving the earlier authorities :

" that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

In *In re Rubel Bronze & Metal Co., and Vos* (3) McCardie, J., states :

" It has been authoritatively stated that the question to be asked In cases of alleged repudiation is ' whether the acts and conduct of the party evince an intention no longer to be bound by the contract " ,

and again at p 323 of the report :

" If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and repudiation of the contract."

Applying these rulings to the facts in the case before me as I have set them out, I am of opinion that the only inference to be drawn is, that the plaintiff did not resign his appointment but was dismissed by the Managing Committee of the Municipality. It has been argued that the plaintiff's letter Ex. 18 amounts to a voluntary resignation, that the Managing Committee gave the plaintiff an opportunity to resign and the plaintiff availed himself of that opportunity. I think the argument is unsubstantial. Ex. 18 is surely not to be read by itself but in the light of the fact and circumstances immediately preceding and following it, and so read cannot by any stretch of imagination be regarded as evidencing a voluntary resignation.

I, therefore, hold on issue 1 that the plaintiff did not resign his service The second part of issue 1 does not arise.

On issue 2 I hold that the plaintiff is not disentitled to maintain the suit on the ground that he voluntarily resigned. On issue 3 I hold that the defendants prevented the plaintiff from continuing in their service, that they dismissed him On my findings on issues 1 to 3 the question of estoppel covered by issue 6 does not arise. I, therefore, answer that issue in the negative. The really important issue in the case is issue 4 and this I propose next to discuss For the defendants it is contended that this is not a case governed by the ordinary law of master and servant under which a servant wrongfully dismissed is entitled to damages from his master and is entitled to have the questions of wrongful dismissal and damages determined by a Court of law The servants of a District Municipality, it is argued are appointed, suspended and removed in pursuance of powers conferred

(1) [1904] 52 W. R. 83=20 T.L.R. 9.
(2) [1909] A. C. 118=25 T.L.R. 178=78 L.J. Ch. 77=99 L.T. 943.
(3) [1918] 1 K.B. 315=34 T.L.R. 171=87 L.J. K.B. 466=118 L.T. 348.

by Statute under rules and bye-laws made thereunder That, municipal servants are on a par with servants of the Crown; they are servants at pleasure Where therefore a servant of a District Municipality is dismissed no suit can lie against the Municipality for wrongful dismissal. He can avail himself only of such remedial provisions as the Statute or the rules and bye-laws made thereunder provide; a civil Court has no jurisdiction in the matter.

For the plaintiff, on the other hand, it is argued that the District Municipal Act 3 of 1901 does not confer on the Municipality the power to appoint, suspend and dismiss servants; it merely provides for the mode and conditions under which servants may be appointed, etc That the law regulating the relations between a District Municipality and its servants is the ordinary law of master and servant qualified only in certain particulars by the rules and bye-laws which regulate the mode and conditions in and under which such servants may be appointed, suspended and dismissed. That the civil Court's jurisdiction to determine in any particular case the questions of wrongful dismissal and damages therefor, remains unaffected. That a Municipal servant aggrieved by an order of dismissal whether on the ground that the order is not justified by the facts, or on the ground that the mode and conditions prescribed in the rules and bye-laws have not been observed, has the ordinary servant's right to obtain a civil Court's decision on the question whether there has or has not been a wrongful dismissal and if the former, what damages he is entitled to for such wrongful dismissal

Now, S. 184, Bombay District Municipal Act 3 of 1901 in the clearest possible terms invests the Chief Officer with power :

"(a) to appoint (i) without the previous sanction, of the Municipality, to any post the monthly salary for which . . . . . does not exceed Rs. 15, and

(ii) with such previous sanction in each case, to any post under the Municipality other than that of the Health Officer, Engineer or Chief Accountant,

and (b) to fine, reduce, suspend or dismiss any municipal servant whose salary does not exceed Rs. 15, and, subject to the provisions of the rules for the time being in force, any other Municipal Officer or servant not being the Health Officer, Engineer or Chief Accountant, provided that in respect of any punishment other than a fine not exceeding one week's salary his order shall be subject to an appeal to the Municipality."

Further the section states that the Chief Officer is invested by the Act with this power

"Independently of such powers as may be delegated to him by the Municipality in this behalf."

Obviously if the Municipality can under the Act delegate to its Chief Officer powers "in this behalf" i. e powers of appointing, fining, reducing, suspending and dismissing servants, it must under the Act itself be invested with such powers. Again S. 46, Bombay District Municipal Act, requires the Municipality to make rules in respect of certain matters specified in the section and Cl. (e) thereof reads :

"subject to the provisions of S. 184, determining the mode and conditions of appointing, punishing or dismissing any officer or servant and delegating to officers designated in the rules the power to appoint, fine, reduce, suspend or dismiss any officer or servant."

Obviously again, if the Municipality is empowered to make rules delegating to officers designated in the rules the power to appoint, fine, reduce, suspend or dismiss any officer or servant it must itself by the Act be invested with powers to appoint, fine, reduce, suspend or dismiss officers and servants

Reading Ss 184 and 46 (e), Bombay District Municipal Act together, I am of opinion that it is clear that the Municipality has vested in it a statutory power to appoint, fine, reduce, suspend, or dismiss officers and servants, to make rules determining the mode and conditions of appointing, punishing or dismissing such officers or servants and to delegate to officers specified in such rules the power to appoint, fine, reduce, suspend or dismiss any officer or servant Where under S 182, a City Municipality appoints a Chief Officer then such Chief Officer has the statutory powers in respect of the appointment and punishment of municipal officers and servants specified in S 184 over and above powers in this regard delegated to him by the Municipality under rules framed in accordance with S. 46 (e) of the Act

Now the rules framed by the Karachi Municipality under S 46 (e) of the Act appear in Ch 6 of the compilation "Rules and Bye-laws of the Karachi Municipality" which is Ex. 53 in the case. The Chapter is headed "Appointment of

Officers" Rr. 86, 88 (1) and 90 which are relevant to the present enquiry read as follows :

"86. The Managing Committee will have power to appoint, punish, suspend or dismiss officers and servants drawing a pay exceeding Rs. 125 but not exceeding Rs. 300."

"88. Any member of the establishment whose monthly salary exceeds Rs. 125 punished, suspended or dismissed by the Managing Committee may appeal to the Municipality."

'90. No officer or servant shall be dismissed without a reasonable opportunity being given to him of being heard in his defence."

For the defendants it is contended that Ss 184 and 46 (e), Bombay District Municipal Act read with R. 88 framed under S 46 (e) exclude the jurisdiction of the civil Court in the matter of the dismissal of a servant of the Karachi Municipality. That the provisions of R. 90 are not intended to give jurisdiction to the civil Court but are purely for the benefit of the Municipality. I have already set out the contentions of the plaintiff but it is further contended on his behalf with special reference to the rules that the plaintiff was dismissed without a reasonable opportunity being given to him of being heard in his defence as provided by R 90, that there was, therefore, an initial breach of contract on the part of the defendants and that if this is established the plaintiff is entitled to a declaration by the civil Court that he has been wrongly dismissed and to damages for wrongful dismissal even without going into the further question of misconduct involved in issue 5

There would appear to be only two cases in our Court, one reported the other unreported, in which a District Municipality was sued by one of its servants for damages for wrongful dismissal.

In the first of these, *Thariomal Pritamdas* v. *Karachi Municipality*, Civil Suit No. 164 of 1892 the issues raised were (1) whether the plaintiff was rightly dismissed, (2) to what relief if any is he entitled. The District Judge Mr. Hart Davis held that the plaintiff had not been rightly dismissed and awarded him Rs 500 as damages.

The case is of no assistance in deciding the issue now under discussion It was decided in 1893, long before the present Bombay District Municipal Act 3 of 1901 came into force. There is no reference in the whole of the judgment to the District Municipal Act then in force and it was assumed by the Court as well as by both the parties that the law relating to relations between a District Municipality and its servants was the ordinary law of master and servant The other case is one reported as *Municipality of Tatta* v. *Assanmal Chandomal* (4). This was an appeal from the decision of the Subordinate Judge of Tatta awarding damages to the plaintiff Assanmal who had been employed as Secretary by the Tatta Municipality and whose services had been dispensed with wrongfully as the plaintiff alleged.

Now, this was a case decided in 1914 when the Bombay District Municipal Act 3 of 1901 was in force, but strange as it may seem, the issue now before me for decision was not raised and the case was argued and decided on the basis that the law applicable thereto was the ordinary law regulating the relations of master and servant The main issue in the lower Court and on appeal before Fawcett, A. J. C, was.

"whether defendants were justified in dispensing with the plaintiff's services on the ground alleged in para. 3 of the written statement."

The case is of course strongly relied on by the plaintiff as a decision of an eminent Judge of our Court holding that the ordinary law of master and servants applied as between a District Municipality and its servant In deciding the issue now under discussion, however, I think the case is of no assistance The parties thereto went to trial and appeal on a particular common legal basis and the only points decided by Fawcett, A J. C., were whether on that admitted legal basis the plaintiff had been wrongly dismissed and if so to what damages he was entitled The very point of jurisdiction involved in this issue was raised in the case of *Chellam Aiyar* v. *Corporation of Madras* (5) The appellant in that case was servant of the Municipal Corporation of Madras and had been dismissed from service by the President of the Corporation. He sued the Corporation of Madras for damages for wrongful dismissal. His suit was dismissed by Srinivasa Aiyangar J , on the ground that such a suit would not lie. On appeal the decision was upheld by a Division Bench of the Madras High Court consisting of Sir John Wallis, C.J., and Oldfield, J. After refer-

(4) [1915] 8 S. L. R. 294=29 I. C. 597.
(5) [1917] 6 M. L. W. 284 = 42 I. C. 518.

ring to S. 58, Madras City Municipality Act 3 of 1904 which empowers the President to appoint subordinate officers and servants subject to the control of the Local Government and subject to such control if any to fine, suspend, reduce or dismiss any of the said officers and servants the judgment proceeds :

"Now it appears to be well-settled that when an officer in the position of the President of the Madras Corporation is empowered by Statute to appoint and dismiss subordinate officers and servants those officers and servants hold their office at pleasure This was decided in the case of *Smyth* v. *Latham* (6), and more recently in the case of *Notley* v. *London County Council* (7)."

The learned Judges of the Divisional Bench then go on to find that though S. 58 refers to the power of the President being subject to the control of the Local Government no action in regard to such control had been taken by Government when the Madras Corporation Code had been sent up to it. They proceed :

"The position, therefore, simply is that the officers and servants of the Corporation hold office at pleasure and subject to dismissal by the President. There is a further provision enabling them to appeal from the President either to the Standing Committee or to the Corporation according to the amount of their salaries, and a provision that the decision of the Standing Committee or Corporation, as the case may be, shall be final. Independently of this last provision we think that a Corporation servant thus holding office at pleasure who has been dismissed by the President has no cause of action against the Corporation."

They go on to state that as regards offices held at pleasure it is well-settled that no notice of framing of charges is necessary to validate the dismissal. Lastly, the learned Judges refer to the cases of *Shenton* v *Smith* (8) and *Ram Das Hazra* v *Secy. of State* (9), in support of the proposition that even where Government had prescribed rules regulating the dismissal of public servants yet the non-observance of those rules would not render the dismissal of an officer holding office at pleasure invalid or give him a cause of action. The case is undoubtedly very much in point. It is, of course, very strongly relied on by the defendants on whose behalf their learned pleader has pointed out that the three propositions it establishes put the plaintiff clean out of Court. The plaintiff, it is argued, as a servant of the Karachi Municipality held his office at the pleasure of the Municipality, he was liable to be dismissed at any time without notice and without the framing of any charge even if R 90 of the rules and byelaws of the Karachi Municipality has not been observed and the plaintiff has been given no opportunity of being heard in his defence, the failure to observe the rule furnishes him no cause of action and does not invest the civil Court with jurisdiction to determine whether the plaintiff has been rightly or wrongly dismissed

The learned counsel for the plaintiff has endeavoured to distinguish the case on two grounds. He argued first that it was a decision based on S. 58, Madras City Municipal Act, which vested in the President of the Corporation a statutory power to appoint and dismiss subordinate officers and servants There was no corresponding section in the Bombay District Municipal Act, the defendants had no statutory powers in regard to the appointment and dismissal of servants. I have already held that such a statutory power is vested in the Karachi Municipality by reason of S 184 and 46 (e), Bombay District Municipal Act. The Madras case is, therefore, in my opinion not distinguishable on this ground

The learned counsel next referred to the case of *Satish Chandra Das* v *Secy. of State* (10) This case has a direct bearing on the issue under consideration as well as on *Chellam Aiyar's* case (5). It was a suit brought against the Secretary of State by a dismissed Sub-Inspector of Police for the recovery of Rs. 10,000 as damages for alleged wrongful dismissal by the Inspector-General of Police, Bengal. In his plaint the plaintiff contended that his dismissal was illegal and wrongful and in flagrant disregard of all the regulations and conditions of police service. In particular he alleged that no enquiry was held as contemplated by the Government of India Act and the rules framed thereunder The defence inter alias was that the plaint disclosed no cause of action as Government had every right to dismiss its officers at its pleasure.

(6) [1893] 9 Bing. 692 = 3 Tyr. 509 = 3 M & Scott. 251 = 1 C. & M. 547 = 2 L. J.-Ex. 241.

(7) [1915] 3 K. B. 580 = 13 L. G. R. 1346 = 85 L. J. K. B 113.

(8) [1895] A. C. 229 = 64 L. J. P. C. 119 = 43 W. R. 637 =72 L. T. 130 = 11 R. 375.

(9) [1912] 18 C. W. N. 106 = 16 I. C. 922 = 17 C. L. J. 75.

(10) A. I. R. 1927 Cal. 311=54 Cal. 44.

Buckland, J., framed the following preliminary issue :

"Does the plaint disclose any cause of action by reason of any regulation or regulations having the force of law and providing for the grounds or manner in which the plaintiff could be dismissed."

The regulation relied by the plaintiff was R. 14 of the Rules regarding the Civil Services in India made by the Secretary of State for India in Council under sub-S. (2), S. 96-B, Government of India Act which provided that the dismissal, removal or reduction of any officer should except in certain specified cases be preceded by a properly recorded departmental enquiry the nature of which the rule proceeded to lay down. On the hearing of the issue the learned Judge held that notwithstandiug S. 96 (b), Government of India Act, 1915, which provided that every person in the Civil Service of the Crown of India held office during His Majesty's pleasure the provisions of R. 14 of the Rules regarding the Civil Services in India made by the Secretary of State for India in Council under sub-S (2), S. 96 (b), Government of India Act which are manifestly intended for the protection and benefit of the officer are inconsistent with importing into the contract of service the term that the Crown may put an end to it at pleasure. At p. 50 (*of* 54 *Cal.*) of the report the learned Judge states :

"Stated in other words what it comes to is that before a Police Officer may be dismissed, the procedure laid down by R. 14 must be followed. In so far as the plaintiff alleges that such regulation was not complied with, the plaint discloses a cause of action."

The case mainly relied on by Buckland was that of *Gould* v. *Stuart* (11).

In that case the Government of New South Wales in answer to a suit for damages brought against it by a clerk who had entered the service of the Government under the New South Wales Civil Services Act of 1884 and been dismissed summarily raised as preliminary pleas (a) : That the declaration disclosed no cause of action and (b) that there was nothing in the provisions of the Civil Service Act which prevented the Government from terminating the employment of an officer under it at any time The Supreme Court of New South Wales gave judgment for the plaintiff on these preliminary points. On appeal their Lordships of the Privy Council affirmed the judgment of the Supreme Court on the ground that though under the law of New South Wales as well as of England the Crown has the power to dismiss its servants at its pleasure, yet part 3, Civil Service Act, which prescribed the procedure to be followed before a Civil Servant could be dismissed contained provisions which were manifestly intended for the protection and benefit of the officer and were inconsistent with the importing into the contract of service the term that the Crown may put an end to it at pleasure. At p. 578 of the report their Lordships say : "In that case they would be superfluous, useless and delusive" The case of *Gould* v. *Stuart* (11) is distinctly referred to by Mookerji, J., in the case of *Ram Das Hazra* v. *Secy of State* (9) as establishing an exception to the rule that all public servants and servants of the Crown hold their appointments at the pleasure of the Crown on the ground that in that case "It was otherwise provided by Statute" It does not appear that either in *Ram Das* case (9) or in *Chellam Aiyer's* case (5) or in the English case referred to therein, the Statute in question or any rules framed thereunder contained any provisions making it inconsistent to import into the contract of service of the plaintiffs in those cases the term that their service could be put an end to at pleasure That there can be such an exception to the general rule that servants of the Crown hold their office at the pleasure of the Crown has again been recognized in the case of *Jehangir* v. *Secy. of State* (12) where Mr. Justice Tyabji states :

"The plaintiff was a public officer, whose employment was one which could only be given to him by the Sovereign or the agents of the Sovereign. Such public servants hold their offices at the pleasure of the Sovereign and are liable to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision."

My attention has also been drawn to an unreported decision of Beaman, J., *in Civil Suit No.* 596 *of* 1917, *David Joseph N. P Damson* v. *The Trustees for the improvement of the City of Bombay* I have read through a copy of the judgment handed to me but have come to the conclusion that the decision in that case was very largely influenced by the fact that there was a contract in writing

(11) [1896] A. C. 575=65 L. J. P. C. 82=75 L. T. 110.

(12) [1903] 27 Bom. 189=5 Bom. L. R. 80.

under the terms of which the plaintiff in that case entered the service of the Improvement Trust. The decision, therefore, throws no light on the matter now under consideration.

On a consideration of the various cases I have discussed above, I have come to the conclusion that the learned counsel for the plaintiff has succeeded in showing that the case of *Chellam Aiyar* v *Corporation of Madras* (5) is entirely distinguishable. R. 90 of the rules and bye-laws of the Karachi Municipality which provides a reasonable opportunity being given him of being heard in his defence is a rule made under the provisions of a Statute, the rule is manifestly for the protection and benefit of officers and servants of the municipality and the existence of such a rule is inconsistent with the position that a servant of the Karachi Municipality is a servant at pleasure who may be dismissed at any time without notice and without reason. The provisions of R. 90, in my opinion, constitute a statutory restriction or limitation to the power given by Statute to the defendants to dismiss their servants In so far as the plaintiff alleges in para. 8 of his plaint that the provisions of R 90 have not been complied with, that he has not been given a reasonable opportunity of being heard in his defence, he has in my opinion a cause of action.

In this view of the matter it becomes necessary, therefore, to determine whether the plaintiff's allegation that before his dismissal he was not given a reasonable opportunity of being heard in his defence is at all well founded. I have indeed in the opening portion of this judgment set out in chronological order the facts leading up to this litigation, some of those facts, however, call now for closer attention The plaintiff cannot but have been aware of the resolution of the Karachi Municipality Ex 5 appointing a sub-committee to investigate the charges of corruption laid against some members of the municipal establishment I feel that he cannot have been unaware that he was one of the members of the municipal establishment to whom the resolution referred. At any rate any doubt that he might have entertained on the subject must undoubtedly have been dispelled when the Corruption Committee took up its work and called for a statement from him of the property moveable and immovable acquired by him during the period of his service in the Karachi Municipality. That such statement was called for and was submitted by him to the Corruption Committee is manifest from Ex 12 the record of the plaintiff's examination before the Corruption Committee which is based on the statement submitted by him, and from Ex 51, containing the details called for

Between October 1919, and February 1920, the plaintiff was examined not less than six times by the Corruption Committee and a perusal of Ex. 12 the record of his examination makes it clear to me and it must have been clear to the plaintiff at the time that the object of that examination was to elucidate two points whether the plaintiff could honestly have acquired during the period of his service with the Municipality the property moveable and immovable declared in his statement and valued at about Rs. 70,000 and whether there had been any improper relations and connexions between the plaintiff and contractors dealing with the Municipality during the period of his service.

In June 1920, the Corruption Committee submitted its report Ex. 6 and on 30th June, a copy of that report was in the plaintiff's hands. The Committee's finding and recommendations so far as they relate to the plaintiff are contained in para. 21 (i) of their report They are very clear indeed: the plaintiff is held to be dishonest and to have made plenty of money in Municipal service, the Committee recommend that he be seriously dealt with By Ex 8 a copy of this report was forwarded to the plaintiff "for any explanation he may have to give"

The plaintiff has been examined and cross-examined before me at great length and it is obvious to me that he is highly intelligent individual, fairly educated and possessing quite good knowledge of English I cannot, therefore, regard as serious the argument advanced by his learned counsel that the plaintiff was no lawyer but a mere engineer and that he could not be expected to spell out of a report covering seven pages of print what charge he had to meet and what explanation he had to give Such an argument is further met by the plaintiff's explanation Ex. 9 itself which clearly indicates that the plaintiff well understood that the finding against him and the charge he had to meet was that he had made money

dishonestly during his service with the Municipality.

There was in my opinion, therefore, a definitely laid charge against the plaintiff which he was given an opportunity to meet. It has been argued that seven days was not a reasonable opportunity to the plaintiff to meet a charge or be heard in his defence. The answer to this argument is that the plaintiff never asked for a day more but submitted Ex. 9 on 7th July as the only explanation he had to offer. Even on 3rd December 1920, when the plaintiff had been asked by the Managing Committee to resign he states in reply Ex. 15 :

"I am quite prepared to defend and prove that the allegations made were quite false and without foundation."

By "allegations" he can only mean the finding of the Corruption Committee that he was dishonest and had made plenty of money in Municipal service. Till the date of his handing over charge at the end of December 1920, the plaintiff never offered any explanation or defence other than Ex. 9 to which I have referred above. On these facts I feel no hesitation in holding that the plaintiff was afforded from start to finish a reasonable opportunity which fully complied with the requirements of R 90 and that the plaintiff deliberately chose not to defend himself against the general charge of dishonesty laid against him but contented himself with a show of readiness to meet what he knew, the defendants, and before them the Corruption Committee were not in a position to formulate specific instances when the plaintiff had accepted bribes or been corrupt.

To summarise the position the plaintiff has been dismissed from the service of the Karachi Municipality by virtue of the powers vested in the Municipality by reasons of Ss 184 and 46 (e), Bombay District Municipal Act. One of the conditions and limitations attached to the exercise of that statutory powers is that plaintiff, before he can be dismissed must have a reasonable opportunity of being heard in his defence. This condition has been entirely fulfilled. The plaintiff had a right of appeal against the Managing Committee's order of dismissal. This right he has availed himself of and his appeal has been dismissed. The question remains in this state of facts and in these circumstances : has the Court jurisdiction to decide whether the plaintiff has been rightly or wrongly dismissed ? The question, I must confess, is a difficult one, and the conclusion I have arrived at is not free from doubt. On the one hand, the authorities cited by the learned counsel for the plaintiff in support of his position that the jurisdiction of the Court to determine whether the plaintiff has been rightly or wrongly dismissed is unfettered by anything contained in the Bombay District Municipal Act or in any rules or bye-laws framed thereunder appear to me to be of little assistance

Andrews v. *Mitchell* (13) was a case under the Friendly Societies Act of 1896. The plaintiff Mitchell had been expelled from the Foresters' Friendly Society without any charge being framed against him. By the rules of the Society no members could be expelled unless a charge was framed against him and he had been proved guilty on that charge. Their Lordships of the Privy Council affirming the decision of the Court of appeal held that the plaintiff's expulsion was without jurisdiction Lord Robertson stated :

"The Act of 1896 has not given carte blanche to the tribunals of these Societies to pronounce decisions which shall be exempt from examination in Courts of Law. The decisions protected from review are constitutional decisions—decisions pronounced according to the rules ... registered under the Friendly Societies Acts."

It was the entire departure from those rules which was held to invest a Court of law with jurisdiction. *Cassel* v. *Inglis* (14) was a stock exchange case. The decision of Astbury, J., is summed up as follows :

"I am of opinion that the contract gave to the Committee the right to decide how and by what procedure they would carry out the fiduciary duty committed to them, whether an objection under R. 35 had been lodged or not, and in the absence of evidence to the contrary, I cannot say that they departed in any way from what the law requires of them in this respect, but must assume that they, acting honestly, came to the conclusion for some good and sufficient reason ..... that the plaintiff was not eligible for re-election."

The decision, if anything, is against the plaintiff.

In *Thompson* v. *New South Wales Branch of the British Medical Associa-*

(13) [1905] A. C. 78=91 L. T. 537=74 L. J. K. B. 383.

(14) [1916] 2 Ch. 211=85 L. J. Ch. 569=32 T. L. R. 555=114 L. T. 935.

tion (15) the main point raised was that the rules set out in the Articles of Association relating to the expulsion of members was illegal as being in restraint of trade and, therefore, void. The plaintiff further alleged libel and claimed damages therefor.

None of these cases relate to servants of the Crown or to servants appointed in virtue of powers granted by Statute; none of them can, therefore, be regarded as an authority really bearing on the point now under discussion. They do in general lay down that bodies like the Stock Exchange, Friendly Societies, Medical Associations, which in some cases exercise under their rules and regulations quasi-judicial functions, are required by law to exercise these functions with due regard to natural justice and equity, and that Courts of law have jurisdiction to interfere where their decisions are contrary to natural justice and equity; but they can be of little assistance in determining to what extent, if any, a Court of law has jurisdiction to interfere in questions between master and servant, where the master is the Crown or a public body empowered by Statute to employ and dismiss servants.

In the same category must be placed the two Indian cases relied on by the learned counsel for the plaintiff: *Mohamed Kalim-ud-din* v. *Stewart* (16) a stock exchange case, and *Gompertz* v. *Goldingham* (17) a club case.

Lastly the case of *Satish Chandra Das* v. *Secretary of State for India* (10) is of no assistance as the case when reported had not proceeded beyond the stage of the preliminary issue to which reference has been made before

On the other hand, the learned pleader for the defendants has been unable to refer me to any authority other than the case of *Chellam Aiyar* v *Corporation of Madras* (5) and the English rulings cited therein as supporting his position that the Court has no jurisdiction to determine whether the plaintiff has been rightly or wrongly dismissed. *Chellam Aiyar's case* (5), as I have shown before, is distinguishable, and with all respect to the learned Judges that decided it I think the propositions they lay down are too broadly stated.

The point, it appears to me, must be determined on a consideration of general principles.

It is difficult to understand why Statute like the Bombay District Municipal Act should specially invest municipalities with power to appoint, fine, reduce, suspend or dismiss officers or servants, and require elaborate rules to be framed regulating the appointment, etc. of officers and servants if the legal relations between these officers and servants and the body empowered by the statute to appoint and dismiss them remain the ordinary legal relations existing between any ordinary master and servant. To my mind the object can only be in order to create special legal relations between these bodies so empowered and their officers and servants suspending the ordinary legal relations of master and servant

Again it is difficult to understand why a municipality should be empowered by statute to frame rules and bye-laws having the force of law empowering particular high placed officers to dismiss officers, servants, providing an appeal to a higher tribunal against an order of dismissal, requiring that the officer or servant proposed to be dismissed be afforded an opportunity of defending himself, if the officer or servant dismissed can in the exercise of his ordinary civil rights have the question whether he had been rightly or wrongly dismissed determined by the civil Court To my mind again the object can only be to supersede the common law right of a servant to have such questions determined by a Court of law and to provide instead domestic tribunals the decision of the highest of which should be final and binding of such officers and servants

Again an officer or servant of a municipality is a public servant, his conduct or misconduct in the discharge of his duties affects the public and their interests It would be highly inconvenient, nay scandalous, if every question relating to the misconduct or corruption of a public servant in the discharge of his duties had to be investigated in a Court of law. On the other hand, a municipality owes a duty to the public in the matter of their officers and servants, that they should be honest and fit and proper for the office held by them It would be impossible

(15) [1924] A. C. 764=93 L. J. P. C. 203=68 S. J. 518=131 L. T. 162=40 T. L. R. 506.

(16) [1920] 47 Cal. 623=56 I. C. 556=31 C. L. J. 247.

(17) [1886] 9 Mad. 319.

for a municipality to discharge their duty in this regard to the public if every action taken by them in the control of their officers and servants was liable, to be contested, investigated and scrutinized by a Court of law The words of Lord Denman in the case of *R v. Darlington School Governors* (18) are to my mind very apt in this regard He said:

"They "—that is the governing body—"are bound to remove any master whom according to their sound discretion, they think unfit and improper for the office and, as that discretion may possibly be well exercised for defects of various kinds not amounting to misconduct, so there may be misconduct, incapable of proof by witness but fully known to the governors themselves on which they could not abstain from exercising their power of removing the master without ths abandonment of their duty . . . . . they might be reasonably satisfied of the truth of the charges without possessing any means of proving them by evidence."

It is on a consideration of these general principles that I have come to the conclusion that on the facts of this case and in the circumstances thereof, both of which I have laid out above in detail, the Court has, by reason of the provisions of the Bombay District Municipal Act and the rules and bye-laws framed by the Karachi Municipality thereunder, and to which I have made special reference, no jurisdiction to decide whether the plaintiff has been rightly or wrongly dismissed I would go further and hold in general that in a suit for damages for wrongful dismissal brought by an officer or servant of the Karachi Municipality against the municipality, once the Court is satisfied, that the plaintiff's dismissal has been in accordance with the rules and bye-laws of the municipality, it has no jurisdiction to probe any further into the question and the plaintiff's suit must be dismissed

It is unnecessary for me in the view I have taken to determine what the position would be if in such a case a Court came to the conclusion that the plaintiff's dismissal had been wanton and in utter disregard of the rules and bye-laws of the municipality. It seems to me, however, that in such a case the municipality would forfeit the protection and privileges afforded to them by Statute and that the plaintiff would be entitled to succeed as in an ordinary suit between master and servant for wrongful dismissal.

(18) [1844] 6 Q. B. 682=14 L. J. Q. B. 67.

I, therefore, answer issue 4 in the negative

My finding on this issue is sufficient to dispose of the suit ; but this litigation is not likely to end here ; the suit is one of 1921, and in the event of an appellate Court taking on the question involved in issue No. 4 a view different from mine, I feel they should have before them my findings on all the points involved in the suit so as to obviate the necessity of a remand. I, therefore, proceed to consider the remaining issues. (The judgment then proceeded to consider issue 5 as if whether the plaintiff was wrongfully and illegally dismissed) I have not come to a finding on the material before me whether the plaintiff has amassed his wealth honestly or dishonestly. The point is whether before the Managing Committee of the municipality which dispensed with the plaintiff's services there was material on which they could honestly come to the conclusion that the plaintiff could not by fair means have acquired the property he admittedly possessed. As to the charges of improper relations with municipal contractors, there was material before the Corruption Committee and the managing committee that the plaintiff was badly mixed up with at least two contractors dealing with the municipality, Badrudin Budhabhoy and Kabla Umar. This point has been brought out in further detail in the cross-examination of the plaintiff in this Court. I do not propose to go into this matter at any length as I think it is unnecessary for me to do so. I cannot help concluding, however, that the admissions made by the plaintiff cast a cloud of suspicion over his dealings with both these contractors.

Now, the plaintiff in his plaint has imputed no malice to the members of the Managing Committee of the Karachi Municipality who dismissed him ; and this being so, I cannot seriously regard the insinuations made against Messrs, Dipchand Ojha, Ghulam Hussain Kassim, Jamshed Mehta and Ghulamali Chagla in their cross-examination by the learned counsel for the plaintiff The plaintiff alleges the dismissal was wrongful that is unjustifiable Can it be said that with the materials before them, and to which I have referred in so much detail, their dismissal of the plaintiff was wrongful and illegal? As stated by their

Lordships of the Privy Council in the case of *Clouston & Co. Ltd.* v. *Corry* (19):

"there is no fixed rule of law defining the degree of misconduct which will justify dismissal from service."

Much will depend on the nature of the misconduct and the nature of the duties to be performed by the person dismissed In the present case the plaintiff was a trusted officer of the Karachi Municipality, a public servant owing duties not only to his employers but to the public generally. I feel no hestitation in stating that on the materials before them the Managing Committee of the Karachi Municipality were justified in the action they took My answer to issue 5 is, therefore, in the negative.

Issues 7 to 11 may well be dealt with together ; they involve the one question. What damages is the plaintiff entitled to if the Court having jurisdiction to do so were to hold that the plaintiff had been dismissed wrongfully and illegally. It is entirely unnecessary to discuss these issues individually or to record a finding on each of them as the learned counsel for the plaintiff has admitted that the plaintiff does not claim the specific sums shown by him in the annexure to the plaint, but that these particulars are intended merely te furnish a basis for determining the measure of damages. These issues in fact appear to have been drawn under a misapprehension.

Now, every master has an inherent right to dispense with the services of his servant with reasonable notice. As to what is reasonable notice depends on the nature of the servant's employment When this is determined, the measure of damages is what the servant would have earned in the employment of his master during the period of the notice. This I think is a proposition of law which cannot be disputed, in fact, the learned counsel for the plaintiff conceded this position and confined his final arguments on the issue of damages to the point as to what in the plaintiff's case should be regarded as reasonable notice. The case of *Maw* v. *Jones* (20) which appears to have laid down a contrary principle has been practically overruled in *Addis* v. *Gramophone Co* (21) where their Lordships of the Privy Council held that :

" Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment."

In *Manubens* v. *Leon* (22) a hair dresser's assistant on a weekly wage but with an implied term that he was to receive tips was held entitled to claim as damages for wrongful dismissal in addition to a week's wages an amount in respect of the loss of the tips which he would have received but for the wrongful dismissal In *Grundy* v. *Sun Printing and Publishing Association* (23) a year's notice was considered reasonable for an Editor of a newspaper and damages were awarded on that basis. In the case of *Municipality of Tatta* v *Assanmal Chandoomal* (4) three months salary was awarded as damages to the plaintiff who was the Secretary of a Small Municipality In a footnote at p 97 of Vol. 20 of Halsbury's Laws of England there is a whole collection of cases showing what period of notice has in decided cases been held to be reasonable for persons employed in various trades and professions.

Bearing in mind the nature of the plaintiff's employment, and after considering the cases I have referred to above, I should in this case, had I not decided issues 4 and 5 against the plaintiff, have awarded him 12 months' salary at Rs 335 per month (Rs 280 plus 45 plus Rs 20), as damages for wrongful dismissal Unfortunately for the plaintiff I have found on issues 4 and 5 against him and his suit must, therefore, be dismissed with costs.

R.K. *Suit dismissed.*

(19) [1906] A. C. 122=75 L. J. P. C. 20=54 W. R. 382=22 T. L. R. 107=93 L. T. 706.
(20) [1890] 25 Q. B. D. 107=59 L. J. Q. B. 542=38 W. R. 716=54 J. P. 727.
(21) [1909] A. C. 488=78 L. J. K. B. 1122=101 L. T. 466.
(22) [1919] 1 K. B. 208=88 L. J. K. B. 311=63 S. J. 102=35 T. L. R. 94=120 L. T. 279.
(23) [1916] 33 T. L. R. 77.

* A I R. 1929 Sind 83

ASTON, A. J. C

Chetoomal Bulchand and *others*—Respondents.1

v

Shankerdas Girdharilal and *others*—Respondents 2.

Judl. Misc No 348 of 1928, Decided on 28th January 1929.

*** (a) Arbitration Act, S. 4 — Option to submit to arbitration exerciseable by one party only—Award is valid.**

Section 4, Arbitration Act, like S. 27 Arbitration Act 52 and 53 Vict. C. 49, only requires an agreement in writing to submit present or future differences to arbitration and provided the agreement is a valid agreement in writing it makes no difference whether the provision for the submission of present or future differences to arbitration is unconditional or subject to a contingency, such as the exercise of an option by one of the parties. *Woodall* v. *Pearl Assurance Co.*, (1919) 1 *K. B.* 593, *Foll.* [P 84 C 2]

(b) Specific Relief Act S. 19 — Mutuality —Principle does not apply in India.

The doctrine of mutuality which was one of the defences in English Law to an action for specific performance has been deliberately left out from the Specific Relief Act by the legislature and it is not applicable to India. 5 *S. L. R.* 61 *Rel. on.* [P 84 C 2; P 85 C 1]

(c) Contract Act, S. 2 (i) — Mutuality— Doctrine of—S. 2 (i) does not incorporate.

Section 2 cannot be invoked as a clause importing the doctrine of "mutuality" into the law of contract in India. [P 85 C 1]

Srikishindass H. Lulla —for Respondents 1.

Kimatrai Bhojraj — for Respondents 2.

Judgment —Mr. Kimatrai has pressed the following objections on behalf of respondent 2. He contends that there was no valid submission inasmuch as the arbitration clause in the agreement gave one of the parties only an option to have the dispute referred to arbitration and and not the other It is contended that in order to constitute a submission within the meaning of S 4, Arbitration Act, there must be be an unqualified agreement to refer.

Reliance is placed in this connexion on the judgment of the Bombay High Court in *Burjor* v. *Ellerman City Lines Ltd* (1) in which Macleod, C J, expressed the obiter opinion that if there had been an agreement to refer any disputes which might arise to the arbitration of named arbitrators at the option of one of the parties he would hesitate before holding that that was a submission within the proper meaning of the term.

It is contended that a condition precedent to a valid submission is that either party in case of a dispute arisiug on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration.

(1) A. I. R. 1925 Bom. 449=49 Bom. 854.

The definition of "submission," however, is the same under the Indian Arbitration Act 9 of 1899 as under S. 27 Arbitration Act 52 and 53 Vict. C 49 and it was held by the Court of appeal in *Woodall* v. *Pearl Assurance Co* (2) that a clause in an agreement which provided that in the event of one of the parties viz, an insurance company requiring arbitration the award of the arbitrator was to be a condition precedent to any right of action in the assured constituted a valid condition precedent to the maintenance of an action.

It has been suggested that this was an obiter opinion and that the real matter for decision was whether defendant could repudiate liability under the policy on the ground that the assured had misdescribed his occupation and at the same time avail himself of the arbitration clause. A reference to the judgments, however, shows that although this was one of the contentions it was only one of them and the Court for the purpose of deciding the appeal construed the arbitration clause and held that it gave the insurance company an option to refer and then decided that notwithstanding this fact the agreement created a valid condition precedent to the maintenance of an action.

Section 4, Arbitration Act like S 27, Arbitration Act 52 and 53 Vict C. 49 seems to me only to require an agreement in writing to submit present or future differences to arbitration and provided the agreement is a valid agreement in writing it seems to me to make no difference whether the provision for the submission of present or future differences to arbitration is unconditional or subject to a contingency, such as the exercise of an option by one of the parties.

It is contended, that a one-sided option is an infringment of the doctrine of "mutuality." It was, however, pointed out by a Bench of this Court in *Kewalram Ganshamdas* v *Donald Graham & Co.* (3) that the doctrine of mutuality which was one of the defences in English Law to an action for specific performance has been deliberately left out from

(2) [1919] 1 K. B. 593=88 L. J. K. B. 706= 120 L. T. 556=63 S. J. 352=83 J. P. 125 21 Com. Cas. 237.

(3) [1911] 5 S. L. R. 61=10 I. C. 211.

the Specific Relief Act by the legislature and that it is not applicable to India

It is lastly contended that under the provisions of S 2 (i), Contract Act, since the agreement to refer was enforceable by one of the parties thereto but not at the option of the other, it was a 'contract voidable at the option of the party on whom the agreement conferred no option. But S 2 (i), Contract Act says nothing of the sort The marginal note to the section is " Interpretation clause " and the section merely explains what is meant by a proposal, a promise, promisee, consideration for the promise, an agreement, reciprocal promises, void agreement, contract, and a voidable contract S. 2 cannot possibly be invoked as a clause importing the doctrine of " mutuality " into the law of contract in India I am of opinion that there is no force in the objection raised on behalf of respondent. 2

An application is now made on his behalf that the Court will under the power conferred by the proviso to S 9 (b), Arbitration Act, set aside the appointment It seems to me doubtful whether the proviso to S 9 (b) has any application The sole arbitrator was not appointed, in pursuance of Cl. (b), as required by the proviso, he was appointed in the exercise of a power created in the agreement. In other words, he was appointed in the exercise of an express power agreed to by the parties, and not in the exercise of a power implied by statute But even if the Court has power the present does not appear to be a fit case in which to exercise it

On 15th September 1928 Messrs. Srikisandas and Co, the pleaders of Messrs Chetoomal Bulchand wrote to respondent 2 informing them, that Messrs Chetoomal Bulchand appointed Bhai Thakurdas Mulchand as their arbitrator and calling on respondent 2 to nominate an arbitrator within 7 days. On 22nd September Messrs N G Dalal and Co, a firm of Bombay solicitors wrote in reply that it was not a question which required to be settled by arbitration and that their clients were not bound to do so On 4th October Messrs. Srikishindas and Co, wrote that their clients appointed their arbitrator as the sole arbitrator. On 19th October 1928 Mr. Chatar Beharilal, advocate of respondent 2 sent a telegram addressed to Chetoomal Bulchand stating that his clients appointed Dwarkadas of Kodhromal Jethanand as their arbitrator.

This was three days before the first hearing and 4 days before the award, and no application was made under the proviso to S 9 (b) to set aside the appointment of the sole arbitrator until 14th January 1929 nearly three months after the award. The only reason urged in support of the application is that respondent 2 was a " few days " late in appointing his arbitrator The correspondence, however, shows that he was a few " weeks " late I think it would be utterly unreasonable, on such a feeble pretext, to set aside an appointment long after the award was made The application is dismissed The award will remain filed with costs on respondent 2.

D D *Application dismissed.*

A I. R. 1929 Sind 85

DE SOUZA, A. J C.

Haji Abdul Latif and *others*—Plaintiffs

v

Suleman Umar and *another*—Defendants

Civil Suit No 491 of 1922, Decided on 22nd April 1927.

(a) Partnership — Partner employing his own capital in partnership business should be given interest on it while making up business account

Where a partner invests capital of his own in the partnership business, he should in equity be allowed to charge interest on the capital so employed in making up the profit and loss account of business. (*Obiter*). *Ex parte Chippendale*, (1853) *Ch* 4 *D. M.* and *G.* 19, 36, *Foll* [P 87 C 2]

(b) Partnership—Goodwill—Meaning of.

The goodwill of a business means every affirmative advantage, as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises of the business or its name or style and everything connected with or carrying with it the benefit of the business, *Cruttwell* v. *Lye*, (1810) 17 *Ves.* 335; *Trego* v. *Hunt*, (1896) *A. C.* 7, *Cons.*, *Churton* v. *Douglas*, (1859) 28 *L. J. Ch.* 84, *Foll.* [P 88 C 1]

(c) Partnership — Goodwill — Effectiveness of possible competition should be main factor in valuing goodwill.

The effectiveness of possible or probable competition should be one of the main determining factors in the valuation of goodwill. [P 88 C 2]

(d) Partnership — Goodwill — Calculation of.

Goodwill is generally valued at so many years purchase on the amount of profits. And these annual profits are generally calculated on an average of 3 years *Davis* v. *Hodgson*, (1858) 119 *R. R.* 379, *Page* v. *Ratliffe*, (1896) 75 *L. T. R* 371, *Von Au* v. *Magenheimer*, 115 *App. Div.* 84, 20 *Harv* v. *Law Rev.* 235, *Cons.* [P 88 C 2]

C. Lobo and *Hakumatrai M Advani* —for Plaintiffs

Dipchand Chandumal and *Kimatrai Bhojraj*—for Defendants

Judgment. — These are certain objections filed by the plaintiffs and the defendants respectively against the report of the Official Commissioner who was directed by order of Kennedy, A J C dated 22nd December 1925 to take accounts of the business of Arms and Ammunition carried on by the firm of A Haji Dossal and Sons from year 1907

At the hearing before the Official Commissioner disputes arose as to whether the accounts most be confined to the Arms and Ammunition business alone or whether the defendants should be made to account for dealings in other commodities The Commissioner made a reference to the Court and Barlee, A J C. on the 5th August 1926 gave directions as follows

(1) The Commissioner should take an account of all dealings in Arms and Ammunition into which the defendants can be proved to have entered up to the date of the dissolution of the partnership;

(2) He should take an account if their dealings in other commodities when such dealings were made through the Branch or were financed by money which came to them through the Branch, and

(3) That he should take an account of any transactions in goods other than Arms and Ammunition of which any mention is made in the books and documents of the Branch but may not consider evidence of any other transactions.

Subsequently the appeal against the judgment and decree of Kennedy, A. J. C. came on for hearing before the High Court And the High Court, in their judgment dated 13th June 1927 gave directions to the Official Commissioner to take account in the following words :

" We therefore add to the instructions of the learned Additional Judicial Commissioner (Kennedy, A. J. C.) the instructions that the plaintiffs are not entitled to any interest on the withdrawals by the defendants and that the conclusions should be made simply on the strength of Ex. 42 without any consideration of interest and in the second place they should be allowed nothing for rent, light, municipal rates and the like."

A direction was also added .

" That the Commissioner should go into the question of goodwill and decide what the goodwill of the business amounted to and award to the defendants 1/4th share of that goodwill with interest from the date of the dissolution of the partnership."

The lines on which the accounts of the business have to be taken have therefore to be sought in the directions given in those three orders by Kennedy, A J.C , Barlee, A J C and the High Court. Some of the directions are rather vague and prima facie not mutually consistent It is not easy to pick one's way through the labyrinth of the directions given by three different Courts on three different occasions And in this obscurity and confusion the leaders of the Bar have found their opportunity

At first I thought that the question was concluded by the directions in the judgment of the Court of appeal

" that the calculations should be made simply on the strength of Ex. 42 without any consideration of interest."

It appeared as though the Court of appeal regarded Ex 42 as the final settlement of accounts of the period covered by the statement and that the plaintiffs were therefore debarred from going behind that statement and reopening the account. Mr Lobo, however, argued that this passage in the judgment of the appeal Court must be read in its true context and so read the true construction is that that the appeal Court referred to the calculations of overdrawings alone and its remarks must not be construed as referring to any other items in the account.

As against this interpretation Mr. Dipchand argues that if the Court meant that the plaintiffs should be confined to Ex 42 with regard to calculations of overdrawings alone it would have said so and that there is no warrant for this interpretation of words in the manner suggested by Mr. Lobo. True that in this portion of the judgment the Court of appeal deals with interest and charges for rent, light, municipal rates alone and Mr Lobo's argument appears to be plausible On the other hand it must be remembered that Ex. 42 was a statement prepared by the plaintiffs themselves and produced at the trial as being a correct statement of the profits of the partnership on the footing that defen-

dants had a four annas share. They now contend that that statement is not correct as it did not include the profits made by the partnership from the general business transacted by the Arms and Ammunition Department from the 5th May 1919 to the date of dissolution. It was on this basis they asked that they should be allowed to re-open the account from the 5th May 1919 to the date of dissolution And this contention prevailed with Mr. Barlee, A. J. C. when he formulated the three cannons for the guidance of the Official Commissioner

Whether it was open to the Official Commissioner at the taking of the accounts to allow the plaintiffs to resile from the account which they had themselves produced at the trial as the correct account is an open question I do not feel that I am called upon no decide it in view of the order of Barlee, A J. C. behind which I am unable to go.

But it is possible that the Court of appeal had this aspect of the case in their minds when they gave the directions which I have above set out. And if that was the intention of the Court of appeal, of course, I would be bound by that expression of intention and I would have to treat Ex 42 as a settlement of account till the period 1920 and the account for the remaining period up to the date of dissolution of partnership on 15th May 1922 will be the Potamel prepared by the Official Receiver after the institution of the suit.

In my own personal opinion, I do not think that the plaintiffs should be allowed to re-open the account and go behind Ex. 42 But as I have said the directions given by the three Courts are not very clear and it is possible for the array of the learned pleaders engaged in the case to successfully argue in the Court of appeal that my view of the position is incorrect and therefore I proceed to consider the several items objected to on their merits (Here the judgment proceeds to consider the objections one by one and proceeds) The items then around which the dispute centres in this Court is an item of shop rent at Rs 1,800, an item of interest on a capital of Rs. 75,000 which works out at Rs 4,500 and messing charges which amounts to Rs. 750 These three items added to the actual figures shown in the exhibits above referred to amount to a total of Rs. 18,000 from which deducting Rs. 3,400 the estimated expenditure at 2½% on the general business, Mr. Dipchand claims that the defendants should be awarded Rs 13,700.

Now, the defendant has been held liable to account for business done in arms and ammunition during this period under S. 259, Contract Act, as a partner malgre lui and at first sight it seemed to me that as he invested capital of his own in this business he should in equity be allowed to charge interest on the capital so employed in making up the profit and loss account of the business This view is supported by the observations of L J. Knight Bruce in *Ex parte Chippendale* (1) "I think" said the L. J. :

"that mercantile usage and the general course of trade dealings do where a partner in a trade had duly and properly advanced money of his own for the purposes of the partnership business so as to become justly a creditor in account with the partnership for the amount raise an implied contract for interest so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorized and may not have known of the transaction at least in the absence of any e press contract to the contrary."

I would have given effect to his view were it not that I find that nothing was claimed on account of interest before the Official Commissioner (Here the judgment discusses other objections to the Commissioner's report and proceeds.) The last set of objections to the Commissioner's report refers to the question of goodwill. The Court of appeal reversing the order of the learned trial Judge directed that the Commissioner should go into the question of goodwill and decide what the goodwill of the business amounted to and award to the defendants four-annas share of that goodwill with interest from the date of the dissolution of the partnership The learned Judges observed :

"The plaintiffs have been taking advantage of the whole of the goodwill of the firm by using the name and the other benefits derived from the continuation of the ammunition business, while defendants have had nothing of that advantage. In these circumstances we are of opinion that the defendants should obtain their share of the goodwill with interest thereupon from the date of the dissolution of the partnership."

Goodwill was defined in one of the earliest leading cases on the subject by

(1) [1853] Ch. 4 D. M. & G. 19, 36.

Lord Eldon in *Cruttwell* v. *Lye* (2) as being :

"nothing more than the probability that the old customers will resort to the old place. It is also that good disposition which customers entertain towards the house of business identified by the particular name or firm and which may induce them to continue giving their custom to it . . . . . That it is property is abundantly settled by authority."

This definition was found to be too limited for modern kinds or methods of business as it involves the ancient ideas that goodwill inhered in the premises where the business was conducted. After a period of vacillation and hesitation in the English Courts this matter came up for decision finally before the House of Lords in *Trego* v. *Hunt* (3) where Lord Macnaghten designated the goodwill as the very sap and life of the business, without which the business would yield little or no fruit, the result of the reputation and connexion of the firm which may have been built up by years of honest work or gain, by lavish expenditure of money. And Lord Davis in the same case said that the idea of goodwill and what is comprised in the sale of business has generally been developed and grown since the days of Lord Eldon. Following this decision Wood V. C. in *Churton* v. *Douglas* (4) observed that the goodwill of a business means every affirmative advantage, as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises of the business or its name or style and everything connected with or carrying with it the benefit of the business. The learned V. C emphatically observed in that case that the name of a firm is very important part of the goodwill

Mr. Lobo on behalf of the plaintiffs has contended that the name and style under which the firm of a Haji Dossul & Sons traded has had little or no saleable value because he argued that the plaintiffs need pay nothing for it as they were entitled to continue to trade under the same name and style even after dissolution ; that the defendants' offer through their pleader to pay a lakh for the goodwill including the name was pure bravado as they are not in a position to raise the money and a decree for more than a lakh is pending against them and that for a third party the goodwill would have no value as the defendants had already started a rival shop dealing in arms and ammunition opposite the present premises I venture to think that there is a fallacy underlying each of these alternatives. I demur to the proposition that the plaintiffs could after dissolution continue to trade under the name and style of a Haji Dossal & Sons on the ground that a Haji Dossul and sons were one unit in the partuership and I consider that the authority of *Churton* v *Doughlas* (4) on which Mr. Lobo relies does not support this proposition. As regards the defendants' inability to make a firm offer, the question is not so much the defendants' capacity to raise the money as what price it was worth the defendants' while to pay. And as regards a third party, the question has to be decided having regard to the probability of how far the competition by the defendants after the dissolution would be effective

Unfortunately there is very scanty authority either the English or the Indian Law Reports as to how the value of goodwill of a business has to be assessed. It is said that the English Courts have adopted an arbitrary rule of limiting the value of goodwill to one years' purchase of the net annual profits calculated on an average for three years . cf *Davies* v *Hodgson* (5) or that three years net profits represent the value of good-will : *Page* v *Ratliffe* (6). But it appears that the American Courts have not adopted any such arbitrary standard : *Von Au* v *Magenheirmer* (7) where an attempt was made to prescribe a rule for ascertaining the value of a goodwill by multiplying the average annual net profits for a suitable number of years with reference to the business But as was observed in 20 *Harve* v *Law Rev* 235, it would be difficult to deal with the question of value where it arises otherwise than to leave it to be determined as other matters of fact

Mr. Kimatrai on behalf of the defendants has expatiated on the great repute the firm had acquired not only in Karachi but more specially upcountry in Sind,

(2) [1810] 17 Ves. 335.
(3) [1896] A. C. 7=65 L. J. Ch. 1=44 W. R. 225=73 L. T. 514.
(4) [1859] 28 L. J. Ch. 841=7 W. R. 365=5 Jur. (n. s.) 887.
(5) [1858] 119 R. R. 379=25 Beav. 177.
(6) [1896] 75 L. T. 371.
(7) 115 App. Div. 84=100 N. Y. Supp. 659.

Punjab and Baluchistan and even in far off Bengal and Southern India, the up-country sales of the firm amounting to a value 75% of the total sales. He has elaborated the point that the business which was taken over by the plaintiffs' firm as a derelict business in 1902 investing therein a capital of Rs. 15,000 only, was by the energy and enterprise of the defendants, by successful advertisement on which they spent on an average Rs 200 a month by surviving sale agencies for leading English firms and by their business acumen generally developed into an extremely prosperous business, and the net average profits which in the year 1902 amounted to Rs 22,620 progressively increased till in the year 1920 they amounted to Rs 59,045 Mr Kimatrai lays stress on the fact that the good name acquired by the firm during all these years is a very valuable asset that in a business like the business of arms and ammunition where expert knowledge, reliability and honesty are essential, nothing is more probable than that the old customers will, in the words of Lord Eldon resort to the old place and what is more that it has an attractive force which will bring in more custom. Mr. Kimatrai dwelt on the progressive rate of profits made by the firm without scarcely ever a set-back and had argued that the business of the firm had been established on such a sound and steady basis that it would have little or nothing to fear from competition.

To my mind the effectiveness of possible or probable competition should be one of the main determining factors in the valuation of good will, and in the present case this factor need not have been assessed at a hypothetical valuation because there were data which could have been gathered from the accounts of the plaintiffs' firm after dissolution to show how far the competition by the defendant had affected the plaintiffs' business. But curiously enough no attempt was made by the plaintiffs to produce their profit and loss accounts in the ammunition department after the dissolution nor by the defendants to compel the production of these accounts. Instead of this we have vague statements of witnesses like Dorabji, Byramji and Husseinbhoy salesmen in the rival ammunition firms who state vaguely that after 1922 there was a slump in the ammunition business that prices came down with a crash and that trade was killed and one of the firms had actually to close this department of the business.

It seems to me that if the plaintiffs wished to rely upon facts that business in arms and ammunition became very slack and the slackness was due as whole or in part to competition by the defendant, the best evidence on the point would have been their own books of account which they did not produce before the Official Commissioner. We have, however, a very important clue as to whether there really was a slump in the business after 1922 in the statement (Ex 41) produced by the plaintiffs themselves at the trial showing their turn over of rifles, revolvers, pistols, cartridges, gun-powder, percussion-caps and shots, from the year 1922 to the year 1925. Comparing this statement with the statement of turn over (Ex. 18) for the years prior to the dissolution it seems that far from there being a slump, there was a boom during this period and the average number of arms and ammunition sold during this period is considerably in excess of the average sold during the years prior to 1922. One of the plaintiffs' witnesses Byramji a salesman of Murray & Co, stated that the trade of that firm in arms and ammunition was practically killed by competition during this period. It is possible that one firm's loss was the other firm's gain and the plaintiffs' firm certainly judging from the turn over was none the worse for the competition.

Mr. Lobo argued on this aspect of the case that the turn over is no clue to the profits made and that the plaintiffs being a wealthy firm could afford to lay in a large stock and could sell at little or no profit. I venture to think that the plaintiffs, shrewd men of business as they are, would hardly carry on business in arms and ammunition on a philanthropic basis

Approaching the case from whatever point of view it seems to me that the competition whether by the defendants or by any of the rival firms in no way affected the business of the arms and ammunition department carried on by A. Haji Dossal & Sons; that the profits if anything were even greater after the dissolution than before and that the pros-

perous condition of this business must be ascribed to the goodwill acquired by the firm during long years of hard and honest work

Goodwill is generally valued at so many years purchase on the amount of profits, cf., Lindley on Partnership 9th Edn, 545. These annual profits are generally calculated on an average of three years In the present case the Official Commissioner has calculated them on an average of the years from 1908 to May 1922 and Mr. Lobo has argued that it would not be right to calculate the average of the last three year's profits as they were war profits. There is considerable force in this argument and I think the most equitable way of calculating profits here would be to take out the average of the profits for six years from 1914 to 1920. On this basis the average profits would amount to Rs. 46,086.

And for the reasons I have set out in the earlier part of this judgment I am of opinion that the valuation of the good will in this case should be made at three years purchase of the net annual profits equal to Rs. 1,38,258 of which 1/4th viz., Rs 34,564-8-0 should be apportioned to the defendants. (Here the judgment dealt with other objections and proceeded) Decree to be in terms of the Commissioner's order as modified by directions given by this Court. The decree to be shown to the learned pleaders on both sides before it is brought up for signature.

I do not think that this is a case in which instalments should be granted to the defendants. The amount adjudged due is on account of over-drawings by the defendants while the partnership was in force and is now ordered to be recovered from them as such over-drawings. It is contended that it is a large sum and if the defendants are compelled to pay at once it must cripple their business. There is nothing to show that the defendants are at the beam-end of their financial resources In any case the plaintiffs are entitled to recover in a lump the amount due to them as amouut due on accounts taken of the partnership. I, therefore, decline to award instalments nor do I think any time should be given to the defendants for the payment of this sum.

As regards costs the Court of appeal has directed that each party should bear their own costs right up to the moment the judgment of that Court was delivered. I make a similar order as to costs except with regard to the Commissioner's fee about which I have already passed orders The balance of the Commissioner's fee to be deposited by each party.

S.N./R.K. *Decree modified.*

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* A. I. R. 1929 Sind 90

PERCIVAL, J. C. AND RUPCHAND, A. J. C.

Mir Allahbuxkhan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln No. 258 of 1928, Decided on 14th January 1929, against decision of Ag J C.

*** (a) Penal Code, S. 499, Excep. 9—Wilful misrepresentation or misstatement without due enquiry cannot support plea of "fair comment."**

There is a distinction between "fair comment" based on well-known or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappears. A wilful misrepresentation of fact or any misstatement which an editor could have discovered to be a misstatement if he had made proper enquiries cannot support the plea of "fair comment" as an editor must make due enquiries as to its truth before disseminating the statement of those facts. (*English case-law Considered.*) [P 91 C 1, 2]

(b) Criminal P. C., S. 439 — Finding of fact will not be interfered unless unsupported by evidence.

It is not open to High Court to go behind the finding of fact in revision unless it is shown that the evidence on the record left no scope for the Courts below to come to that conclusion. [P 92 C 1]

Hatim Tyebji—for Applicant.

Rupchand, A. J. C.—The accused who is the editor of a local newspaper "The Alwahid" has been convicted by the learned City Magistrate of Karachi, under S 500, I P. C. and sentenced to pay a fine of Rs. 1,000 or in default to suffer simple imprisonment for six months. The appeal filed by him before this Court on its Sessions Court side has been summarily dismissed by the learned Ag. Judicial Commissioner. The accused has now come to us in revision.

The learned counsel has strenuously argued that the case of the accused falls within the purview of Excep. 9, S. 499, I. P. C. and that this was not a case which deserved a summary dismissal by the appellate Court The whole of the argument of the learned counsel is based on a misconception of the law pertaining to the main point at issue It loses sight of the important distinction which has been repeatedly pointed out between "fair comment" based on well known or admitted facts and the assertion of unsubstantiated facts for comment Where comment is made on allegations of facts which do not exist, the very foundation of the plea disappears

In *Lefroy* v *Burnside* (*No* 2) (1), the defendants, a Dublin newspaper asserted that the plaintiff who was the Manager of the Geen's Printing office in Ireland, had corruptly supplied Freeman's Journal with official information and surreptitious copies of official documents A plea of fair comment, stating that Freeman's Journal did somehow get official information earlier than the other papers, and that the defendant bona fide believed that such information could only have been obtained from the Queen's Printing Office, was held bad on demurrer

In *Davis* v *Shepstone* (2). The appellants were the owners of a daily newspaper called the "Natal Witness" in which they constantly attacked the official conduct of the respondent, the British Resident Commissioner in Zululand, asserting that he had himself violently assaulted a Zulu chief, that he had set on his native police to assault and abuse others etc They proceeded, on the assumption that the charges were true, to comment on the respondent's conduct in most offensive and injurious language and at the trial in Natal, on 4th September 1883, it was proved that the charges against the respondent were absolutely without foundation. A verdict was given for the plaintiff. On appeal to the Judicial Committee, the decision of the lower Court was affirmed and in delivering the judgment of their Lordships of the Privy Council, Lord Herschell, L. C observed at p. 190 as follows :

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticizm not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticizm and allegations of fact such as that disgraceful acts had been committed, or discreditable language used. It is one thing to comment upon or criticize even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

In *Joynt* v *Cycle Trade Publishing Co.* (3) where the plaintiffs sued the defendants who were the proprietors and editors of a trade journal for libel Kennedy in summing up the case to the jury inter alia said :

"The comment must . . . not misstate facts because a comment cannot be fair which is built upon facts which are not truly stated, and further it must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation."

These observations were quoted with approval by Vaughan Williams L J. in that case at p. 298 when it came up for appeal and by Cozen Hardy M R in *Hunt* v *Star Newspaper Co Ltd. at p.* 317 (4) The learned counsel has invited our attention to the following passage in the judgment of Couch, J., in *Howards* v *Mull* (5) *at p.* 91 ;

"And where a person makes the public conduct of a public man the subject of comment and it is for the public good he is not liable for an action if the comments are made honestly and he honestly believes the facts to be as he states them and there is no wilful misrepresentation of fact or a misstatement which he must have known to be a misstatement if he had exercised ordinary care."

This passage lays down no different rule of law as it enjoins the defendant to make no wilful misrepresentation of fact or any misstatement which he could have discovered to be a misstatement if he had made proper enquiries

Now the charge against the accused was two-fold, namely, that certain allegations of fact which were false had been made against the complainant, and that the comment which was based on those allegations of fact was malicious.

The trial Court found as a fact that the allegations of fact were in the main untrue, and the appellate Court must be deemed to have been of the same opinion

(1) 4 L. R. Ir. 557.
(2) [1886] 11 A. C. 187=55 L. J. P. C. 51=50 J. P. 709=34 W. R. 722=55 L. T. 1.
(3) [1904] 2 K. B. 292=73 L. J. K. B. 752=91 L. T. 155.
(4) [1908] 2 K. B. 309=77 L. J. K. B. 732=52 S. J. 376=24 T. L. R. 452=98 L. T. 629.
(5) [1866] 1 Bom. H. C. R. App. 85.

when it summarily dismissed the appeal. It is, therefore, not open to us to go behind the finding of fact of these two Courts in revision, unless the accused satisfies us that the evidence on the record left no scope for the Courts below to come to that conclusion. Not only is there ample evidence on the record in support of the findings of the Courts below, and including the unimpeachable testimony of Mr Smart, the then Collector of Karachi, but the language of the allegations of fact mentioned in one of the counts is such that there can be no doubt as to its being untrue and to have been made recklessly. This allegation is as follows :

"On the Moulvi complaining to the Collector Abdul Kadir (complainant) in order to show his pharaohism told all the shipping companies not to sell tickets to the Moulvi who tries to buy them but could not."

Now, not only it is difficult to believe that the complainant would dare to approach all the shipping companies with such request but it has been proved by the evidence of a responsible officer of of one of the principal shipping companies that the complainant never approached them with such a request. There is no allegation much less proof that the accused made any enquiries from any of the shipping companies to find out whether this allegation was true before he made it.

If the accused had realized the responsibilities which attach to the power of an editor in the dissemination of the printed matter and had acted as a cautious journalist would do, it was his duty to have made due enquiries before disseminating such a statement.

In the present case there is no scope for the plea that some of the allegations of fact which are not true were slight unintentional errors which might be excused, and we have no doubt that if the accused had exercised due care and caution some of the allegations should never have been made.

In view of the findings of two Courts that the main allegations of facts are untrue, the very foundation of the plea of privilege, or fair comment fails. It is therefore hardly necessary for us to go into the further question whether the comment based on such allegations was made in good faith. It would be sufficient for us to observe that the expressions "tyrannical" "unfeeling," "dead-hearted man."

"worthless Pharaoh who had out of personal animosity prevented a pilgrim from performing the indispensable religious duty of going to the Haj."

are expressions which prima facie take the case of the accused beyond the range either of fair and honest comment or comment worthy of a responsible editor of any decent and well managed newspaper

We accordingly, summarily dismiss this application.

R.K. *Application dismissed.*

A. I. R. 1929 Sind 92

PERCIVAL, J. C. AND ASTON. A. J. C

Spencer and *Co.*—Applicants.

v.

Edulji and *others*—Opponents.

Revn. Appln. No. 5 of 1926, Decided on 25th February 1929

(a) Civil P. C., S. 115—S. 115 applies to "jurisdiction" alone.

Section 115 applies to jurisdiction alone the irregular exercise or non-exercise of it and the section is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. The refusal to issue a commission for the examination of a witness does not constitute a question in which jurisdiction was involved. *A. I. R.* 1924 *Mad.* 541, *not foll.*, *A. I. R.* 1917 *P. C.* 71, *Foll.* [P 93 C 1. 2]

(b) Civil P. C., S. 115—Order of refusal to issue a commission is not a "case."

The order of refusal to issue a commission does not appear to be a case decided within the meaning of S. 115, Civil P. C. 14 *S. L. R.* 28 ; 44 *Bom.* 619 ; *A. I. R.* 1927 *Bom.* 664 and *A. I. R.* 1924 *Lah.* 425, *Rel. on.*; *A. I. R.* 1927 *Sind* 264, *Foll.* [P 93 C 2]

Nadirshah Naoroji—for Applicants.

Isardas Oodharam—for Opponents.

Aston, A J.C—This is an application under S. 115, Civil P C, for the revision of an order by the learned A. J. C refusing to grant a commission to issue for the examination of a director in the defendants' company who was also a defendant in his personal capacity.

It appears that Mr Walton, the director was passing through Karachi and during his visit he had an interview with the plaintiff in the case on the subject of a lease. Mr. Walton who is a director of other companies proceeded to Calcutta and the defendant company Messrs. Spencer and Co., wished to examine him on commission in Calcutta.

The order passed by the learned Additional Judicial Commissioner was as follows :

"As the witness to be examined is a director of the defendant and is said to be in India on his tour, I cannot allow the application for commission. I shall be prepared to examine him de bene esse on any day he comes down here provided he gives intimation of the date of his arrival at least 8 days before."

It is contended by Mr Nadirshah that a party has a right to the issue of a commission : see *Vidya Parna* v. *Shethamma* (1) that a Court will not scrutinize an application of the defendant to be examined on commission with the same strictness as the application of the plaintiff, *Akbar Ali Khan* v. *Herbert Francis* (2) and that it will be a great hardship to require a defendant who is not ordinarily residing within the jurisdiction of the Court and who is permanently residing at a great distance from the Court either to attend Court at a great loss and inconvenience to himself or be virtually shut out of his defence : see *Adami Khadi* v. *Isuf Ahmed Mulla* (3)

It has, however, been argued by way of preliminary objection that an application for revision in the circum stances will not lie. This preliminary objection is based on two grounds firstly, that the question of jurisdiction is not involved in this case and secondly that the application made to the A. J C and his order thereupon was not a "case" which has been decided within the meaning of S 115.

As regards the first of these points, it was held by the Madras High Court in *Vishwanathan Chetty* v *Somasundaram Chetty* (4) that where a Court refused to grant a commission to examine the defendant the High Court can interfere under S. 115 It was, however, pointed out by their Lordships of the Privy Council in *Balkrishna Udayar* v *Vasudeva Aiyar* (5) that S. 115 applies to jurisdiction alone the irregular execise or non-exercise of it and that the section is not directed against conclusions of law or facts in which the question of jurisdiction is not involved.

I am of opinion that the refusal to issue a commission for the examination of a witness does not constitute a question in which jurisdiction was involved. The applicant's proper remedy it seems to me is to make the order against which he has filed his revisional application one of the grounds of appeal in the event of the suit being decided against him.

With regard to the second point relating to the meaning of a "case" in S. 115, it has been held by the Bombay High Court in *Secy. of State* v. *Narsibhai Dadabhai* (6) that the High Court will interfere under S. 115 where the question of jurisdiction is involved in an interlocutory stage. The Madras High Court in *Balkrishna Udayar* v *Vasudeva Aiyar* (5) were of the opinion that the word "case" in S 115 might include an exparte application In *Municipality of Tando Adami* v. *Khair Mahomed* (7) a Bench of this Court while expressing approval of the decision of this Court in *Yusafally Alibhoy* v. *Haji Muhomed Haji Abdulla* (8) set aside under S. 115, Civil P C., an interlocutory order by a lower Court refusing to amend a plaint.

As against these decisions it was held by this Court in the case above quoted viz, *Yusafally Alibhoy* v. *Haji Muhomed Haji Abdulla* (8) that a High Court will not interfere under S 115, Civil P. C against interlocutory orders. A similar view was expressed in *Bai Rami* v. *Jaga Dhullabh* (9) where the Court held the High Court will not interfere with interlocutory orders passed by the lower Courts in the course of a pending suit This was followed by Percival, J., of the Bombay High Court in *Isa Adam* v. *Bai Mariam* (10) and the similar view was expressed by the Full Bench of the Lahore High Court in *Lal Chand Mangal Sain* v. *Behari Lal Mehr Chand* (11)

I am of opinion that the preliminary objection must be allowed on both grounds.

The refusal to issue a commission does not appear to me to be an order in which the question of jurisdiction is involved and such an order is not in my opinion a case which has been decided within the meaning of S. 115. I am in

(1) [1911] 21 M. L. J. 889=12 I. C. 74.
(2) A. I. R. 1925 Pat. 125=3 Pat. 863.
(3) [1912] 16 I. C. 750.
(4) A. I. R. 1924 Mad. 541.
(5) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261 (P. C.).
(6) A. I. R. 1924 Bom. 65=48 Bom. 48.
(7) A. I. R. 1925 Sind 260.
(8) [1920] 14 S. L. R. 28=58 I. C. 721.
(9) [1920] 44 Bom. 619=57 I. C. 556=22 Bom. L. R. 801.
(10) A. I. R. 1927 Bom. 664.
(11) A. I. R. 1924 Lah. 425=5 Lah. 289 (F.B.)

full agreement with the view expressed in *Yusafally Alibhoy* v. *Haji Mahomed Haji Abdulla* (8), *Bai Rami* v. *Jaga Dhullabh* (9) and by Percival, J in *Isa Adam* v *Bai Mariam* (10) and a Full Bench of the Lahore High Court, in *Lal Chand Mangal Sain* v *Behari Lal Mehr Chand* (11).

I would therefore dismiss this application with costs.

Percival, J. C —I quite agree.

During the course of the arguments reference was made to two cases to which I myself was a party and I see no reason now to differ from the view taken in these two cases. In the Sind case namely *Mt Malanbai* v. *Nihal Chand* (12) the exact point now before this Court came up for consideration and the conclusion of Mr Tyabji, A J. C. and myself was:

"no revision lies against an order of the trial Court dismissing an application for issue of a commission but such an order of dismissal may be made a ground of appeal against the final judgment."

That decision was in accordance with the ruling in *Yusafally Alibhoy* v *Haji Mahomed Haji Abdulla* (8) and the view taken by Mr Tyabji and myself was that there was no reason why we should disagree with that ruling. Mr. Tyabji observed there .

"It is urged before us that this decision is erroneous and opposed to the decisions of the other High Courts and that we should therefore refer that decision to a Full Bench so that it may be reconsidered. For the reasons that I have indicated it seems to me that this is not a proper case in which we should refer the matter to the Full Bench but that in the present case we should follow the decision in *Yusafally Alibhoy* v. *Haji Mahomed Haji Abdulla* (8)."

That judgment was delivered two years ago but the present position is much the same The decision of different High Courts are to some extent disprepant, some in favour of a mere liberal interpretation on S. 115 and others in favour of a less liberal interpretation So far as Sind is concerned, however, *Yusufally Alibhoy* v. *Haji Mahomed Haji Abdulla* (8) has not been overruled and I see no reason why we should not continue to follow that ruling

I agree therefore in the order dismissing the application with costs.

P.R./R.K. *Application dismissed.*

(12) A. I. R. 1927 Sind 264=22 S. L. R. 129.

A. I. R. 1929 Sind 94

RUPCHAND, A. J. C.

Atmaram Udhavdas and *others* — Applicants.

v.

Dayaram Sawney—Opponent

Insolvency No 60 of 1924, and Judl Misc. Appln. No 146 of 1928, Decided on 19th February 1929, by Official Receiver J C.'s Court, Karachi

(a) Provincial Insolvency Act (1920), S. 53 —Limitation.

The actual date of the order of adjudication is the terminating point for the purpose of limitation : *A. I. R.* 1925 *Bom.* 480, *A. I. R.* 1928 *Lah.* 361, (*F. B.,*) *A. I. R.* 1928 *Rang.* 148, and *A. I. R.* 1927 *Sind* 66, *Foll.* [P 95 C 2]

(b) Transfer of Property Act, S. 53—Suit for cancellation of an instrument of transfer can be brought by the creditor within three years from the date of the cause of action—Similar time is granted to a transferrer and to his receiver—Provincial Insolvency Act (1920), S. 53.

Apart from the Provisions of S. 53, Prov' Ins. Act, which enable the Insolvency Court to declare certain transfers of property as void, it is open to any transferrer to sue in a Court of law for cancellation of a document of transfer of property executed by him on the ground that such transfer was not intended to be acted upon provided he files a suit within three years from the date when the facts entitling him to have the instrument cancelled or set aside become known to him. If the transferrer becomes an insolvent, there is no reason why the Official Receiver in whom the estate of the transferrer has vested or he himself acting under the instruction of the Official Receiver should not institute such a suit after his insolvency provided he does so within three years of the date of his cause of action. It is equally open to any creditor of a transferrer to file a suit within three years of the date of such transfer under S. 53, T. P. Act, if such transfer has been executed with the object of defrauding creditors. There is again no reason why such creditor or the Official Receiver acting for his benefit should not institute a suit under that section subsequent to the date of the order of adjudication. [P 96 C 1 2]

(c) Provincial Insolvency Act (1920), S. 53 —Operation of S. 53 is not intended to deprive party of the advantage of the provisions of Limitation Act by instituting a suit.

Legislature by enacting S. 53 did not impliedly intend to deprive the debtor or the creditor of their right to have transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation. [P 96 C 2]

(d) Provincial Insolvency Act (1920), S. 4 —Where if suit instituted simultaneously with application under S. 4 would be time-barred the Court will not exercise its juris-

diction under S. 4 except in special circumstances.

When the Insolvency Court is called upon to exercise its jurisdiction under S. 4 it would except under very special circumstances, refuse to exercise that jurisdiction where a suit instituted on the same date as the application made before it, is liable to be defeated by the plea of limitation, that is to say, it would not afford relief to the aggrieved party to resort to this section when the enforcement of such relief before an ordinary tribunal is statute barred. [P 96 C 2]

(e) Provincial Insolvency Act (1920), S. 53 —Relief under S. 53 statute barred— Special provisions of the onus of proof are inapplicable.

Section 53 casts a heavy burden on the transferee to prove his bona fides. If the relief of the Official Receiver under S. 53 is statute barred, it is not open to the Court to rely upon the special provisions of that section for the purpose of throwing the onus on the transferee to prove the bona fides of his transaction. While entertaining such an application under S. 4 of the Act, the Court will deal with the question of onus in the same manner as in an ordinary suit. [P 96 C 2. P 97 C 1]

(f) Transfer of Property Act, S. 53—Meaning of a fraudulent transfer.

A transfer of property is not made with intent to defraud, defeat or delay creditors within the meaning of S. 53 if its effect or object is to prefer one creditor to another, even if it is made with the intention to defeat an anticipated execution. What the section invalidates is a transfer which removes the whole or a part of the debtor's property from the creditor as a body to the benefit of the debtor : *A. I. R.* 1915 *P.C.* 115, *Foll.* [P 97 C 2]

Kimatrai Bhojraj—for Applicants.

Dipchand Chandumal—for Opponent

Judgment.— This is an application under Ss 4 and 53, Prov. Ins Act, praying that the mortgage executed by the insolvent Motiram in favour of his brother Rai Bahadur Dayaram Sawney on 29th February 1924 be set aside as being without consideration, or in the alternative as being a fraud on the creditors

The mortgage was admittedly executed within about five months of the date of the presentation of the petition for insolvency of the firm of Lalchand Motiram of whom Motiram was a partner; but more than two years before the date on which the order of adjudication was passed

There is a divergence of judicial opinion on the question whether for the purpose of computing the period of limitation prescribed by S. 53, the date on which the order of adjudication was passed, or the date of the presentation of the petition for insolvency should be the terminus a quo. The Bombay, Lahore and Rangoon High Courts have adopted the view that the plain meaning of the words used in S 53 should be given effect to, and that therefore the actual date of the order of adjudication is the terminating point for the purpose of limitation, vide *Nagindas Dayabhai* v *Gordhan Dayabhai* (1) *Hemraj* v *Krishanlal A I. R* 1928 *Lah.* 361 (*F.B.*), *Mg. Po* v. *Mg. Htein* (2). The same view was, as far as I am aware taken by this Court under old Provincial Insolvency Act 3 of 1907, and has been adhered to under the present Act: see *Official Receiver* v. *Tirathdas Mewaram A. I. R.* 1927 *Sind* 66.

On the other hand, the Calcutta, Madras and Allahabad High Courts have taken a contrary view, and have held that S. 53 should be read with S 28 Cl (7) of the Act, that the date of the order of adjudication relates back to the date of the presentation of the petition for insolvency, and that the date of presentation of the petition is therefore the terminus a quo: *Rakhal Chandra* v. *Sudhindra Nath* (3); *Rangiah* v *Appaji Rao* (4); *Sheonath* v. *Munshiram* (5).

The point in issue is not free from difficulties. It has been said that the act of the Court in delaying the passing of the order of adjudication, whether it be due to the tactics adopted by a dishonest debtor or not, should not prejudice the Official Receiver and the creditors who attack the bona fides of a transfer made by the debtor. But there is equally no reason for holding that the delay in passing the order of adjudication, whether the same be caused by the dilatoriness of the creditors or not, should prejudice the unfortunate transferee.

Under S. 53 there is a heavy burden on the transferee to prove his bona fides. If there is delay in challenging the validity of a transaction, it is likely to prejudice him in proving his bona fides. This is especially so in places outside the Presidency Towns where there is a greater risk of evidence not being easily available if it is not recorded at an early date. It is therefore open to argument that the legislature has intentionally provided for a

(1) A. I. R. 1925 Bom. 480 =49 Bom. 730.
(2) A. I. R. 1928 Rang. 148=6 Rang. 193.
(3) [1919] 46 Cal. 991=52 I. C. 747=24 C.W. N. 172.
(4) A. I. R. 1927 Mad. 163=50 Mad. 300.
(5) [1920] 42 All. 433=55 I. C. 941=18 A. L. J. 449.

different terminating point in S 53 of the Act than that provided elsewhere

As at present advised, I am not prepared to differ from the view hitherto entertained by this Court which is in conformity with that taken by at least three High Courts The present application so far as it purports to be made under S 53 of the Act is therefore statute barred.

It has been argued that where an application falls within the purview of S. 53 of the Act, S 4 has no application whatsoever, and that, in any case, it will be an improper exercise of the discretion vested in the insolvency Court to entertain an application under that section when it is statute barred under another section of the same Act. I am not prepared to accept the whole of this argument as sound nor am I prepared to accept it in the form in which it has been put before me

Section 4 is a general section It confers jurisdiction on the insolvency Court to deal with all questions arising between the debtor's estate and strangers which would otherwise be triable by an ordinary tribunal, provided the insolvency Court considers it expedient or necessary to decide such questions for the purpose of doing complete justice between the parties or making complete distribution of the debtor's estate It is, however, to be noted that the section does not confer any arbitrary powers on the insolvency Court of deciding such questions in any manner it thinks fit, and in the absence of any express provision in that behalf the Court is bound to decide such disputes according to the same principles of law as an ordinary tribunal, though its procedure may to a certain extent be summary

Apart from the provisions of S 53 of the Act which enable the insolvency Court to declare certain transfer of property as void, it is open to any transferrer to sue in a Court of law for cancellation of a document of transfer of property executed by him on the ground that such transfer was not intended to be acted upon provided he files a suit within three years from the date when the facts entitling him to have the instrument cancelled or set aside become known to him. If the transferrer becomes an insolvent, there is no reason why the Official Receiver in whom the estate of the transferrer has vested or he himself acting under the instructions of the Official Receiver should not institute such a suit after his insolvency provided he does so within three years of the date of his cause of action.

It is equally open to any creditor of a transferrer to file a suit within three years of the date of such transfer under S. 53, T. P Act, if such transfer has been executed with the object of defrauding creditors. There is again no reason why such creditor or the Official Receiver acting for his benefit should not institute a suit under that section subsequent to the date of the order of adjudication.

It is doubtless true that S 53, Prov Ins Act prescribes a period of 2 years for the entertainment of an application to set aside certain transfers including those referred to above. But it cannot even for a moment be contended that the legislature by enacting this section impliedly intended to deprive the debtor or the creditor, as the case may be, of their right to have such transfers set aside by instituting a suit before an ordinary tribunal within the longer period of limitation prescribed by the Limitation Act. If that be so, I can see no reason why the same relief should not be afforded to them by the insolvency Court under S 4, Prov Ins. Act. Whether in the exercise of its discretion the insolvency Court will not assume jurisdiction vested in it under S. 4 of the Act and thereby withdraw the case from the ordinary tribunal is quite another matter.

I am prepared to concede that when the insolvency Court is called upon to exercise its jurisdiction under S 4, it would, except under very special circumstances, refuse to exercise that jurisdiction where a suit instituted on the same date as the application made before it, is liable to be defeated by the plea of limitation, that is to say, it would not afford relief to the aggrieved party to resort to this section when the enforcement of such relief before an ordinary tribunal is statute barred I have advisedly used the expression "except under very special circumstances" as it will presently appear.

I am also prepared to concede another point which is still of greater importance to the opponent and that is this

Section 53, Pro Ins. Act casts a heavy burden on the transferee to prove his bona fides. If the relief of the Official Receiver under S. 53 is statute barred, it is not open to the Court to rely upon the special

provisions of that section for the purpose of throwing the onus on the transferee to prove the bona fides of his transaction. While entertaining such an application under S. 4 of the Act, the Court will deal with the question of onus in the same manner as in an ordinary suit

Now the application of the Official Receiver is twofold. In the first place he represents the general body of creditors and applies that the mortgage be declared void under S. 53, T P. Act, This application was presented more than 3 years after the date of the mortgage and therefore ordinarily I should have been reluctant to exercise my discretion under S. 4 of the Act. But in the present case, there are certain special circumstances which make it proper for me to entertain the application on that ground as well One Pandit Harnamdas had attached the property of the insolvent Motiram in execution of his decree passed in Suit No 177 of 1926, which was transferred by this Court to the Senior Sub-Judge, Jhelum, for execution. On the application made by the opponent that attachment was raised The creditor then filed a suit under O 21, R 58, Civil P.C. for a declaration that mortgage executed by the debtor in favour of the opponent was void On Motiram being adjudged insolvent, the Senior Sub-Judge, Jhelum, passed an order dated 27th April 1927, holding that Pandit Harnamdas had no right to institute the suit and that the proper person to have the mortgage declared void was the Official Receiver This decision was given on the plea raised by the opponent He cannot blow hot and cold, and it is hardly open to him now to object to the Official Receiver proceeding with the present application as representing the said Harnamdas.

In the next place, the Official Receiver represents the debtor and applies that the mortgage be declared void on the ground that as between the debtor and the opponent it was never intended to be operative Even if it be assumed that the opponent asserted an adverse claim against the debtor in the execution proceedings, the present application being within 3 years of that date, the question of limitation hardly arises

On the merits, however, I am of opinion that the Official Receiver has failed to discharge the burden which would entitle him to relief under the ordinary law. The Official Receiver has established certain cogent facts which create a good deal of suspicion on the bona fides of the claim of the opponent; but they do not amount to sufficient proof. It is established that the opponent knew that the debtor and his brothers were in difficulties when he got the document executed in his favour but that is not enough There is evidence that he used to advance moneys to his brothers-in-law, and that they were indebted to him to a certain extent What their actual indebtedness was it is difficult to ascertain. The bandi produced by him is in no way above suspicion, and the debtors' books have not been produced. The Official Receiver is in the unfortunate position that he has to rely upon the evidence of the debtor whom he is prosecuting for perjury, and certain other offences committed by him against the insolvency law The debtor has given evidence (whether it be true or not), to support the case of the opponent. He has alleged that there was a partition between him and his brothers, and that in pursuance of that partition he was made to pay a sum of Rs 14,000-0-0 to the opponent and to secure the due payment thereof, he executed a mortgage on his property. This may or may not be true But on the materials before me, I am not prepared to hold that a certain sum not less than Rs 14,000-0-0 was due by the family to the opponent. If that is so, it was open to the opponent to hold the insolvent liable for the whole of that sum and to secure himself by getting a mortgage executed in his favour In *Musahar Sahu* v *Hakim Lal* (6), their Lordships have observed that:

"A transfer of property is not made with intend to defraud, defeat or delay creditors within the meaning of S. 53, Transfer of Property Act, if its effect or object is to prefer one creditor to another, even if it is made with the intention to defeat an anticipated execution. What the section invalidates is a transfer which removes the whole, or a part of the debtor's property from the creditors as a body, to the benefit of the debtor."

The fact that the insolvent executed the mortgage in favour of the opponent with the object of preferring him to Harnamdas or with the object of avoiding the anticipation of execution in Harnamdas's decree, is not sufficient.

The Official Receiver as representing the general body of creditors cannot

(6) A. I. R. 1915 P. C. 115=43 Cal. 521=43 I. A. 104 (P.C.).

therefore have the mortgage set aside unless he shows that it was executed without consideration and for the benefit of the debtor. He cannot for the same reason have it set aside as representing the debtor as mortgage was intended to be acted upon.

I must confess that if S 53, Pro Ins. Act had applied, a good deal might have been said in favour of the Official Receiver But his claim under that section being statute barred, I have no option but to hold that he has failed to establish a case for setting aside the transfer and that this application should therefore be dismissed

As I am not satisfied with certain statements made by the opponent in his evidence, I order that each party should bear his own costs.

P R/R K. *Application dismissed.*

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* A. I. R. 1929 Sind 98

PERCIVAL, J. C., AND RUPCHAND, A J. C.

Dayaram Gidumal—Appellant.

v

Nabibux and *others*—Respondents

First Appeal No. 113 of 1925, Decided on 1st February 1929.

*** Contract Act, S. 74—S. 74 does not penalise party making concession to debtor by accepting smaller sum than due if paid in strict conformity to concession — Consent decree providing, in default of payment by defendant on certain date of smaller sum than due, defendant to pay larger sum claimed and due to plaintiff — Time is whole consideration of such contract and such decree cannot be penal.**

Section 74 does not penalise a party who is prepared to make a concession in favour of his debtor by accepting a smaller sum than is due to him provided it is paid in strict conformity of the concession shown to him. [P 100 C 1 2]

Where a consent decree provides that in default of payment by the defendant on certain dates of a certain smaller sum of money than is claimed to be due, the defendant shall pay to the plaintiff the larger sum claimed and which is really due plus the costs of the suit with interest at 9 per cent per annum. Time is not only the essence of such contract but it is also its whole consideration and such decree cannot amount to a penalty which means something which the debtor is to pay over and above his original liability as a punishment : *Thompson* v. *Hudson*, (1869) 38 *L. J. Ch.* 431; *Ex parte Burden, In Re Neil*, (1881) 16 *Ch. D.* 675, *Rel. on*; *A. I R.* 1924 *Pat.* 387, *Cons.* and *not Foll.*; 8 *M. I. A.* 239 *Dist.*, *Ford* v. *Earl of Chesterfield*, 105 *R. R.* 201, *A. I. R.* 1928 *P. C.* 27, *Ref.*; 10 *Cal.* 305 (*P. C.*), *Expl.* [P 100 C 2, P 102 C 1, 2]

Dipchand Chandumal—for Appellant.

Chubermal Valiram—for Respondents.

Rupchand, A. J. C—This appeal arises in execution proceedings of a consent decree which provides as follows:

"1. That the defendant do pay to the plaintiff Rs. 5,000-0 0 on account of the entire claim and costs in two equal instalments, the first being payable on 15th January 1924, and the 2nd on 15th January 1925. That in case of default in the payment of any of the instalments the defendants do pay to the plaintiffs the whole amount of claim viz., Rs. 9,000-0-0 and costs of the suit amounting to Rs. 723-6 9 with interest at 9 per cent. per annum."

The trial Court held that the defendants had made default in payment of the first instalment, and that the payments made by them to plaintiff 3 of Rs 2,000-0-0 on 2nd February 1924 and Rs. 500-0-0 on 11th February 1924, towards the first instalment were not only out of time, but were not a valid discharge of their liability to pay the amount to the plaintiffs who were jointly entitled to receive the same, but held that as the decree provided for a penalty, it was open to the Court to relieve the defendants of such penalty. The defendants having paid the second instalment in time during the pendency of these proceedings, the Court ordered the defendants to pay an additional sum of two third of Rs. 2,500-0-0 with interest due thereon to plaintiffs 1 and 2 in full satisfaction of their decree.

The main point raised before us is whether the decree provides for a penalty. Now, there is a broad distinction between an agreement which provides that in default of payment of a certain amount on a particular date or dates, the defaulting party shall pay a much larger amount than is admittedly due by him, and an agreement which provides that in default of payment on certain dates of a certain smaller sum than is admitted to be due or is claimed to be due, the defaulting party shall be liable to pay the larger sum admitted or claimed to be due. In the former case, the provision for payment of the larger sum is clearly in the nature of a penalty. In the latter case, where the larger sum is admittedly due the agreement to enforce the payment of such sum does not come within the purview of that expression It would appear that where a

larger sum is claimed, but not admitted, the question whether such larger sum was agreed to be paid in the event of default is a penalty or not would greatly depend upon the nature of such claim and on what transpired at the time of the agreement to accept the smaller sum in satisfaction thereof.

The leading English case on this point is *Thompson* v *Hudson* (1). In that case, *H* was indebted to *T* and *S* on several accounts to ascertain which three separate suits were pending against him. In one suit a final decree was made fixing the liability of *H* on one account and ordering him to pay by a day named. *H* wanted further time and it was agreed between him and *T* and *S* that the terms of the order as to payment should be varied, *H* agreeing not to appeal against the final decree already made, to admit the amounts claimed in the other two suits, and on a certain day to pay a fixed sum and to execute a mortgage, for securing payments in a particular manner of another sum, and *T* and *S* agreed thereupon to take a lesser sum than they claimed with a proviso that if *H* made any default they should be at liberty to recover their whole debt He carried out his agreement in part and made default in payment of the amount due by him according to the manner stipulated and on *T* and *S* enforcing payment of the full amounts claimed by them pleaded that the proviso in that behalf was a penalty which could not be enforced in equity. That proviso was in the following terms;

"In case Lord Downe, or the defendants shall not pay and secure the said sums to the plaintiffs in manner aforesaid, or if a good and satisfactory mortgage shall not be executed to the plaintiff for the said sum of £ 25,613 15s. and interest, or if the defendants shall fail in performing all or any of the stipulations on their part hereinbefore contained, then the plaintiffs shall be at liberty to recover the said principal sums, interest and costs decreed or claimed to be due to them in the said several suits, and to adopt all such proceedings in the said several suits or otherwise for aiding their recovery of their said several claims as they may be advised."

It was held that the plea that the said proviso was in the nature of a penalty could not be sustained. At p. 441 Lord Westbury has observed as follows:

"In answer to the questions which they were required to answer in the chambers of the Master of the Rolls they thought that it was very rational and very right to say, if a creditor, tells his debtor, 'provided you pay me half the debt, or two-thirds of the debt, on an appointed day I will release you from the rest' and will accept the money so paid in discharge of the whole debt, but if you do not make payment of it on that day, then the whole debt shall remain due to me and I shall be at liberty to recover it'. There would be no doubt at all that the proposition was both reasonable and accordant with common sense. But the principal has not been accepted by the two tribunals before which the case has been heard. "The Master of the Rolls appears to have thought that the residue of the debt in the case I have put would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty A penalty is a punishment, an affliction, for not doing something. But if a man claims to be entitled to receive at a future time, on the default of his debtor, that which he is now entitled to receive it is impossible to understand how that can be regarded as a penalty. I have not, therefore, the least hesitation in stating that, if the Master of the Rolls is rightly reported, there was a strange confusion at the moment prevailing in his Lordship's mind, and that it could not have been present to him at the moment when he delivered his judgment that the rest of the debt still remained due by contract, and that what was due by contract could not be a penalty."

At p. 435 the Lord Chancellor has said:

"It is equally clear on the other hand that where there is a debt actually due, and at the time when the debt becomes due and is not paid, an agreement is entered into for granting to the debtor further indulgence, and the creditor is willing to allow him certain advantages and deductions from that debt as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions then it is perfectly competent for the creditor to say: "If the payment be not made mode et forma as I have stipulated, then forthwith the right to the whole original debt shall revert to me, and it shall be open to me to proceed and to exercise all those powers which I have for compelling payment of the original debt, in other words, I am entitled to be replaced in the position in which I was when this agreement which has been broken was entered into. Therefore, as far as the law of the case is concerned, there can be no difficulty in the matter."

In this case *H* was disputing the validity of the final decree passed in one suit and the amount claimed in the other two suits, but in consideration of the agreement to pay a small sum on certain conditions he waived his right to file an appeal in the suit which was decreed and submitted to decrees for the sums claimed in the other two suits, and he was made to pay the said sums.

(1) [1869] 38 L. J. Ch. 431=4 H. L. 1.

In the later case of *Ex parte Burden In re Neil* (2) a creditor who had issued a debtor's summons in respect of a judgment debt of £344 agreed to accept a cheque for £105 and three bills of exchange for £50 each accepted by a third party, and on payment of the cheque and bills in due course to give a receipt in full settlement of the judgment debt, but that in default of payment of any or either of the cheque or bills, the creditor was at liberty to proceed for the full amount The Court consisting of James Cotton and Lush, L. J. J., unanimously held that the creditor was entitled to proceed for the full amount. Cotton, L J. expressed his view thus :

"It is said that the provision for the revivor of the original debt is in the nature of a penalty. I know of no case in which the equitable doctrine about penalties has been applied to a case in which a creditor agrees to reduce the amount of his claim on certain conditions but that on the failure of the debtor to fulfil any one of those conditions the original rights of the creditor shall revive, and in my opinion the doctrine ought not to be applied to such a case."

Lush, L. J., has expressed the same view in different terms as follows :

"Is there any equitable ground for relieving the debtor? It has been argued that the provision for the revivor of the debt is a penalty. I understand penalty to be something which a debtor is to pay over and above his original liability, as a punishment. But that is not so in the present case."

It would follow from both these cases that where a party claims to be entitled to receive a larger sum which is really due to him, in the event of default in payment of the smaller sum which he has agreed to take subject to certain conditions, the claim for money really due to him cannot be converted into a penalty which means something which the debtor is to pay over and above his original liability as a punishment, and no such question can therefore arise.

Now, it is no doubt true that S. 74, Contract Act, has done away with the distinction between a penalty and liquidated damages, but there is nothing in that section or in the illustrations thereto to show that it was ever intended to lay down any different law than was laid down in the two cases cited above, and to penalise a party who was prepared to make a concession in favour of his debtor by accepting a smaller sum than was due to him provided it was paid in strict conformity of the concession shown to him

Our attention has been invited to *Mt. Nand Rani Kuer* v *Durga Das Narain* (3), where a compromise decree provided that if the defendant paid to the plaintiff Rs. 1,000-0-0 immediately and Rs. 12,000-0-0 on or before 31st March 1923, the claim of the plaintiffs would be discharged in full, but that on failure to pay the above instalments, the plaintiff would be entitled to realize her full claim for Rs 20,989-9-0 with costs and future interest, the defendants had made default in payment of Rs 12,000-0-0 on the due date, the Court condoned the delay.

It appears that the attention of their Lordships was not drawn to the above decisions. The judgment is a short one and all that it says on this point is :

"On the other hand, it seems to be now settled that where the agreement is for the payment of money on a prescribed date, and that upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract."

Now, these observations are perfectly correct, and perfectly intelligible, if they are applied to a case where the party in default is made to pay a larger sum than is due by him. But with all respect, I fail to see how time could be treated to be a non-essential term in the contract in the case where the creditor agrees to forgo part of his admitted claim provided he gets the lesser sum on a particular date In such a case time is not only the essence of the contract, but the whole consideration of it. It is in consequence of the promptness of payment of a part of the debt at once that the creditor agrees to forgo the remainder, and it is not a case in which equity relieves against time, for if it did, it would be violating its rules, as per Master of the Rolls in *Ford* v. *Earl of Chesterfield* (4).

Our attention has also been invited to the case of *Ram Gopal Mookerjea* v. *Samuel Masseyk* and *Thomas J Kenny* (5) ; but in that case the point which their Lordships were required to adjudicate upon, was whether there had been any failure by the respondents in the substantial performance of the contract and if there had been any default to whom

(2) [1881] 16 Ch. D. 675=29 W. R. 879=44 L. T. 525.

(3) A. I. R. 1924 Pat. 987=2 Pat. 906.

(4) 105 R. R. 201.

(5) [1860] 8 M. I. A. 239=2 W. R. 43 (P.C.).

such default was attributable (p. 258). In that case the offer of payment had been made in time by the respondents but it was urged before their Lordships that that offer was no valid offer on three grounds . first, that the offer did not include the interest which ought at that time to have been paid, second, that the person to whom money was offered had no authority to receive money on behalf of the appellant, and third, that the respondent was bound to seek out the appellant on the date of payment and to tender him the exact amount and interest then due (p 259) As to the first objection their Lordships observed that the omission to include interest arose from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused. As to the second objection, their Lordships observed that they were by no means satisfied that the person to whom the money was tendered had no authority to receive the money As to the third, it was said that there seemed to have been uncertainty on both sides as to the place where the ikrarnamah was to be produced and the money paid. After discussing the evidence their Lordships held that they were satisfied that there was a bona fide endeavour on the part of the respondent fairly to perform his agreement.

The case of *Ford* v. *Earl of Chesterfield* (4), was cited before their Lordships as good authority but an attempt was made to distinguish it on the ground that in the case before their Lordships a third person had undertaken the liability of the debt and to incur the penalty. But the judgment of their Lordships of the Privy Council is silent on that point. It cannot therefore for a moment be suggested that the principle laid down in *Ford's* case was considered as inapplicable to India.

The case of *Rai Balkishindas* v. *Raja Run Bahadursing* (6), is an authority for the proposition that a penal clause contained in a consent decree may be relieved by the Court, though it does not so expressly decide, and proceeds upon that assumption. But it goes no further and if carefully analysed, it, on the contrary, helps the plaintiffs to a certain extent. In that case certain instalments were allowed on certain conditions. Art. 2 of the solehnamah provided for payment of interest at eight annas per cent. and further provided for the amounts paid being appropriated in a certain manner and how they were to be paid. The third article which is the important one ran as follows :

"If the first instalment be not paid on 30th Bhadon 1281 Fasli, the two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree and realize his entire decretal money with interest at the rate of one rupee per cent. per mensem from defendants and their properties In case of default, the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on 30th Bhadon 1281 Fasli, then the decree-holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this solehnamah, to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs. 30,000 0-0 the plaintiff shall have no objection to receive the same"

In dealing with the effect of these different clauses in the decree, at p. 165 it is said .

". . . their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent under certain circumstances, and 12 per cent. under others."

And at p. 170 it is said :

"It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances."

It would, therefore, appear that the mere fact that a higher rate of interest was provided by a consent decree, would not necessarily render the payment of such higher rate a penal rate. Different clauses of the decree must needs be construed as a whole; *Bissessar Das Daga* v. *Emanuel Vas* (7). If both the clauses of the decree in suit are construed together, it would appear that it was intended to provide that there was to be a decree for the whole amount due with interest

(6) [1884] 10 Cal. 305=10 I.A. 162=13 C.L.R. 392=4 Sar. 465 (P.C.).

(7) A. I. R. 1928 P. C. 27=55 Cal. 298=55 I. A. 58 (P.C.).

and costs, but that if Rs 5,000-0-0 was paid in certain instalments no further sum was to be recovered and that it proceeded on the admission that the sum claimed was really due to the plaintiffs

No attempt has been made to prove that Rs. 9,000-0-0 was not the sum really due or that the claim in suit was exaggerated and so excessive that the respondents could not possibly have agreed to a decree for that amount except on the basis of the excess over Rs. 5,000-0-0 being by way of a penal provision for non-payment of the amount really due by the defendants on the dates stipulated by them. On the contrary, it would appear that the sum of Rs 9,000-0-0 was approximately the amount justly due by the defendants and that the defendants were securing a substantial concession by agreeing to pay the sum of Rs 5,000-0-0 promptly. A reference to the pleadings makes it abundantly clear that the minimum sum which the plaintiffs bona fide believed to be due was Rs 9,000-0-0. They had asked for a decree for this amount or such further sum as was found due to them. The respondents were the accounting parties and had suppressed their books A commissioner had been appointed to ascertain what amount should be decreed to the plaintiff, and there was a chance of the defendants being made to pay more than Rs 9,000-0-0 Lastly the defendants 2 were minors, and the Court's sanction was duly obtained before the compromise decree was passed It is hardly believable that the Court agreed to be a party to a consent decree which rendered the minors liable to a penalty of paying about Rs. 5,000-0-0 on a just claim of an equal amount, unless the amount justly due was paid in two equal instalments within a period of about eighteen months from the date of the decree which was 15th May 1923. If, on the other hand, it is borne in mind that as the defendants were agriculturists and the recovery of the money under the provisions of S. 29, Deccan Agriculturists Relief Act, would mean any amount of delay in its recovery, the plaintiffs were prepared to make a substantial reduction of the amount due provided the defendants paid the sums agreed upon on the stipulated dates. I am of opinion that on a true construction of the decree read as a whole, and in the light of the other circumstances of the case, the decree was not a penal decree and that it could not therefore be relieved against, and the decree of the lower Court cannot therefore be maintained. The defendants have paid Rs. 2,500-0-0 to plaintiff 3 and have deposited a further sum of Rs. 2,500-0-0 in Court. The share of the plaintiff 3 in the full amount decreed is over Rs. 3,000-0-0 The defendants are therefore entitled to full credit for Rs 2,500-0-0 paid to plaintiff 3, the plaintiffs being at liberty to settle their equities inter se.

I hold that plaintiffs 1 and 2 are entitled to proceed with the execution application under O. 21, R. 15, Civil P. C., for recovery of the full amount of Rs. 9,000-0-0 and costs as provided in the decree less Rs 2,500-0-0 paid to plaintiff 3 and Rs 2,500-0-0 and such further sum as has been deposited in Court with interest at the stipulated rate, such interest being charged on the sums actually due from time to time I would accordingly allow this appeal and order the learned Judge below to deal with the execution application according to law and in the light of the above findings. Taking into consideration all the circumstances of this case, I would order that each party should bear his own costs throughout.

Percival, J. C —I concur.

P.N./R.K. *Appeal allowed.*

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* A. I. R. 1929 Sind 102

RUPCHAND, A. J C.

Rambhabai—Plaintiff.

v.

Doongersi Nagji and *others*—Defendants

Suit No. 612 of 1926, Decided on 18th February 1929

*** (a) Hindu Law—Widow instituting suit before partition for charge on property for her maintenance—Lis pendens applies to subsequent partition—Transfer of Property Act, S. 52 (*Obiter.*)**

Where a widow of a coparcener has instituted a suit for a declaration that her right of maintenance should be made a charge on the joint family property before partition, the doctrine of lis pendens would apply, and any partition which takes place subsequent to the institution of her suit cannot affect her right. [P 104 C 2]

(b) Hindu Law— Maintenance — Coparceners of different branches of joint family do not continue to be responsible for maintenance of widows of other branches though they separate without their consent.

Coparceners belonging to different branches of the joint family do not continue to be res-

ponsible for the maintenance of widows and of persons, who are entitled to a share belonging to another branch even though they do not make provision for them at the time of partition or obtain their consent to it : 35 *Mad.* 147, *Expl.* [P 105 C 6]

(c) Hindu Law—Maintenance

The right of evidence is a right to a provision for residence and is included in the general right of maintenance 4 *S. L. R.* 278, *Foll.* [P 105 C 2, P 106 C 1]

L P. Ferro—for Plaintiff.

Kimatrai Bhojraj—for Defendants

Judgment.—This is a suit in forma pauperis. The plaintiff is the widow of one Raghunath Nagji. She claims in this suit certain past maintenance and a declaration that she is entitled to future maintenance which should be made a charge on the joint family property and that she is entitled to reside in the family house Defendant 1 is her husband's brother Defendants 2 and 3 are his sons. Defendants 5 to 7 are the cousins of defendant 1 and their sons Defendants 8, 9 and 10 are widows belonging to the same family. The plaintiff has based her case on the plea that all the defendants form members of a joint Hindu family and possess joint family property which has descended to them from a common ancestor, and that, therefore, she is entitled to a decree against all of them. The plaintiff has further claimed the return of her ornaments valued at Rs. 3,000. The defendants have inter alia contested her claim on several grounds Their case is that defendant 1 and his cousins severed their joint family tie in the year 1906 and that after that date they messed and lived separately and carried on a separate business. In 1913 they executed a deed of release reciting the family history up to that date. According to that deed of release defendant 1 alone is liable to maintain the plaintiff.

From 1923 to 1924 or thereabouts, defendant 1 and the other defendants continued as tenants-in-common of certain ancestral properties In that year defendant 1 and his cousin Tejsi who carried on business in partnership sustained heavy losses. They received monetary help from the defendants Tikamji and Khimji and in consideration of such help they executed a deed of conveyance transfering their right, title and interest in the family property, which had up to that date remained undivided in favour of Tikamji and Khimji. The defendants deny that she deposited any ornaments with them, and say that the plaintiff is in possession of those ornaments and other property from which she can maintain herself and that her right for maintenance, if any, is against Doongersi only, and that she can not claim any relief against any of the other defendants or against the family property which has been validly transferred

The following issues have been raised by the Court

(1) " Was there on or about 3rd December 1906, a partition of joint family property as alleged in para. 6 of written statement of defendants 4 to 10 ?

(2) Has the family dwelling house referred to in para. 10 of the plaint become the sole and absolute property of defendants 4 and 6 for reasons alleged in para. 8 of the written statement of defendants 1 to 10 by virtue of alleged conveyance of 31st May 1922 ?

(3) What is the effect of the aforesaid two transactions on plaintiff's right of maintenance and residence ?

(4) Is the plaintiff entitled to a right of residence in the house referred to in para. 10 of the plaint ?

(5) Is the plaintiff entitled to receive maintenance and if so, at what rate and from whom ?

(6) What amount, if any, is the plaintiff entitled to recover on account of arrears of maintenance and from whom ?

(7) What amount, if any, is the plaintiff entitled to recover and from whom on account of her pilgrimage, funeral and other death expenses ?

(8) What is the amount of debts, if any, which the plaintiff has incurred ?

(9) Is the plaintiff entitled to a charge on the property mentioned in para. 10 of the plaint on account of various sums claimed by her ?

(10) Did the plaintiff deposit ornaments mentioned in the schedule to the plaint or any of them with defendants 4 to 6 and what is the value thereof ?

(11) If so, what relief is she entitled to in respect of them ?

(12) What relief, if any, is the plaintiff entitled to ?

(13) General."

There is hardly any dispute about the facts which have been conclusively proved by documentary evidence. It appears from the recitals contained in the deed of release that one Umersi died about 60 years ago. He had seven sons, namely, Morarji, Nagji, Thakursi, Veiji, Ramji, Anandji and Jethabhai. Morarji, died about 22 years ago leaving his son Tikamji defendant 4 in the suit. Tikamji's son is Moolji defendant 5. Nagji died about 32 years ago leaving two sons Rughnath and Doongersi.

Rughnath died about 25 years ago and the plaintiff is his widow. Doongersi is defendant 1 and his two sons are defendants 2 and 3 Thakursi died about 45 years ago leaving a son Jivraj, who separated from his brother prior to 1906 and whose heirs are not on the record. Velji died leaving no issue. Ramji left two sons Tejsi and Jadhowji. Tejsi died in 1925 leaving a widow defendant 10, and a son defendant 7 Jadhowji died about 20 years ago leaving his widow Jivibai, defendant 9. Anandji died about 25 years ago leaving as his widow defendant 8. Jethabhai died about 22 years ago leaving a son Khimji defendant 6.

After the severance of the joint family tie between the different branches of the family, Doongersi and Tejsi carried on business in partnership in Khataoo Makan Cloth Market in the name of Nagji Umersi, while Khimji and Tikamji carried on business in partnership in sundries in the name of Morarji Umersi, and also in cloth in the same name The release deed Ex 10/1 expressly provides that Doongersi has been and shall continue to pay Rs. 10 per month to the plaintiff for her maintenance. It has been proved by the evidence of Doongersi and the rent-book kept by him on behalf of himself and his tenants-in-common, that from 1906 to 1913 the amount of maintenance paid by him to the plaintiff was debited to his own personal account. He states that he likewise maintained the plaintiff up to 1922 when his business failed, and the entries for that period were in a book kept by Tejsi which is missing. For the purpose of proving that even after the execution of the release deed the defendants continued separate, entries have been put in from the account of the parties from 1913 right up to 1924, to show that the firm consisting of Doongersi and Tejsi had monetary dealings with the firm of Tikamji and Khinji, and that in 1924 Tikamji and Khimji helped Tejsi and Doongersi with large sums of money, a part of which they borrowed from the banks. On 30th May 1922, Doongersi and Tejsi executed a sale deed for the sum of Rs. 1,35,000 conveying half share in the properties owned by them as tenants-in-commons, to their cousins Tikamji and Khimji. It has been proved from the entries in the books that over and above this amount for which they sold their half share they are liable to Tikamji and Khimji for a further sum of about Rs 35,000. Against this mass of evidence, we have only the word of the plaintiff that all the defendants continued as members of the joint Hindu family up to the date of suit and continued to maintain her out of the joint funds. It is, therefore, abundantly clear that the plaintiff can not succeed on the case as set up by her in the plaint Her suit for maintenance as against the joint family property is, therefore, liable to be dismissed in limine.

Certain points have, however, been urged on her behalf. I shall deal with them though they do not strictly arise on the pleadings It is contended in the first place that as the plaintiff's husband died at a time when all the defendants formed members of a joint Hindu family, her claim for maintenance and residence was a charge upon the family property, at least in the sense that it was incumbent upon the members of the different branches of the joint family property to maintain her so long as they remained joint and at the time of partition either to make due provision for her maintenance or at any rate to obtain her consent to a partition which made no such provision but provided that only one member of the joint family should maintain her. My attention has been invited to the case of *T. Subbarayadu Chetti* v. *T. Kamalavalli Thayaramma* (1), and to the passage of West and Buhler at p. 791, which has been referred to in that case. Now there can be no doubt that so long as the family continues to be joint, a widow of a coparcener has to look up to the manager of the family for her maintenance. It is therefore open to her to enforce her right against any part of the joint family property in the hands of such manager In that sense her right is enforceable against the whole family property and against every member of the family who claims a joint interest in such property. Where she has instituted a suit for a declaration that her right of maintenance should be made a charge on the property before partition, the doctrine of lis pendens would apply, and any partition which takes place subsequent to the in-

(1) [1912] 35 Mad. 147=21 M.L.J. 493=10 I.C. 347=(1911) 2 M.W.N. 148.

stitution of her suit cannot affect her right It is no doubt true that in the above case their Lordships did not proceed on the doctrine of lis pendens but on certain general principles discussed therein But it is worthy of note that the learned Chief Justice was careful in stating that he preferred to deal with the facts of that case which had actually arisen and that he was not prepared to go into the further question as to the effect of a partition taking place before the institution of a suit by the widow for a declaration of her right of maintenance and residence. That case is therefore no authority for the proposition that there is an obligation upon the members of the joint family belonging to different branches to make due provision for the maintenance and residence of the widow of a coparcener of one of the branches. The passage in West and Buhler reads as follows :

" Other liabilities, that is provision for the maintenance or portions of persons not entitled to shares, may be distributed by agreement amongst the cosharers. But the estate at large is liable at least in the hands of the members of the family making a partition and coparceners who desire to limit their responsibilities must obtain the assent of the persons mentioned. "

Though this passage is entitled to great weight, it does not expressly provide that the responsibilities of one branch continue for the maintenance of the widows of another branch. Further-more it does not appear to be supported by any authority either from the Hindu texts or from the case law. If this passage is intended to mean that coparceners belonging to different branches continue to be responsible for the maintenance of widows and of persons who are entitled to a share belonging to another branch, unless they make adequate provision for them or obtain their consent, I am of opinion that it cannot be accepted as sound law, and is one which is likely to lead to anamolous results. For instance where a coparcener dies leaving a widow and a son, it is somewhat difficult to see how his brothers can compel the son to make separate provision for the maintenance of the widow as a condition precedent to effecting a partition on pain of rendering themselves liable to the widow at a future date in the event of her son getting bankrupt. Again it is difficult to see how coparceners belonging to one branch can be compelled to make provision for the maintenance of a person who is congenitally deaf and dumb and who is living jointly with his own brother, both brothers belonging to different branches, and to run the risk of maintaining such person in the event of his brother becoming a bankrupt notwithstanding the fact that the partition effected by them was absolutely fair and square It is hardly necessary to develop this point any further as it would appear that the plaintiff knew for no less than 18 years that Doongersi had separated from his cousins and she remained content to receive her maintenance from him It is not open to her now to contend that as her assent was not obtained to the partition, the members of the different branches continue to remain liable for her maintenance. If she objected to the arrangement made for her, it was her duty to have sued for declaration of her rights at once and probably her maintenance would have been made a charge on the share of Doongersi in the ancestral property. Not only did she remain silent but received increased allowance from Doongersi in subsequent years She is clearly estopped from falling back on the members of other branches after Doongersi has become a pauper

The next point urged is with regard to her right of residence. My attention has been invited to a passage in Gour's Hindu Law, p. 481, S 84, and the commentaries thereon. It has been argued that as the plaintiff was living in the family house up to the date of the sale to the knowledge of Tikamji and Khimji, her right of residence cannot be defeated by the sale to them of the right, title and interest of Doongersi. On the other hand, my attention has been invited to a decision of this Court on its High Court side in the case of *Thanwerdas* v. *Mt. Vani* (2), which has been followed with approval by this Court on its High Court side in *Kawalmal* v. *Issribai*, *A. I. R* 1926 *Sind* 135 In the case of Thanwerdas, Pratt, J. C , said :

" The right of residence is therefore a right to a provision for residence and is included in the general right of maintenance. Like the right of maintenance it is an equitable and not a legal right . . . It is an equity binding on the conscience of the coparceners, but it may be defeated by bona fide alienation which is not so justified or which is merely a pretext to shuffle off the obligation of maintenance. In the case of an improper alienation the equity is enforceable against the

(2) [1910] 4 S.L.R. 278=10 I.C. 985.

alienee under the same conditions that apply to any other equity i. e., the transferee takes subject to the equity unless he has taken for value and without notice of the right. This is the law laid down in *Lakshman* v. *Satyabhamabai* (3) and now codified in S. 39, T P. Act."

Whatever may be the law in force outside Sind, I am bound to give effect to this ruling. If the right of residence of the plaintiff is included in her general right of maintenance, it would appear that unless it could be proved that the transfer by Doongersi of his interest in the family property was a mere pretext to shuffle off the obligation of her maintenance or was not otherwise bona fide, she has no right of residence either. If that be so, there is no doubt that in this case there is no question that the alienation was in no way brought about with the object of defeating her rights. It was a bona fide alienation made at a time of great need when on account of the fluctuation in exchange, Doongersi and Tejsi had suffered heavy losses in their trade and were obliged to transfer their property to avoid insolvency It is no doubt true that Doongersi still continues to live in the family house and receives an allowance of Rs 100 from Tikamji and Khimji who are both well off But Tikamji and Khimji have done this out of charity, and as a matter of fact, out of the same motives they have throughout the suit offered to maintain the plaintiff but under the evil advice of her brother she has refused to accept their offer and has insisted upon her legal rights, if any, being declared by the Court. Every endeavour made in Court to make her realize her position has failed, and though I regret very much that my decision might result in her having to depend for her maintenance on the charity of others, I am afraid I cannot help it I hold that she has no right to reside in the family house as no part of it belongs at present to Doongersi. The plaintiff's right to her maintenance by Doongersi depends on his being in possession of ancestral property If the plaintiff failed to sue for a charge being created on such property before it was sold in payment of Doongersi's debts, the plaintiff is without any remedy and her suit must fail. She has claimed maintenance at the rate of Rs. 100 per month and has claimed certain other large sums of money. As evidence has been led on those points, I propose to deal with them.

It appears that though up to 1913 the plaintiff received only a sum of Rs. 10 per mensem from Doongersi, her maintenance was increased from time to time and in 1924 it was increased to Rs. 25 per month. The cost of living is at present somewhat less A sum of Rs. 20 per month would at present be ample for her, she is expected to cook for herself, and though one of the witnesses said that she would require a person to buy foodstuffs for her and that this would cost her Rs 10 per month, I am inclined to the view that she can easily arrange to get her foodstuffs without any such charge The witnesses called on her behalf seemed to be inclined to exaggerate the cost of expenses, but on the whole I am inclined to the view that Rs. 20 would be sufficient for her maintenance. I am also inclined to the view that she would require Rs 5 more to secure a room for herself to live in.

With regard to her claim for expenses of pilgrimage, I think there is no evidence to show that there is any obligation on a widow to go on pilgrimage more than once. She has admittedly been to pilgrimage on one occasion, and therefore she is not entitled to a further provision in that behalf

With regard to provision being made for her funeral caste feast, I think it is clear from the evidence that this is not obligatory and that she is not entitled to the same

With regard to the return of her ornaments, it is sufficient to observe that except her own word, there is no evidence to prove that she handed over ornaments to any of the defendants and they have denied receipt thereof I hold that she has failed to prove that she entrusted the ornaments to the defendants. I shall now proceed to record my findings on the issues:

Issue 1 —In the affirmative;

Issue 2:—In the affirmative;

Issue 3:—The effect of these two transactions is that the plaintiff's right, if any, for maintenance was against the property allotted to defendant 1 at the partition and that all that she is entitled to in respect of her claim for residence is a fair allowance for getting on rent a house to live in,

Issue 4:—In the negative.

(3) [1877] 2 Bom. 494.

Issue 5 :—The plaintiff is not entitled to receive maintenance as her suit is for maintenance and subsequent to the sale by Doongersi there is no evidence to show that there is any part of the ancestral property from which she could receive an allowance. (Part 2) :

That if she has any right to receive any maintenance including residence, it is at the rate of Rs. 25 per month and from defendant 1 ;

Issues 6 *to* 8 :—As there is no property in the hands of defendant 1 and as the plaintiff has no right to fall back on the property of defendants 3 and 4, no finding is necessary on these issues.

Issue 9 :—In the negative ;

Issue 10 :—In the negative ;

Issue 11 :—In the negative ;

Issue 12 :—The plaintiff is entitled to no relief

Issue 13 :—The plaintiff's suit is dismissed.

As the defendants do not press for costs, I make no order as to costs

P.N /R.K *Suit dismissed.*

A. I. R. 1929 Sind 107

PERCIVAL, J.C., AND RUPCHAND A. J C.

(*Pir Sidik*) *Mohomed Shah*—Appellant.

v.

Nihalchand and *others*—Respondents.

Misc Appeal No. 33 of 1925, Decided on 22nd January 1929.

Civil P. C., Sch. 2, Rr. 1 and 2—Court has no jurisdiction to refer disputes on award made by arbitrator outside Court so as to modify award.

When an award is made by arbitrator outside Court and afterwards an application is made to the Court under R. 20 to file the same, the Court has no jurisdiction to refer the disputes on the award to arbitration so as to modify the award inasmuch as it cannot itself do so, but has either to order the award to stand filed and to pass a decree in accordance with it or to order that the application to file an award be dismissed *A. I. R.* 1925 *P.C.* 299, *Rel. on.* [P 109 C 1]

Dipchand Chandumal—for Appellant.

Tolasing K. Advani—for Respondents.

Judgment.—The facts of this case are somewhat complicated. It appears that there were several disputes between three different sets of parties referred to as Banias, Othas and Pirs The Othas and the Pirs claimed to be owners of certain agricultural land. They had disputes inter se as to their respective shares. Pending settlement of those disputes the Othas had leased an eight anna share in the land to the Banias and the Pirs had likewise given a lease of the remaining eight annas share to them. Some of the Othas executed a mortgage in favour of the Banias. They also borrowed certain money not secured by any mortgage. The litigation between the Othas and the Pirs resulted in the Othas getting six annas and ten pie share in the land. Thereafter they disturbed the possession of the Banias and subsequently transferred their six annas and ten pie share which they had succeeded by establishing in litigation to the Pirs At that time the lease of the Banias was still continuing and the Pirs were anxious to get back the land and to have the unexpired portion of the lease cancelled. On the other hand, the Banias were anxious to get compensation for disturbance of possession and also further compensation for the cancellation of the lease. They also wanted payment of their secured and unsecured claims, against the Othas The parties entered into one single reference for settlement of all those disputes in favour of one Walabdas who passed an award dated 29th January 1923.

According to that award he ordered that the unexpired period of the lease be cancelled and awarded a sum of Rs 15,000-0-0 from the Othas and the Pirs jointly as compensation both for disturbance of their possession during the continuance of the unexpired period of the lease which was cancelled He also passed an award against the Othas for Rs. 3,500-0-0 in respect of the mortgage and for Rupees 5,000-0-0 in respect of the money claim. An application was made by the Banias to the Court under Sch 2, R 20, Civil P C., for filing the reference and the award and for a decree being passed in terms thereof Several objections were filed to the maintainability of the application and the validity of the award. On the date fixed for hearing all the parties except one Ibrahim, defendant 3 in the case who is an "Otha" put in a petition to the Court asking that their disputes be referred to the arbitration of Messrs. Gopaldas and Motiram who were acting as pleaders for them in those pro-

ceedings. This petition is in the ordinary form as prescribed and inter-alia recites as follows

"The parties who are all interested in the disputes have agreed to refer the matter to the arbitration of Messrs. Gopaldas and Motiram, pleaders, who will have power to confirm, modify, or alter the award in any manner they think just and proper. Defendant 3 is given up for the purpose of this reference."

On that petition the Court passed the following order

"Parties agree to the reference. Suit is referred to arbitrators. Award due on 25th August (1911)."

The arbitrators passed an award holding that the first award be filed subject to certain modifications namely that the amount of Rs 15,000-0-0 Rs. 3,500-0-0 and Rs 5,000-0-0 be reduced to Rs. 8,200-0-0 3,200-0-0 and Rs. 2,750-0-0 respectively. They also allowed certain instalments to the Othas and the Pirs which were different from those provided in the first award Several objections were filed against this second award which have all been disallowed and the Court has passed a decree in terms of the first award as modified by the second award. It is against that decree that the Pirs have come to us in appeal. Now one of the main objections urged on behalf of the Pirs is that assuming that a petition to file an award under R. 20, Sch. 2, Civil P. C., is a suit within the meaning of R. 1 of that Schedule and that disputes arising in proceedings filed under the provisions of R. 1, the only award which the arbitrators could have passed in pursuance of the mandate issued to them by the Court was either to hold that the first award was valid and the decree should follow thereon or to hold that the application to file the reference and the award should stand dismissed. It has been urged that notwithstanding the wide powers conferred on the arbitrators by the parties to alter or amend the 1st award, the arbitrators had no jurisdiction to exercise such powers while acting under the reference issued by the Court and the Court had likewise no jurisdiction to order that the 1st award as modified by the arbitrators do stand filed in these proceedings.

Now no doubt it lies ill in the mouth of the Pirs to raise this objection when they find that the second award is not so beneficial to them as they expected But the objection raised by them relates to jurisdiction of the Court and of the arbitrators to pass a decree in terms of the modified award and if that objection is well founded, we are afraid, we must give effect to it. Now the question of the scope of the authority of an arbitrator appointed by the Court under the provisions of R. 1 of Sch. 2, recently came up for consideration before their Lordships of the Privy Council in the case of *Ram Protab Chamria* v. *Durga Prosad Chamria* (1) In that case a suit had been brought on the original side of the Calcutta High Court, praying for a dissolution of a family partnership and accounts During the pendency of that suit, the parties to the suit and one other person entered into an agreement for the settlement of all matters in dispute amongst themselves, that is to say, not only matters in suit but certain other subsidiary matters. They further agreed to accept whatever the arbitrators might decide with respect to the said disputes In pursuance of that agreement they applied to the Court for an order of reference and praying in effect that the matters alluded to, in the agreement, arrived at, by them outside Court should all be referred to the arbitrators in accordance with its terms. On that petition, the Court passed the usual order to the effect that all matters in difference and others between the parties to the suit be referred to the persons named as arbitrators in the petition. The arbitrators sent in an award in Court which dealt with matters which were the subject matter of the suit and also other matters. The award was held to be "otherwise invalid" within the meaning of Cl. 15 of the schedule. In dealing with the effect of the order of reference made by the Court and the jurisdiction of the arbitrators to make an award in pursuance thereof their Lordships have said :

"In their Lordships' judgment the decision of this appeal really turns upon the effect of that order properly interpreted. It was an order made in pursuance of Ss. 1 and 2 of Sch. 2 to the Civil P. C., 1908, and in the exercise of a power thereby given to the Court to refer to arbitration matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance

(1) A. I. R. 1925 P. C. 293=58 Cal. 258=53 I A. 1 (P.C.).

with the authority by the order conferred upon them, is, their Lordships can not doubt, an award which is "otherwise invalid" and which may accordingly be set aside by the Court under S. 15 of the same schedule."

If we examine the facts of the present case in the light of these observations what do we find? Had the disputes not been referred to arbitration the only legal order which the trial Judge could have passed was either to order the award to stand filed and a decree be framed in accordance therewith or to order the application to file the award be dismissed. It was not open to the trial Judge to vary the award, or to modify the award and pass a decree in terms of the modified award. If that be so, can it be said that the trial Judge had jurisdiction to issue a mandate to the arbitrators giving them jurisdiction to adjudicate upon points which he himself could not adjudicate in view of the nature of the proceedings which were then pending before him? If he had no power to do so the consent of the parties either made outside Court or contained in the petition filed before the learned Judge asking him to refer the disputes to arbitration was of no avail It is to be noted that the mandate issued by the learned Judge to the arbitrators is that the " suit is referred to them" that is to say, the points in dispute in the suit and nothing more. That the award can be modified or that it should be modified in that suit was not a point in dispute in the suit.

We think that the award cannot, therefore, be maintained as a valid award made in pursuance of the limited mandate issued by the Court to the arbitrators. It was argued in the lower Court that the award should be treated as an award made in pursuance of an oral reference made outside Court and be accepted as an adjustment of the disputes of the parties under O. 23, R. 3, Civil P.C. This argument also found favour with the learned Judge below. He has said :

" assuming the agreement to be invalid as a reference it can still take effect as an agreement or lawful compromise by parties to abide by the decision of a third party."

He has relied upon the case of *Rajkumar Lal* v. *Bulak Miyan* (2), where the reference and the award in respect of certain execution proceedings were upheld as an adjustment. It would appear that in that case the judgment-debtor was arrested in execution proceedings on 8th January 1916, but he was released on his furnishing security On 7th February 1916 the decree-holder and the judgment-debtor put in a joint petition stating that the disputes between them have been referred to three persons named in the petition. On 18th February 1916 these persons gave an award to the effect that the judgment-debtor should pay Rs 83 to the decree-holder on the following day, and in the event of the decree-holder declining to accept it, the money be deposited in Court On the following day the decree-holder put in a petition asking that the proceedings in execution might be pressed. The judgment-debtor then offered to pay the sum of Rs. 83 in Court and contended that the decree-holder could not recover anything more than that amount

Now the facts as stated above are quite consistent with the reference and the award having been made outside Court If that be so, there was no objection to the award being pleaded as an adjustment and no question would arise as to its being in excess of the mandate issued by the Court The only point discussed in the case is whether the award could be pleaded as an adjustment in execution proceedings The obvious answer to the argument of the learned Judge is that the arbitrators have not proceeded on an alleged oral reference outside Court but on the mandate issued by the Court and that it is, therefore, not open to any of the parties to plead that it is so based , and we are not prepared to treat the award as based on any such oral reference. It is worthy of note that though the award which was the subject matter of the appeal before their Lordships of the Privy Council was a fair and equitable award and there was a prior agreement in writing dated 11th May 1922 outside Court which was made between the parties to the suit and other parties who were not parties to the suit that the disputes between them be referred to arbitration, still no attempt was made to support the award on the ground that the prior agreement and the award constituted a valid adjustment of the suit.

In view of our finding on this main objection it is not necessary for us to go into the question whether the disputes

(2) [1917] 3 Pat. L. W. 146 = 42 I. C. 467.

arising in proceedings instituted under R. 20, Sch. 2 could be the subject of a valid reference under R 1 or not and we wish to express no opinion on that point or on the further question whether in the circumstances of the present case respondent Ibrahim was a party interested in the subject-matter of the reference and could be given up for the purpose of the reference. It is no doubt true that a good deal is to be said in favour of the Banias. They have been kept out of their money for a long time and were it not for the fact that the Pirs and the Othas consented to refer the points in dispute to the pleaders of the parties and expressly empowered them to modify or alter the award, the objections filed by them against the first award would have been disposed of about four years ago. It has been urged and not without some reason that the Othas and the Pirs wanted a reduction of the amount awarded against them by way of equitable relief and that it was for that purpose that they induced the Banias to refer but subsequently raised certain technical objections in order to put off payment and to get further reduction and that they should not be permitted to do so We are afraid that we cannot accede to this argument. All that we are prepared to do to help the Banias is to give directions so as to safe-guard their interests in the event of the Court holding that the first award was a valid award and one which should be filed under R. 21. We are told that the stay of execution of the decree was disallowed and it is likely that the Banias have been able to recover a portion of the amount due to them. If that is so we think that one of the conditions which we should impose is that the Othas and the Pirs should not get restoration of this money without giving security and that in the event of such security not being furnished the amount, if restored by the Banias should remain in Court pending the disposal of the objections to the first award. The other direction which we propose giving is to request the Judge below to dispose of the objections to the first award at as early a date as possible.

We have noticed that defendant 3 was given up in consequence of the second award. He is not now before us. We do not, therefore, wish to say any thing which might prejudice him. But we have no doubt that the learned Judge after due notice to defendant 3 will consider whether he still continues to be on the record for the purpose of the first award. With regard to costs, we think it is a fit case in which we should mulct the Pirs and the Othas with all costs throughout. We accordingly set aside the decree of the lower Court and direct the lower Court to proceed with the objections filed to the first award and we order that the Pirs and the Othas except defendant 3 should pay all costs of the lower Court and this Court upto date.

P N./R.K. *Decree set aside.*

A. I. R. 1929 Sind 110

PERCIVAL, J.C., AND RUPCHAND, A.J.C

Jiwandas Virbhandas—Appellant.

v.

Khemchand Ramdas—Respondent

First Appeal No. 36 of 1928, Decided on 24th January 1929.

(a) Civil P C , O. 47, R. 1—Ex parte order not operating as res judicata can be reviewed by successor of Judge making it—Civil P. C., S. 11.

Where the order is an ex parte order issued without hearing the opposite party, it cannot operate as res judicata and can be reviewed by the successor of the Judge who made such ex parte order. *A I. R* 1921 *P. C.* 11, *Dist* : [P 111 C 1]

(b) Civil P.C , O. 21, R 40—Judgment-debtor applying to Court after issue of warrant without notice and before his arrest to enquire into his pauperism—S. 151 does not apply as he can still surrender himself in Court and move it to pass order under R. 40 (3).

Where a judgment-debtor against whom a warrant is issued applies to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested, it is not necessary to invoke the provisions of S. 151, as it is still open to him to surrender himself in Court and then to move it to pass an order under R. 40 (3). [P 111 C 2]

(c) Civil P. C , O. 21, R. 29 — Revision —Civil P C. S. 115.

Security for the full amount of the decree under O. 21, R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used. [P 111 C 2]

Dipchand Chandumal—for Appellant.

Kimatrai Bhojraj—for Respondent.

Rupchand, A. J C — The facts leading up to this appeal are somewhat as follows . The plaintiff-respon-

dent obtained a decree against the defendant-appellant for Rs.5,500 odd on the strength of certain hundis executed by him in their favour. The defendant in his own turn filed a suit against the plaintiff for settlement of partnership accounts and valued his suit for the purposes of Court-fees at Rs 5,100. The second suit is pending in the Court of the First Class Sub-Judge, Shikarpur The plaintiff applied for execution of his decree for Rs. 5,500 and on certain statements made ex-parte, he was able to induce the then presiding Judge to issue a warrant against the defendant without notice. The defendant then put in an application purporting to be one under O 21, R 40 and S 151, Civil P. C, requesting the Court to stay the warrant pending an inquiry into his pauperism. He alleged that besides his claim for settlement of partnership accounts against the plaintiff on which he expected to get a decree for a very large sum he had no other property and was not in a position to pay the decretal debt On that application, the learned Judge passed the following ex parte order :

"Issue notice to the other side. Pay costs. Hearing 12th December 1927. If security for appearance is given, warrant to be stayed."

At a subsequent hearing, the learned Judge recorded some evidence adduced by the defendant and then adjourned it to 1st May 1928. On that day his successor passed the following order :

"Pleaders of the parties heard. O. 21, R. 40, Civil P. C. does not apply because no notice under O. 21, R. 37, Civil P. C., has been issued nor the judgment-debtor has been arrested under a warrant of this Court. Under O. 21, R. 29, Civil P. C., I order that security be given of the decretal amount within 7 days when proceedings will be stayed."

Now it is against that 2nd order that the present appeal has been filed. The first point argued by the learned pleader is that the learned Judge had no jurisdiction to review the order passed by his predecessor which operated as res judicata He has relied upon the ruling in *Hook* v. *Administrator General of Bengal* (1). The obvious answer to that argument is that the first order was an ex parte order issued without hearing the opposite party and that it could not therefore operate as res judicata.

The next argument urged by him is that O. 21, R. 40, Civil P. C., provides only for two cases where the Court can hold an enquiry into pauperism of a debtor: first, where a notice is ordered to issue and the judgment-debtor appears in answer to that notice, and 2ndly, where a warrant is issued and the judgment-debtor is brought under arrest in execution of the warrant. It is said that there is a third case where a judgment-debtor against whom a warrant is issued applies to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested as in the present case and that there is no express provision in that behalf the provisions of S. 151 apply. But again this argument is not based on any substantial foundation. In such a case it is open to the judgment-debtor to surrender himself in Court and then move the Court to be released pending proof of his poverty. That being so there is no occasion for invoking the provisions of S. 151, Civil P. C.

We are not prepared to hold that the learned Sub-Judge was in error in holding that in the circumstances of this case where the appellant had not surrendered himself in Court the provisions of O. 21, R. 40 applied or that S. 151, Civil P. C. could be invoked. It is still open to the judgment-debtor, if so advised, to surrender himself before the learned Sub Judge and to move him to pass an order under Cl. (3), R. 40, O. 21, Civil P. C.

The third point urged by the learned pleader is that the learned Judge was in error in asking for full security to be given under O. 21, R. 29. Now again there is in the first place no appeal provided by the Code against that order and in the second place, it was discretionary with the learned Judge to order that security should be given for the full amount of the decree and no grounds whatsoever exist for our holding that the learned Judge had so improperly exercised his discretion as to call for an interference. The appeal is therefore dismissed with costs.

P.N./R.K. *Appeal dismissed.*

(1) A. I. R 1921 P. C. 11=48 Cal. 499=48 I. A. 187 (P.C.).

A. I. R. 1929 Sind 112

PERCIVAL, J.C., AND RUPCHAND, A.J.C.

Nainomal—Appellant.

v.

Bashomal Sanwaldas—Respondent.

Second Appeal No. 7 of 1926, Decided on 24th January 1929.

Compromise—Plaintiff, uncle of defendant passing deed of gift of property to him—Suit brought to cancel deed compromised providing plaintiff should recover property if he paid certain sum to defendant and if not his rights over property should cease—Such compromise supersedes deed of gift.

A plaintiff, who was the uncle of the defendant, passed a deed of gift of property in his favour on condition of his receiving maintenance. A suit brought to cancel the deed was settled by a compromise which provided that if the plaintiff paid certain amount to the defendant, he should recover the property and become its owner, and that if the money was not paid, he should cease to have any right over the property.

Held, that the compromise superseded the deed of gift and a suit brought for maintenance on the strength of the gift deed was not maintainable. [P 112 C 2]

Dipchand Chandumal—for Appellant.

Srikrishindas H. Lulla—for Respondent.

Judgment.—In this case, the plaintiff, who is the uncle of the defendant, passed a deed of gift in favour of the defendant and it is contended that one of the terms of the deed of gift in respect of the house was that the defendant should maintain the plaintiff. The suit in the original Court was for maintenance being Rs. 1,000. The Joint Sub-Judge of Shikarpur decreed the suit in favour of the plaintiff. On appeal to the District Judge this decree was reversed on the ground that there had been a suit to cancel the gift, and that suit had been settled by a compromise which in superseded the deed of gift The compromise provided that the plaintiff should pay Rs. 2,125 to the defendant within five months: and that if he paid this amount he should recover the property from the defendant and become the owner thereof. But if he failed to pay the amount within five months, the defendant was to remain the absolute owner of the house in question and the plaintiff's rights were to cease. It is true that in the first Court the question of the compromise superseding the gift was not expressly brought out. At the same time, the third issue was:

"Whether the suit is not maintainable on the strength of the gift deed." If therefore, it is held that the compromise superseded the deed of gift, it follows that the suit was not maintainable. In regard to the compromise the learned District Judge has observed as follows:

"It was clear on the terms of that compromise that no future rights or obligations based on the gift deed were kept alive between the parties beyond what was provided in the compromise itself. There is not a word about future maintenance for the plaintiff even if he failed to pay the stipulated amount, and in case the defendant became the absolute owner of the property. To my mind it is clear that the effect of that compromise was to render the original deed of gift simply non-existent, and to make the mutual rights of the parties dependent solely on the terms of that compromise between them."

It is contended by the learned pleader for the appellant that the effect of the compromise was simply that, if the money was not paid, the defendant should remain the owner but that at the same time he should remain liable to maintain the plaintiff. It seems to me that this is a contention that the compromise should stand good, and that at the same time part of the deed of the original gift, should stand good; which contention cannot be accepted. It appears therefore that the view taken by the learned District Judge is correct. The suit was for cancellation of the deed, and the plaintiff with his eyes open agreed to cancel the deed, and the simple agreement was that, if certain money was paid, he should obtain the house in question, and that, if the money is not paid, he should cease to have any right over the house. I agree therefore that the view taken by the learned District Judge, that the compromise superseded the deed of gift, and that the plaintiff is not entitled to maintenance. It appears, however, that the plaintiff has to a certain extent suffered hardship, as the defendant, who is his nephew has failed to maintain him. It may be noted that in the deed of gift it was not directly stated that the maintenance should be paid, but it contained a moral obligation that the defendant should pay the maintenance. For these reasons, we are of opinion that this appeal should be dismissed, but that each party should bear his own costs throughout. The order of attachment is cancelled.

P.N./R.K. *Appeal dismiseed.*

A. I. R 1929 Sind 113

PERCIVAL, J C., AND ASTON, A. J C.

Pir Mahomed—Applicant.

v.

Yacoob and *another*—Opponents.

Criminal Revn. Appln. No. 267 of 1928, Decided on 13th February 1929, against order of Special First Class Magistrate.

(a) Criminal P. C, S. 250—Omission to record reasons even in summary trial is irregularity not cured by S. 537.

The mere fact that a Magistrate is trying a case summarily does not justify his omission to record the complainant's objections to an order directing compensation and that such an omission is not a mere irregularity which can be cured by S. 537 : 8 *S. L. R.* 25, *Rel. on.* [P 113 C 2]

(b) Criminal P. C., S. 250 — To pass an order under S. 250 the final opinion of the Court should be that the case was false and frivolous or vexatious, not that the explanation was unsatisfactory.

Section 250 shows that the Court must first be of the opinion that a case is either false and frivolous or vexatious to justify him in calling upon the complainant to show cause why he should not pay compensation. It is necessary after hearing complainant's explanation that he should still be of the opinion that the case is either false and frivolous or vexatious. To pass an order under S. 250 Court's final opinion should be that the case was false and frivolous or vexatious not that the explanation was unsatisfactory. [P 113 C 2 ; P 114 C 1]

P. U. Vaswani—for Applicant.

C M Lobo—for the Crown.

Percival, J. C—This is a revision application against the order of the Special First Class Magistrate, under S. 250, Criminal P C., directing the complainant in this case to pay a sum of five rupees to each of the accused as compensation.

The complaint was one under S. 323, I. P. C., but the evidence of the two witnesses whom the complainant had called did not support him and the accused was no doubt rightly discharged under S. 253, Criminal P. C. Then the learned Magistrate called on the appellant to shew cause why he should not be dealt with under S. 250, Criminal P. C. The Magistrate thereupon observed that the explanation given by the complainant was not satisfactory, and then he passed an order under S. 250, Criminal P. C

Now it is laid down in S. 250, Cl. (2) that

"the Magistrate shall record and consider any cause which the complainant may show"

in explaining why an order should not be passed under S. 250. No doubt that has to be interpreted in the light of the circumstances of each case ; but in this case it appears that the complainant had given some explanation as to why the case had not been proved, viz., he wished to put in a report and call for the Medical Officer to give evidence regarding his injuries Even if the learned Magistrate was justified in refusing to call for further evidence it appears to me to be right that he should have explained in his order why he did not consider that the explanation was satisfactory. Merely to say that the case is false and then that the explanation is not satisfactory does not give the revisional Court sufficient grounds for finding whether there are good grounds for the order of compensation or not. In the somewhat peculiar circumstances of this case I think that, although the order of discharge was correct, it was not right that an order should have been passed under S. 250, Criminal P. C. The order is accordingly set aside and the compensation, if paid, should be refunded.

Aston, A J C.—I agree. The procedure laid down in S 250 should in my opinion, be strictly followed, and I am of opinion that the mere fact that a Magistrate is trying a case summarily does not justify his omission to record the complainant's objections to an order directing compensation and that such an omission is not a mere irregularity which can be cured by S. 537 : see the cases cited in Sohani, 12th edition, p 621. I agree with Hayward Judicial Commissioner's judgment in *Minhomal* v. *Emperor* (1). Quite apart from this S 250 shows that the Court must first be of the opinion that a case is either false and frivolous or vexatious to justify him in calling upon the complainant to show cause why he should not pay compensation It is necessary after hearing complainant's explanation that he should still be of the opinion that the case is either false and frivolous or vexatious. In the present case the learned Magistrate appears to have been of the opinion that the case was false and either frivolous or vexatious ; he called upon the complainant for his explanation and his opinion then was that the complainant's explanation was unsatisfactory. This does not appear to

(1) [1914] 8 S.L.R. 25=25 I.C. 994=15 Cr. L.J. 666.

me to be a sufficient ingredient to enable the Court to pass an order under S. 250. His final opinion should have been that the case was false and frivolous or vexatious, not that the explanation was unsatisfactory.

On the merits it appears to me that the application made by the complainant with regard to the letters of his witness demanding money throw a considerable doubt on the evidence of his witnesses, which was not of much value either for the prosecution or for the defence. There remained the evidence of the complainant against that of the accused. There were ample grounds for discharging the accused for want of sufficient evidence, but the record does not seem to me to disclose any ground for treating the case as false and frivolous or vexatious.

P.R./R.K. *Order set aside.*

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*A I R. 1929 Sind 114

RUPCHAND A J. C.

In Re Moolji Morarji—Insolvent.

Ex Parte The Panjab National Bank Ltd.—Mortgagee.

Insolvency No. 78 of 1927, Decided on 30th November 1928.

*** Presidency Towns Insolvency Act, S. 17, Proviso—In mortgage suit for sale of mortgaged property Court appointing receiver to collect rent and profits of property pending sale — Mortgagor becoming insolvent and Official Assignee claiming rents and profits for benefit of general body of creditors in preference to mortgagee — Mortgagee has right to money being paid to him in case sale proceeds of property being insufficient to pay off mortgage debt and Official Assignee has no right to claim money on behalf of general body of creditors in preference to mortgagee.**

Where in a suit for sale of property based on an equitable mortgage, the Court appoints a receiver to collect the rents and profits of the property pending its sale and afterwards the mortgagor becomes insolvent and the Official Assignee in whom his estate vested claims the profits in the hands of the receiver for the benefit of the general body of creditors in preference to the mortgagee, the mortgagee has a right to the mesne profits in the possession of the receiver being paid to him in satisfaction of his mortgage in the event of his succeeding in the suit and the sale proceeds of property being insufficient to pay off his mortgage debt and the Official Assignee has no right to claim the rents and profits on behalf of the general body of creditors in preference to the mortgagee, since his title cannot be superior to that of the insolvent : *A.I.R.* 1924 *Cal.* 600, *Harris* v. *Trumans*, (1882) 9 *Q. B. D.* 264, *Ex Parte Holthasen*, (1874) 9 *Ch.* 722; *A.I.R.*1927 *Sind* 230, *Rel.on.* [P 114 C 2, P 115 C 1]

T.G. Elphinston—for Official Assignee.

Dingomal Narainsing—for Mortgagee.

Judgment.—This application raises an important question of law. In Suit No. 236 of 1927, which was instituted by the Punjab National Bank Ltd., for sale of the property mortgaged to them by Moolji Morarji by way of equitable mortgage, I appointed a receiver of the rents and profits of the mortgaged property pending its sale Since then Moolji Morarji has been adjudicated as an insolvent and the Official Assignee in whom his estate has vested has claimed the rents and profits in the hands of the receiver for the benefit of the general body of creditors in preference to the Bank. This claim has been made on the ground that the appointment of the receiver was for the preservation of the rents and mesne profits of the property pending suit and nothing more. I am afraid I cannot accept this argument as sound. There may be some doubt as to the power of the Court to appoint a receiver in a suit for sale of property based on a simple or an equitable mortgage. But if once it is conceded that the Court has such power and acts under it, it follows as a matter of course, that the property which comes into the possession of the receiver in pursuance of that order is in custodia legis and that his possession is that of a stakeholder for and on behalf of the parties to the action according to their respective titles thereto and their rights therein : *Devijendra* v *Joges* (1). What then is the title or the right of the mortgagee to the mesne profits in the possession of the receiver ? He has not only a mere right that the money be preserved pending the settlement of the controversy in suit and the sale of the mortgaged property but he has a further right to the same being paid to him in satisfaction of his mortgage in the event of his succeeding in the suit and the sale-proceeds being insufficient to pay off his mortgage debt. Until satisfaction of the claim of the mortgagee in the suit in which a receiver is appointed, neither the mortgagor has any right to effect a transfer nor any creditor of the mortgagor having a money decree

(1) A. I. R. 1924 Cal. 600.

in his favour has any right to effect an attachment of the money in the hands of the receiver so as to prejudice the right of the mortgagee to appropriate it towards the balance of the amount due to him after the sale of the property. Were it otherwise, the appointment of a receiver could easily be rendered nugatory by the debtor delaying the disposal of the suit by various devices and in the meantime either transferring his interest in the money in the hands of the receiver or by helping his other creditors to have it attached.

Now speaking generally the Official Assignee or the Trustee in bankruptcy takes the estate subject to the same equities as those to which it is subject in the hands of the bankrupt i. e. all such property as he does not take by a title superior to that of the bankrupt. *Harris* v. *Truman* (2), *Ex parte Holthausen* (3), Williams on Bankruptcy, Edn 13, p 235. There is nothing in the Insolvency law as in force in India or England to give the Official Assignee a superior title to that of the bankrupt over the money in the hands of a receiver duly appointed by the Court. On the contrary, the proviso to S 17, Presidency Towns Insolvency Act, corresponding to Cl. (2), S. 7, English Bankruptcy Act of 1914, declares in express terms that the order of adjudication shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if that section had not been passed. The learned counsel for the Official Receiver has been unable to satisfy me that there is any magic in the passing of an order of adjudication so as to deprive the mortgagee of his rights over the mesne profits and to confer them by operation of law on the general body of the secured creditors Nor are there any equities in their favour. If the claim of the mortgagee is well-founded, the delay of the Court in adjudicating upon it should not prejudice him, nor should the order of the Court permitting the mortgagor a certain time, not exceeding six months, to pay off the mortgage amount enable the mortgagor not only to withhold payment of the interest which accrues due during that period, but to claim that the rents of the mortgaged property, recovered by the receiver during the said period, be applied to purposes other than the payment of interest due on the mortgage. In *Punjab National Bank Ltd., Karachi* v. *Moosaji* (*A. I. R.* 1927 *Sind* 230,) I held that the Court had power to appoint a receiver in mortgage suits, and that the provision of law empowering the Court to allow a certain time to the mortgagor to pay the amount due by him had not the effect of enabling the mortgagor to retain possession of the property upto such date.

That decision was not taken to appeal. The learned counsel has said nothing to make me change my view, and unless that decision is upset by the High Court, I have no option, for reasons already stated, but to hold that the Official Assignee has no claim to the money in the hands of the receiver. I, therefore, disallow the application of the Official Assignee, however, in view of the importance of the question involved, I permit the Official Assignee to appeal against this order if he is so advised.

P.N /R.K. *Application dismissed.*

(2) [1882] 9 Q. B. D. 264=51 L.J.Q.B. 338=30 W. R. 593=46 L. T. 844.

(3) [1875] 9 Ch. 722=44 L. J. B. K. 26=31 L. T. 19.

A. I. R. 1929 Sind 115

WILD, J. C., AND ASTON, A.J.C.

Ramchand—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 205 of 1928, Decided on 19th November 1928, against order of First Class Magistrate and Sub-Judge Badin.

(a) Criminal Trial—Criminal Court cannot stay proceedings.

Criminal Court has no power after it is seized with a case to stay proceedings. The proper course is to grant postponement from time to time . *A. I. R.* 1927 *Mad.* 851, *Rel. on.* [P 116 C 1]

(b) Penal Code, Ss. 182 and 211—Person making complaint to police — Police taking no action — Complaint filed in Court of Magistrate—Magistrate ordering preliminary inquiry—Police subsequently filing complaint in Court of another Magistrate against the informant charging him under Ss. 182 and 211—Latter Court cannot take cognizance of complaint filed by police.

A person made a complaint against Abkari Inspector's Naik to the police and as the police took no action he filed a complaint in the Court of a Magistrate and the Magistrate

ordered a preliminary enquiry. The police subsequently filed a complaint against the person in the Court of another Magistrate charging him under Ss. 182 and 211 with regard to the complaint which he had made to the police.

Held, that the latter Court could not take cognizance of the complaint filed by the police against the person, the preliminary enquiry of the first Court not having been completed and no complaint by the first Court having been made. *A. I. R.* 1927 *Cal* 95, *A. I. R.* 1927 *Mad.* 851; *A. I. R.* 1928 *Rang.* 254, *Rel. on.* [P 117 C 1]

Partabrai D Punwani—for Applicant.

C. M. Lobo—for the Crown.

Judgment—This is an application made by one Ramchand Nanumal, a Signaller at Badin Railway Station who alleges that on 2nd June, 1928, he was on duty at the gate when one Mr. Assudomal, an Abkari Inspector's Naik, delivered to him a wrong ticket. The applicant pointed out to the Abkari Inspector's Naik that it was a wrong ticket and asked for the fare. The latter declined to pay the fare and rushed through the gate. Thereupon the applicant made a complaint to the police. The police, however, took no action. A complaint was filed by the applicant in the Court of the First Class Magistrate, Badin, charging Mr. Assudomal under Ss. 332 and 504, I. P. C. The learned Magistrate ordered a preliminary enquiry. Mr. Assudomal had the applicant challaned in the same Court on charges under Ss. 323 and 342 I. P. C., and S. 120, Railways Act. On 8th August 1928, the police filed a complaint against Ramchand, in the Court of the First Class Magistrate, Tando Mahomed Khan, charging the applicant under Ss. 182 and 211, I. P. C., with regard to the complaint which the applicant had made to the police against Mr. Assudomal. The applicant thereupon applied to the First Class Magistrate, Tando, requesting him to stay proceedings pending result of the preliminary enquiry in his complaint against Mr. Assudomal or to grant a stay with a view to enable the applicant to obtain an order from this Court. It may be pointed out in this connexion that a criminal Court has no power after it is seized with a case to stay proceedings. Proper course is to grant postponement from time to time: cf. *Murugan* v. *Gutha Rami Naidu* (1). The learned First Class Magistrate, Tando, granted the applicant's alternative prayer and stayed the case with a view to enable him to approach this Court.

In dealing with the present application before us, it is clear that under the old law sanction for prosecution was not required from a Court when a false complaint was made to the police. There was an exception, however, to the rule that no sanction was necessary under S. 195 (1) (b), Criminal P. C., where a false complaint was made to the police, for this only held good, if a subsequent complaint was not made to a Magistrate. In *Tayabullah* v. *Emperor* (2) the Calcutta High Court held that where a complaint to the police was followed by a complaint to the Court based on the same allegations and the same charges and such complaint was investigated by the Court, the sanction or complaint of the Court was necessary for the prosecution of the complainant in respect of a false charge made to the police: see also *Brown* v. *Ananda Lal Mullick* (3) following *Tayabullah* v. *Emperor* (2). Since the Criminal Code was amended, sanction by the Court has been superseded by a complaint in writing by the Court, it is the Court or some Court to which it is subordinate itself which makes the complaint. It has, therefore, been held in *Samir* v. *Sajidar Rahman* (4) that where a complaint to the police is followed by a complaint to the Court, the person who made the complaint cannot be prosecuted except on the complaint of the Court. There is a ruling to the same effect by the Madras High Court in *Murugan* v. *Gutha Rami Naidu* (1) and in *Rambrose* v. *Emperor* (5). In the latter case, it was also pointed out that where an accused commits an offence which comes both within the purview of Ss. 182 and 211, I. P. C., the latter section includes an offence under the former section. Accused under such circumstances should be prosecuted under S. 211, I P. C., on the complaint of the Court according to the provisions of S. 195 (1) (b) and not under S. 182, I. P. C., merely on the complaint by a public servant concerned. Taking the

(1) A. I. R. 1927 Mad. 851.

(2) [1916] 43 Cal. 1152 = 20 C. W. N. 1265 = 36 I. C. 845 = 24 C. L. J. 134.

(3) [1916] 44 Cal. 650 = 25 C. L. J. 59 = 35 I. C. 857 = 20 C. W. N. 1347.

(4) A. I. R. 1927 Cal. 95 = 53 Cal. 824.

(5) A. I. R. 1928 Rang. 254 = 6 Rang. 573.

circumstances into consideration, it seems to me clear that the First Class Magistrate, Tando had no jurisdiction to take cognizance of the complaint filed by the police against the applicant under Ss. 182 and 211, the preliminary enquiry of the First Class Magistrate, Badin, not having been completed and no complaint by the First Class Magistrate, Badin having been made. We, accordingly, quash the proceedings pending before the First Class Magistrate, Tando, under Ss. 182 and 211, I. P. C.

P.N./R.K. *Proceedings quashed.*

A. I. R 1929 Sind 117

WILD, J. C., AND ASTON, A. J C

Hashmatmal and *others*—Applicants.

v.

Pribhdas and *others*—Opponents.

Civil Revn. Appln No 60 of 1925, Decided on 17th October 1928, against the judgment and decree of Sm. C. C. Judge, Sukkur.

(a) Trust Act, S. 56—Beneficiary can sue in his own right to enforce trust.

Where agreement between two persons is intended to secure to another a benefit as a cestui que trust, the latter is competent to sue in his own right to enforce the trust. 37 *I. A.* 152, *Rel. on.* [P 117 C 2]

(b) Provincial Small Cause Courts Act, S. 25 — Small Cause Court having jurisdiction to decide point but committing error of law in deciding it—High Court will not interfere unless such error results in failure of justice.

Where Small Cause Court has jurisdiction to decide a point, but it commits an error of law in deciding it, High Court will not interfere in revision unless such error of law has resulted in failure of justice.

[P 117 C 2 ; P 118 C 1]

Dipchand Chandumal — for Applicants.

Khemchand Sukhramdas — for Opponents.

Judgment. — This is an application under S. 25, Provincial Small Cause Courts Act, asking us to set aside the decree passed by the learned Judge of the Small Cause Court, Sukkur, against the applicants for a sum of Rs. 196-8 0.

It appears that the applicants had a dispute with one Mt. Rizikbai, defendant 4 in the case. The opponent, Mr Pribhdas, was her pleader and had to receive a sum of Rs. 150 from her as his fees. A compromise was arrived at between the applicants and Rizikbai under which Rizikbai gave up her rights to certain property which was the subject matter of the litigation on certain terms and conditions. One of the terms was that the applicants will pay to the opponent the sum of Rs. 150 being the amount of fees due by Rizikbai to him. The whole compromise was brought about with the help of the opponent and he was present when it was signed. It was on the basis of that compromise that he filed the present suit against the applicants for recovering Rs. 150 and interest due thereon impleading at the same time Rizikbai as a co-defendant

The main plea raised by the applicants was that as there was no privity of contract between them and the opponent and as the applicants received no consideration from the opponents he could not sue the applicants.

Now it is well-settled that in India consideration need not move from the promisee and the rule of English Law enunciated in the case of *Tweddle* v. *Atkinson* (1) has no application here. The only point in issue, therefore, is whether the opponent could sue on the agreement made between the applicants and Rizikbai under which the applicants promised to pay to the opponent his fees. The answer to this question depends on whether the agreement between the applicants and Rizikbai was intended to secure to the opponent a benefit as a cestui que trust. If so he was competent to sue in his own right to enforce the trust *Khwaja Muhammad Khan* v *Husaini Begum* (2).

In the present case the opponent was present when the agreement was made and it would appear that he had assented to it though his presence or assent were in no way essential : *Dwarka Nath* v *Priya Nath* (3). Indubitably the learned Small Cause Court Judge had jurisdiction to decide the point whether the opponent was a cestui que trust or not, and even assuming that he had committed an error of law in deciding it that in itself would not be sufficient to warrant our interference. We must be satisfied that

(1) [1861] 30 L.J. Q.B. 265=1 B. & S. 393=9 W.R. 781=8 Jur. (n.s.) 332=4 L.T. 468.
(2) [1910] 32 All. 410=7 I.C. 237=37 I.A. 152 (P.C.).
(3) [1916] 27 C.L.J. 483=36 I.C. 792=22 C. W.N. 279.

such error has resulted in a failure of justice There has been no such failure of justice here. The applicants were attempting to get out of their liability by raising a technical plea which could easily have been met by transposing Rizikbai who was already on the record as a co-plaintiff. This application, therefore, fails and is dismissed with costs.

P.N./R.K. *Application dismissed*

A. I R 1929 Sind 118

PERCIVAL, J. C , AND
RUPCHAND, A. J. C.

Nenumal Vishindas—Applicant.

v.

Emperor

Criminal Revn Appln No 23 of 1929, Decided on 15th April 1929.

Stamp Act, S. 69 Cls (a) and (b)—Person's admission that he at licensed vendor's request made endorsement on, and entries in sale register in respect of stamps sold is not evidence of abetment of offence of breach of R. 11 framed under S. 74 — Penal Code S. 107.

Admission of a person, who is not a licensed vendor that he, at the request of licensed vendor, made endorsement on and entries in sale register in respect of, stamps sold by the latter is not sufficient evidence to hold that he abetted the offence of a breach of R. 11, framed under S. 74, within the meaning of S. 107 Penal Code. [P 119 C 1]

Khanchand Gopaldas—for Applicant.

C M. Lobo—for the Crown.

Judgment—One Mahomed Yusif a licensed vendor of stamps who is not now before us and the applicant Nenumal were jointly tried before the First Class Magistrate, Mirpur Khas, for certain offences alleged to have been committed by them under S 69, Cls. (a) and (b), Stamp Act read with S 109, I P. C The prosecution case was that the applicant sold certain stamps supplied for Government to Mahomed Yusif, and made endorsements under his own signature on stamps sold by him, though he himself possessed no license It was further said that Nenumal had also made entries of such sales in the sale register supplied to Mahomed Yusif by Government contrary to the rules framed by Government under S. 74 Stamp Act. R. 11 of the rules framed under S. 74 of the Act inter alia reads as follows:

"(1) Every ex-officio or licensed vendor shall with his own hand write on the back of every stamp embossed or engraved on stamped paper which he sells its serial number, the date of sale the name and residence of the purchaser, the value of the stamp in full in words, and his ordinary signature; at the same time he shall make corresponding entries in the register to be kept by him in the following form,"

The applicant is a petition writer; and at one time he possessed a license to sell stamps and so did one Pessumal who was his partner The present prosecution was filed by the revenue authorities on a complaint made to them by Pessumal who alleged that Mahomed Yusif had permitted the applicant to sell stamps on his behalf, and to make the necessary endorsements on the stamps and entries in the register. At the trial the prosecution failed to prove that the applicant had sold stamps himself but there was his own admission that he had made an endorsement on a stamp Ex. 26 which was sold by Mahomed Yusif and that Mahomed Yusif had put his signature below that endorsement He also admitted hat he had made entries Exs. 41 and 41-a in the sale register in respect of that stamp and two other stamps which were not produced and were said to have likewise been sold by Mahomed Yusif. On these admissions, the learned Magistrate found that the applicant was not guilty of the offence of selling stamps contrary to the rules but had abetted an offence said to have been committed by Mahomed Yusif, namely the offence of failing to make the endorsement on Ex. 26 and making the entries Exs 41 and 41-a in the sale register. He accordingly convicted Mahomed Yusif of the principal offence of failure to comply with R. 11, such failure being made punishable under S. 69, Stamp Act, and he convicted the applicant of abetting the said offence and sentenced each of the accused to pay a fine of Rs. 250.

In appeal the learned Sessions Judge, Hyderabad, confirmed their convictions and sentences. In dealing with the case of the applicant all that he has observed is as follows:

"As regards Nenumal it is urged that since he was not a licensed vendor he could not be penalized for breach of R. 11. Nenumal has in fact abetted the breach of R. 11 by a licensed vendor and can therefore be held liable for abetment under S. 109, I. P. C."

Three points have urged on behalf of the applicant:

(a) That the joint trial of the accused for a number of distinct offences exceeding three was bad.

(b) that there was no obligation upon the licensed vendor to make the entries in the sale register in his own handwriting and lastly,

(c) that the making of an endorsement on a stamp sold by a licensed vendor or the making of entries in the sale register by the applicant does not amount to the offence of abetment We propose to deal with the last point only as it goes to the very root of the conviction of the applicant and as Mahomed Yusif is not before us we do not consider ourselves called upon to deal with points (a) and (b).

Now the only reliable evidence on the record on which the conviction of the applicant is based is his own admission that he made the endorsement Ex. 26 and the entries Exs. 41 and 41 (a). This admission is consistent with his having made them at the request of Mahomed Yusif In the absence of any further evidence there was no scope for the plea that the applicant had abetted the offence of a breach of R. 11, within the meaning of S. 107, I. P. C. On that admission this applicant could not be said to have either instigated Mahomed Yusif or to have engaged with Mahomed Yusif in a conspiracy or intentionally aided or abetted Mahomed Yusif in not complying with R. 11. We, accordingly, set aside the conviction and sentence passed against applicant and order that the fine if paid be refunded

P N/R.K. *Conviction set aside.*

A. I. R. 1929 Sind 119

PERCIVAL, J. C., AND ASTON, A. J. C.

Hussanali Mahomedali—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 14 of 1929, Decided on 13th February 1929.

Penal Code, S. 405—Return of deposit to brother of depositor with best intention and absence of moral turpitude does not amount to criminal breach of trust.

The return of a deposit to the brother of a depositor under circumstances indicating the best of intention and an absence of moral turpitude, may render a person civilly liable to the depositor but does not amount to criminal breach of trust as that offence involves moral turpitude. [P 119 C 2]

Motiram Idanmal—for Applicant.

C. M. Lobo—for the Crown.

Judgment.—This is an application for revision of an order of the learned Judicial Commissioner summarily dismissing the applicant's appeal and confirming the conviction of the applicant under S. 406, I. P. C. and a sentence of fine passed on him by the learned Special First Class Magistrate, Karachi. The facts in the case briefly are that in or about December 1925, the complainant says that he deposited a sum of Rs. 300 with the accused requesting him to keep the money and to return it to him when he wanted it. Some three years later he made a demand for the return of the money and the reply of the accused was that he had returned it to him and that he had handed it over to his brother Ibrahim. The learned Magistrate held that the accused did hand over the money entrusted to him to Ibrahim, the brother of the complainant, with the best of intentions and without any moral turpitude, and sentenced the accused to pay a fine of Rs. 300 (three hundred rupees) or in default to three months simple imprisonment.

The defence to the case was that the transaction was a deposit and not a trust and secondly that he had returned it to Ibrahim the brother of the complainant in the presence of the complainant. The learned Magistrate in his judgment has not discussed the defence that the money was not "entrusted" but was "deposited." Where money is given to a person in business the transaction may amount either to a loan or to a deposit or to a trust. In the present case the complainant's own allegation was it was "deposited" and in the notice which he sent to the accused, his pleader stated that in the event of the money not being paid within 24 hours, a suit would be filed. The circumstances seem to me to point to the fact that the transaction was a deposit. The return of a deposit to the brother of a depositor under circumstances indicating the best of intentions and an absence of moral turpitude, might render a person civilly liable to the depositor, but I cannot conceive of the act amounting to criminal breach of trust. The offence of criminal breach of trust involving as it does an intention to cause "wrongful" gain or "wrongful" loss is in my opinion an offence which involves moral turpitude. It is not an offence, which can be committed with the best of intentions. I would therefore set aside the conviction of the applicant and order the fine, if paid, to be refunded. Bail bonds cancelled.

P.N./R.K. *Conviction set aside.*

A. I. R. 1929 Sind 120

WILD, J. C., AND RUPCHAND A. J. C.

Tulshidas Keshowdas Khatri—Appellant.

v.

Ahmed Nur Mahomed Khatri—Respondent.

First Appeal No. 159 of 1925, Decided on 24th October 1928, against decree of Addl. Judicial Commissioner

Civil P. C., O 41, R 20—Appellant omitting to implead necessary respondents to avoid Court-fee—Appeal is incompetent and parties should not be added under R. 20.

The plaintiff had obtained a preliminary mortgage decree against two out of three defendants for the whole of his claim, and appealed against the decision making only defendant 3 a respondent for making him liable for his share, on payment of proportionate Court-fee.

Held, it was not open to him to ask for payment by defendant 3 of a part of the same claim over again and the only mode of affording him relief if any was by re-opening the preliminary mortgage decree. This could not be done without defendants 1 and 2 being parties to the appeal. Therefore the appeal as constituted was incompetent and the discretionary powers of adding parties under O. 41, R. 20, should not be used as the appellant to avoid Court-fee deliberately omitted them.

[P 120 C 2]

Dingomal Narainsing—for Appellant

E. V. Costellino—for Respondent

Judgment.—This appeal arises out of a suit filed by the plaintiff-appellants against his uncle and two nephews for recovery of a sum of Rs. 38,000 said to be due on certain mortgages executed by the uncle in favour of the plaintiff-appellant. The first Court held that those mortgages were binding on the uncle and one of the nephews and dismissed the suit against the other nephew who is respondent in this appeal. For purposes which are best known to the appellant but which may well be surmised, he filed this appeal only against the respondent. And in para. 24 of his memorandum of appeal he stated as follows:

"That no personal decree is sought against respondent Ahmed and as properties in question will hardly be worth even Rs. 20,000 and as by the judgment only one-fourth share belonging to Ahmed has been excluded the Court-fee for the purpose of this appeal is paid on one-fourth the value of the property, namely, Rs. 5,000."

A preliminary objection has been raised on behalf of the respondent that this appeal as constituted is incompetent. We think that this objection is well-founded and should prevail.

The plaintiff has obtained a preliminary mortgage decree against defendants 1 and 2 for the whole of his claim. It is not, therefore, open to him to ask for payment by defendant 3 of a part of the same claim over again and the only mode of affording him relief if any is by re-opening the preliminary mortgage decree. This we cannot do without defendants 1 and 2 being parties to the appeal. It has been argued that we should exercise our discretionary powers under O. 41, R. 20, Civil P. C. and add defendants 1 and 2 parties to the appeal. We are afraid we cannot accede to this request. In the first place, there are no grounds for the exercise of our discretion. The plaintiff intentionally dropped defendants 1 and 2 from this appeal with the object of avoiding Court-fee and refused to pay additional Court-fee though his attention was drawn to it by the Registrar at the time he presented his memorandum of appeal. With open eyes he took the risk of his appeal being opposed at the hearing on that ground and cannot now complain against the consequences, which have ensued. In the next place, the plaintiff has by his subsequent conduct made it impossible for this Court to come to his help. In his anxiety to realize his security at an early date, he obtained a final decree against defendants 1 and 2 and brought to sale their right, title and interest in the mortgage property with the result that if the preliminary decree be varied at present by permitting the mortgagors to pay the decretal amount within such time not exceeding six months as the appellate Court might fix, the right, title and interest of defendants 1 and 2 in the property is not available for redemption. It has been argued that the plaintiff is the purchaser of the shares of defendants 1 and 2 in the property and that he is prepared to relinquish his rights therein but there is no provision of law under which we can compel the defendants or any of them to accept such relinquishment. We accordingly dismiss the appeal with costs.

M.N./R.K. *Appeal dismissed.*

A. I. R 1929 Sind 121
Full Bench

PERCIVAL, J. C., ASTON, RUPCHAND AND DE SOUZA, A. J. Cs.

Re. Enquiry against L, Bar-at-law.

Revn. Appln No 40 of 1927, Decided on 4th October 1927

(a) Sind Courts Act (12 of 1866), S. 16—If pleader or barrister fails to keep fee-book or ledger showing sums deposited by client for expenses and sum expended on his behalf, High Court is justified in taking serious notice of his conduct under its disciplinary jurisdiction.

It is the duty of a pleader or a barrister to keep a fee book and a ledger showing every sum deposited by the client for expenses and sum expended on his behalf, and failure to do this duty on the part of any pleader or barrister will justify High Court in taking serious notice of his conduct under its disciplinary jurisdiction. 5 *S. L. R.* 222, *Foll.* [P 123 C 1]

(b) Sind Courts Act (12 of 1866), S. 16—"Misbehaviour" is not limited to professional misconduct, but includes general misconduct also.

"Misbehaviour" in S. 16 is not limited to professional misconduct, but can be extended to general misconduct as well. [P 123 C 2]

Per Rupchand, A. J. C.—The Judicial Commissioner's Court of Sind has unlimited jurisdiction to deal with every kind of misbehaviour, professional or otherwise of a pleader though such jurisdiction will undoubtedly be exercised for the very object with which it has been conferred, namely, the preservation of the purity of the Courts and the proper and honest administration of the law: 11 *S. L. R.* 81 (*F. B.*), *Foll.*; 37 *Bom.* 351, 29 *Cal.* 890 and *A. I. R.* 1922 *P. C.* 351, *Rel. on* [P 124 C 2]

(c) Sind Courts Act (12 of 1866), S. 16—Failure to keep fee-book or ledger of clients' money is professional misbehaviour because that will be considered disgraceful and dishonourable by pleaders of repute and competency.

Per Rupchand, A. J. C.—Professional conduct of a pleader must be judged by the rules and standard of his profession and if a pleader has done something which would be reasonably regarded as disgraceful and dishonourable by pleaders of good reputation and competency he is guilty of professional misconduct. Further a pleader becomes more disgraceful and calls for a more severe punishment, when he is guilty not only of an unwritten rule of professional conduct, but where such rule has been enacted and laid down by the Rules of Association to which he has the honour to belong and where one of the conditions on which he has obtained his license to practice as a pleader is that he shall undertake to submit to such written rules of conduct. [P 124 C 2, P 125 C 2]

Applying this test the failure by a pleader to keep a fee-book or a ledger containing the account of clients' money for a number of years which is a breach of Rr. 35 and 36 of the Rules of the Karachi Bar Association, is an act of professional misbehaviour because that would be considered disgraceful and dishonourable by pleaders of good repute and competency *Ex-parte Law Society In Re. A Solicitor*, (1912) *K. B.* 302, *Foll.* [P 124 C 2]

(d) Sind Courts Act (12 of 1866), S. 16—Proceedings under S. 16 though judicial are neither criminal nor civil, but special proceedings resulting from Court's inherent power over its officers—Form of procedure in such proceedings is not of controlling importance so long fair notice and chance of being heard are present.

Per Rupchand, A. J. C.—Proceedings under S. 16, in the exercise of the disciplinary jurisdiction of the High Court, though judicial proceedings, are neither criminal nor civil in their nature, but they are special proceedings resulting from the inherent power of the Courts over their officers, such as pleaders and barristers, and their object is to preserve the purity of the Courts and the proper and honest administration of the law. In such proceedings the form of procedure is not of controlling importance so long as the essentials of fair notice and opportunity to be heard are present. *A. I. R.* 1922 *Cal.* 515 (*S. B.*), *Foll.*, 36 *Bom.* 606; 23 *C. W. N.* 560, 32 *M. L. J.* 402; 1 *P. L. J.* 576 and 19 *M. L. J* 501, *Rel. on.* [P 126 C 2, P 127 C 1]

(e) Sind Courts Act (12 of 1866), S 16—Pleader in order to avoid punishment in disciplinary proceedings voluntarily committing perjury—There is no reason why he should not be prosecuted for perjury.

Per Rupchand, A. J. C.—Although it is extremely undesirable that a pleader should be compelled to answer questions on oath in an inquiry against him and then to be prosecuted for perjury for giving false answers to such questions, still there is no reason why a pleader who voluntarily and deliberately commits perjury for the purpose of avoiding punishment in disciplinary proceedings should not be prosecuted for perjury: 6 *Mad.* 252, *Ref.* [P 128 C 1]

(f) Sind Courts Act (12 of 1866), S. 16—In disciplinary proceedings against pleader he, being inadvertently put on oath, answering questions without protest—He cannot afterwards urge that answers given by him if found false, should not be used against him in determining whether his conduct was worthy of his profession.

Per Rupchand, A. J. C.—Where a pleader in disciplinary proceedings against him is inadvertently put on oath by the Court, and he answers questions without objecting or pleading privilege, it is not open to him to urge that as he was improperly put on oath, the answers given by him, if found to be false, should not be taken into account in determining whether his conduct is worthy of being a member of the honourable profession to which he belongs. [P 128 C 2]

(g) Sind Courts Act (12 of 1866), S. 16—Where accusations against pleader are of criminal nature, it is only if acts com-

plained of are not done in professional capacity and not in presence of Court, that Court cannot take disciplinary proceedings against him until he has been convicted.

Per Rupchand, A. J. C.—Where the accusations against a pleader are of a criminal nature, it is not in every case that criminal conviction is a sine qua non to the exercise of the disciplinary jurisdiction of the High Court. A broad distinction has to be drawn between the acts done by the pleader in his professional capacity or in the presence of the Court, and acts not done in such capacity and not in the presence of the Court. It is only in the latter case when the acts charged are indictable and are fairly denied that the Court will not proceed against the pleader in the exercise of its disciplinary jurisdiction, until he has been convicted and will not compel him to answer on oath to a charge for which he may be indicted. 47 *Cal.* 1115 and *other cases relied on*; *A. I. R.* 1926 *Cal.* 502 and *A. I. R* 1927 *Cal.* 536, *Ref.*

[P 128 C 2]

(h) Sind Courts Act (12 of 1866), S. 16—Professional misconduct must be made out either by admission or other strong proof.

Per De Souza, A. J. C.—Disciplinary proceedings against a pleader being of a quasi criminal character, the misconduct must be made out by the admission of the party concerned or else there must be other strong proof of the misconduct imputed: 17 *All.* 498; 41 *Cal.* 113; 11 *Bom L. R* 1150, *Foll*

[P 130 C 2]

(i) Sind Courts Act (12 of 1866), S. 16—Court has power to define by judicial decision or otherwise what constitutes misbehaviour on pleader's part—Rules framed by Bar Association with Court's approval are such to which pleaders must conform, but it does not follow that breach of any of them should call for disciplinary action.

Per De Souza, A. J. C.—The Court which under S. 16 (3) has power to remove or to suspend from practice for misbehaviour any person admitted to be a pleader, has by necessary implication, power to define by judicial decision or otherwise what constitutes misbehaviour and to lay down canons of good behaviour, departure from which may constitute misbehaviour. The rules framed by the Bar Association with the approval of the Court must be regarded as laying a standard of good behaviour to which pleaders should ordinarily conform. But it does not necessarily follow that a breach of all or any of these rules would call for the exercise of the High Court's disciplinary jurisdiction. The rules are exhortatory but not punitive.

[P 131 C 2]

T. G. Elphinston—for the Crown

O. Sullivan—for Opponent.

Kalumal Pahlumal, Amicus Curiæ.

Percival, J. C.—Mr. L, a Barrister-at-Law and pleader of this Court of eleven years' standing, has been called upon to show cause why he should not be dealt with under the disciplinary jurisdiction of this Court for certain acts of misbehaviour. We have heard Mr. O'Sullivan on behalf of Mr. L., the Government Pleader for the Crown, and Mr Kalumal, a Senior Pleader, of this Court, as amicus curiae, selected by the Committee of the Karachi Bar Association.

The enquiry arose out of an application of one Jeewansing on behalf of whom Mr. L appeared in a Small Cause Court case. The complaint was enquired into by Mr. Rupchand, Additional Judicial Commissioner of Sind, and in the course of the inquiry certain further complaints against Mr. L's conduct came to light. Finally seven charges were drawn up against him, of which the first two were the following:

(1) That he has failed to keep a register of "fees settled, the amount settled, and the name of the client" as required by R. 35, Rules of the Bar Association. for a number of years preceding 1st January 1927 and

(2) that he has failed to:

"keep a ledger showing every sum deposited by such client for expenses and sum expended on his behalf"

as required by R 36, Rules of the Bar Association

Mr. O'Sullivan on behalf of Mr. L, admits that these two charges are made out He contends, however, that they are trifling matters, having regard to the facts that no fraud on a client in respect of fees has been proved in this case. He further contends that the rules of the Bar Association are ultra vires and should not be enforced against members of the Bar who do not wish to follow them. I am of opinion that, for the purpose of this enquiry it is unnecessary for this Court to decide whether all the rules of the Association, which have been already approved by this Court under S. 16. Sind Courts Act 1866, are binding on the members of the Bar. Because it has already been laid down in *Varanbai* v. *M. Pleader* (1) that:

"It is recognized as the duty of a solicitor (and this applies to a pleader also) to keep a clear and accurate account of all moneys received by him for and on behalf of his client and to keep such moneys apart from his own."

a view with which I entirely agree. In this province a Barrister performs

(1) [1912] 5 S. L. R. 222=15 I. C. 785=13 Cr. L. J. 513.

the functions of a solicitor also "The only question therefore, is that of the seriousness with which the omission to keep a fee book and a ledger of sums deposited should be regarded. On this point it is noticeable that the leaders of the Bar themselves take a serious view of this delinquency The learned Government Pleader is emphatic in the contention that the non-keeping of a fee book and of accounts in respect of his professional work shows that a pleader must be dishonest, a view that is supported by Mr. Kalumal On these two charges alone, therefore, serious notice can be taken of the conduct of Mr L

Turning to the other five charges against Mr L. they refer chiefly to alleged false statements made by Mr. L in the course of the inquiry held by Mr Rupchand As most of these allegations of false statements by Mr. L depend on word against word, particularly on the word of Jeewansing against that of Mr. L, I do not think that they should form the basis of disciplinary action. Reference, however, must be made in particular to the replies given by Mr. L to Mr Rupchand in connexion with the question whether he kept a fee book or not. The examination by Mr. Rupchand of Mr. L runs as follows .

"This letter is mine marked D I say that I did not keep a fee book for some years. I don't remember now for what years I did not keep the fee book "

Q. Please try to remember and say for what years you did not keep the fee books ?

A. (He takes two minutes to answer and says) Since long I gave up my office and so I don't know when I stopped keeping the fee books

Q How many years ago you gave up your office ?

A. I don't remember.

Q Had you any office this year ?

A. No.

Q Why did you keep a fee book this year ?

A. In the Small Causes Court a question was put to me whether I kept a fee book. I can't say if this was one year or two years ago And after that I thought of keeping a fee book Before that also I kept a fee book Besides the two books produced by me I may have other books. I can't say ; my books are at Lahore.

Q. Did you keep a fee-book last year ?

A. I don't remember. When the question was put to me in the Small Causes Court, I kept a fee book. I had a fee book six months ago. I made entries in a fee book during the month of November and December 1926 I can't say if I made entries in a book for the month of October 1926 I don't know where that book is ?

Mr. L. in fact produced an alleged fee book, beginning from January 1927 which to say the least of it is a suspicious document. It would have been better if Mr. L had stated straight out from the first that he kept no fee books at least between 1922 and 1926, instead, of prevaricating in the manner shown above. Apart, therefore, from any other alleged false statements made by Mr. L, it is clear on the face of it that he has prevaricated in the above mentioned deposition.

Taking this view of the case I am of opinion that there are sufficient grounds to take action against him According to this view of the case it is unnecessary to enter into a discussion as to whether a criminal charge should have been, or should be, brought against Mr L. in respect of perjury and forgery, before disciplinary action is taken Nor is it necessary to refer to the various rulings of the High Courts on the subject, except to the case of *Re Enquiry against Mr. M Pleader* (2) a Full Bench ruling of this Court, where the whole subject of disciplinary action in Sind was fully discussed It is there laid down among other things that "misbehaviour" in S 16, Sind Courts Act, 1866 is not limited to professional misconduct Having regard to all the facts of the case I am of opinion that Mr L should be suspended from practice for a period of one year from the date on which the order of interim suspension was passed against him, and that he should surrender his sanad to the Registrar of this Court.

Aston, A. J. C.—I concur with the learned Judicial Commissioner and Mr De Souza and have nothing further to add.

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(2) [1918] 11 S. L. R. 81=44 I. C. 336=19 Cr. L. J. 322 (F. B.).

Rupchand, A J C.—Mr. L. a barrister-at-law and a pleader of this Court of eleven year's standing had been called upon to show cause why he should not be dealt with under the disciplinary jurisdiction of this Court for certain acts of mishaviour The acts complained of which are referred to in the report under consideration as seven different charges fall in two groups Charges 1 to 4 and the first alternative of charge 5 relate to acts of commission or omission prior to this enquiry The second alternative of charge 5 and charges 6 and 7 relate to acts said to have been done in the course of this enquiry. The learned counsel for Mr L. has raised several interesting questions of law and fact. I shall deal with them in the order in which they have been urged. Referring to charges 1 to 3 the learned counsel has strenuously argued that they refer to a breach of the rules of the Bar Association and do not amount to misbehaviour within the meaning of S 16, Sind Courts Act, which is limited to professional misconduct properly so-called.

This point was exhaustively dealt with in the Full Bench case of this Court in *Re Enquiry against Mr. M. Pleader* (2) where after a review of the whole case law on the subject Pratt, J C., observed .

"There can be no doubt, therefore, that the jurisdiction extends not only to professional misbehaviour but to general misbehaviour. A similar construction has been put by the Bombay High Court on the almost identical words occurring in S. 56, Bombay Pleaders' Regn. 2 of 1827, *Government Pleader, Bombay* v. *Annaji Narayan Deshpande* (3) and by a Full Bench of the Calcutta High Court on S. 14, Legal Practitioners Act, 18 of 1879, *Le Mesurier* v. *Wajid Hossain* (4). "

This point has now been settled and been placed beyond doubt by the authoritative decision of the Privy Council in *Shankar Ganesh* v. *Secy of State* (5) where their Lordships have laid down that the words "any other reasonable cause" in S 13 (f), Legal Practitioners Act, 1879 (as amended by Act 11 of 1896) "is not confined to acts done in a professional capacity."

In my opinion the expression "misbehaviour" is at least as, if not more, comprehensive than the expression "any other reasonable cause" This Court has therefore in my opinion, unlimited jurisdiction to deal with every kind of misbehaviour of a pleader though such jurisdiction will undoubtedly be exercised for the very object with which it has been conferred, namely, the preservation of the purity of the Courts and the proper and honest administration of the law

It is not necessary for me to go into this matter any further as the acts of misbehaviour complained of concern the conduct of Mr L in discharge of his professional duties and, therefore, fall within the purview of the professional misconduct as opposed to misconduct or misbehaviour in matters not so connected. It has been argued that a breach of the rules to keep a fee book or a ledger of clients' accounts is not professional misconduct but in *Ex parte Law Society-In re A Solicitor* (6) it was very pertinently said that professional conduct of a solicitor must be judged by the rules and standard of his profession and that if a solicitor has done something which would be reasonably regarded as disgraceful and dishonourable by solicitors of good repute and competency he is guilty of professional misconduct. These observations equally apply to a pleader of this Court who is inter alia called upon to perform the same function and is as much an officer of the Court as a solicitor in England.

The first question, therefore, is whether the failure by the pleader to keep a fee book or a ledger containing the accounts of clients for a number of years is such conduct as would be considered disgraceful or dishonourable by pleaders of good repute and competency? My answer to this question is positively in the affirmative If any assurance was wanted on that point, we have had that assurance both from the learned Public Prosecutor who is the present recognized leader of the Karachi Bar and from Mr. Kalumal another leading lawyer who has been heard amicus curiae as the nominee of the Bar Committee. In the course of his arguments the learned Public Pro-

(3) [1913] 37 Bom. 354=19 I. C 529=15 Bom. L. R. 231.
(4) [1902] 29 Cal. 890=6 C. W. N. 556 (F. B.).
(5) A. I. R 1922 P. C. 351=19 Cal. 845=49 I. A. 319 (P. C.).
(6) [1912] 1 K. B. 302=81 L. J. K. B. 245=56 S. J. 92=105 L. T. 874=28 T. L. R. 50.

secutor very rightly said that it was hnmanly impossible for an honest practitioner to carry on his business without keeping such books This argument is based on a solid foundation It cannot be disputed that it is in very rare cases that a pleader receives his full fee at the time of his engagement and that in every civil proceeding where costs are allowed to a successful party the pleader is required by the rules of the Court to file a certificate in Court stating on his honour that he has not agreed to receive a fee less than that prescribed by the Rules of the Court and in the event of his having agreed to receive a fee below the taxable fee he is required to disclose such fee to enable the taxing master to allow lower fee This rule was enacted with the object, (a) of preventing pleaders from receiving a back fee in event of success and (b) of preventing a successful party from recovering from the opponent as taxed costs a fee in excess of that agreed to be paid by him to his pleader. A failure to keep a fee book opens a wide door to fraud. It, inter alia, enables a pleader to break the rules of the Court without compunction or fear of detection The consequences of a failure to keep a ledger of a clients' moneys are even more serious Court proceedings last for years. During their continuance a pleader receives money from his clients in small bits and spends it equally in small bits as process fee, copying fee, stamp fee and the like extending in some instances to a period of as many as five or six years. However small the practice of a pleader may be it is impossible for him to rely upon his memory for rendition of accounts or to expect that a rendition of accounts by him unsupported by entries from his books will be acceptable either to his clients or to the Court in the event of dispute. In *Varanbai* v. *M* , *Pleader* (1) while dealing with a similar point Fawcett, A. J. C., said:

"It is recognized as a duty of a solicitor to keep clear and accurate accounts of all monyes received by him for and on behalf of his client and to keep such moneys apart from his own (Encyclopediae of the Laws of England, Vol. 11, p. 590), and it is important that conduct, which is a breach of the relations of confidence and trust which should exist between the client and solicitor or in this country client and pleader—should not be allowed to pass unnoticed by a Court which is authorized to deal with cases of misbehaviour."

In my opinion the conduct of a pleader becomes more disgraceful and calls for a more severe punishment, where he is guilty not only of unwritten rule of professional conduct but where such rule has been enacted and expressly laid down by the Rules of the Association to which he has the honour to belong and where one of the conditions on which he has obtained his license to practice as a pleader is that he shall undetake to submit to such written rules of conduct

The third charge depends on a breach of the written Rules of the Association pure and simple which require a pleader to accept a fee of not less than Rs. 10 in any Court case and stands on a slightly different footing It has been argued that a breach of this rule is not so serious or objectionable as to call for the exercise of our disciplinary jurisdiction.

It is necessary, therefore, to critically examine the object with which this rule, which has the approval of the Court, was enacted. Its main object is to prevent unhealthy competition between members of the Bar, and to require that no member shall receive a fee below the prescribed minimum which is commensurate with the work a pleader is required to do. This rule is subject to two valuable exceptions. It is open to a pleader to accept no fee at all in any particular case without disclosing that he has done so, or to accept in any special case with the permission of the Court a fee less than that prescribed under the rules. Receiving of inadequate fees is indubitably detrimental to the interests and the dignity of the Bar as a whole and to the interests of the clients themselves. Receiving of inadequate fees often results in the pleaders' failure to attend at the hearing on acount of his being obliged to take many more engagements than he can attend to In order to protect the interests of the junior members of the Bar and to help them in getting a fair share of the work, the rule requires the senior members to accept a fee of not less than Rs. 30 in any case A surreptitious breach of these rules is, in my opinion, certainly dishonourable and is committed with the evident object of securing by unfair and improper means work which would otherwise be given to other and more competent members of the Bar and disentitles the delinquent to a claim to

his official badge of respectability and trustworthiness.

The first two acts of misconduct have been admitted and act 3 has been denied. With all due deference to my learned brothers on the evidence I am constrained to hold that the denial is not true The evidence given by Jeewansing on solemn affirmation that he agreed to pay a fee of Rs. 4 and not more finds ample support from the surrounding circumstances. The claim in suit was only Rs 33 for provision supplied and if Mr. L's explanation that he was engaged only for the purpose of obtaining instalments is accepted, it is somewhat difficult for me to believe that Jeewansing agreed to pay a fee of Rs. 10 for the purpose of securing instalments in a suit for Rs. 33 only. Again apart from the fact that the explanation of Mr. L does not appear to me to be true, I am not prepared to hold that Jeewansing agreed to pay Rs 10 as the fee for this case. The entry in the fee book produced by Mr L, is to say the least extremely suspicious and unreliable Our attention was specifically drawn to the petition made by Jeewansing and it was argued and not without good reasons that Jeewansing's petition had been drawn up by a lawyer and that as Jeewansing had made no definite statement in the petition that he had agreed to pay a fee of Rs. 4, only we should not attach any weight to his subsequent evidence.

The petition, however, specifically mentions that full fee agreed upon had been paid. There is no dispute that the amount paid to Mr L was in this case not more than Rs 4 It would, therefore, appear that according to Jeewansing the sum paid by him represented the full fee agreed upon. It was argued that the word of Jeewansing should not be accepted in preference to that of Mr. L But Jeewansing was cross examined and there was nothing in his demeanour to make me consider that his evidence on this point was false. Furthermore, as pointed out above his evidence on this point is amply corroborated by the surrounding circumstances I hold that Mr. L. agreed to receive a fee of less than Rs. 10 from Jeewansing

As a corollary to the above finding the answer to the first alternative in charge 4 must be in the affirmative Except the fact that the entries in the fee-book of 1927 are of a highly suspicious nature and the further fact that Mr. L. has not produced fee books for the prior period there is no other evidence to prove that the fee book for 1927 was written for the occasion My finding, therefore, on the second alternative referred to in the charge is in the negative The learned Public Prosecutor has frankly stated to the Court that the failure of Mr L to attend to the Small Cause Court case was equally consistent with his having committed an error of judgment and that he did not, therefore, press the fifth charge. This charge has consequently been struck off and there is nothing further to be said about it.

The sixth and seventh charges relate to the conduct of Mr L. during these proceedings and are pertinent to the question of punishment only The learned counsel has attacked the report on both these charges on the grounds of an irregularity and an illegality in the proceedings He has urged that the proceedings under S. 16 of the Act are in the nature of criminal proceedings and that the rules of procedure applicable to criminal trials apply pro tanto to these proceedings. In answer to this objection I cannot do better than quote the observations of Mookerjee, J , in *Emperor* v *Rajani Kanta Bose* (7) which are as follows.

> In my opinion, it is plain that the proceeding is not of a criminal nature, see *Government Pleader* v *Bhagubhai* (8), though, as pointed in *Nando Lal Roy* v. *Baser Ali* (9) and *Nallasivan Pallai* v. *Ramlingam Pillai* (10), it is undoubtedly a judicial proceeding. It was ruled in the cases of *In re Hardwick* (11) and *In re Eede* (12) that as the Court in making an order striking a solicitor off the rolls for misconduct does so in the exercise of its disciplinary powers over its own officers and not in the exercise of its criminal jurisdiction, an appeal lies from such order to the Court of Appeal. . . . . The true position appears to be that these proceedings are neither civil suits nor criminal prosecutions *In the matter of Janak Kishore* (13).

(7) A. I. R. 1922 Cal. 515=49 Cal. 732 (S.B.)
(8) [1912] 36 Bom. 606=16 I. C. 783=14 Bom. L. R. 700.
(9) [1919] 23 C. W. N. 560=50 I. C. 806.
(10) [1917] 32 M. L. J. 402=6 M. L W. 364=41 I. C. 305=(1917) M. W. N. 303.
(11) [1884] 12 Q. B. D. 148=53 L. J. Q B. 61=32 W. R. 191=49 L. T. 584.
(12) [1890] 25 Q. B D. 228=39 W. R. 683=59 L. J. Q. B. 376.
(13) [1917] 1 P. L. J. 576=37 I. C. 484=(1917) P. H. C. C. 60.

They are special proceedings resulting from the inherent power of the Courts over their officers. Their object is to preserve the purity of the Courts and the proper and honest administration of the law. The purpose of suspension and disbarment is to protect the Court and the public from legal practitioners who, disregarding the sanctity of their office, pervert or abuse the privileges annexed to the responsible office they have secured from the Court. The form of proceedure, consequently, is not of controlling importance, so long as the essentials of fair notice and opportunity to be heard are present. *In re Ganapathy Sastri* (14)."

The argument that the fifth charge was defective and should be struck off is without any foundation This charge must be read as part for the report which makes it abundantly clear what it meant. The objection that the letter of the Small Cause Court Judge should have been proved formally by calling him as a witness is, in my opinion, equally futile Mr. L knew that the letter of the learned Judge was being used against him and that it had been exhibited. On remand he was given an opportunity of getting copies of such documents as were placed on the record without his knowledge. At any rate he knew then of the existence of this document and the use which it was being put to. It would have been most unusual for the Court to summon the learned Small Cause Court Judge to give formal evidence in support of what he had written to this Court, unless Mr. L. had expressed a desire to cross examine him. His failure to do so was, in my opinion tantamount to an assent on his part to the document being treated as evidence and, in my opinion, it is too late for him now to argue that it should be expunged from consideration. The exclusion of this letter does not help him either.

The sixth charge is as follows.

"That the explanation submitted by him to the Registrar of this Court in his letter of 5th February 1928, is false and unworthy of a member of the honourable profession.

In the letter Mr. L has, inter alia, stated as under

"That I was engaged by the applicant.... for Rs. 10 to get him instalment in Suit No. 113 of 1927..... and he said that he had no defence."

This statement is sufficient to condemn him from his own mouth It is not disputed that at the first hearing of the Small Cause Court case Mr. L. did not state to the Court that his client wanted instalment and that on the contrary stated to the Court that his client's defence to the action was that the claim was denied If his explanation to this Court is true it was unworthy of him as a member of the honourable profession to raise a false defence contrary to instructions, and which he knew to be false, whatever his motives may have been, whether it was to secure the balance of his fees or to harass the plaintiff to agree to instalments. If, on the other hand, his explanation to this Court is false it is equally unworthy of the high position he enjoys. I would, therefore, hold that this charge requires no further proof whatsoever.

The most serious objection raised is that inrespect of the seventh charge. It is argued that as Mr. L was in the position of an accused person, it was not competent for him to make any statement on oath, that his being put on oath was illegal, and that therefore, he was at liberty to make untrue statements without running any risk not only of being criminally prosecuted for perjury but also of being punished under the disciplinary jurisdiction of this Court Reliance has been placed on the case of *Kotha Subba Chetty* v. *Queen* (15) for the proposition that no charge of perjury could ever be maintained in such a case With all respect, I am not prepared to accept this view. Their Lordships' judgment is very short and is not supported by any authority. It is also not clear from their Lordships' judgment whether the pleader had given perjured evidence voluntarily or under compulsion. If an enquiry under the disciplinary jurisdiction of this Court is not a criminal enquiry, S. 342, Cl. (4), Criminal P. C., has no application whatsoever Our attention has not been invited to any other statutory provision prohibiting the person against whom a judicial enquiry is proceeding from being put on oath or being made to answer questions relevant thereto

Section 2, Evidence Act, extends the provisions of that Act to all judicial proceedings. S. 118 declares that all persons shall be competent to testify the facts in issue unless they are non

(14) [1909] 19 M. L. J. 504=3 I. C. 344=6 M. L. T. 253 (F.B.)

(15) [1883] 6 Mad. 252.

compos mentis or otherwise incapable of understanding questions or giving rational answers. Ss. 121 to 131 protect certain witnesses from answering certain questions. These sections do not apply to the present case S. 132 in clear and express terms provides that no witness shall be excused from answering questions in issue in a judicial proceeding on the ground that such question may criminate or tend to criminate him or that they will expose or tend to expose him to a penalty of forfeiture of any kind The only protection afforded to him by the proviso to that section is that the answers given by him shall not be used against him in a criminal proceeding other than a prosecution for giving false evidence by such answer.

The maxim *nemo teonetur seipsum accusare* does not apply here to the same extent as in England and permits of a person being put questions which tend to expose him to a penalty or punishment other than a punishment in a criminal case. It also permits of such a person being prosecuted for perjury if, in order to avoid such penalty, or for other reasons he commits perjury I am prepared to concede that it is extremely undesirable that a pleader should be compelled to answer questions on oath in an inquiry against him and then be prosecuted for perjury for giving false answers to such questions As at present advised I am not prepared to go any further than that Reference to the decided cases shows that a legal practitioner often files an affidavit of his own in explanation of the allegations made against him and I am certainly of the opinion that where he voluntarily offers to file an affidavit or offers to go into the witness box for the purpose of disproving the allegations made against him he has a right to do so. Under the English Evidence Act, 1898, 61 & 62 Vic. Ch. 36, even a person accused of a criminal offence is permitted to offer himself as a witness at his own trial, and renders himself liable for perjury if he is guilty of it. There is no reason why a pleader who voluntarily and deliberately commits perjury for the purpose of avoiding punishment in disciplinary proceedings should not likewise be dealt with. It is true that in the present case Mr L. did not expressly volunteer to give evidence and that after Jeewansing's evidence was over he was put on oath inadvertently by the Court. But he did not protest against giving evidence or claim any privilege and the Court did not apply its mind whether he should be compelled to answer questions or not If he had objected either to his being put on oath or to answering any particular question it was open to the Court to draw an adverse inference against him. Having raised no protest, it is not open to him to urge that as he was improperly put on oath (assuming that to be the state of law) the answers given by him if found to be false should not be taken into account in determining whether his conduct is worthy of being a member of the honourable profession to which he belongs.

In the end it was faintly suggested that the seventh charge should not be taken into consideration until and unless Mr. L had been prosecuted in a criminal Court for the offence of perjury. Reliance was placed on *In the matter of Chandi Charan Mitter* (16), *Emperor* v. *Rajendra Kumar Dutt* (17) and *Emperor* v *Satish Chandra Singha* (18). None of these cases lays down that where the accusation against the pleader is in the nature of a criminal offence his conviction in a criminal Court is a sine qua non to the exercise of the disciplinary jurisdiction of this Court Each case must depend on its own merits In dealing with this point a broad distinction has been drawn between the acts done by the pleader in his professional capacity or in the presence of the Court, and acts not done in such capacity and not in the presence of the Court. It is only in the latter case when the acts charged are indictable and are fairly denied, the Court will not proceed against the pleader until he has been convicted and will not compel him to answer on oath to a charge for which he may be indicted *In the matter of Chandi Charan Mitter* (16), *Anon.* (19), *Anon.* (20), *Anon.* (21) and *Stephens* v. *Hill*(22)

(16) [1920] 47 Cal. 1115=31 C. L. J. 471=57 I. C. 931=24 C. W. N. 755.
(17) A. I. R. 1926 Cal. 502.
(18) A. I. R. 1927 Cal. 536=54 Cal. 721.
(19) [1834] 5 B. & Ad. 1089.
(20) [1838] 3 N. & P. 389.
(21) [1833] 2 Dowl. P. C. 110.
(22) [1842] 62 R. R. 517=11 L. J. Ex. 329=10 M. & W. 28=6 Jur. 585=1 D.(n.s.) 669

This distinction has been sufficiently brought out in the judgment of Lord Abinger at p. 522 in the last cited case which is as follows :

"But in all cases where an attorney abuses the process of the Court of which he is an officer, and his proceedings are of such a nature as tend to defeat justice in the very cause in which he is engaged professionally, I never heard that, because by possibility he may have thereby exposed himself to be indicted as a cheat or for a conspiracy, he is to be permitted to remain on the roll, and if the cases in Queen's Bench be carefully examined, it will be found that no such rule exists. Such a rule would be extremly injurious ; for in no case could any remedy be had against the attorney, unless the client would first prosecute him to conviction, until which time he could not be struck off the roll or prevented from practising. Where, indeed, the attorney is indicted for some matter not connected with the practice of his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury. Now, with respect to the merits of the case before us, I cannot conceive how any attorney employed to prosecute or defend a suit in a Court of justice can be justified in using any influence directly or indirectly, for the purpose of preventing a witness who has been subpoenaed by his adversary from coming forward to give evidence. The present charge is, therefore, one of a very serious nature, as the proceeding complained of would, if unchecked, be an easy way for any attorney to win his causes , and is it to be said that no remedy can be had unless he is first indicted, and that the Court has no power to at once strike him off the roll ? If an indictment is to be first preferred, the point at issue in it might, from its very nature, be one of which a jury would not be the best judges, and more proper to be determined by the Court, who are always the fittest tribunal to decide on complaints of technical misconduct, and to determine not only the degree of severity which ought to be resorted to but the proper cases for the exercise of that mercy which they are ever ready to extend where they see just ground for it."

In the present case false statements were made in the course of the enquiry against Mr L and the proper tribunal to judge of the severity or otherwise of the punishment to be inflicted on him is this Court. Such false statements are generally taken into account in determining the punishment to be inflicted upon the delinquent. As authority for that proposition it would be sufficient to refer to the case of *Ex parte Law Society, In re A Solicitor* (6) referred to above

The learned counsel has appealed to us for a lenient view of the case. He has urged that Mr. L. is not the only black sheep in the fold who has broken the rule with regard to the minimum fee to be accepted by pleaders. This is probably true to a certain extent. But the same thing cannot be said in respect of failure by him to keep a fee book and a ledger of his clients' account or his conduct in misleading the Court and untrue answers Taking, however, into consideration all the circumstances of the case I agree with the learned Judicial Commissioner whose judgment I have had the privilege of listening to, that Mr L. be suspended from practice for a period of one year from the date on which the order of interim suspension was passed against him and that he do surrender his sanad to the Registrar of this Court forthwith

De Souza, A. J C—I concur with the judgment delivered by the learned Judicial Commissioner I should like to add one word about the devious course taken by the proceedings in this enquiry in consequence, no doubt, of no rules of procedure having been extended to this Province beyond the general provisions of S. 40, Legal Practitioners Act 18 of 1879, which enacts that no pleader, mukhtiar or revenue agent shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authority suspending or dismissing him. The proceedings were initiated on a petition made by one Jeewansing Budhasing on 29th January 1927, to the Judge of the Court of the Small Causes at Karachi complaining, first, that Mr. L was guilty of wilful neglect to appear in Court without any justification after receipt of full fees at the hearing of a suit which had been filed against him by one Locumal and thus liable to be dealt with under the provisions of S 13, Legal Practitioners Act 18 of 1879, and, secondly, that Mr. L was also further guilty of unprofessional conduct as he obtained one eight annas Court-fee stamp from the applicant Jeewansing by making a false representation that the same was required for filing a vakalatnama when no such vakalatnama was required to be filed as Mr. L. is an advocate.

As this complaint referred to proceedings that took place in his own Court, it was competent to the learned Small Cause Court Judge under the direction of the Judicial Commissioner, as S. 14 of the Act has not been extended to Sind, to

make an enquiry into the allegations made by Jeewansing and if in his opinion a prima facie case had been made out against Mr L. to submit his proceedings to the Court of the Judicial Commissioner of Sind for such action as the Court might deem fit to take in the exercise of its disciplinary jurisdiction. If this had been done a good deal of this Court's time would have been saved The learned Judge of the Small Cause Court, however, merely forwarded Jeewansing's petition to the Court of the Judicial Commissioner and the learned Judicial Commissioner after calling for Mr. L's explanation and sending the papers to the Small Cause Court Judge for any remarks which he might wish to make thereon, referred the matter for enquiry to one of the Judges of this Court, Mr. Rupchand, A J. C. Mr. Rupchand after examining the petitioner Jeewansing and after recording the statement on oath of Mr. L came to the conclusion that besides the allegations made in Jeewansing's petition there were several other acts of misconduct disclosed against Mr L, in the course of the enquiry and on 8th June 1927, he submitted the proceedings to the Judicial Commissioner formulating nine distinct charges of misconduct against Mr L. The Judicial Commissioner directed that the matter be heard by Full Bench

When the matter came on for hearing before the Full Bench on 27th June 1927 Mr. O'Sullivan, counsel for Mr. L., contended that he had no notice of any of the charges contained in Mr Rupchand's report save the two charges made in Jeewansing's petition. In these circumstances it was open to Mr. O'Sullivan to ask the Full Bench to confine itself to the charges of which Mr. L, had notice and to disregard the other charges, and I think the Full Bench following the decision of a Full Bench of the Patna High Court *In the matter of Jugal Chandra Mazumdar* (23) would have had to accept Mr. O'Sullivan's contention and acquit Mr. L., on those charges

Mr O'Sullivan, however, contented himself with asking an opportunity to meet the further charges which he said had been suddenly sprung upon him and the Full Bench accordingly remitted the enquiry to Mr. Rupchand for taking Mr. L's explanation on the added charges. No further evidence was tendered or taken after the remand. Mr L on 29th August 1927, put in a statement denying these charges, which Mr. O'Sullivan intimated was not to be regarded as an explanation but rather in the nature of a statement, adding that his explanation will come in with his arguments which he will advance before the Full Bench. I may add that in the course of the hearing before the Full Bench Aston, A J C., threw out a suggestion that there was a multiplicity of charges framed against Mr. L which might possibly embarrass his defence and, if possible, some of the charges should be deleted.

Accordingly, on 29th August 1927, Mr. Rupchand submitted the amended report formulating seven distinct charges against Mr. L which have now come up for hearing before the Full Bench. It is curious to note that the two charges made by Jeewansing in his petition which originated the enquiry have been abandoned, the charges of misappropriating annas eight being dropped in the amended report as it practically depended upon Jeewansing's word as against Mr. L's word and the charge of wilful neglect to put in appearance at the hearing of the suit in the Small Cause Court not being pressed by the learned Government Pleader as Mr L's default is quite consistent with a bona fide mistake. It comes to this then that the misconduct under enquiry before the Full Bench is misconduct that came to light in Mr L's defence in the course of the enquiry.

In *In the matter of Parbati Charan Chatterji* (24) it was laid down by the Allahabad High Court that misconduct must be made out by the admission of the party concerned or on evidence to the satisfaction of the Court. And in the leading case *In re An Attorney* (25) a Full Bench of the Calcutta High Court consisting of Jenkins, C. J. and Stephen and Chaudhuri, JJ, laid down that :

"where there was a positive sworn denial of the misconduct by the attorney coupled with an explanation which was not demonstrably false, even a strong case of suspicion would not justify disciplinary action against the attorney on a summary proceeding "

(23) [1916] 20 C. W. N. 1016=34 I. C. 645=17 Cr. L. J. 229 (F.B.).

(24) [1895] 17 All. 498=22 I. A. 193=6 Sar. 635 (P.C.).

(25) [1913] 41 Cal. 113=19 I. C. 933=14 Cr. L. J. 305.

To the same effect are the observations of the Bombay High Court in *Government Pleader* v *Raghanath S. Sule* (26) where it was held that the enquiry is of a quasi criminal character and the Court must have strict proof of the professional misconduct imputed.

Now, with regard to the first two charges, viz., first, that he failed to keep a register of fees settled, the amount settled and the name of the client as required by R 35 of the Rules of the Bar Association for a number of years preceding 1st January 1927, and, second, that he failed to keep a register showing every sum deposited by each client for expenses and the sum expended on his behalf as required by R. 36, Rules of the Bar Association, there is an admission by Mr. L. that he is guilty on those charges. With regard to the other charges, however, I venture to think that there is no evidence legally admissible against Mr. L. which would justify a finding that he is guilty on those charges. On charge 3 that Mr. L agreed to receive low fees in contravention of R 32 (b), Rules of the Bar Association, there is nothing beyond the word of Jeewansing against the word of Mr L. and on charges 4 to 7 regarding the alleged false entries made in the fee book produced by Mr L. or in the alternative the fabrication of the fee book and the alleged perjury said to have been committed by Mr. L. In these proceedings there is nothing beyond the report made by the learned Judge who held the enquiry and is now one of the Judges constituting the Full Bench before whom the alleged perjury and forgery are said to have been committed and the fee book produced for our inspection, suspicious looking, no doubt which we are asked to say is a forgery but which Mr L. solemnly swears is a genuine document. As was pointed out by Jenkins, C. J., In *In re An Attorney* (25) the role of prosecutor and Judge thus thrust upon the Full Bench is invidious and one to be deprecated

As regards misconduct charged in charges 1 and 2 to which Mr. L. pleads guilty, Mr. O'Sullivan argued that they were in the nature of a trivial breach of one of the Rules of the Bar Association which he contended is not enforced in any other Province in India. In developing his argument Mr. O'Sullivan contended that the only power to make rules which the Court of the Judicial Commisssoner possessed were the powers under S. 16, Cl. (1), Sind Courts Act "to make rules for the qualification and admission of proper persons to be pleaders" When once those rules are framed he argued the Court was functus officio and any other rule purporting to be made and sanctioned by the Court under this section for the conduct of pleaders after admission was ultra vires But it seems to me that the Court which under S 16 (3), Sind Courts Act, has power to remove or to suspend from practice for misbehaviour any person admitted to be a pleader has by necessary implication, power to define by judicial decision or otherwise what constitutes misbehaviour and laying down canons of good behaviour, departure from which may constitute misbehaviour. The rules framed by the Bar Association with the approval of the Court must, I think, be regarded as laying a standard of good behaviour to which pleaders should ordinarily conform. But it does not necessarily follow that a breach of all or any of these rules would call for the exercise of the Court's disciplinary jurisdiction The rules are exhortatory but not punitive. They refer to matters of varying degrees of gravity with varying sanctions attaching to them. In some cases censure by the Committee is considered a sufficient punishment (see R 28) in others suspension or expulsion from membership of the Bar Association. And, in extreme cases a report to the Judicial Commissioner.

Mr. Kalumal a representative of the Committee of the Bar Association who argued the case as amicus curiae claims for these rules a much higher sanction. He referred to the terms of the sanad conferred on a pleader on admission to the Bar and argued that every pleader by the mere fact of accepting his sanad agrees to be bound by the conditions endorsed on the sanad which among others include a promise to be a member and submit to the rules both of the Bar Association of the District and of the Karachi Bar Association. He contended there was here a contractual obligation imposed upon the pleader or at any rate an obligation of honour to resile from which was dishonourable and unprofessional

(26) [1909] 11 Bom. L. R. 1150=1 I. C. 266=10 Cr. L. J. 526.

and called for disciplinary action from the Court. Mr. Kalumal could hardly have been serious when he advanced this argument I presume that the contracting parties here contemplated are the Court of the Judicial Commissioner on the one hand and the aspiring candidate for the Bar on the other. Obviously these contracting parties are not in a position to deal at arm's length. Ex hypothesi the conditions imposed in the sanad would be ultra vires. If so, the result will follow that the grant is valid and the conditions void.

Mr. L has pleaded guilty to the two charges of failing to keep a register of fees settled, the amount settled and the name of the client and to keep a register showing every sum deposited by such client for expenses and the sum expended on his behalf. It is true that no dishonesty is alleged or proved in consequence of his failure to keep these books and the plea of guilty cannot be construed as anything beyond an admission that he has failed to conform to Rr. 35 and 36, Rules of the Bar Association Mr. O'Sullivan asks us not to take any more serious view of this case than that there has been a technical breach of a Rule of the Bar Association. But in this Province the rule has been held to possess a much higher sanction and that a violation of it constituting as it does a breach of the relation of confidence and trust which should exist between pleader and client amounts to "misbehaviour" which calls for disciplinary action : vide Fawcett, A. J. C., in *Varanbai* v *M, Pleader* (1).

Still in view of the absence of any allegation or proof of dishonest conduct in consequence of the failure to keep regular accounts I was inclined to take a lenient view of the case but I agree that the prevarications and subterfuges to which Mr L. resorted in conducting the defence aggravated his original offence. I, therefore, concur in the order proposed by the learned Judicial Commissioner.

S.N./R.K. *Suspension order passed.*

A. I. R. 1929 Sind 132

PERCIVAL, J C AND RUPCHAND, A. J. C.

Chuhermal Nihalmal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 255 of 1928, Decided on 12th February 1929.

(a) Criminal P. C, S. 4—It is not necessary that the complaint should be presented personally by the complainant.

It is not essential that the complaint should be presented in person by the complainant and the fact that it is not so presented does not render it the less a complaint under the Code. For the purpose of vesting the Magistrate with jurisdiction to take cognizance of a case on a complaint made to him it is not essential such complaint should be presented to him by the complainant personally 17 *C. W. N.* 448, *A. I. R.* 1925 *Oudh* 144, *Ref.* [P 134 C 1]

(b) Criminal P C., S. 195 — Section requires the complaint of the Court not only in respect of certain offences committed in but also in relation to any proceedings in the Court.

It requires the complaint of the Court not only in respect of certain offence committed in the proceedings in the Court but in relation to any proceedings in the Court The expression "in relation to any proceedings" is very general and is wide enough to cover a proceeding in contemplation before a criminal Court though the proceedings may not have commenced when the offence was committed *A. I. R.* 1923 *Bom.* 105, *Foll.* [P 134 C 2]

(c) Criminal P C., S. 195 — In case of accused put on trial under S. 211, I. P. C., it is a question of fact in each case whether he made the false accusations in contemplation of preceedings which he intended to take in the Court or not.

Where a person is put on his trial under S. 211, I. P. C., in respect of an alleged false accusation by him against another it is a question of fact to be decided in the particular circumstances of that case whether that person made such false accusation in contemplation of proceedings which he intended to take in a Court or not. Where the accused has made a false accusation at the same time in two documents one a petition addressed to the Assistant Superintendent of Police and the other a complaint posted to a criminal Court it may be fairly presumed that he did so with the object of moving the criminal Court to take proceedings. The offence committed by him, therefore, falls within the purview of the expression "in relation to criminal proceedings within the meaning of the above section. [P 134 C 1]

(d) Criminal P. C., S. 195 — Sanction under the section necessary together with Magistrate's written complaint if false information to the police is followed by a complaint to the Magistrate.

Where a false information given to the police was followed by a complaint to the Magistrate on the same facts and the same

charge the sanction of such Magistrate under the old S. 195 and a complaint in writing by such Magistrate under the present amended section is essential.

It was immaterial whether the complaint subsequently presented by the accused had actually been proceeded with or not.

[P 134 C 2, P 135 C 1]

Partabrai D. Punwani — for Appellant.

C. M. Lobo—for the Crown.

Rupchand, A. J. C —This is an appeal against the judgment of the learned Sessions Judge, Larkana, convicting the accused under S 211, Part 2, I P. C., and sentencing him to nine months rigorous imprisonment There is hardly any dispute about the facts and the only question argued before us in one of law.

It appears that on or about 15th August 1927 the accused sent two petitions one addressed to the Assistant Superintendent of Police and the other to the Sub-Divisional Magistrate, Larkana making serious allegations of trespass and theft against certain relatives of his The petition addressed to the Assistant Superintendent of Police was dealt with by the Inspector of Police. He found that the allegations made by the accused had no foundation. He accordingly applied to the District Superintendent of Police for sanction to prosecute the accused. On 11th October 1927 he obtained a sanction from the District Superintendent of Police to prosecute the accused and on 21st October 1927 he lodged the present complaint under S 211, I P. C before the First Class Magistrate, Larkana, who committed the case to the Sessions.

The petition addressed by the accused to the Sub-Divisional Magistrate was in similar terms except that it was headed as a complaint and contained the names of witnesses whom the accused wished to examine. It also bore the usual court-fee stamp of eight annas It was received by the Sub-Divisional Magistrate on 16th August. He took no action upon it until 24th October 1927 when he is said to have passed some order which is not before us

Now in the Sessions Court it was urged on behalf of the accused that as the accused had made the alleged false charge against his relatives simultaneously to the police and the Sub-Divisional Magistrate S. 195, (1) (b) was a bar to his prosecution by the police and that the only complaint on which he could be tried and convicted would be one filed by the Sub-Divisional Magistrate.

In dealing with this point the learned Sessions Judge has said :

"The sanction (Ex. 5), therefore, was granted and the proceedings before the Committing Magistrate were started under that sanction prior to the date on which the Magistrate took cognizance of the complaint (Ex. 7) to him. The Magistrate came to know after 25th October 1927 that action upon the police complaint was already taken and the accused was proceeded with before the Committing Magistrate Nothing, therefore, remained for the Sub-Divisional Magistrate to do in the matter and his second sanction was obviously not necessary."

On behalf of the accused, it has been argued that the observations of the learned Sessions Judge are contrary to the provisions of S 195 (b) and the case law on the point Reliance has been placed on *Tayebullah* v. *Emperor* (1), *Brown* v. *Anandalal Mullick* (2), *Sheikh Samir* v. *Sajidar Rahman* (3), *Ramchand Nanumal* v. *Emperor* (4), *Marugan* v. *Gutha Rami Naidu A. I. R.* 1927 *Mad.* 851, *Maung P. C.* v. *Maung Chaw, A. I. R.* 1928 *Rang.* 243, *Mahomed Yassin* v. *Emperor* (5) On the other hand, it has been contended on behalf of the Crown that the petition sent by the accused to the Sub-Divisional Magistrate was not a complaint as it was not personally presented and that as no attempt was made by the accused to proceed with it S. 195 (1) (b) had no application I am afraid I cannot accept either of the contentions of the learned Public Prosecutor as sound.

Section 4, Cl. (h), Criminal P C., defines a complaint to mean an allegation made either orally or in writing to a Magistrate with a view to his taking action under the Criminal Procedure Code that some person whether known or unknown had committed an offence.

This section does not prescribe that the complaint should be made to the Magistrate in person and that it may

(1) [1916] 43 Cal. 1152=24 C. L. J. 134=36 I. C. 845=20 C. W. N. 1265.
(2) [1916] 44 Cal. 650=25 C. L. J. 59=36 I. C. 857=20 C. W. N. 1347.
(3) A. I. R. 1927 Cal. 95=53 Cal. 824.
(4) A. I. R. 1929 Sind 115.
(5) A. I. R. 1925 Pat. 483=4 Patna 323.

not be posted to him or that if it is posted it is not a complaint at all. Our attention has been invited to S. 200, Criminal P. C, which provides that a Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant upon oath and reduce in writing the substance of his examination

But again that section requires the Magistrate to examine the complainant without delay after he has taken cognizance of it, and does not prevent the Magistrate from calling upon the complainant to appear before him on a date to be fixed by him.

Clause (a) dispenses with the necessity of examining the complainant on oath where the complaint is not being dealt with by the Magistrate taking cognizance of the offence himself but is being transferred by him to another Magistrate.

Clause (aa) likewise dispenses with the necessity of examining the complainant where the complaint is filed by a public officer, in his official capacity or where the complaint is filed by the Court.

In both these instances it would appear that it is not essential that the complaint should be presented in person by the complainant and the fact that it is not so presented, does not render it the less a complaint under the Code.

A careful reading of that section therefore points rather to the conclusion that for the purpose of vesting the Magistrate with jurisdiction to take cognizance of a case on a complaint made to him it is not essential that such complaint should be presented to him by the complainant personally. *Kettar Mohan Mitter* v *Emperor* (6) and *Chote Maharaj* v. *Emperor* (7) are cases where more letters addressed to a Magistrate which complied with the ingredients of S. 4, Cl. (h) were held to be complaints.

The petition in the present case not only falls within the definition of that section but is headed and duly stamped as such. In my opinion it was intended to be filed as a complaint and no sufficient grounds have been shown to us that it should not be treated as such.

The fact that the Sub-Divisional Magistrate took no action on it until after the filing of the present case by the police or the further fact that the accused has shown no anxiety to proceed with his complaint in Court, were in my opinion equally insufficient to vest the Magistrate before whom the present complaint was filed with jurisdiction to proceed with it after he had been apprised of the fact that the accused had made a complaint to the Sub-Divisional Magistrate on the same facts as disclosed by him in his petition to the police.

Section 195 (1) (b) reads as follows :

"No Court shall take cognizance of any offence punishable under any of the following sections of the same Code namely Ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228 when such offence is alleged to have been committed in or in relation to any proceedings in any Court except on the complaint in writing or such Court or some other Court to which such Court is subordinate."

It requires the complaint of the Court not only in respect of certain offence committed in the proceedings in the Court but in relation to any proceedings in the Court

The expression "in relation to any proceedings" is very general and is wide enough to cover a proceeding in contemplation before a criminal Court though the proceedings may not have commenced when the offence was committed: cf. *In re Vasudev Ramchandra Joshi* (8).

Where a person is put on his trial under S 211, I. P C. in respect of an alleged false accusation by him against another it is a question of fact to be decided in the particular circumstances of that case whether that person made such false accusation in contemplation of proceedings which he intended to take in a Court or not. Where the accused has made a false accusation at the same time in two documents one a petition addressed to the Assistant Superintendent of Police and the other a complaint posted to a criminal Court it may be fairly presumed that he did so with the object of moving the criminal Court to take proceedings. The offence committed by him, therefore, falls within the purview of the expression "in relation to criminal proceedings" within the meaning of the above section.

The cases referred to by the learned pleader for the accused, all lay down that where a false information given to the police was followed by a complaint to the Magistrate on the same facts and the

(6) [1913] 17 C. W. N. 448=18 I. C. 412=14 Cr. L. J. 76.

(7) A. I. R. 1925 Oudh 144=28 O. C. 83.

(8) A. I. R. 1923 Bom. 105.

same charge the sanction of such Magistrate under the old S. 195 and a complaint in writing by such Magistrate under the present amended section was essential. It has also been held that it was immaterial whether the complaint subsequently presented by the accused had been actually proceeded with or not: see *Shaikh Mahomed Yassin* v. *King Emperor* (4).

Our attention has not been drawn to anything in S. 195 (1) (b), Criminal P.C., to suggest that it has no application to a case where the Magistrate has not proceeded with the complaint before him whether it be suo motu or on account of the indifference of the complainant in prosecuting his complaint, and I am not prepared to interpolate into this clause a condition precedent that it is not to come into operation unless the Magistrate has proceeded with the complaint before him and that if he has not done so for any reason whatever this clause shall not come into operation.

I think that as soon as the police officer in charge of the present case came to know that a complaint had been filed in respect of the same alleged false charge before the Sub-Divisional Magistrate it was his duty to have moved the learned Magistrate to file a complaint on behalf of the Court and on that being done he should have allowed his own complaint to be dropped.

In my opinion the whole trial is bad and the conviction and sentence of the accused cannot be maintained

As this appeal succeeds on a technical ground I would leave it open to the learned Sub-Divisional Magistrate to file a complaint in respect of the same offence if he thinks it desirable specially in view of the serious allegations made by the accused against persons who are alleged to be respectable. Before doing so, he will no doubt afford an opportunity to the accused of being heard

Percival, J C —I concur

P. R./R K. *Appeal allowed.*

A. I. R. 1929 Sind 135

WILD, J. C.

Official Receiver—Applicant.

v.

Jankibai—Opponent.

Misc. Appl. No. 381 of 1927, Decided on 8th December 1928.

Provincial Insolvency Act (1920), S. 4—Scope of proceedings under S. 4.

Proceedings under S. 4 are not restricted to the decision of the title and property within the territorial jurisdiction of the Court.

[P 135 C 2]

Khanchand Gopaldas—for Applicant.

Kewalram Jethanand—for Opponent.

Order.—This is an application under S. 4, Provincial Insolvency Act, by the Official Receiver in whom the property of certain insolvents vests for a declaration that a house at Amritsar in the Punjab is the property of the insolvents The insolvents raise the objection that the Court has no jurisdiction to entertain the application and that if it has jurisdiction it should not entertain it. It is argued that under S. 5 of the Act, the Courts have the same powers under the Act, as they have under the Civil Procedure Code and as this Court has no territorial jurisdiction at Amritsar the only Court which would have jurisdiction under Art. 16 (d), Civil P. C. would be the Amritsar Court. S. 5 is, however, stated to be subject to the other provisions of the Provincial Insolvency Act, and clearly the provisions as to the place of suing in the Civil Procedure Code do not apply to proceedings under the Provincial Insolvency Act, as S. 11 which gives the Court its jurisdiction in insolvency matters is not at all in accordance with those provisions. Moreover the whole of the insolvent's property whether within or without the territorial jurisdiction of the Court vests under S. 28 (2) in the Court or its Receiver. Proceedings under S. 4 are, therefore, not restricted to the decision of the title and property within the territorial jurisdiction of the Court and the Court in the present case has jurisdiction It is argued that the matter cannot properly be decided in this Court on evidence taken on commission but the inconvenience, if any, will be the same for both parties. Moreover, to refer the Official Receiver to a suit would mean a great delay and would be unjust to the creditors. The application, is, therefore, entertained and the commission should now issue.

P.N /R.K. *Application entertained.*

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*A I. 1929 Sind 136

RUPCHAND A. J. C

Khatijanbai—Applicant.

v.

Nur Mahomed—Opponent.

Judicial Misc Case No. 415 of 1927, Decided on 1st March 1929.

*** (a) Limitation Act Art. 177—Art. 177 does not apply to forma pauperis enquiry—Civil P. C, O. 33.**

An application for bringing on the record the legal representative of a deceased opponent in an application for permission to sue in forma pauperis is not governed by the provisions of Art. 177 7 *Bom.* 373, *Rel.* [P 135 C 1]

*** (b) Civil P. C, O 33, R. 9 (a) and S 141 — Pauper purposely delaying to bring legal representative of deceased opponent on record within reasonable time—Application can be rejected under O. 33, R. 9 (a) read with S. 141 or under S. 151**

If the pauper purposely delays in bringing the legal representatives of the deceased opponent on the record within a reasonable time it is within the discretion of the Court to punish him by rejecting his application either under the provisions of O 33, R 9 (a) read with S. 141 treating his failure to bring the legal representatives on the record within the time allowed by the Court as vexatious or improper conduct on his part in the course of the proceedings or under the provisions of S. 151 as an abuse of the process of the Court. [P 136 C 2]

Judgment — I think the learned Second Registrar was right in holding that an application for bringing on the record the legal representatives of a deceased opponent in an application for permission to sue in forma pauperis is not governed by the provisions of Art. 177, Lim. Act Before the Court grants permission to the applicant to file a suit in forma pauperis, there is no suit before the Court, and before the application to sue in forma pauperis is granted, there is no plaintiff and no defendant The parties to the application are referred to as the applicant and the opponent. On the very face of it O. 22, Civil P. C., deals with applications to bring on record the legal representatives of parties to a suit dying during the pendency of the suit, and therefore, reading the provisions of O. 22, Civil P. C., with those of Art. 177, Lim. Act, there can be no doubt that that article applies to suits, and that this is so is also abundantly clear from the provisions of O 22, R 4, Civil P. C, which provides the penalty for such non-joinder as the abatement of the suit There being no suit before the Court there could be no abatement. Mr. Jamiatrai has contended that S. 141 makes the provisions of the Code applicable to applications which are not suits and that O. 22, Civil P. C., and Art. 177 Lim. Act, should, therefore, apply to applications to sue in forma pauperis But all that is said in S 141 is that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction Therefore, though no doubt the precedure laid down in O. 22, Civil P. C requiring a plaintiff to bring on the record the legal representatives of a deceased defendant may apply to applications which are not suits, it does not follow therefrom that the penalties provided in O. 22, R 4, Civil P. C or the period of limitation prescribed for making applications under O. 22, Civil P. C. can without any express provision in that behalf, be said to apply to applications which are not suits In *Janardhan Vithal* v *Anant Mahadev* (1) a somewhat similar plea under Art, 171-B, Sch. 2, Act 15 of 1877 corresponding to Art 177, present Limitation Act, was held not to apply to a forma pauperis inquiry It has been suggested that in the absence of a penalty being imposed on a pauper, it would be open to him to delay bringing the legal representatives of a deceased opponent on the record for an ultimated time to the serious prejudice of the respondent. I do not think the Court is so powerless. If the pauper purposely delays in bringing the legal representatives of the deceased opponent on the record within a reasonable time, it is always within the discretion of the Court to punish him by rejecting his application either under the provisions of O 33, R. 9 Cl. (a), Civil P. C. read with S. 141, Civil P. C., treating his failure to bring the legal representatives on the record within the time allowed by the Court as vexatious or improper conduct on his part in the course of the proceedings or under the provisions of S 151, Civil P. C. as an abuse of the process of the Court I therefore, see no reason to interfere with the order of the learned Second Registrar and hold that the applicant do pay costs of this hearing.

P.N./R.K *Reference answered.*

(1) [1883] 7 Bom. 373.

A. I. R. 1929 Sind 137

PERCIVAL, J. C. AND BARLEE, A. J. C.

Emperor

v.

Walidino and *others*—Opponents.

Criminal Revn. Appln. No. 37 of 1929, Decided on 19th March 1929, against order of Sess. Judge, Larkana.

(a) Criminal P. C, S. 497—Accused persons committed for non-bailable offence to the Sessions Court for trial on prima facie case being made out—Trial adjourned sine die, closely connected case being tried by Committing Magistrate—Bail granted— No urgency—Orders from Government not obtained for remanding accused to jail though there was time to do so—High Court would not interfere in revision.

Where an application for bail was granted by the Sessions Judge on the ground of delay in trial owing to subsequent closely connected case being tried by the Committing Magistrate, and the offence under which the accused were tried was non-bailable, in which a prima facie case made out and the trial was adjourned sine die at the request of prosecution.

Held that though the delay was not due to prosecution and the case was not one in which bail should have been granted but as it was not a case of urgency the High Court would not interfere in revision as there were no orders or application from the Government in this respect for obtaining which there was sufficient time for the prosecution 1 *S. L. R.* 40, *Rel. on.* [P 138 C 2]

(b) Criminal P. C, S. 209 — Duties of Magistrate — Lengthy cross-examination should not be allowed in committal proceedings as Magistrate has to find only whether a prima facie case is made out or not

Where in committal proceedings the trial was being unduly delayed by long cross-examination, the Magistrate was not justified in allowing long cross-examination of witnesses as he had only to find whether there was a prima facie case for committing to the Sessions or not. [P 139 C 1, 2]

C. M. Lobo—for the Crown.

T. G. Elphinston—for Opponent

Percival, J. C. — This is a revision application by the Public Prosecutor for Sind asking this Court to revise the order of the learned Sessions Judge, Larkana, granting bail to certain persons who have been committed for trial to the Sessions Court of Larakana under S. 366, I P. C

The facts as regards bail are briefly that these accused, eight persons in all, were committed for trial to the Sessions Court under S 366 The bail application originally came before the Sessions Judge of Larkana (Mr. Dialmal Doulatram) on 20th October 1928, and he passed an order refusing to grant bail. A revision application was then made to this Court which was summarily dismissed. The sessions case, in which these men were concerned, however, was delayed owing to the fact that a subsequent connected case was brought under Ss. 302, 368 and other sections against Wahidbux Bhutto and other persons. The persons concerned in the present application are servants of Wahidbux Bhutto, who is a big zamindar and an M. L. A Subsequently another application was made to the learned Sessions Judge of Larkana, who is now Mr Master, and he also rejected the application on 25th January 1929 A further application was again made to Mr. Master, and finally in his order dated 23rd February 1929 the learned Sessions Judge released these persons on bail, on the ground of the delay which was occurring before the Sessions case against the present applicants could be taken up in the Sessions Court.

The learned Public Prosecutor has applied to this Court on the ground chiefly that the delay in the case is not due to the Crown, and that, if these accused are allowed to remain on bail, the witnesses will be tampered with ; para 7 of his application runs as follows

"That the learned Judge's order is utterly and entirely unjustified, and is causing and will continue to cause grave prejudice to the Crown and is calculated to defeat the ends of justice. The opponents are the servants of Wadero Wahidbux Bhutto, who is himself along with others being prosecuted for offences under Ss. 368, 302, etc., I. P. C. The opponents and their master have used and are continuing to use every effort to tamper with the witnesses, both in the above case and in the case now pending before the Special Magistrate, Larkana."

Now, after hearing the learned Public Prosecutor and the learned counsel for the accused, I must say, speaking for myself, I should not have passed the order passed by the learned Sessions Judge on 23rd February 1929 It seems to me that the order passed by Mr. Dialmal Doulatram on 20th October 1928 so well explains the position that it is desirable simply to quote it as showing the reasons against the grant of bail. He said in his judgment as follows :

"This is hardly the stage and it is not the practice of this Court to deal with the merits of the case at this stage. When, however, the best arguments of the applicants rest upon a consideration of the merits, some remarks appear unavoidable. The learned

Magistrate has given reasons that a prima facie case was made out against the accused so that they be tried before this Court. I agree with the conclusion of the learned Magistrate. That the accused are closely connected with Wahidbux Bhutto cannot be denied. The accused themselves have mentioned in their statements how they are connected with him. That he is an influential zamindar and an M. L. A, also cannot be denied. The complaint made is that the evidence has been tempered with. I am of opinion that the complaint of the learned A P P appears justified. To enlarge the accused on bail would be to encourage further tampering and consequent failure of justice. It is obvious that the woman has not yet been produced. The offence charged is a non-bailable one and although this Court has considerable discretion to enlarge on bail persons accused of such offences in the circumstances of this case, discretion will be wisely exercised by refusing the bail."

Now that order very satisfactorily disposes of the whole question, except as regards delay occurring in the other case which is proceeding against Wahidbux and others. And as regards that case the main argument advanced by the learned Public Prosecutor is that the delay is primarily due to the accused themselves and not to the Public Prosecutor. After hearing the Public Prosecutor and the learned counsel on the other side I am disposed to agree with the learned Public Prosecutor on this point. However, at the same time we have to remember that this matter has now come before us in revision While therefore one may not accept the view taken by the learned Sessions Judge and prefer the view taken by his predecessor Mr. Dialmal, still it is a different question when we have to decide whether to remand these accused person to jail, when they have been already enlarged on bail. I do not accept the contention of the learned counsel for the accused that this Court should not interfere in bail applications of this nature except on an application by Government, because such cases can be distinguished from cases in which there is no urgency, and in which it is desirable that the order of Government should be obtained. For instance one of the cases cited was one in which a District Magistrate proposed that certain words used by a Sessions Judge in his judgment should be expunged Now in a case of this character there is no urgency. It is right therefore for the Court in such a case to take action only on a reference by Government. But in bail applications the position is different. At the same time it is desirable for the Public Prosecutor to apply for the orders of Government in cases in which there is sufficient time to do so. In this instance there was time for the learned Public Prosecutor to obtain the order from Government, and it does not appear from the record that Government themselves have displayed any special desire for the accused to be remanded to prison. We know only that the application is "that under instructions from the District Magistrate, Larkana" There is also another slight difficulty in this case, namely that the delay that is occurring is in the case against Wahidbux Bhutto and others. So, assuming that Wahidbux Bhutto and other accused are unduly delaying the case against them, still it cannot be shown directly that the present accused are responsible for that delay.

Accordingly, though I do not agree myself with the view taken by the learned Sessions Judge and prefer the view taken by his predecessor, still, in the circumstances of the present case, it is not desirable to interfere with his order at present. It will be open to the learned Public Prosecutor, if he wishes to do so, to take the orders of Government, to apply to this Court again, not only in respect of the present accused but also in respect of Wahidbux in the other case, as Wahidbux is on bail in that case.

One remark is made by the learned Sessions Judge in his judgment, which, I think also should be mentioned, as I do not agree with it. His observation is :

"Besides the considerations of the cases cited by Mr. Lobo will not apply to the present case when the Sessions case has been adjourned sine die at the request of the prosecution and when it is not known when it will be eventually taken up by this Court, and when there is an intense desire on the part of the prosecution to lock up the applicants as under-trial prisoners for an indefinite period."

Now it seems to me that that remark is hardly justified. The accused have been committed to the Sessions for trial for an offence punishable under .S. 366, I P. C., a nonbailable offence, and I am of opinion that it is the clear duty of the Public Prosecutor to ask that they should be kept in prison, unless there are special

reasons why they should be released on bail. I think it would have a very bad effect, if the view is adopted that, because an accused person delays the trial of the case against him, therefore there is reason for him to be released on bail

However, having regard to all the facts of this case, as indicated above, I think it is not desirable to interfere at present with the order of the learned Sessions Judge.

In the course of the argument in this case, however, the learned Public Prosecutor also drew attention to the delay which was taking place in the case against Wahidbux Bhutto, which, as indicated above, is closely connected with the present case. The learned counsel for the accused in this case argued that no reference should be made to that case, because the accused are not before us I, however, do not agree with his suggestion. The two cases are closely connected, and it is on account of the delay which is occurring in the other case that the learned Sessions Judge enlarged the accused in the present case. So it is necessary for the purpose of the present application to consider whether those proceedings are being unduly protracted. Now the learned Public Prosecutor in the course of his arguments observed that :

"The committal proceedings in that case are being protracted beyond all limit. Witness Ex. 34 examination-in-chief 152lines, the cross-examination begins at about line 165 and extends up to line 770, witness Ex. 37 examination in chief is 260 lines, cross examination goes on to line 1120. The Mukhtiarkar of Tatta was called as a formal witness. Examination in chief is 199 lines, his cross-examination goes on to line 630. etc."

Now I do not wish to express any opinion on the question whether the Magistrate should or should not commit that case to the Sessions That is a different matter and is not before us. But it seems to me that it is only right and proper to make a few observations regarding the cross-examination of witnesses in that case, which, as indicated above, is intimately connected with the application which is now before us Now I have had considerable experience as a Sessions Judge in the Presidency proper, and I never came across a case in which there had been prolonged cross-examination in the Committing Magistrate's Court. It is hardly necessary to repeat. what is well known, namely, that the Magistrate in committal proceedings has only to find out whether there is a prima facie case for committing to the Sessions or whether there is no prima facie case. I am of opinion. that, for the purpose of finding whether there is a prima facie case or not, it is not necessary to extend the cross examination of a witness to 750 lines or so. It appears to be a speciality of Sind that committal proceedings are treated almost as a regular trial, and the proceedings are very greatly protracted It seems to me that this long cross examination of the witnesses in the committal preceedings against Wahidbux cannot be justified. In the committal proceedings the Magistrate has simply to find whether there is a prima facie case for committal or not I think, therefore, that the learned Magistrate will be well advised to prevent any further cross-examination which will not help him in arriving at the simple decision at which he has to arrive, namely whether there is a prima facie case for committal or not With these remarks, I would dismiss the application

Barlee, A J. C —I would reject this application for two reasons: firstly, I think that we must be careful not to weaken the rule laid down in the case of *Emperor* v. *Shah Nawaz Bachal* (1), that when a District Magistrate is dissatisfied with an order made by the Court of Sessions, his proper course is to communicate with the Local Government so that the High Court may be moved in the regular way. It is true that in exceptional circumstances, we have power to interfere whatever the source of our information, and at first, when I saw the papers of this case I thought that this was perhaps a case where interference would be justified Bail matters are often urgent and irreparable damage may be caused to the public interests by an ill advised order of release. But, on looking into the facts, I am not convinced of the urgency of the matter The order complained of was made on 23rd February and it does not appear to me that any particular effort has been made to treat the case as urgent Further the accused have been at large for four weeks and I think no real damage is likely to occur at this stage if the accused are not locked up again They have had time to approach the prosecution witnesses ; and in any case, whether they are in prison or free, the defence

(1) [1907] 1 S. L. R. 40.

will have no difficulty in tampering with the witnesses if they are open to influence. It does not appear, then, that the help of this Court is so urgently required as to justify departure from the ordinary rule.

My second and principal reason is that it seems to me inequitable to insist on locking up these accused while the man, who is said to be their leader, and who is accused of a much more serious offence is on bail. It is true that a prima facie case has been made out against these accused while Wahidbux is still before the Committing Magistrate. But this is scarcely a ground for a distinction between the cases, as the law permits and even directs the arrest of persons accused of serious crime save in exceptional circumstances, and does not wait for a prima facie case to be made. I find it hard to distinguish against the agents in favour of the principal and I feel that it would be inequitable to treat them differently. It cannot be that they are more likely to tamper with evidence and the only possible ground for distinction which I can think is that they may, but he cannot possibly, disappear But this is not a reason put forward by the learned Public Prosecutor. I would say, however, that whilst I can find no reason for making this case an exception to the rule in *Shah Nawaz Wd. Bachal* I do not wish it to be understood that I agree with the order of the learned Sessions Judge. This case and its companion case against Wahidbux Bhutto are very important from a public point of view, and it must be recognized that the police have had to contend with very great difficulties. In such circumstances Magistrates and Sessions Judges should recognize difficulties of prosecution and should avoid, if possible, adding to them I therefore agree with the order proposed by the learned Judicial Commissioner

M.N./R.K. *Application dismissed.*

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*A. I. R. 1929 Sind 140

RUPCHAND, A. J. C

Nenomal Jiamal—Plaintiff.

v.

Chandumal Assanmal and *others*—Defendants.

Suit No. 790 of 1927, Decided on 26th February 1929.

***(a) Limitation Act, Art. 116 — Mortgagor promising to pay interest every month —Mortgage-deed providing that on failure to pay such interest mortgagor shall pay principal and interest before expiry of mortgage period whenever mortgagee would demand—Cause of action arises from default to pay monthly interest and not at expiry of mortgage period—Limitation Act Art. 75.**

Where in a mortgage-deed the mortgagor promises to pay interest at the end of every month and the deed further provides that in case of default to pay such interest, the mortgagor shall return the principal as well as interest before the expiry of the mortgage period, whenever the creditor would demand the same, the cause of action arises on the day on which default in paying monthly interest is made and time runs from that day and not when the mortgage period expires: *A. I. R.* 1927 *Sind* 151, *not Appr.*; 9 *S. L. R.* 90, *Expl.*, 1 *S. L R.* 252; 8 *S. L. R.* 63, 37 *All.* 400 (*F.B.*); *A. I R.* 1921 *All.* 296, *A. I. R.* 1923 *All.* 1 (*F.B*); *A. I. R.* 1925 *All.* 499, 24 *Cal.* 281; *A. I. R.* 1926 *Cal.* 789; *Hemp* v. *Garland*, (1842) 4 *Q. B*, 519, *Reeves* v. *Butcher*, (1891) 2 *Q B. D.* 509, *Rel. on*, 39 *Mad.* 981, *A. I. R.* 1926 *Mad* 160, *not Foll*; *A. I. R.* 1928 *Mad.* 705, *Appr.* [P 144 C 2]

(b) Limitation Act—Interpretation.

There is no warrant for importing into the Limitation Act the provisions of a special English statute of limitation such as Ss. 3 and 4, Real Property Lim. Act, 1833 [P 143 C 2]

(c) Limitation Act, Art. 75—Mere laches on mortgagee's part in instituting suit is not proof of waiver—Transfer of Property Act, S. 112.

Mere laches on the part of the mortgagee in not selling the mortgaged property or instituting a suit for the recovery of the amount due to him within the period of limitation, is not tantamount of waiver and the mortgagee has to prove express waiver 5 *Cal.* 97, *Foll.* [P 144 C 2]

Tulsidas Ammamual—for Plaintiff.

G. A. Kikla—for Defendants.

Judgment.—The only plea raised in this suit is one of limitation. The mortgage bond executed by defendants 1 to 6 in favour of one Amanmal is dated 6th May 1920 It provides inter alia as follows:

"(We have) settled the interest thereof i. e. Rs. 100 at the rate of one rupee per cent per month. We shall pay this interest monthly . . . . . and return the principal amount in 12 months' time . . . . . If we continue to pay the interest punctually as agreed upon then the creditor will remit us four annas per cent. per month, out of the interest. But if we fail to pay it at the stipulated time, then the creditor is not bound to give us any discount nor shall we claim it. If, however, we do, then such claim on our part is and will remain void and ineffectual and we shall return the principal and interest amount before the expiry of 12 months whenever the creditor above named will demand the same."

By a deed of assignment dated 21st May 1921, Amanmal assigned his rights in the mortgage-deed to one Jiamal. Jiamal is dead, and his son is the plaintiff. He has sold the property in exercise of the express power of sale given to the mortgagee under the deed of mortgage, and has now filed this suit for recovery of the deficit resulting therefrom, but has limited his claim to a sum of Rs 5,000 only. Defendants 2 to 6 have been given up as they have been adjudicated as insolvents.

The defence of defendant 1, who is the only defendant on the record is that as there was a failure to pay interest in the very first month, the whole amount became payable at once, and that therefore under Arts. 65, 66, 68 and 80, whichever Article may be applicable, read with S 116, Lim. Act, this suit should have been brought within six years of the date on which the amount became payable under the mortgage bond, that is to say, on or about 21st June 1926, and as the plaint is dated 5th May 1927, the plaintiff's claim is barred by limitation. Mr Tulsidas has relied upon the case of the *Official Receiver* v. *Hussain Lal Mahomed* (1) in support of his contention that notwithstanding such failure to pay interest the period of limitation commenced to run from the expiry of 12 months when the amount was made repayable. In that case the mortgage-deed inter alia provided as follows.

"I shall repay the principal amount within two years and the creditor shall receive the same when I do so . . . . But if I fail to pay the fixed interest in any month punctually at the stipulated time as above, then there will be a breach of this promise, and in that event I shall pay back all the money together with interest in respect of which default is made when he demands even before the expiry of the above period."

My learned brother Lobo who tried that case held on the evidence that interest had been paid up to a certain date, that such payment revived limitation under S. 20, Lim. Act, and that the suit was therefore within time. He, however, made certain obiter dicta which are in favour of the plaintiff. With all respect I am not prepared to agree with the view taken by him. The learned Judge seems to have proceeded upon certain passages appearing in the judgments of Pratt, J. C. and Crouch, A. J. C. in the case of *Vishindas Vadhuram* v. *Hotomal Ditomal* (2) but in my opinion those passages have no application and that case as also the prior rulings of this Court on which it proceeded support the contrary view.

The earliest reported case is that of *Jethanand* v *Lalamal* (3). That was a case of an instalment decree which provided;

"If the defendant fails to pay any instalment, then he shall pay the whole balance at once . . . . But it shall be optional to the plaintiff to recover the entire amount at once or by instalments if there is default in payment of any instalment."

Crouch, A J. C., in delivering the judgment of the Bench said:

"Mr. Rupchand contends that the cases relied on by the lower Court do not cover the case where a creditor has a clear option given him by the decree. But as pointed out in *Jadabchandra Baksh* v. *Bhairab Chandra Chuckerbutty* (4), no distinction can be drawn between a case in which it is provided that on under payment of an instalment the whole amount shall become due and in which it is provided that on non-payment of an instalment the whole amount may be claimed. The proviso being for the benefit of the creditor the presumption is that he does not waive it, and the defendant may well consider the whole amount to be due from the time the creditor has a right to enforce it: see *Hemp* v. *Garland* cited in *Sitab Chand Nahar* v. *Hyder Malla* (5)."

In *Kimatrai* v. *Wadero Sher Mahomed* (6), the instalment mortgage bond in suit contained a clause in the following words:

"If I make any default I will be liable to pay the remaining amount at once and even then it will be in the power of the mortgagee to let the money remain with me or not."

It was contended before the Court that the last words "even then it will be in the power &c." amounted to an independent contract for the recovery of the instalments as previously provided in addition to the optional contract for the payment of the whole amount in default of payment of the instalment. This contention was negatived on the ground that clear words would be necessary to establish such a contract and it was held that the date of default in payment of the instalment was the starting point of limitation under S. 75, and that mere abstinence

(1) A. I. R. 1927 Sind 151.

(2) [1915] 9 S. L. R. 90=31 I. C. 479.
(3) [1907] 1 S. L. R. 252.
(4) [1904] 31 Cal. 297.
(5) [1897] 24 Cal. 281=1 C. W. N. 229.
(6) [1914] 8 S. L. R. 63=25 I. C. 938.

on the part of the creditor not to sue was not proof of waiver so as to affect limitation. In *Vishindas* v. *Hotomal* (2) the agreement provided as follows:

"The agreement is that within 12 months from this day we shall repay the principal amount to the lender. Interest on the above sum is fixed at the rate of eight annas per mensem from today .... If we fail to pay interest in any month, then we shall pay the creditor two months' interest together. Should we fail to pay the principal sum on due date as stipulated above, or monthly interest, or two months' interest together to the creditor then in that case the creditor aforesaid is at liberty to file a suit immediately and to recover the whole of the above amount with interest at the rate of one per cent per mensem until satisfaction."

The learned Judges held that time began to run when the default was made in the payment of interest, and that the clause which gave the creditor liberty to file a suit in no way affected the question Pratt, J. C pointed out that if the stipulation as to default were so worded that it does not come into operation unless and until the obligee elects to enforce it, then there is, as pointed out in *Kimatrai* v *Waderao Sher Mahomed* (6) an alternative contract But the phrases "is at liberty to file a suit for the whole amount" and the like do not impose any election. They merely imply that the whole amount is payable on demand and no distinction can be drawn between the phrases "may be sued" and "shall become due" Crouch, A. J. C. said :

"It matters not by what form of words the right to immediate payment of the principal in default of payment of an instalment, or of interest, is conferred. Every creditor has an option to file a suit and within certain limits to select his own time for filing it. The test whether or not the period of limitation begins to run is has the payee or obligee a right to file a suit forthwith for the principal remaining due if he so chooses ?"

It is no doubt true that the learned A. J C. further observed as follows :

"It would of course be quite easy to draw a bond in such form that the creditor would not get an immediate right to sue for the principal unless he elected to do so"

and illustrated his observation by saying :

"Thus in the event of interest being in arrears for two months the creditor shall be on liberty to serve on the debtor a written notice calling on the debtor to forthwith pay the whole principal and interest then due, and on such notice being served, the whole principal and interest shall become due."

Now there can be no doubt that it is open to the parties to provide by their agreement that even in the event of failure by one of them to pay interest on the due dates, the principal amount shall not be payable at once until and unless something further is done on the nature of an exercise by the party who is not at default of his right to put an end to the contract and to call for the payment of money on such default. But there is no provision in the present case in that behalf, nor was there any in the case of *Vishindas Vadhuram* v. *Hotomal Ditomal* (2).

The cases decided by this Court were governed by different articles of the Limitation Act. *Jethanand* v. *Lal Mahomed* (3) was a case of an instalment decree falling within Art 179 of the Act of 1877 corresponding to Art 182 of the present Act : *Kimatrai* v. *Wadera Sher Mahomed* (6) was a case of a mortgage-bond providing for payment of the amount due by instalments and governed by Art. 132, Lim Act · *Vishindas Vadhuram* v. *Hotomal* (2) was again a case of a bond providing for payment of interest at certain stated terms and making the whole payable on failure to pay interest and was treated as falling under Art. 65 or 66 or 68. But in all these cases the same principle was applied for determining the starting point of limitation

The view taken by this Court seems to be in accordance with that taken by the Allahabad and Calcutta High Courts . cf. *Gayadin* v. *Jhamanlal* (7), *Pancham* v. *Assar Hussain* (8), both cases of instalment mortgage-bonds under Art. 132, Lim. Act : *Shib Dayal* v. *Mehertan* (9), (a case of a mortgage-bond providing for immediate payment of money on failure to pay interest and governed by Arts. 80 and 116, Lim Act).

Kanhai v. *Amrit* (10) (a case of instalments under Art 75, Lim. Act). *Sitabchand Nahar* v. *Hyder Malla* (5), and *Jagdeosing* v *Balgovind* (11) (cases of mortgage-bond providing for payment of the amount on default of payment of interest regularly under Art. 132, Lim. Act). *Kalicharan Roy* v. *Moheschander Ghosh* (12) (an instalment decree under Art. 182, Lim Act).

(7) [1915] 37 All. 409=28 I.C. 910=13 A.L.J. 510 (F.B.).
(8) A.I.R. 1921 All. 296=43 All. 596.
(9) A.I.R. 1923 All. 1=45 All. 27 (F.B.).
(10) A.I.R. 1925 All. 499=47 All. 552.
(11) [1909] 2 I.C. 659.
(12) A.I.R. 1926 Cal. 789=53 Cal. 277.

The leading *English* case on this point and which appears to have been relied upon in most of the above cases is that of *Hemp* v. *Garland* (13), where it is said :

" If he (the plaintiff) chose to wait till all the instalments became due, no doubt he might do so ; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitation runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the Statute. "

This case was followed in *Reeves* v. *Butcher* (14), and is accepted as good law in England up to this day : see Halsbury's Laws of England p. 94.

The Madras High Court has taken a somewhat different view. In *Narana* v. *Ammani Amma* (15), the hypothecation bond sued upon provided that interest due on the amount of Rs. 200 at the rate of 6¼ per cent. per annum should be paid on 1st November of every year commencing from 1st November 1889, and that the principal amount should be paid on 1st November 1899, with interest due for the previous year ; and that in the event of default of the mortgagor in the payment of interest in any year or of the principal on the dates specified therein, the mortgagor should pay the principal sum together with interest at 12 per cent. per annum from the date of default till the date of payment without raising the plea of future instalments on the liability of the mortgaged property. There was default in payment of interest in 1896 and in subsequent years, and the suit was filed on 10th October 1922. It was held that the suit was not barred by limitation. Seshagiri Ayyar, J , said at p. 985 :

" It is well settled principle of law that no one is obliged to take advantage of a forfeiture, S. 4, 3 & 4 Will. 4, Chap. 27. This rule has been applied to cases providing a right of entry on a forfeiture ; and it has been held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it . *Astley* v. *Earl of Essex* (16).

In a later case, Sir George Jessel, M. R. who decided the case just quoted used some very forcible language against the contention to accelerate limitation. In *Governors of Magadalen Hospital* v. *Knotts* (17) the learned Master of the Rolls says :

"The mere statement of such a proposition was shocking to one's intellectual perception when one considered for what objects the Statute of Elizabeth was enacted."

It was also pointed out that a benefit secured to the creditor should not be availed of by the debtor when the former does not want it No doubt, in *Reeves* v. *Butcher* (14) and *Hemp* v *Garland* (13) a different view was taken . . It is most probable that the language of Art. 75, Lim. Act, was borrowed from this judgment Banning on Limitation points out

"that this decision does not consider the principle that no one ought to be forced to take advantage of a forfeiture. Whatever may be the effect of the learned Chief Justice's view regarding the construction of Art. 75, Lim. Act, we see no reason for not giving the language of Art. 132 its plain and natural significance."

This case was followed in *Vellappa Chettiar* v. *Venkatasubbarayulu Naidu* (18). With all respect, I can find no warrant for importing into the Limitation Act the provisions of Ss. 3 and 4, Real Property Lim. Act. 1833, 3 and 4 Will. c. 27, which deal with a different set of circumstances. S 3 inter alia declares that :

"where a person claiming the land or rent (referred to therein) or the person through whom he claims shall have become entitled by reason of a forfeiture or breach of condition then such right shall be deemed to have first occurred when such forfeiture was incurred or such condition was broken."

Then follows S 4 which provides in express terms that :

"where the advantage of forfeiture is not taken by the remainderman, than he shall have a new right when his estate comes into possession."

In *Astley* v. *Earl of Essex* (16), S. 4, 3 and 4 Will, c. 27 was held to extend to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures of which the heirs at law only can take advantage. This

(13) [1842] 4 Q.B. 519=7 Jur. 302=3 G. & D. 402=12 L.J.Q.B. 134=62 R.R. 423=114 E.R. 994.

(14) [1891] 2 Q.B. 509=60 L.J.Q.B. 619=39 W.R. 626=65 L.T. 329.

(15) [1916] 39 Mad. 981=31 M.L.J. 865=4 M.L.W. 77=35 I.C. 418=(1916) 2 M. W.N. 125.

(16) [1874] 18 Esq. 290=22 W. R. 620=43 L. J. Ch. 817=30 L. T. 485.

(17) [1876] 5 Ch. D. 175.

(18) A. I. R. 1926 Mad. 160=49 Mad. 403.

case proceeded on the construction and underlying object of the section.

I think it is a dangerous principle to follow, to import into Limitation Act express provisions contained in a special English Statute of Limitation relating to actions of real property which have no application even in England to actions of a similar nature to that in suit, and more so where S. 112, Transfer of property Act which deals with waiver of forefeiture contemplates certain overt acts being done by the lessor and not mere laches as evidence of waiver.

With regard to the case of *Governors of Magdalen Hospital* (17), it is sufficient to observe that the judgment in that case was reversed by the Court of appeal *President of the Governors of the Magdalen Hospital* v. *Knotts* (19). The ruling in *Narha* v *Ammani Amma* (15) does not also appear to have found favour with Ramesam, J, in *Mukyaprana Bhatta* v. *Kelu Nambiyar*, *A I R.* 1928 *Mad.* 705 *at p.* 707, where his Lordship has said :

" . . . but there is another group of cases where without the use of such phrases, it was said the mortgagee has got an option to take advantage of the default clause. They are for example *Narha* v. *Ammani Amma* (15), and *P. P. B. Kunjunna Nair* v. *Kunjunna Nair* (20) (a case of chit fund). These are in conflict with the decisions in *Gaya Din* v. *Jhuman Lal* (7) and *Sitab Chand* v. *Hyder Malla* (5). I am inclined to agree with the Allahabad and Calcutta decision and dissent from the decisions of this Court. . . . .

If analyzed, the agreement in suit amounts to nothing more than this : that the mortgagee agrees with the mortgagor that he will not claim repayment of the amount advanced for a period of 12 months provided the interest accruing due is paid every month. But if there is default in payment of such interest, the agreement is broken, and there is no obligation upon the mortgagee not to demand repayment of the money up to the expiry of the stipulated period, and the amount becomes payable on demand, and its payment may be enforced at any time thereafter at the desire of the mortgagee. As so stated, to me there appears to be no difference between this agreement after a default has been made in the payment of interest and a promissory note or other agreement to pay in the very first instance the amount on demand. There can be no doubt that in the case of an ordinary agreement providing for payment on demand, time runs from the date of the agreement and not from the date of demand. Ipso facto where the condition on which the mortgagee has agreed to allow time, namely, the regular payment of interest is broken the amount due becomes payable on demand and time runs from that date. It is not necessary for me to develop this point further, as whatever may be the view entertained by other High Courts, I am bound by the decisions of this Court given on its appellate side.

I am not able to distinguish either the present case or the case of the *Official Receiver* v. *Hossain Lalmahomed* (1) from that of *Vishindas Wadhuram* v. *Hotomal Ditomal* (2) and I hold that time commenced to run from the date of default. As the present case does not fall within the purview of Art. 75, Lim. Act, the question of waiver hardly arises. But even if that article were applied, there was an obligation on the plaintiff to prove express waiver, and as said in *Chenr Bash Shaha* v. *Kodum Mundul* (21) waiver and laches are not convertible terms. Mere laches on the part of the mortgagee in not selling the mortgaged property or instituting a suit for the recovery of the amount due to him within the period of limitation is not tantamount to waiver.

In the course of evidence of Amanmal it transpired that he admitted having received interest for a number of months though such payment was not expressly pleaded as reviving limitation under S. 20 of the Act, I adjourned the hearing to today to enable Amanmal to inspect his books and to state what interest, if any, had been paid to him. I understand from Mr Tulsidas that the last date on which any interest was paid was 3rd and 4th January 1921. Assuming therefore that the cause of action arose on that date the plaintiff's suit is statute barred having been filed six years and four months after that date.

I accordingly dismiss this suit with costs

S N./R.K. *Suit dismissed.*

(19) [1879] 4 A. C. 324.
(20) [1911] 1 M. W. N. 79=9 I. C. 510=9 M. L. T. 36.
(21) [1880] 5 Cal. 97.

* A. I. R. 1929 Sind 145

BARLEE, J. C., AND ASTON, A. J. C.

Mir Ahmad Shah Sikandar Shah—Accused—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revn. Appln. No. 73 of 1929, Decided on 26th June 1929, from an order of Judicial Commissioner, in Sessions Case No. 45 of 1928.

(a) Criminal P. C., Ss. 301 and 302—Verdict of jury—Inference from verdict of "not guilty" is that offence of accused is not established.

The only legitimate inference to be drawn from a verdict of "not guilty" is that in the opinion of the majority of the jury it is not established that the accused committed the offence with which he was charged. The verdict cannot be construed in any other way. [P 115 C 2]

***(b) Criminal P. C., S. 308—Entry that accused should not be retried amounts to acquittal—In order under S. 308 Judge cannot pass remarks implying guilt of accused.**

Section 308 provides that making entry to the effect that the accused should not be retried amounts to an acquittal. In an order under S. 308 the Judge cannot pass remarks implying the guilt of the accused. Every accused is presumed to be innocent until he is strictly proved to be guilty. [P 115 C 2, P 116 C 1]

Nadirbeg K. Mirza—for Applicant.

C. Lobo—for the Crown.

Aston, A. J. C.—This is an application for the revision of an order passed by the learned Judicial Commissioner in the case of *The Crown* v. *Mir Ahmed Shah*, son of Sikander Shah (Sessions Case 15 of 1928).

The applicant Mir Ahmed Shah was tried by a Judge and jury on a charge of having committed an offence under S. 330, I. P. C., viz. the offence of causing hurt in order to extort a confession.

The jury by a majority of seven to two brought in a verdict of "not guilty."

The Judge disagreed with the majority and discharged the jury and remanded the accused on bail.

On 14th March 1929, the learned Judge passed the following order under S. 308, Criminal P. C.

Finding. "I am personally of opinion that the accused Mir Ahmed Shah Wd. Sikander Shah is guilty of the offence charged namely, the offence under S. 330, I. P. C. I have therefore carefully considered whether I should order a retrial under S. 305, Criminal P. C. or not. On due consideration, however, I do not think that this is a case in which it is necessary to order a retrial. So far as cases go under S. 330, I. P. C., this is not a very serious one and it may be that the view taken by the majority of the jury was really that, though the accused was guilty of some misconduct, his conduct was not such as to warrant a longish term of imprisonment. In this view of the case it seems to me that his conduct can be dealt with best in some departmental measure. I accordingly suggest for the consideration of the Police Department that severe departmental action (in such a manner as they think fit) should be taken against Mir Ahmed Shah. I may add that I am of opinion that there is no substance whatever in the complaints against Mr. Kazi Khuda Bux, Pleader, Inspector Partabrai or Sub-Inspector Partabrai in connexion with this case. Subject to these remarks I agree with the verdict of the majority of the jury and direct that the accused be acquitted and discharged."

It is contended on behalf of the applicant, that the learned Judge erred in construing a verdict of "not guilty" of the majority of the jury as open to possible hypothesis that the majority may have considered, that accused was guilty of some misconduct, but that his conduct had not been such as to warrant a longish term of imprisonment. There seems to me much force in this contention. In my opinion the only legitimate inference to be drawn from a verdict of "not guilty" is that in the opinion of the jury or of the majority of the jury, as the case may be, it is not established that accused committed the offence with which he was charged.

It is further contended that it was not open to the Judge in an order under S. 308 to pass remarks implying the guilt of the accused and suggesting for the consideration of the Police Department that severe departmental action (in such manner as they might think fit) should be taken against him.

This contention also seems to me correct. An accused person, as was pointed out by Ameerali and Woodroff in "The Law of Evidence," is entitled to the legal presumption in favour of innocence 3rd edn. p. 68 (n): no presumption, perhaps, is more highly favoured in the law, than that of innocence (p. 946). When misconduct or crime is alleged, whether in a criminal or in a civil proceeding, whether in a direct proceeding to punish the offender, or in some collateral matter, the accused is presumed to be innocent until he is strictly proved to be guilty. (p. 947).

In the present case, the prosecution have failed to prove the accused's guilt, for they had not satisfied the majority of

the jury, that he was guilty. The Judge no doubt disagreed with the majority, and had discharged the jury, and the Judge could have ordered the accused to be tried by another jury, in which case the innocence or guilt of Mir Ahmed would have been enquired into again but until that was done and his guilt established, no presumption of guilt could be raised against him In addition to this, it was the opinion of the Judge that Mir Ahmed should not be retried, and S. 308 itself provides that the making of an entry to that effect on the charge operates as an acquittal.

The learned Judge therefore, it seems to me erred in passing an order, having the effect of an acquittal, and at the same time and in the same order making observations implying that accused had committed the offence, of which he was accused and a recommendation that he should be severely dealt with by the Police Department, this in my opinion was prejudicial to the applicant and contravened the legal maxim "*actus legis nemini facit injuriam*" the law wrongs no man" "*actus legis nemini est damnosus.*" An act in law shall prejudice no man. "*Actus curiae neminem gravabit*. An act of the Court shall prejudice no man" For the accused, having undergone a criminal trial, and having had an order passed in his favour, which operated as an acquittal, was entitled to the benefit of the order and to all the consequences, which it implied.

I would accordingly set aside that portion of the learned Judge's order under S. 308, Criminal P C. which construed the verdict of not guilty as possibly amounting to a verdict of guilty of some misconduct and also that portion which implied the guilt of the applicant and recommended departmental action being taken against him. This will in my opinion sufficiently protect the applicant, and action under S 561-A does not in the circumstances appear to be necessary.

Barlee, J C.—I agree with the proposed order.

The applicant was prosecuted on a charge under S. 330, I. P. C. and at a trial in the Court of Sessions was acquitted by a majority of seven to two. The trial Judge disagreed with the majority of the jury and discharged them and it was then for him to consider whether there should be a new trial and, after consideration he decided that the circumstances did not justify a new trial. Accordingly he passed an order accepting the verdict of the majority of the jury and directing that the accused be acquitted and discharged. But in the body of the order he gave the reasons for the course which he was taking, and it is this part of the order to which the applicant objects. For, though it is clear that he thought that too much had been made of the matter, and evidently was anxious to protect the accused from the anxiety and expense of a new trial for what was, in his opinion, at most a technical or a trivial offence, the result of his remarks, the applicant says has been that the order of acquittal has done more harm than he would have been likely to suffer from a new trial

It is contended by Mr. Nadirbeg that it was not open to the learned trial Judge to give any opinion, but that he should have confined himself to saying whether the accused should be retried or acquitted and discharged I am not prepared to accept this view The learned trial Judge by the fact of his discharging the jury had expressed his opinion that their verdict was incorrect, and I think it was open to him to give reasons for refusing to take the normal course and to order a retrial, and I do not think that a recommendation of department action would necessarily have been improper, provided that there had been no suggestion that the accused might be assumed to be guilty of the offence of which he had been charged. But actually the order goes far beyond this, for in it the trial Judge has suggested that the real opinion of the jury was the same as that which he had taken, that the accused was guilty of the offence with which he had been charged, and suggested further severe departmental punishment as justified by this view.

I agree with my learned brother that it was not open to him to suggest that the verdict of the jury was incorrect or to recommend that the departmental authorities should take action on the understanding that it was incorrect.

I accordingly agree with the order which has been proposed.

R.M./R K. *Order modified.*

A. I. R. 1929 Sind 147

BARLEE, J. C., AND ASTON, A. J. C.

Haroon and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 42 of 1929, Decided on 28th June 1929.

(a) Criminal P. C., Ss. 236, 237, and 238—Applicability—Person charged with dacoity can be convicted under S. 403, Penal Code.

Where the accused could have been charged with dacoity, theft and criminal misappropriation but is charged with dacoity under S. 395, Penal Code, it is legal to convict him under S. 403, Penal Code according to S 237, Criminal P. C. Such a finding is also justified by S 238, Criminal P. C., where the offence charged under S. 395 consists of several elements and combination of some of which amounts to an offence under S. 403.

[P 148 C 1]

(b) Criminal P. C., S. 309—Opinion of assessors is not essential when accused is convicted of offence with which he was not charged.

Where the accused is convicted of an offence with which he was not charged according to S. 239, Criminal P. C., it is not necessary that Judge should require the assessors to state their opinion, as there is no charge. [P 148 C 1]

(c) Criminal P. C., 3. 309—Prosecutor putting to assessors that case was clear under S. 395 or S. 403, Penal Code—Assessors finding accused guilty of theft—It cannot be said that assessors' opinion was not taken.

Where the Public Prosecutor puts to the assessor that there is a clear case under S. 395 or S. 403, Penal Code, and the majority of the assessors finds that the theft had been committed it cannot be said that the Judge adopted a view which had not been submitted to the assessors and even if there is irregularity it does not prejudice the accused. [P 148 C 1]

Rewachand V. Thaduani—for Appellants.

C. Lobo—for the Crown.

Judgment.—The admitted facts are that in 1921, the complainant Udhavdas filed a suit against Jagan, father of the appellant Mewo and others for a declaration of his ownership of and for possession of an eight anna share in Survey No. 7½ occupied by Jagan and other persons of his party. Udhavdas pleaded that they were mere haris, but they claimed title. At first Jagan was appointed receiver, but in 1924 Udhavdas was appointed in his stead. In May 1927 the suit was decided in his favour and decree made for possession of the Survey No. 7½ with costs, and the Court directed an enquiry regarding mesne profits. An appeal was filed and a stay order made in general terms "on security being furnished." Udhavdas then applied for execution by an application dated 28th February 1928, by the attachment of the crops standing on the disputed lands. It was opposed and on 17th March 1928, was rejected. I must add that in this he said that the crop was ready and would be cut and gathered by 10th March.

What happened thereafter is in dispute. Udhavdas' complaint is that on 20th March he was informed that the accused were removing the produce. He went at once to the Mukhtiarkar's office and made a report, then tried to get police help but failed, and finally drove to the land. He found the accused removing the produce, and they told him that if he interfered he would be killed. He went back and made a complaint of dacoity. The defence version is that the story is pure fiction. The accused reaped and disposed of the crop quietly and as they had always done on or about 10th March.

The accused were committed for trial on a charge of dacoity. The Assistant Public Prosecutor, it appears, did not press this charge, but submitted that there was a case of theft or at least under S. 403 or S. 421. Two of three assessors found that theft had been committed and the Additional Sessions Judge held that an offence under S. 403 had been committed.

I shall at once say that nothing has been said in arguments and we have been shown no evidence which would lead us to suppose that the complainant's version accepted by the Judge and by two out of three assessors, was false. The fact that on 28th February the complainant in his execution application stated that the crop would be ready by 10th March, does not show that they must have been ready. His explanation is that applicant Mewo gave him that date, and this can be accepted.

The questions for us to decide are three. Firstly whether when a man has been charged with dacoity he can be convicted under S. 403 of wrongful conversion; secondly, whether the Sessions Judge had jurisdiction to convict under S. 403 without asking the opinion of

the assessors on this section; and lastly whether the misappropriation was dishonest

It seems to us that S. 237 (read with S. 236) and S. 238 justify the learned Judge's action. 236 provides that :

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once or he may be charged in the alternative with having comitted some one of the said offences."

And S. 237 (1).

"If, in the case mentioned in S. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

In the present case the charge was of a series of acts, cutting and removing crops and threats of violence. The legal nature of these acts was doubtful and depended on the questions of ownership and the effect of civil Court orders. Therefore, the accused could have been charged with dacoity, theft, or criminal misappropriation. This seems clear from illustration (a) to S. 236 and in consequence, if the charge was one under S. 395 it was legal to count under S. 403. Further the offence charged under S. 395 consisted of several particulars, or elements, and a combination of some of which amounted to an offence under S. 403, so the finding of the learned Additional Sessions Judge is justified by S. 238, Criminal P. C. The second objection is that the learned Judge did not require the assessors to state the opinion on all the charges on which the accused had been tried since he did not question them about S. 403. But this is merely technical and can be met with the technical answer that there was no charge under S. 403. In addition it may be said that the Assistant Public Prosecutor had put it to the assessors that there was a clear case under S. 379, or S. 403, and the record shows that two out of three were of opinion that theft had been committed Thus it is not a fact that the learned Judge adopted a view which had not been submitted to the assessors and if there was an irregularity clearly it did not prejudice the accused.

The last question is whether the evidence establishes the guilt of the appellants and this must be subdivided into two: whether their act amounted to conversion and secondly, whether it was dishonest We agree that there was conversion, for we cannot admit that the order of the civil Court appointing Udhavdas receiver was meaningless and gave him no right. It gave him the right to take the produce and in consequence deprived the appellants of all rights except the right of use and occupation. They had no right to the produce. Any other conclusion seems to us to be impossible. But the appellants are Udhavdas' cultivators and it does not follow that they knew the legal position and intended to cause wrongful loss to Udhavdas.

Ordinarily we would be slow to believe in the bona fides of man who has taken a crop after an order appointing a receiver, apparently in defiance of the order, but the facts of this case are peculiar. Udhavdas was appointed receiver in 1924, and according to the opinion of the learned Sessions Judge it has not been proved that upto 1928 he ever received anything. Then in 1927 he obtained a decree and on 28th February 1928, he made an application for the attachment of the original crops about which the case has arison and it was refused. That was on 17th March. Three days later, after the Court had refused to give him the crops he went to the field and demanded them. Granted then that he was entitled to them as receiver, and that his application for attachment had been unnecessary, it is difficult for us to say that the appellants must have understood or probably understood the legal position, and deliberately refused what they knew he was entitled to. We think that it is not improbable that they had lost sight of the orders of receivership, or imagined that it was no longer in force in view of the many subsequent orders, especially as Udhavdas had never tried to enforce his rights as receiver. We are not satisfied that the conversion has been proved to have been legally dishonest, and we allow the appeals and set aside the convictions and sentences.

R.M./R.K. *Appeal allowed.*

A. I. R. 1929 Sind 149

PERCIVAL, J. C. AND ASTON, A. J. C.

Ramzan and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 43 of 1927, Decided on 5th July 1927, against order of Addl. Sess. Judge, Hyderabad, Sind.

Criminal Trial—Identification tests are as a rule not sufficient to form basis of conviction.

Identification tests are a form of evidence which is always to be taken with a considerable amount of caution and they are, as a rule, not quite sufficient to form the basis of a conviction, though they may perhaps add some weight to other evidence against an accused person. [P 119 C 2, P 150 C 1]

D. N. O'Sullivan—for Appellants

T. G. Elphinston—for the Crown.

Judgment.—This is an appeal against the order of the Additional Sessions Judge, Hyderabad, in which he convicted the three appellants, accused 1, 3 and 4, Ramzan, Mehar and Saleh, of dacoity under S. 395, I. P. C., the other accused 2, 5, 6 and 7 being acquitted by him.

There is no doubt in this case that a dacoity was committed at night on the village in question, the dacoits being seen by various of the villagers, and one of the villagers Koso being shot in the face though not seriously injured

A considerable amount of the evidence in the case consists of evidence regarding the dacoity and regarding the other accused who have been acquitted. We are, however, at this stage not concerned with the latter, while on the other hand there is no doubt that a dacoity was committed. We can therefore confine ourselves at this stage to a discussion of the evidence connecting the present appellants with the dacoity

The learned Additional Sessions Judge has clearly enumerated the portions of the evidence which go against the present appellants and he has discussed those pieces of evidence on which he is disposed to rely and those on which he is not disposed to rely.

The conclusion at which the learned Judge arrives is as follows:

"To sum up, accused 1, 3 and 4 have been identified at a test which I believe to have been honestly conducted. There is no other really good evidence against them. But I hold that the evidence of identification is sufficient for a conviction."

He also observes in his judgment:

"I hold then that the identification tests were genuine. Now the odds against the person suspected not being the real criminal, but so like him as to be picked out by mistake are so queer that it would, I think, be safe to convict on the identification of one person only."

In regard to the footprints test the learned Judge observes

"I regard these tests as of very slight value as against accused 1 to 3 and of no value a all against accused 4."

Somewhat similar remarks are made regarding the value of the evidence of certain persons who saw accused 2, 3 and 4 together at certain places other than the scene of the dacoity.

It may be noted that the footprints test were regarding shod prints not bare prints, which also tends to weaken the value of this portion of the prosecution evidence.

I think therefore that, having regard to the evidence as a whole and to the remarks of the learned Sessions Judge thereon we may take it that the convictions must stand or fall by the view taken of the identification tests.

Now, as identification tests were required, it means of course that the witnesses, namely Pessu, who identified accused 1 and 3, Lalu, who identified accused 4 did not previously know these men. The statement attached to the judgment shows that No 4 was also identified by the witness Dinio, but less weight was attached to his evidence, because he had left British India and it was not possible to secure his attendance before the Sessions Court

The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases. The learned counsel for the appellants referred on this point to the well known Adolf Beck case. There eight or ten witnesses recognized Beck as the man who had cheated them, yet it turned out that it was a case of mistaken identity. It is of course not desirable to attach too much importance to that particular case, it does, however, go to show that cases of mistaken identity are quite possible

The learned Judge, however, clearly relies on the further point that here it was not merely a case of recognition of the appellants, but of the selection there-

of out of a number of persons, which fact goes to guarantee the correctness of the recognition.

Theoretically that argument is sound. But it is a question how far the theory can be accepted as true in fact. It is noticeable that these identification tests seem to be rather a speciality of Sind. I do not remember them to any thing like the same extent in the Presidency Proper nor do they appear to be adopted to any great extent in England No doubt such tests are often, and may be in this case, perfectly genuine Still it is a question how far they are evidence which can suitably form the main basis of a conviction. I am disposed to hold that as a rule they are not quite sufficient to form the basis of a conviction, though they may perhaps add some weight to other evidence against an accused person.

In regard to the identification tests, however, we have further to consider how far it is probable that the witnesses were in a position to identify the accused. On this point it may be noted generally that in the first report it is stated that "The night was a dark one and therefore the dacoits could not be recognized." In regard moreover, to the particular persons who identified these appellants we have it that Pessu Ex. 40, states that "he did not recognize" the dacoits This may mean that he did not know them previously, but it is ambiguous Apart from this statement we have merely the evidence that a lamp was burning at the time, and that he identified Nos 1 and 3 out of a number of other persons and that they had guns

With reference to Lalu Ex. 39 he gives evidence a little more detailed as against accused 4, who, he says, pointed out a gun at his chest. He also says that a lamp was burning. Even in his case, however, we have no special reason for the recognition of accused 4 beyond what is mentioned above.

It is suggested on behalf of the appellants that the Bania witnesses are unreliable, and it is pointed out that the learned Sessions Judge has noted that some of them pretended to recognize accused 5 and 6 because they believed from other information received that they were among the dacoits. It seems, however, preferable to base one's argument rather on the general weakness of identification evidence and the danger of mistaken identity than on any deliberate fraud on the part of the prosecution witnesses. The case against all the three appellants is similar in this respect.

On the whole therefore it appears that there is not quite sufficient evidence to bring home the offence to the appellants, Ramzan, Mehar and Soleh, who are accordingly acquitted and discharged. Their convictions and sentences are reversed

There is evidence on the record to the effect that accused 1 and 3 each committed an offence under the Arms Act. It is still open to the authorities to prosecute them for an offence under the Act, if they are so disposed.

S N /R.K. *Accused acquitted*

A. I R 1929 Sind 150

BARLEE, J C., AND KALUMAL PAHLUMAL, A. J C

Mahomeddin—Applicant.

v.

Emperor

Criminal Revn. Applu No 89 of 1929, Decided on 16th July 1929, against order of Special 1st Class Magistrate, Cantonment and Sadar Bazar, Karachi.

(a) Cantonments Act (2 of 1924), Ss 213 and 216—Butcher without license importing meat in quantities more than required for his personal use and distributing it—No proof of receiving money—Presumption that he actually imported meat and sold it is justified—Evidence Act S. 114

Where a person, who was a butcher by trade and had no license, actually imported meat in large quantities far more than could be required for his personal use and had distributed it but where there was no evidence that he actually received any money the presumption that he actually imported meat and sold it can be legitimately drawn [P 151 C 1]

(b) Criminal P. C., S. 439— Scope.

It is not the duty of the High Court in revision to weigh the evidence and to decide whether the conclusion drawn from it was justified. [P 151 C 1, 2]

Hassomal M. Gurbuxani—for Applicant.

Partabrai D. Punwani—for the Crown

Judgment.—The applicant has been convicted by the Special 1st Class Magistrate, Cantonment and Sadar Bazar, Karachi, of offences under Ss. 213, and 216, Cantonments Act (2 of 1924), and sentenced to pay fines of Rs. 100 and Rs. 25 respectively. The admitted facts of this case are that the applicant who was a butcher by caste traded as a

butcher at Manora within the Cantonment limits. But in November 1927, he was deprived of his stall, which was given by the Cantonment authorities to one Nur Mahomed. Subsequently, Nur Mahomed made a complaint that the applicant was importing meat and was selling it to the people at Manora. The applicant was warned on 13th February 1929, and on 17th February was found at Manora with two baskets of meat, which he had brought by boat from Karachi It is in evidence that he distributed the meat to various persons But there is no evidence that he received any cash payment. There is further evidence that some days previously one Bhawanmal had purchased meat at Manora from the applicant through one Guli, and evidently this was brought to prove that the applicant was in the habit of selling meat. The defence was that the applicant was a Bazari, a man employed by various persons belonging to the Port Trust Department at Manora to fetch meat for them from Karachi, and that he did not make a profit by the sale of meat but was remunerated by salary. The learned Magistrate, however, disbelieved this defence and convicted the applicant of trading in meat without a license and importing meat into the Cantonment without a license. The first question was one of fact whether the applicant imported the meat for sale and actually sold it. The burden of proving this was on the prosecution and their evidence, as has been said, amounted to this that the applicant had actually imported meat in large quantities far more than could be required for his personal use and had distributed it. The question for us to consider is whether in the absence of any evidence that he actually received any money, there was a presumption from this fact and from the fact that he was by trade a butcher, that he actually had imported meat for sale and sold it.

We think that this was a legitimate presumption and that the learned Magistrate was justified in calling on the applicant to defend himself. This being our view, there remains very little more to be said, for the Magistrate disbelieved the evidence which was called for the defence, and it is not our duty to weigh the evidence and to decide whether his conclusion was justified, and in as much as the case was tried summarily we are not in a position to do soif we wished Granting then that the accused was not a Bazari as held by the learned Magistrate, he was clearly guilty under both sections of the Cantonment Act S 213 prohibits the carrying of any of the trades mentioned in S. 210 without a license The first of these trades mentioned is that of butcher and butcher, according to Webster's English Dictionary, means not only a man who kills animals for human consumption, but also a man who deals in meat The second is S. 216 and that prohibits importation of any animal intended for human consumption, or the flesh of any animal slaughtered outside the Cantonment otherwise than in a slaughter-house maintained by the Government or the Cantonment Authority

It has been contended that in practice this section must cause hardship since there is no slaughterhouse maintained by the Government or Cantonment Authority, in Karachi, and therefore it practically prohibits importation of meat altogether. But it is possible for any one to bring meat into the Cantonment or Manora for his own domestic consumption as sub-S (4) contains an exception to this effect, and there is no particular hardship in the first subsection inasmuch as meat may be imported with permission of the Cantonment Authority. We can see no particular reason for considering that this applicant has been hardly dealt with, since he had been warned only a few days before 17th February and deliberately broke the rules. We dismiss the application.

P N./R.K *Revision dismissed.*

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* A. I. R. 1929 Sind 151

BARLEE, J. C. AND ASTON, A J. C

Chagpal Narainji—Applicant.

v.

Emperor

Criminal Revn. Application No. 90 of 1929, Decided on 26th June 1929

*** Criminal P. C., S. 256—Failure to act in accordance with S. 256 is not mere irregularity but an illegality.**

Section 256 lays down that the accused shall have the right to recall and cross-examine the prosecution witnesses after the charge has been framed. The Magistrate can-

not reject such an application. Failure of the Magistrate to act in accordance with the express provision of S. 256 is not a mere irregularity but an illegality. 25 *Mad.* 61 (*P.C.*), *Rel. on* , *A. I. R.* 1927 *All.* 217, *Dist.*, *A. I. R.* 1927 *Mad.* 78, *Ref.* [P 152 C 2]

Fatehchand Dharamdas—for Applicant.

C Lobo—for the Crown.

Judgment.—The facts of this case are briefly as follows .

The accused is a merchant of Karachi and has a corn mill On 28th February last 3 persons came to him to buy corn and purchased more than 1½ maunds of corn They said that they were Hajis and were about to sail on pilgrimage. They left the corn to be ground, whilst they went to make other purchases and when they returned there was a dispute as to whether they had actually paid Rs 10-0-0 the price of the corn, as they asserted, or whether that sum was still due. It appears that the accused removed the corn from the cart which they had bought, and they then went to the Magistrate and lodged a complaint In the end the accused was arrested and put before the Magistrate at 4 p. m. and the case was taken up on the same day. The prosecution witnesses were examined and cross-examined The next day a charge was framed, and the accused was called on to enter on his defence on 4th March. His pleader filed a list of witnesses and requested the Magistrate to recall the prosecution witnesses for cross-examination The Magistrate made the inquiry as to whether the prosecution witnesses could be found, but they had left He, accordingly, rejected the application, heard the defence pleader and convicted the accused.

The complaint made to us is that the accused was deprived of his right given him by S. 256, Criminal P. C , of cross-examining the prosecution witnesses after the charge.

It seems to us that this plea must prevail. S 256 is as follows :

"If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination if any, they shall be discharged."

This is an express provision of law and it appears to us to be an express provision as to the mode of trial, and that the failure of the learned Magistrate to act in accordance with it is not a mere irregularity but an illegality, as has been laid down by the Privy Council in the case of *Subramania Ayyar* v. *Emperor* (1). Our attention has been drawn by the learned Public Prosecutor to several cases in which the terms of this section have been construed But it does not appear that there is any authority for the proposition that an accused person can be deprived of his right of cross-examination after the charge The principal case on which the learned Public Prosecutor relies is that of *Emperor* v. *Chhajju* (2) But in that case the question was merely whether the omission of a Magistrate to inform an accused person that he had a right to re-summon the prosecution witnesses for cross-examination at the next hearing was an irregularity or illegality. Their Lordships decided that it was a mere irregularity especially as in that case the accused had never made any request to recall the witnesses though at the next hearing they were represented by a counsel ; and it appeared to their Lordships that the accused had in fact not wished to cross-examine the prosecution witnesses. However that may be, this is not an authority on the point which is now before us And, moreover, in the case of *Re Raju Achari* (3), the Madras High Court took a different view on the same point

For these reasons, we find that the trial has been vitiated by an illegality and we set aside the conviction and sentence, and direct that the fine, if paid, be refunded and also direct that the Magistrate should recommence the proceedings from the stage of the charge We are not inclined to agree with the request made by the learned pleader on behalf of the applicant to send the case before another Magistrate, a course which would certainly cause undue delay without being of real advantage to the accused persons if they are innocent.

R.M./R.K. *Retrial ordered.*

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(1) [1902] 25 Mad. 61=28 I. A. 257=3 Sar 160 (P.C.).
(2) A. I. R. 1927 All. 217=49 All. 316.
(3) A. I. R. 1927 Mad. 78=50 Mad. 740.

* A. I. R. 1929 Sind 153

WILD, J. C., AND RUPCHAND A. J. C.

Kalumal Devandas and *others*—Applicants.

v.

Kessumal Naraindas and *others*—Opponents.

Revision Application No. 63 of 1925, Decided on 2nd April 1928, against decree of Small Cause Court Judge, D/- 26th April 1925

(a) Evidence Act, S 92—Suit instituted for recovery of sum due under hundi—Defendants pleading composition with plaintiffs' creditors by agreeing to pay them 12 annas in rupee in full satisfaction of claim of which they had to pay 4 annas in rupee in cash—Defendants paying and plaintiffs receiving 4 annas in pursuance of agreement—Evidence of defendants cannot be excluded, S. 92 having no applicability—There was consideration for such agreement within Contract Act S 2 (d) and (e).

In a suit instituted for recovery of a certain sum due on a hundi, the defendants pleaded that they had compounded with the plaintiffs' creditors by agreeing to pay them 12 annas in the rupee in full settlement of their claims of which they had to pay 4 annas in the rupee in cash and to execute hundis on the balance payable at a future date. The defendants said that the plaintiffs had agreed to the terms and in pursuance thereof received 4 annas in cash but declined to receive the hundis tendered to them.

Held that the evidence of the defendants could not be excluded and S. 92 did not apply as the defendants did not attempt to contradict, add to or substract from the terms of the contract as contained in the hundi. [P 153 C 2]

Held further, that for such an agreement there was ample consideration to each creditor namely, the undertaking by other compromising creditors to give up a part of their claim and again the defendants' payment to the plaintiffs of 4 annas in the rupee in pursuance of the agreement which they would not have otherwise got was in itself good and valuable consideration to bring the agreement within the purview of S. 2 (e) of Contract Act. *Smith* v. *Trowsdale*, (1854), 23 *L.J Q.B* 107, *Goad* v. *Cheeseman*, (1831) 9 *L.J. (O. S.) K.B.* 234, *Rel. on.* 28 *Bom.* 66, *not foll.* [P 154 C 1]

*** (b) Contract Act, S. 63—Agreement made between parties after breach of contract—Such agreement may be enforced whether it is with consideration or not.**

When an agreement has been made between the parties after the breach of a contract it may be properly enforced under S. 63, whether such agreement be with consideration or not and that therefore it is hardly necessary to invoke the aid of S. 62 *A. I. R.* 1928 (*P.C.*), 99, *Rel. on.* [P 154 C 2]

Kimatrai Bhojraj—for Applicants.

Dharamrai Tirathdas—for Respondents.

Judgment.—This is an application under S. 25, Provincial Small Cause Courts Act, 1887. It arises out of a suit instituted by the plaintiffs-respondents against the defendants-appellants for recovery of a certain sum of money due on a hundi. The defendants pleaded that as they were in a weak position they had compounded with their creditors including the plaintiffs by agreeing to pay them 12 annas in the rupee in full and final settlement of their claims of which they had to pay 4 annas in the rupee in cash and to execute hundis of the value of 8 annas in the rupee payable at a future date. These hundis were to be endorsed by the firm of Thawerdas Tekchand. The defendants said that the plaintiffs had agreed to these terms and in pursuance thereof had received 4 annas in cash but had subsequently declined to receive the hundis which were tendered to them duly endorsed. The learned Judge below refused to allow evidence to be led in proof of the defence holding as follows.

"Section 92, Evidence Act, applies and no oral evidence can be given. Proviso 4 does not apply as the hundis were rquired by law to be in writing."

We think that the learned Judge was clearly wrong in excluding the evidence of the defendants. The defendants were in no way attempting to contradict, vary, add to or subtract from the terms of the contract as contained in the hundi so as to attract the applicability of S. 92, Evidence Act. As a matter of fact, they admitted the contract and its breach. They pleaded a discharge of their liability for the breach of their contract as provided in S 63, Contract Act, by saying that the plaintiffs as promisees had remitted a part of their claim and had accepted satisfaction of the balance in a different manner. Under the English Law the somewhat similar plea of accord and satisfaction by parol has always been held to be pleadable notwithstanding the fact that the contract which is said to have been broken, is in writing and under seal: *Smith* v. *Trowsdale* (1) The learned pleader for the respondent has urged that the present case is not one in which we should interfere. He has contended that even if the evidence in support of the plea raised by the defendants were admitted it could

(1) [1854] 23 L. J. Q.B. 107=3 El. & Bl. 83 =2 C. L. R. 874=18 Jur. 552.

not carry the case of the defendants any further as the plaintiffs were not bound by their acceptance of the proposed satisfaction there being no consideration for their doing so. He has relied on the following passage in the judgment of Sir Lawrence Jenkins in *Abaji Sitaram* v *Trimbak Municipality* (2):

"Therefore we hold that assuming there was a legal resolution and that it was communicated as alleged still inasmuch as a dispensation or remission under S 63, requires an agreement or contract, the resolution was of no legal effect since the provisions of S. 30, of Bombay Act 2 of 1894 have not been observed."

When the learned pleader referred to the above ruling he was probably not aware of the recent decision of their Lordships of the Privy Council in *Chhunna Mal Ram Nath* v *Moolchand Ram Bhagat* (3), where the dictum of Sir Lawrence Jenkins has been disapproved and it has been authoritatively laid down that the language of S 63, does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines There is therefore, an end to this argument. But apart from this it would appear that if the defence version is true there was ample consideration to bind the plaintiffs to their promise. In the first place, the defendants had compounded with different creditors including the plaintiffs and each of such creditors had given up 4 annas in the rupee. Even under the English law a composition between a debtor and his creditors has always been held to afford a complete answer to an action by one of the creditors upon the original liability. For such an agreement there is good consideration to each creditor, namely, the undertaking by other compromising creditors to give up a part of their claim. *Good* v *Cheeseman* (4) and *Lewis* v *Leonard* (5). In the next place the defendants paid to the plaintiffs 4 annas in the rupee in pursuance of this agreement which they would not have got otherwise. This was in itself good and valuable consideration to bring the agreement within the purview of S. 2 (e), Contract Act.

The learned pleader has invited our attention to the case of *Ghumanmal* v. *Dayal Kanji* (6), and has argued that as the defence set up falls within S. 62, Contract Act, there can be no novatio after breach. The case cited by him, however, cuts the ground under his very feet. It is, no doubt, true that in that case the Court held following *Manohur Koyal* v *Thakur Das Naskar* (7), that there could be no novatio after breach but the Court gave effect to the agreement between the parties under S. 63, Contract Act, on the ground that on the performance of a part of the new agreement by the person who had committed a breach there was ample consideration to convert the nudum pactum into a legal contract This case proceeded on the assumption that in order to attract the applicability of S 63, there should be an agreement with consideration. We need hardly mention that the dictum that there can be no novatio after breach was challenged and not acted upon in the case of *K. M P R N. M. Firm* v. *Perumal Chetty* (8), and requires to be reviewed by a Full Bench of this Court when a proper occasion arises. It will be sufficient for the present to observe that when an agreement has been made between the parties after the breach of a contract, it may now in view of the Privy Council ruling referred to above, be properly enforced under S 63, Contract Act, whether such agreement be with consideration or not and that, therefore, it is hardly necessary to invoke the aid of S. 62. For these reasons we allow this application and direct the learned Small Cause Court Judge to take back the case on his file and dispose it of according to law. Costs to be costs in the cause.

P.N /R.K *Revision allowed.*

(2) [1904] 28 Bom. 66=5 Bom. L.R 689.
(3) A I. R. 1928 P. C. 99=9 Lah. 510=55 I. A. 154 (P. C).
(4) [1831] 9 L. J. (O S.) K. B. 234=2 B. & Ad. 328=4 Car. & P. 513.
(5) [1880] 49 L J. Ex 308=28 W. R. 719=42 L T. 351=5 Ex. D. 165.
(6) [1907] 1 S. L R. 101.
(7) [1888] 15 Cal. 319.
(8) A. I. R. 1922 Mad. 314=45 Mad. 180.

* A. I. R 1929 Sind 154

BARLEE, A. J. C

Tulsidas Kishindayal—Plaintiffs.

v

Alibhoy Karimji—Defendants.

Suit No 967 of 1926, Decided on 17th April 1929.

*** (a) Tort—Negligence — Contributory—Plaintiff knowing damages likely to be caused to his goods by water used by defendant for construction of building near his godown—Mere neglect on his part to take precautions to avoid it does not amount to breach of duty on his part and does not excuse defendant.**

The plaintiff cannot be blamed for failure to take care in the absence of notice that a particular quality of water likely to do damage to his goods was being used for carrying on building operations near his godown in which the goods were stored and even if he knows of the damage, a mere omission on his part to take precautions to avoid it cannot excuse the defendant and the plaintiff cannot be held to be guilty of a breach of duty . *A. I. R* 1925 *Cal.* 893, *Appl.*

[P 156 C 1, 2]

*** (b) Tort—Negligence—Plaintiff's goods damaged by water escaping from roof of defendant's godown — Defendant engaging competent contracter and architect to build his godown—He is exempt from liability.**

Where plaintiff was in possession of a godown in which his goods were stored and the defendant engaged a competent contractor and architect for building a new godown and the plaintiff's goods were damaged by water escaping from the roof of the new godown, the defendant is exempt from liability because by employing a competent contractor and architect, he acted with greatest possible care *Fletcher* v. *Rylands*, (1866) 1 *Ex.* 265, *not Appl.*; 1 *Smith's L. C.* 882, *Ed* 12, *Nicholas* v *Marsland*, (1878) 46 *L. J. Ex.* 174; *Box.* v. *Jubb.* (1880) 48 *L J Ex.* 417, *Cons.*; 7 *Bom. L. R.* 713, 1 *Smith L. C* 903, *Appl.* [P 159 C 2]

Judgment.—The plaintiffs, the firm of Tulsidas Kishindayal, have pleaded that they were in possession of a godown on the eastern side of plot 24 survey sheet 3 of the Serai Quarter, Karachi. They stored bales of jute twine in it In January 1926 they discovered that 25 bales had been damaged by water. They alleged that the defendants, the owners of the said plot had erected a new godown thereon, adjacent to theirs, and in doing so had negligently allowed water to flow into their godown They claim damages The defendants have pleaded inter alia (a) that they were not the plaintiffs' landlord (paras. 1 and 2); (b) that the damage was not due to their negligence, (c) that they had employed a competent architect and contractor to erect the godown and (d) contributory negligence

The following issues have been framed :

	Findings.
1. Were the plaintiffs in possession of the premises referred to in the suit as alleged in para 1 of the plaint ?	Yes.
2. Were the defendants guilty of negligence and of taking no due precaution in the construction of the work.	No.
3. Were the goods damaged as alleged ?	Yes.
4. Are plaintiffs guilty of any contributory negligence	No.
5. Are defendants exempt from liability by reason of the alleged employment of a competent architect and an independent contractor ?	Yes.
6. Have the plaintiffs no cause of action against the defendants for the reasons stated in paras 1, 2 and 3	Given up.
7. What amount, if any are plaintiffs entitled to recover as damages.	Nothing.
8. General.	Reasons.

Issues 1 and 6 have been given up. The defendants do not now deny that the plaintiffs were in possession of the godown but as the claim is based on tort and not on contract the fact that they were sub-tenants and had no privity of contract is immaterial This embodies the main question of fact The defendants put the plaintiffs to the proof of the damage, and of its cause, and the plaintiffs have led evidence which proves the damage and makes it extremely probable that it was due to water flowing from the plot on which a new godown was being erected between April and July 1925, under the door of the plaintiff's godown To begin with it is proved by the evidence of the Surveyor, Mr. Barnes, and the plaintiffs' witness Mr Pathak the surveyor who drew the plan (Ex 11), that water had reached the bales from under a door which used to open on the part of the premises on which the new godown was built. Mr. Pathak had deposed that he saw the stains made by water on the rice husks which covered the ground and Mr Barnes that the trail of the liquid was easily traceable He was clear that the water came from below and not from the roof To make doubly sure of this he had some of the damaged jute tested for salt, and the result was negative I am satisfied, therefore, that the damage was done by water, which came from under the door. It is noteworthy in this connexion that there is a slope downwards from the level of the new godown to that of the plaintiffs'.

To account for the water there are only 2 theories, rain-water or a leakage

from the roof of the defendants' new godown. The former is very improbable To do so much damage as was done the quantity of water must have been considerable, and a rain-storm heavy enough to account for so much would be a noticeable event in Karachi; there is no evidence of any storm having occured during the time the bales were in the godown. So it is necessary to accept the alternative and to believe that water escaped from the new roof It is in evidence that a reinforced concrete roof has to be flooded with water ½"-1" deep, and kept flooded for 2 to 3 days at least and though the contractor and architect in charge of the building operations have deposed that very little water can have trickled down I am not satisfied that they are correct res ipsa loquitur. The watering work was entrusted to a cooly, and they were not continuously present. Issue 4 must also be decided in the plaintiff's favour. There is no reason for supposing that he had notice of the fact that a reinforced concrete roof was to be made, or that it would be necessary to use so much water in the construction and he cannot be blamed for a failure to take care. Moreover, even if it be assumed that the plaintiffs knew of the damages, I cannot see how their mere omission to take precautions, which the person who used the water was bound himself to take, can be said to have been a cause of the damage. This matter is discussed in *Nani Bala Sen* v. *Auckland Jute Co.* (1) and in all the treatises on Tort. In all the cases which I have seen quoted the dispute appears to have been as to how far a negligent action on a plaintiff's part will disentitle him to damages and the rule laid down by Lord Penzance, and quoted in the *Calcutta* case cited above is that .

"although the plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and negligence have avoided the mischief which happened, the plaintiffs' negligence will not excuse him."

Thus even if the plaintiffs had by a positive act contributed to the mischief which happened in this case the defendants would not necessarily have been excused and a fortiori a mere neglect on the part of the plaintiffs to take precautions cannot excuse the defendants. The plaintiffs were not guilty of a breach of duty.

Issue 7. I shall take this issue next before coming to Issues 3 and 5 which are the important issues in the case. The plaintiffs have valued their jute at Rs. 24, and have given a list (12) of prices which shows that their claim is not unreasonable. In September 1925 and March 1926 the price was below Rs 24, but at all other times between June and February it was Rs 24 or more And at the date when they discovered the damage it was over Rs 25.

Issues 2 and 5 The questions are whether the defendants were guilty of negligence and if not whether they are liable apart from negligence. The short answer to the former is that they employed a competent architect and contractor, and so did all that they could reasonably be expected to do. The negligence, which caused the damage, was not theirs, but that of the persons in charge of the work A person who employs an independent contractor is not generally responsible for his negligence or that of his servants, because they are not under his control The exceptions to this are five, but I am only concerned with one that the employment of a competent contractor cannot save a person from liability :

"when the thing contracted to be done, though lawful in itself, will naturally be attended by injurios consequences unless effectually guarded against (Fraser on Contract.)"

This is the rule in *Fletcher* v *Rylands* (2) The facts there were that the defendants employed a competent engineer to make them a reservoir, but the water escaped without any negligence on the part of any one, and did mischief to the plaintiffs's mine The defendant was held liable and the rule was stated in these words:

"The person who for his own purposes brings on his land, and keeps there, anything likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape."

It is contended that the present case must be decided in accordance with this rule This is the second question.

(1) A. I. R. 1925 Cal. 893=52 Cal. 602.

(2) [1866] 1 Ex. 265.

This point requires very careful consideration especially as the rule, as it stands at the present day, after explanation and differentiation in subsequent cases does not appear to have any clear logical basis. In his judgment (reported in 1 *Smith's L. C.* 882, 897 (*Ed.* 12) Blackburn, J., after stating the rule in the words quoted above, went on to say:

"He (the causer of damage) can excuse himself by showing that the escape was through the plaintiff's default, or perhaps the consequence of vis major . . . . . The general rule seems just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir . . . . . is damnified without any fault of his own (this it is submitted is perfectly irrelevant as ex hypothesi the persons injured by torts are always damnified without any fault of their own), and it seems reasonable and just that the neighbour who has brought something on his own property . . . . . harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's should be obliged to make good the damage etc."

This is a perfectly obvious reason for making a man liable for his torts, but it is not a clear reason for the exception embodied in the rule. But in the next two pages the learned Judge goes on to discuss the law as to mischief caused by animals, beginning with the year book of 20. Ed. 4, and it is quite clear from this that the basis of the rule is the awe with which at that time men were wont to regard the forces of nature. Nature is uncontrollable and man seeks to control her at his own risk. This, too, appears from the much shorter judgment of Lord Cairns in the House of Lords. But the principle has been invaded by the case of *Nicholas* v. *Marsland* (3) which supplies this exception, that the rule does not apply if vis major be proved, as indeed, was suggested by Blackburn, J., and in *Box* v *Jubb* (4) (quoted Pollock 476) a further exception was made The defendant is not liable if the escape of the natural force is due to the intervention of a stranger Thus it has been recognized that the forces of nature are not necessarily uncontrollable in ordinary circumstances, and that the old common law mediaeval rule based doubtless on the needs of an agricultural community is not wholly suitable in the changed conditions of modern life Indeed the Courts seem to have always been trying to differentiate the cases to which logically it has applied

Nevertheless, the rule exists in England and has been used in India I can only find one case *Bomanji* v *Mahomedally* (5), but there are probably others; and I must differentiate the case now under discussion or hold that, though the defendant would have a perfect defence had of one his contractor's workmen dropped an iron beem on the plaintiff's head, he would have had no defence had they spilled a bucket of water over him. I find what seems to me to be a good ground of distinction in the judgment of Blackburn, J, in the leading case itself:

"There are many cases" he says" (*p.* 903 1 *Smith L. C.*) in which proof of negligence is essential as for instance when an unruly horse gets on the foot path of a public street and kicks a passenger *Hammack* v. *White* (6). Or where a person in a dock is struck by the falling of a bale of cotton which the defendants servant were lowering. *Scott* v. *London Dock Co*) . . . . . But we think these cases distinguishable from the present. Traffic on the highways whether by land or sea cannot be conducted without exposing those persons or property who are near it to some inevitable risk; and, that being so, those who go on the highway or have their property adjacent to it, may well be held to do so subject to their taking on themselves the risk of injury from that inevitable danger, and persons, who by license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident, and it is believed that all the cases in which inevitable accident has been held to be an excuse for what prima facie was a trespass, can be explained on the same principle, that the circumstances were such as to show the plaintiff had taken the risk on himself."

At first sight this may seem irrelevant. The plaintiff was not a passer-by, and did nothing directly to take risk on himself But the principle is that, in considering whether a particular case is within the rule, a Court must make allowance for the conditions of modern life and the accidents which are inevitable when men live and carry on business in communities. If traffic is a necessity of modern life, so surely are building operations; and, as the learned Judge recognized that men who go about the streets

(3) [1878] 46 L. J. Ex. 174.
(4) [1880] 48 L. J. Ex. 417=27 W. R. 415=4 Ex. D. 76=41 L. T. 97.
(5) [1905] 7 Bom. L. R. 713.
(6) [1862] 5 L. T. 676=11 C. B. (n.s) 594= 10 W. R. 230=8 Jur. (n.s.) 796=31 L. J. C. P. 129.

of modern towns voluntarily subject themselves to certain inevitable risks, he would, I imagine, have equally recognized that those who choose to dwell or to store their goods in crowded cities must be assumed to have submitted themselves to certain risks. It is clear from *Scott* v. *The London Dock Co*, that this includes the risk of having heavy articles dropped on their heads from the roofs of high buildings. If that occurs they can recover damages if there has been negligence, but they are not insured by the occupiers of the premises concerned against the risk Had one of the contractor's men in this case injured the plaintiff by dropping an iron beam on him the contractor might have been liable, but the defendant would have been safe And, this being the case, I cannot see why it should not be considered that the plaintiff, when he took the godown on lease, did not submit himself to all such accidents as are likely to occur in the course of building operations, which are a normal part of the life of a modern town, and why any distinction should be made between damage caused by the escape of water which must necessarily be used in such operations, and damage caused in any other way. It cannot be said that the amount of water which is used in making a proof is necessarily more difficult to control than other materials, or that, when carried to a height, it is potentially more dangerous than any other heavy article.

That this is the true rule is shown by the case of *Bomanji* v. *Mahomedally* (5), which decided that though a person who stores water in a house subjects himself to the rule in *Fletcher* v. *Rylands* (2), if the water escapes into his neighbour's property, a person who occupies one floor of the house must be taken to have subjected himself to all risks and must prove negligence, if he wishes to recover damages for mischief, i e, negligence was an essential ingredient of the action The question whether the neighbours had equally with the lodgers voluntarily subjected themselves to the risk of leaks was not then under consideration, but the case shows that even in water cases the main rule has been modified by the principle of the cases of *Hammack* v. *White* (6) and *Box* v *Jubb* (4) For these reasons, I hold that the defendant is not liable. It is hard on the plaintiffs that they should suffer damages and not be able to recover, unless the contractor happens to be a rich man But it seems to me that the strict application of the rule of *Fletcher* and *Rylandas* to all water cases, without taking into account the condition of modern life and the great difference between the permanent storage of vast quantities in artificial reservoirs and the use of a few hundred gallons for purely temporary purposes, would be a great hardship and a hindrance to modern business operations. I find then that the defendants are exempt from liability because by employing a competent contractor and competent architect they acted with the greatest possible care The suit is, therefore, dismissed Nevertheless, since this is apparently the first case regarding the responsibility of persons who undertake building operations, for damage done by water, and the plaintiffs had a good ground for suing the defendant, I make no order as to costs.

P N./R.K. *Suit dismissed.*

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* A. I. R. 1929 Sind 158

PERCIVAL, J. C.

Ismail—Applicant

v.

Mt. Amina—Opponent.

Original Civil Misc. Appln. No. 29 of 1928, Decided on 4th April 1929.

(a) Provident Funds Act (17 of 1925)—Interpretation—Act silent but rules definite—Rules should be referred to—Interpretation of Statutes.

Where the sections of the Act do not specifically deal with a particular point and the rules deal with the very point under consideration the rules should be referred to. [P 159 C 2]

*** (b) Provident Funds Act, Ss. 2, 4 and 5—Nominee dying before subscriber to Provident Fund—First dependent of subscriber and not heir of nominee succeeds.**

If a nominee of the provident fund subscriber dies previous to the death of the person entitled to the said fund it will be the first dependent of the subscriber and not the heir of the nominee that is entitled to the provident fund. [P 159 C 2]

Ghanshamdas Ladharam—for Applicant.

Khemchand Sukhramdas—for Opponent.

Judgment—This is an application for a succession certificate in respect of an item of Rs. 555-7-0 being the amount of

the provident fund of one Moosa, resident of Karachi

The applicant Ismil, son of Moosa, claims the amount as being the heir of Ghulam Hussain, son of Moosa, who was nominated by Moosa as the person who should receive the amount of the provident fund The opponent, Mt Amina, is the widow of the deceased Moosa, and the stepmother of the applicant. She claims the sum on the ground that she is the defendant of the deceased Moosa, who has the first claim to the provident fund Ghulam Hussain died before the death of Moosa.

The point for consideration, therefore, simply is whether if a nominee of a provident fund subscriber has died previous to the death of the person entitled to the said fund, the heir of the nominee is entitled to the money in question or the first dependent of the deceased subscriber.

The learned pleader for the applicant relies chiefly on Ss 4 and 5, Provident Funds Act, 1925. These provisions deal with the payment of provident funds and particularly with payment to the nominee of the subscriber. It is argued that, as the provident fund money vests in the nominee the heir of the nominee is entitled to receive the amount even after the death of the nominee

On behalf of the opponent reliance is placed chiefly on R. 17, Note (2) of the Rules regulating general Provident Fund Accounts. It is there laid down that:

" where a person nominated in the form of declaration dies before the subscriber, the declaration shall, in the absence of direction to the contrary in the form of declaration, become null and void in respect of that person "

This rule deals with the exact point under consideration, whereas Ss. 4 and 5, Provident Funds Act, 1925, do not deal specifically with that point.

It is contended on behalf of the applicant that these rules do not apply to the North Western Railway Provident Fund which is now under consideration. The Rules are stated to be rules regulating the General Provident Funds , and in R. 2 (e) reference is made to the position of a person who has been a subscriber to the State Railway Provident Fund, and who is subsequently transferred to pensionable Government service The rules do not show directly that they apply to State Railway Provident Funds, but, on the other hand, they are rules issued in 1926, after the Provident Funds Act, 1925 was passed, and in any case they form a guide in respect of the interpretation of the question now under consideration

In view, therefore, of the fact that the sections themselves do not deal specifically with the point, I am of opinion that we should refer to the rules where the very point under consideration is dealt with. It also appears to me to be not an unreasonable interpretation of the Act, because a man may be willing to nominate a particular person to receive his provident fund but he may not be willing that the heir of such nominee after the death of nominee, should have the prior right to it. The Act itself makes it clear that normally the person who should receive the amount is the dependent who is defined in S 2 of the Act, as a wife and certain other persons, the major son not being one of those persons. I am of opinion, therefore, that, in the absence of a provision that the heir of nominee should receive the provident fund, the first dependent of the subscriber has the prior right thereto

In view of the above remarks it is open to Mt. Amina the opponent, to make an application for a succession certificate in which case the Court will pass orders thereon

The present application is dismissed with costs.

V B/R K *Application dismissed*

A. I. R. 1929 Sind 159

PERCIVAL, J C AND RUPCHAND, A. J C.

Rochiram Gianchand—Appellants.

v.

Kalachand Deumal—Respondents

Misc Civil Appeal No 22 of 1928, Decided on 25th January 1929, against order of remand of 2nd Asst. Judge, Hyderabad, Sind, D/- 23rd December 1927.

Civil P. C., O. 41, Rr. 27, 28—Decision on merit wrongly refusing evidence of party—Proper course on appeal is to admit such evidence or cause it to be admitted by lower Court with evidence in rebuttal of it and pass judgment upon it.

Where is a suit decided on merits and the trial Court has wrongly disallowed evidence of certain witnesses for a party as also the production of certain documents proper course on appeal for the appellate Court is not to remand

the case to lower Court for trial de novo but to proceed under Rr.27 and 28 and allow such evidence or documents to be produced or witnesses to be examined and also record such evidence of the other party produced in rebuttal thereof or direct the lower Court to do the same and submit it to the appellate Court to enable it to pronounce judgment upon it.

[P 160 C 2]

Pahlajsing B. Advani—for Appellants.
Kimatrai Bhojraj—for Respondents.

Judgment—This appeal arises out of a suit filed by the plaintiff-respondents for recovery of Rs 793-7-9 said to be due by the defendant-appellants carrying on business in the name and style of Rochiram Gianchand on a commission agency account which was said to consist of certain dealings in wheat and dyes.

The defendants admitted that they had dealings with the plaintiffs in respect of wheat but contended that on that account nothing was due by them. With regard to the dyes their case was that the plaintiffs acted as commission agents of quite a different firm which carried on business in the name of Radhomal Santumal. They also raised certain other pleas and the learned trial Judge framed the following issues :

1. Is the suit in time or not ?
2. Cannot the suit lie in the form in which it is brought ?
3. Did the defendants take the items of account shown in the suit ?
4. On an account being taken what will be due to the plaintiff ?
5. What should the decree be ?

When the case started the plaintiffs' pleader had in his opening address the names of the witnesses whom he intended to call. At an adjourned hearing he craved leave to examine certain other witnesses whom he had summoned and who were in attendance but whose names were not mentioned in the opening address. He also craved leave to put in certain documents said to be letters written by the defendant but the learned Judge excluded both these pieces of evidence and on the evidence before him came to the conclusion that the two firms of Rochiram Gianchand and Radomal Santumal were different and that the account of the firm of Rochiram Gianchand consisted only of dealings in wheat on which account nothing was due to the plaintiffs. He accordingly dismissed the plaintiffs' suit.

On appeal the learned Astistant Judge, Hyderabad, Sind, was of opinion that the evidence of witnesses had been wrongly rejected. In the absence of such evidence and in view of the further facts that the defendants in their turn claimed that if that evidence was allowed to be taken they should be permitted to call evidence in rebuttal, the learned Judge set aside the decree of the lower Court and remanded the case to lower Court for trial de novo. It is against that order that the defendants have come to us in appeal.

Now, there can be no doubt that the order of the learned Judge is not strictly correct. The learned Judge appears to have dealt with the case under O. 41, R. 23, Civil P. C. But that rule deals with cases where the judgment of the trial Court on preliminary issue is reversed by the appellate Court. In the present case the Appellate Judge was not in a position either to reverse or confirm the judgment of the trial Court on such issues as certain evidence had been excluded and he was not in a position to say what the effect of such evidence would be on the findings on those issues The proper rule under which the learned Judge should have proceeded was R. 27 which empowered him to allow any evidence or documents to be produced or witnesses to be examined where the trial Court had refused to allow such evidence or where he required the production of such evidence for the purpose of enabling him to pronounce judgment or for any other substantial cause. Under that rule it was open to the learned Judge not only to order that the plaintiffs should be permitted to adduce oral evidence which was excluded but also to order that the defendants should likewise be permitted to adduce evidence in rebuttal if they so wished. It was equally open to him to record such evidence himself or to direct the trial Court to do so.

We accordingly allow the appeal and direct the learned Appellate Judge to remand the case under O. 41, Rr. 27 and 28, to the trial Court with directions to record the evidence of the witnesses cited on behalf of the plaintiffs which was excluded and also to record such evidence of the defendants as may be produced in rebuttal. We understand from Mr. Kimatrai that in pursuance of the order already passed the Sub-Judge has recorded certain evidence, which had originally been excluded. If that is so, we have no

doubt that the learned trial Judge will after hearing the parties treat that evidence as evidence recorded in pursuance of O 41, R. 28, and will not require the plaintiffs to produce those witnesses again unless there is sufficient cause to the contrary.

Costs of both the Courts to be costs in the cause.

V.B /R K. *Appeal allowed.*

A I. R. 1929 Sind 161 (1)

PERCIVAL, J. C., AND RUPCHAND, A. J. C.,

Mithomal and *another*—Appellants.

v.

Bashomal—Respondent.

Second Appeal No 25 of 1926, Decided on 24th January 1929.

Court-fees Act S. 7 (5)—In suit for recovery of possession of property court-fees paid on value of property and suit decreed—Defendant appealing against decree—He must pay same court-fees on value of property though he was in possession of property.

Where in a suit for recovery of possession of certain property on payment of the necessary court-fees on the value of the property the claim is decreed and the defendant appeals against the decree, he is bound to pay the same court-fee upon the value of such property on the memorandum of appeal although he was in possession of property. [P 161 C 2]

Dipchand Chandumal—for Appellants.

Srikishandas H. Lulla—for Respondent.

Judgment.—The plaintiff-respondent filed this suit against the defendants-appellants for recovery of possession of certain property of which he claimed to be the owner and paid the necessary court-fee on the value of the property. He succeeded in the suit and obtained a decree. The defendants appealed against that decree but refused to pay any court-fee on the value of the property on the ground that as he was in possession it was open to him to put his own valuation on the declaration which he wanted, namely, that the plaintiff was not the owner of the property and was not entitled to possession. Notwithstanding an opportunity given to him by the first appellate Court he refused to supply the necessary court-fee with the result that his appeal was dismissed. He has now come to us in second appeal and has again valued the relief sought by him in the same manner as before.

Now the test which is generally laid down in determining what is the proper court-fee payable on a memorandum of appeal is what is the value of the relief granted which is sought to be got rid of. The subject matter in dispute in this case was possession of property and the fee paid by the plaintiff was based upon the value of such property. The appellant was, therefore, bound to pay the same court-fee on the memorandum of appeal irrespective of the fact that he was in possession of the property. As the appellant failed to pay the necessary court-fee in the lower Court though an opportunity was afforded to him the learned Judge was right in dismissing his appeal.

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

P.N /R.K. *Appeal dismissed.*

A. I R. 1929 Sind 161 (2)

PERCIVAL, J. C., AND RUPCHAND, A. J C.

A. C. MacKillop—Applicant.

v.

Noorbhoy Allibhoy and Sons—Opponents

Civil Revn. Appln No. 33 of 1926, Decided on 25th January 1929, against judgment and decree of Sm. C C. Judge, Karachi, D/- 27th January 1926

Contract Act S. 114—Sale—Warranty—Article purchased upon his own judgment by purchaser—No implied warranty—Purchaser relying upon seller's judgment of selection for particular use—There is implied warranty that it will be fit and proper

If a party purchases an article upon his own judgment he cannot afterwards hold the vendor responsible on the ground that the article has turned out to be unfit for the purpose for which it was required. But if the purchaser relies upon the judgment of the seller and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing shall be fit and proper for the purpose for which it was designed : *Brown* v. *Edgington*, 2 *Man. & G.* 279, *Rel. on.* [P 162 C 2]

D. N. O'Sullivan—for Applicant.

Dharamrai Tirathdas — for Opponents.

Percival, J. C.—This is a revision application against the decree of the Small Cause Court, Karachi, who has

passed a decree in favour of the plaintiffs Messrs Norbhoy Allibhoy and Sons for Rs 997-8-0 and costs.

The defendant has filed this application.

In this case the defendant bought a lathe and two other articles from the plaintiff for Rs. 2,650. He paid out of this amount Rs 1,700 to the plaintiffs and the suit was for the remaining amount with interest.

Two grounds raised in the application are that there was misrepresentation by the plaintiff and that there was breach of warranty. The first of these two points is a question of fact, and it has been held by the learned Small Cause Cause Court Judge that there was no misrepresentation by the plaintiff. He holds indeed that the plaintiff was not present at all when the defendant came to inspect the articles.

In connexion with the other point raised by the counsel for the applicant that of a breach of warranty reliance is placed on behalf of the appellant on S. 114, Contract Act, and the case *Hurbut John Amies* v. *Jal P. Virji* (1) If we turn to S 114 we see that the wording of it is rather restricted. The words are as follows :

"Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Illustration

"*B* orders of *A*, copper manufacturer, copper for sheathing a vessel. *A*, on this order supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel."

If we look at the facts of this case, as found by the learned Small Cause Court Judge we see that they are considerably different from those mentioned in S. 114, Contract Act. Or even in the Bombay case mentioned above, which had reference to a vendor of a motor car. In the present case as stated by the plaintiff, the plaintiff sold second-hand iron goods which were obtained from Busreh. He was not present when the defendant came and inspected the goods Defendant came and inspected the goods in the presence of one Abdul Satar for about half or three-fourths of an hour, and after having done this he decided to purchase them. The finding of the learned Small Cause Court Judge, as stated in his judgment, is :

"The defendant had made up his mind to purchase the machines before he had ever seen the plaintiff. The defendant himself is an engineer which the plaintiff is not ; and the machines were admittedly second-hand and received from Busreh. So that even if the plaintiff made the alleged statement, which, however, he denies, it does not appear that the defendant was influenced by it to give his consent or that it was made a term of the contract."

He further observes that the plaintiff was not present when the parties had met and struck the bargain. The finding is, therefore, that they were merely second hand articles bought from Busreh, that the plaintiff did not misrepresent in any way that they were fit for lathes and that he did not in fact give any warranty that they were so fit.

It may be mentioned, inter alia, that the defendant did not take early steps in the matter. He paid Rs. 1,700 and when plaintiff gave him notice demanding the price of the goods a month after the sale he gave no reply.

Having regard to the finding of the learned Small Cause Court Judge, it does not appear to be a case for this Court to interfere ; and the application is accordingly dismissed with costs

Rupchand, A. J. C.—I concur.

It is well settled that if a party purchases an article upon his own judgment he cannot afterwards hold the vendor responsible on the ground that the article has turned out to be unfit for the purpose for which it was required. It is equally well-settled that if a purchaser relies upon the judgment of the seller and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing shall be fit and proper for the purpose for which it was designed. *Brown* v. *Edgington* (2)

Now whether the purchaser has relied upon his own judgment or upon that of the seller is a question of fact in each case In the present case, it is not disputed that the defendant is a Mechanical Engineer and fully knew about the use of the article which he was purchasing.

On the other hand, there is no evidence on the record and no attempt has been made to prove that the plaintiff

(1) A. I. R. 1924 Bom. 41.

(2) [1841] 2 Man. & G. 279=10 L. J. C. P. 66=2 Scott N. R. 496=1 Drink 106.

was dealing in these articles whether new or second-hand. There is also clear evidence that the defendant knew that he was buying these articles which had been purchased by the plaintiff from the Military Authorities at Busreh as second-hand goods. There is also evidence that the defendant himself inspected them at the time when the plaintiff who made the contract was not present there. And under those circumstances, I am not prepared to hold that the learned Judge below was in error in coming to the conclusion that no case of implied warranty had been made out or that, his finding is so erroneous as to require interference in revision.

K.B./R.K. *Application dismissed*

A I. R. 1929 Sind 163

ASTON, A. J. C.

Gangaram Samandas—Plaintiff.

v.

Deumal Nihalchand and *others*—Defendants.

Civil Original Suit No. 14 of 1925, Decided on 19th March 1929.

Deccan Agriculturist Relief Act (17 of 1879), S. 10-A—Legal representative of deceased defendant, agriculturist — Civil Court's jurisdiction is not ousted. (*obiter*)

The mere fact that one or more legal representatives of a deceased defendant has the status of an agriculturist since the death of deceased defendant or acquired that status subsequently will not oust the jurisdiction of the High Court in a suit which is properly instituted. [P 163 C 2]

Srikrishendas H. Lulla — for Plaintiffs.

Kodumal Lekhraj—for Defendants.

Judgment.—Two issues by consent have been fixed as preliminary issues viz., (1) Are the defendants 1 (a) to 1 (e) agriculturists. (1) (a). If so, has this Court jurisdiction ?

The burden of proving issue 1 was on the defendants who raised this issue. The evidence brought consists of the oral evidence of one Tirathmal Janimal and certified copies of 5 extracts from the Record-of-Rights register. Tirathmal alleges that he himself is an agriculturist. He admits that he also does the business of making bidis but says that he derives Rs. 200 to Rs 300 from agriculture and Rs. 100 to Rs. 200 a year from making bidis. He has produced no documentary evidence in support of his allegation that he is an agriculturist and on his mere vague allegation, I am not prepared to hold that he is such. He has, however, given evidence with regard to certain other defendants, viz., defendants Satumal, Tejumal, Rupanmal and Bhojomal. None of these defendants have given evidence themselves. According to Tirathmal they keep books but these books have not been produced. Tirathmal says that they have no other source of income than agriculture. But it is not clear what means Tirathmal has of knowing what the source of the income of these defendants is or how they are related to him. Their omission to come and give evidence and to produce their books raises a presumption against them which considerably weakens the evidence of Tirathmal I am of opinion that it is not established that the main source of income of these defendants is agriculture though it is established that Satumal, Tejumal, Rupanmal and Bhojomal own agricultural lands.

My finding on issue 1 is accordingly in the negative

Issue 1 (a) does not strictly arise. But I would like to point out that at the time of the institution of the suit it was not suggested that any defendant was an agriculturist The only ground on which it is alleged that this Court has now no jurisdiction is that certain legal representatives of the defendant who died after the institution of the suit have acquired that status or had that status at her death. I do not think that the mere fact that one or more legal representatives of a deceased defendant was an agriculturist would oust the jurisdiction of the Court in a suit which was properly instituted If that were the case, great hardship and inconvenience would, in my opinion, arise in cases in which agriculturists were only concerned in a representative capacity Had I decided issue 1 in the affirmative my decision on issue 1 (a) would have been in the affirmative also. That issue, however, does not arise.

Plaintiff to have costs of these preliminary issues, but care should be taken by the office that pleader's fees are not charged twice over in the form of costs.

Hearing of suit 5th April 1929.

V.B./R.K. *Order Accordingly.*

A. I. R. 1929 Sind 164 (1)

RUPCHAND, A J. C.

In re, Assaram Motiram,-Insolvent.

Misc. Appeal No. 15 of 1928, Decided on 13th February 1929, from an order of the Official Assignee in Insolvency Case No. 15 of 1928

(a) Contract Act, S. 62—Unstamped promissory note though inadmissible in evidence, creditor can prove his original debt.

Even if a chit produced is a promissory note and as such inadmissible in evidence for want of stamp, it is open to a creditor to prove his original debt. *Brown* v. *Watts*, (1808) 1 *Taunt* 353, *Rel. on.* [P 164 C 1]

(b) Negotiable Instruments Act, S. 13—Chithi not mentioning payee is not negotiable instrument.

Where the chithi or demand note does not mention the person to whom the amount is to be paid, it is not a negotiable instrument. [P 164 C 1]

Menghraj Kalumal—for Plaintiff.

Judgment — I think the learned Official Assignee was in error in rejecting this claim. Even if the chit produced before him was a promissory note, and as such inadmissible in evidence for want of stamp, it was open to the creditor to prove his original debt : *Brown* v. *Watts* (1). The claim states as follows :

"Particular of account referred to above :

A demand note in my favour issued by the insolvents.

The amount paid to him as deposit. Chithi in original and its translation are hereto attached."

At first sight, it might appear that the creditor had based his claim on the demand note, but reading the whole of this paragraph it is clear that the claim was based upon the original debt, namely, the deposit of Rs. 500, and the demand note or chithi, was relied upon only in proof of the debt. I am further of the opinion that the chithi or demand note is not a negotiable instrument. There is no mention in it of the person to whom Rs. 500 have to be paid on demand. This, in itself, takes the document out of the definition of a negotiable instrument. I accordingly allow the appeal and order that the Official Receiver should admit the claim of the appellant.

P.N./R.K. *Appeal allowed.*

(1) [1808] 1 Taunt 353.

A. I. R. 1929 Sind 164 (2)

PERCIVAL, J. C., AND RUPCHAND, A. J. C.

Satumal—Applicant.

v.

Khudadad—Opponent.

Civil Revn. Appln. No. 148 of 1925, Decided on 23rd January 1929, against the order of Sub-Judge, Sehwan.

Civil P. C, Sch. 2, Para. 14—Award returned to original arbitrator with direction to modify on specified point—Whole award altered—Arbitrator held functus officio.

When an award is sent back by the Court to the original arbitrator with direction to specify definitely the land awarded and return the award so amended, and the arbitrator instead of complying with the order goes afresh into the matter and makes a fresh award, thereby depriving the party of the award made in his favour the award cannot be accepted and the arbitrator is functus officio except as to that portion of the award which was ordered to be amended: *Johnson* v. *Latham*, 20 *L. J. Q. B.* 236, *Rel. on.* [P 165 C 2]

Fatechand Assudomal—for Applicant

Percival, J. C.—This is a revision application against the decree of the Sub-Judge of Sehwan made in terms of an award passed by the arbitrator Wadero Fakirbux Khan. In this case the reference was made to the arbitrator and he made an award in the following terms

"The land, of which the plaintiff produces the deeds proving the purchase and not only giving the boundaries, is awarded to the plaintiff."

On this point the learned Sub-Judge as follows :

"The award read. But it seems the award has not been made clearly. Hence the award may be sent back to the arbitrator who should be asked to make it clear as to which party has been awarded the land mentioned in the suit."

Then he goes on to say :

"Baharsing bailiff to take this award to the arbitrator and bring it amended by 20th June 1925."

To the arbitrator he gave the following instructions :

"The award given by you in this matter is returned in original per Baharsing bailiff which please amend as ordered and return by 27th June per same bailiff."

It appears from this that he intended that the particular lands which were covered by the order in the award, namely, the lands of which the boundaries were stated should be specified. There was no certainty in the award. It was uncertain as to which particular lands were covered by the award. The

arbitrator, however, instead of merely saying that the deeds in question referred to certain particular lands, to which the award was meant to apply, went afresh in the matter and made a fresh award. He said :

"Enquiry has been made from the plaintiff's witnesses and other people of the neighbourhood but no one proves the right of the plaintiff. It is not known as to on what basis the deeds are written. From enquiries made from the witnesses and other people the defendant's right is proved. Hence the defendant should get this land."

So that in fact the arbitrator refused to carry out the order of the Court regarding the award, and made a fresh award In these circumstances it appears that the learned Sub-Judge has exceeded his jurisdiction in accepting the second award as carrying out the instruction made in the remand order sending back the award to the arbitrator. There was, therefore, no proper second award in accordance with which the decree should be framed, and the decree is, accordingly, set aside and the case is remanded to the Sub-Judge for disposal according to law.

Having regard to the fact that the arbitrator did not carry out the instructions of the Court, it does not appear that this is a case which should be sent back to the previous arbitrator for disposal in accordance with the first order of the Court We direct simply that the case should be proceeded with afresh by the Sub-Judge.

Costs to be costs in the cause.

Rupchand, A. J. C —This revision application raises an interesting question of law on which there is apparently no precise authority of any Indian High Court.

We are told that when the first award was received by the Court, the learned Judge passed an order suo motu remitting the award to the arbitrator as it was indefinite in so far that it merely stated that the plaintiff was entitled to a decree for the lands in respect of which he had produced documents but did not specify what those lands were or if they were the same as those which were the subject-matter of the suit. As the award then stood, no decree could be passed thereon so as to be executable and it was necessary that the award should specify the lands in some form or the other. The award was remitted to the arbitrator only for the purpose of enabling him to specify the lands which he had awarded to the plaintiff. Instead of complying with that order the arbitrator submitted a fresh award holding that the plaintiff's suit should be dismissed. Now this new award might have been justified if the document proved by the plaintiff before the arbitrator did not refer to the lands in suit. In that case it might have been said that the arbitrator was under a misapprehension that the documents related to the lands in suit. But that is not so. As a matter of fact the lands referred to in the document and in suit are identical The question, therefore, arises, whether it was competent to the arbitrator to pass a new award diametrically opposed to the first when he was merely required to specify what lands were referred to by him.

The following are the observations of Erle, J , in *Johnson* v. *Latham* (1) :

"Suppose an award good as to three points, and bad as to the fourth, and sent back as to that alone, as at present advised, I am of opinion that the arbitrator is functus officio as to the three, and cannot alter his judgment as to them."

Our attention has not been drawn to any Indian decision directly bearing on the point, but it would appear that the principle enunciated by Erle, J would equally apply to the provisions of R 14, Sch. 2, Civil P C. In my opinion the arbitrator could not alter his judgment and nonsuit the plaintiff. His second award was beyond the scope of his authority and cannot therefore stand nor can a decree be passed on the first award unless it is amended by making it clear what lands it refers to. No useful purpose will be served by remanding the first award again to the arbitrator for the same purpose It will mean an unnecessary waste of time as he is not likely to go back upon his second award. For these reasons I concur in the order proposed by the learned Judicial Commissioner.

V B /R.K. *Application allowed.*

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(1) [1851] 20 L. J. Q. B. 236 = 2 L. M. & P. 205.

* A. I. R 1929 Sind 166

BARLEE, J. C., AND ASTON, A. J. C.

Emperor
v.
Fateh—Accused.

Criminal Ref. No 99 of 1929, Decided on 25th June 1929.

*** (a) Criminal P. C, S. 110—Magistrate can take action under S. 110 against person undergoing sentence of imprisonment by order made on proceedings initiated under S. 109.**

Where a person resided within the jurisdiction of a Magistrate and habitually committed thefts and disposed of stolen property within his jurisdiction, the mere fact that he absconded and was brought back to the jurisdiction of the Magistrate and that an order had meanwhile been passed by another Magistrate sentencing him to 12 months' rigorous imprisonment in default of giving security on proceedings initiated under S. 109 does not oust the jurisdiction of the former Magistrate to take action under S. 110. 46 *Cal.* 215, *Ref.*

[P 166 C 2, P 167 C 1]

*** (b) Criminal P. C, Ss. 120 and 123—Person undergoing sentence of 12 months under S. 109—During pendency of such sentence order passed under S. 110 for sentence of three years—Second sentence begins after first is finished and total imprisonment cannot exceed three years.**

A person was sentenced by a Magistrate to 12 months' rigorous imprisonment on proceedings initiated under S. 109 on 8th August 1927, and while undergoing that sentence he was sentenced to three years' rigorous imprisonment from 21st December 1927 on proceedings instituted under S. 110.

Held: that in view of S. 120 the person should have been required to give security from 8th August 1928 and as according to S. 123 the maximum punishment for failure to give security was three years, the person should be sentenced to two years' rigorous imprisonment from 8th August 1928.

[P 167 C 1]

C. Lobo—for the Crown

Judgment—Our attention has been drawn to the case of Fateh alias Usman, son of Ramzan, who was awarded 12 months' rigorous imprisonment, under Ch. 8, Criminal P. C., by the First Class Magistrate, Shikarpur on 8th August 1927 and while undergoing that sentence, was sentenced to three years rigorous imprisonment under Ch. 8, Criminal P. C., by the Sub-Divisional Magistrate, Kandhkot, on 21st December 1927. This sentence was confirmed by the Sessions Judge, Sukkur, on 24th February 1928. The following questions arise for consideration, viz.:

1 Whether the Sub-Divisional Magistrate, Kandhkot, had jurisdiction to take action under S. 112, Criminal P. C., against a person, who at the time proceedings were instituted by the police, under S 110, Criminal P C, was undergoing a sentence of 12 months' rigorous imprisonment inflicted by another Magistrate for failure to give security for good behaviour. If so,

2. From what date the period for giving security and the sentence of imprisonment in default of giving security would commence.

3 What sentence was the maximum sentence which could be imposed in default of security.

It appears that the house of one Manghomal at Thul in the Upper Sind Frontier District was broken into on 25th July 1927. Fateh alias Usman a resident in the District was suspected but he absconded On the following day viz, 26th July he was found with two companions under suspicious circumstances in Kot Sultan in the Shikarpur Taluka with keys and property in his possession. The real identity of Fateh alias Usman who gave a false name was not known to the police and proceedings were initiated against him under S. 109, Criminal P. C., before the First Class Magistrate, Shikarpur, with the result that on 8th August 1927 he was called upon to furnish security and sentenced to 12 months' rigorous imprisonment in default It was then discovered that the respondent was Fateh alias Usman and that the property in his possession was stolen from the house of Manghomal. Fateh alias Usman was taken to the Court of the Sub-Divisional Magistrate, Kandhkot, and he was challaned for house-breaking and information was given to the Sub-Divisional Magistrate, Kandhkot, under S. 110, Criminal P. C., and on 5th September 1927, an order was passed under S. 112 calling upon him and four others to show cause why they should not give security on the ground that they were habitual thieves and disposers of stolen property.

We are of opinion that the mere fact that Fateh alias Usman absconded and that he was brought back to the jurisdiction of the learned Sub-Divisional Magistrate, Kandhkot, and that an order had meanwhile been passed by the learned First Class Magistrate, Shikarpur, sentencing him to 12 months' rigorous imprisonment in default of giving security on proceedings initiated under

S. 109, Criminal P. C., did not oust the jurisdiction of the learned Sub-Divisional Magistrate, Kandhkot, to take action under S. 110, Criminal P C. It was established that he resided within the jurisdiction of the learned Sub-Divisional Magistrate, Kandhkot, and habitually committed thefts and disposed of stolen property within the jurisdiction. In this connexion see the Calcutta ruling in *Mohindra Mohan* v. *Emperor* (1) S 120, Criminal P. C, however, provides that when the respondent is undergoing a sentence of imprisonment the period for giving security shall commence at the expiration of the sentence. Fateh alias Usman therefore should have been required to give security from 8th August 1928 and under S 123, Criminal P. C, the maximum period for failure to give security is three years. Fateh alias Usman therefore is liable to a maximum sentence of three years from 8th August 1927.

We accordingly set aside the order of the learned Sub-Divisional Magistrate, Kandhkot, and sentence Fateh alias Usman to two years rigorous imprisonment from 8th August 1928 or until he furnishes the required security.

P.N./R.K. *Order set aside.*

(1) [1919] 46 Cal. 215=28 C L J. 25=46 I.C. 152=23 C.W.N. 193.

A I. R. 1929 Sind 167

RUPCHAND, A. J C

Gordhandas—Appellants.

v.

Official Assignee of the Estate of Jafferbhoy & Co.—Respondent.

Civil Appeal No. 5 of 1928, Decided on 1st March 1929, from order of Official Assignee, Sind, D/- 18th July 1928.

Presidency Towns Insolvency Act, S. 52 (2) (c)—Insolvent a trader—Lorry hired out and used by him in business—Insolvent is reputed owner.

The very fact that the vehicle hired out by the insolvent who was a trader, was a lorry is sufficient to raise the presumption that the owner parted with its possession knowing that it will be used by the insolvent for his trade and this coupled with the fact that it was so used and was in his possession at the date of presentation of insolvency petition brings it within the rule laid down in S. 52 (2) (c): *Colonial Bank* v. *Whinney*, (1885) 30 *Ch D.* 261; *Re Watson & Co*, (1904) 2 *K B.* 753; *Lamb* v *Wright* (1924) 1 *K B* 857, *Rel on Case Law Discussed* (1). [P 168 C 1]

Fatehchand Dharamdas — for Appellants

Kewalram Jethanand — for Respondents.

Judgment.—This is an appeal against an order passed by the Official Assignee holding that the motor lorry belonging to the appellant was in possession, order or disposition of the insolvent, Hassanali, in his trade or business by the consent and permission of the true owner under such circumstances that he was the reputed owner within the meaning of S. 52, Cl 2, sub-Cl. (c), Presidency Towns Insolvency Act. A considerable number of authorities have been cited by both sides upon the proper construction of this clause, and the corresponding provisions of the English Bankruptcy Act known as the reputed ownership clause. But I desire to refer only to three of them. In *Colonial Bank* v. *Whinney* (1), Cotton, L. J. said:

"I think the true construction is that the goods must be in his (the bankrupt's) order or disposition for the purposes of, or purposes connected with, his trade or business."

And Lindley, L. J, said:

"The language 'in his trade or business' means.....not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes."

In re, Watson & Co (2), Vaughan Williams, L. J., after reviewing the English case law on the point summarized it by saying that:

"The true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt."

He added:

This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise. see *Hamilton* v. *Bell* (3), *Gibson* v. *Bray* (4) and *Ex parte Bright* (5). The question for us then, is, did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business."

(1) [1885] 30 Ch D 261

(2) [1904] 2 K. B. 753 (757)=73 L. J K B. 854=91 L. T. 709=20 T L R. 727.

(3) [1854] 10 Ex. 545=3 W. R. 62=18 Jur. 1109=24 L. J. Ex. 45=3 C. L. R. 308.

(4) [1817] 8 Taunt 76=Holt 556.

(5) [1879] 10 Ch. D. 566=27 W R. 585=48 L. J. B K. 81=39 L. T 649.

Both these cases have been referred to with approval by McCardie, J., in *Lamb* v. *Wright* (6) and his Lordship has said:

"The section is limited in its operation to goods "in the trade or business of the bankrupt." It does not apply to domestic articles of furniture in bankrupt's private dwelling. If a man consents to the user of his goods in the trade or business of another he knows, or ought to know, that he runs a risk of losing those goods by the operation of S. 38. But if he only consents to the user of goods for private and non-business purposes, then he is not exposed, in my opinion, to the confiscatory provisions of S. 38, merely because the bankrupt without his knowledge or consent, has used those goods in and for his trade and business. A man, of course, cannot be said to consent to what he does not know."

It would appear from these cases that, in order to attract the applicability of of the doctrine of reputed ownership, it must he proved (a) that the true owner parted with possession of the goods under circumstances from which he must have known, if he had considered the matter, that the goods will be used in the trade or business of the bankrupt, (b) that they were so used, and (c) that they were in his possession, order or disposition at the date of the presentation of the insolvency petition. In the present case there can be no doubt that all these conditions exist. It is either admitted or proved beyond doubt that (1) Hassanali the hirer of the motor lorry was a trader, (2) that the motor lorry is pre-eminently a commercial vehicle and as such it was pre-eminently intended to be used for the purpose of some trade, (3) that when Hassanali hired the lorry the appellants either knew, or, if they had made due inquiries, must have known that Hassanali was hiring it for the purpose of its being used in his trade or business; (4) that it was so used by him and (5) that it was in his possession at the date of the presentation of the petition for insolvency.

In *Lamb* v. *Wright* (6), no such presumption was raised as the car given on the hire and purchase system was a Jewet two-seater car pre-eminently intended for private use and was mainly used by the bankrupt as such. It was, therefore, difficult to raise the presumption that he had agreed to its being used by the bankrupt in his trade. In dealing with the facts of that case McCardie, J., said :

"After he got possession of the car in dispute Pinchin used it from time to time (a) for the purpose of delivering goods to the houses of the customers, and (b) for the purpose of getting supplies from the wholesale market. The extent to which the car was used for those purposes was much in dispute before me. In my view the truth of the matter is that the car was used on two or three days in the week either for taking goods to customers or for visits to the wholesale market. The user on such days was for a small part of the day only and not for the whole day. The car was employed somewhat beyond a mere emergency car. But, in my opinion its main function and principal use with Pinchin was that of a pleasure car. He used it regularly as such both on week ends and other days. No name or advertisement was ever placed on it, and it was never altered in any way so as to be convenient for employment as a commercial vehicle."

In the present case, on the contrary, it would appear that the very fact that the vehicle hired out by the insolvent was a lorry is sufficient to raise the presumption that the appellants parted with its possession knowing that it will be used by the insolvent for his trade, and this coupled with the fact that it was so used, brings it within the rule laid down in S. 52, Cl. 2, sub-Cl. (c). I therefore, dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(6) [1924] 1 K. B. 857=93 L. J. K. B 366=46 T. L. R. 290=130 L. T 703=68 S. J. 479.

A I R. 1929 Sind 168

PERCIVAL, C J. AND ASTON, A. J C.

Khubchand Bhikchand—Appellant.

v.

Jethanand Santdas and *others*—Respondents.

First Appeal No. 106 of 1925, Decided on 27th February 1927, from judgment of Raymond, A. J. C, Sind, D/- 4th March 1925.

(a) Limitation Act, Art. 120 — Suits on awards—Limitation Act, Arts. 115 and 113.

Suits to enforce awards are governed by Art. 120 and not by Art. 115 or Art. 113. 33 *Cal.* 881 and 6 *S. L. R.* 148, *Rel on* [P 169 C 2]

(b) Evidence Act, S. 115—Persons acting on general award and accepting benefit under it cannot challenge it.

Persons who act on the general award and accept benefit under it are precluded from challenging it on the ground that the award of interest was beyond the authority of the arbitrators. [P 170 C 1]

G. A Kikla—for Appellant

Kimatrai Bhojraj—for Respondents.

Judgment.—This is an appeal against the judgment and decree of the learned Additional Judicial Commissioner

who held that a certain claim preferred by the plaintiffs was not barred by limitation, and that the vendors impliedly agreed in referring the matters to arbitration, that the breach was on their part, that the defendants' firm had notice of the arbitration proceedings, that the reference and award were valid and genuine, and that the contract between the appellants' firm and that of Lilaram stood cancelled and did not operate.

It is argued on behalf of the appellants that the claim of the plaintiffs was barred by limitation, because it was a claim for damages for breach of contract and due date was admittedly 25th January 1918 It is contended, therefore, that under Art 115, Lim. Act, the suit became barred within three years of that date, and that even if the reference was regarded as an acknowledgment of liability the suit became time barred within three years of 23rd March 1918, the date on which the present reference to arbitration was signed.

I am of opinion that this contention is not sustainable, for the plaintiff, in his plaint, sued in the alternative, on the award, and maintained that the cause of action arose in the alternative on 21st June 1918, when the award was filed. The decision on this point partly depends on the intention of the parties, when the reference was entered into.

For the appellant it is contended that a number of disputes were pending on numerous contracts and that the only question referred to arbitration by the general reference was the question "at what rates damages were to be paid" and that the remaining disputes were left outside the reference The learned Judge was of the opinion that the parties impliedly treated the contract as having been broken, impliedly waived all other defences with regard to the contract and referred the sole remaining dispute to the arbitrators by the general reference so that they might decide at what rates damages were to be paid.

I am of opinion, that the wording of the general reference and the circumstances of the case show, that the view taken by the learned Additional Judicial Commissioner was correct. In the reference it is mentioned:

"disputes are pending between the sellers in respect of the non-fulfilment of the contracts and that the parties have now agreed to refer the said disputes (plural) to the arbitration of the arbitrators."

The arbitrators were then directed to settle the rates as they thought fit and proper at which damages should be calculated and be paid by one party to the other.

It seems to me clear, that it was not the intention of the parties to the general reference that the arbitrators should merely fix rates leaving the rest of the disputes excluded, and that the parties should then settle other disputes in the Courts

That being so, it seems to me it was Art. 120, which applied, and not Art. 115 or Art. 113. The Allahabad High Court, no doubt, in a number of rulings, has held that suits to enforce awards are governed by Art. 113, Lim. Act. There are contradictory rulings by the Allahabad High Court on that point. The view taken, however, by Calcutta and Madras has been that it is Art. 120 which applies and not Art. 113: see *Bhajari Saha Banikya* v. *Behary Lal Basak* (1), which endorsed the view of the Madras High Court. The view of our Court in *Somajimal* v. *Todmal* (2) was to the same effect.

It follows, in my opinion, that the present suit was not barred by limitation.

It is now contended, however, that the question of interest was a matter beyond the scope of the reference It is objected by Mr. Kimatrai on the point that the appellant did not specifically raise this in the issues and did not specifically raise the question of interest in the memorandum of appeal. It is the fact, however, that in the written statement, it was contended that the arbitrators had gone beyond the scope of the reference and an issue was raised on that point and in the memorandum of appeal, it was contended that the learned Judge had erred in not holding that the award was beyond the scope of the reference Reliance is placed on behalf of the appellant on a passage in Russel, 9th Edn., 450, in which the learned author on arbitration points out that future interest was beyond the scope of the reference. On the other hand, it has been held that arbitrators have authority to take into

(1) [1906] 33 Cal 881=4 C. L. J. 162.
(2) [1913] 6 S. L. R. 148=19 I. C. 376.

consideration a custom by which interest is payable : see *Uttam Chand Saligram* v. *Mahmood Jewa Mamooji* (3), where Rankin, J., pointed out that arbitrators have power to decide according to justice and equities Had a general power been conferred on the arbitrators to decide the disputes the question of interest would have presented no difficulty. The reference, however, shows what the arbitrators were authorized to do was to settle and fix the rates as they thought fit and proper, at which damages should be calculated and paid In view of the specific authority given to them, it was not to settle the disputes generally but to settle the disputes by fixing the rates. There might, I think, have been considerable force in the contention that the award of interest as well as the fixing of the rates was beyond the authority given to the arbitrator. The evidence, however, shows that the appellants accepted benefits under the general award. They have pleaded the general award and rate under the general award as a defence to a claim for making payment at the market rate which has been held by this Court to be Rs. 59-0-0.

That being so, I am of opinion that the appellants are precluded, having acted on the general award and having accepted benefits under it, from challenging the award of interest in the present proceedings.

I would, therefore, on the ground mentioned dismiss the appeal with costs

R M /R.K. *Appeal dismissed.*

(3) [1919] 46 Cal. 531=54 I C. 285=23 C. W N. 704.

A. I. R. 1929 Sind 170

PERCIVAL, J C, AND RUPCHAND, A. J C.

Tahilram and *others*—Appellants.

v.

Maghanmal and *others*—Respondents.

Misc. Civil Appeal No. 7 of 1927, Decided on 23rd January 1929, from an order of 1st Class Sub-Judge, Larkana, D/- 13th January 1927

(a) Dekkhan Agriculturists' Relief Act, Ss. 3 and 11—S. 11 preserves right of plaintiff to select venue when defendants agriculturists do not reside within jurisdiction of one Court.

Though S 11 provides that a suit which falls within Cl. (5), S 3, shall be instituted in the Court where the sole defendant who is an agriculturist or where there are more than one defendant who are agriculturists, all such defendants resided, it preserves the right of the plaintiff to select his venue where all defendants who are agriculturists do not reside within the jurisdiction of one Court. The plaintiff has in such case the option of instituting suit in any Court in which any one of such agriculturists resides. [P 171 C 1]

(b) Dekkhan Agriculturists' Relief Act, S 3, Cls. (w) and (x)—Case of surety falls under Cl. (w) and not under Cl. (x)—Suit can be instituted under S. 11 where sureties reside.

The words in Cl. (w), S 3 " on a written or unwritten engagement for the payment of money not herein provided for " are wide enough to cover the case of a surety. Clause (x) does not refer to a contract of suretyship which falls within the purview of Cl. (w), so suit under S 11 can be instituted in the Court within whose jurisdiction the sureties reside. [P 171 C 2]

(c) Civil P. C., S 20 (b)—Cause of action indubitably arising within jurisdiction—No leave is necessary.

Where the cause of action indubitably arises within the jurisdiction of the Court no leave under S. 20 (b) is necessary [P 171 C 2 ; P 172 C 1]

Kimatrai Bhojraj—for Appellants.

G. A. Kikla—for Respondents.

Judgment —This is an appeal against the order of the First Class Sub-Judge, Larkana, returning the plaint for presentation to the proper Court.

It appears that the plaintiffs instituted this suit for recovery of Rs. 5,000 odd against four defendants. Their case was that defendants 1 and 2 had executed certain hundis in their favour on which this sum was due and that defendants 3 and 4 had agreed to stand sureties for due payment thereof. In the plaint it was stated that none of the defendants were agriculturists. Both sets of defendants raised the plea that they were agriculturists and contended that as defendants 1 and 2 resided outside the jurisdiction of the Larkana Court, that Court could not entertain the suit in view of the provisions of S. 11, Dekkhan Agriculturists' Relief Act. They also contended that as no leave of the Court was obtained under S 20, Civil P. C , no leave should be granted for institution of the suit in Larkana Court and that the plaint should be returned for presentation to the Hyderabad Court where defendants 1 and 2 resided. At the hearing the plaintiffs admitted that defendants 3 and 4 were agriculturists and on their admission the learned Judge passed an order dated 23rd November 1926

holding that defendants 3 and 4 were agriculturists. He then proceeded with the trial of the issue as regards the status of defendants 1 and 2. On 13th January 1927, the learned Judge gave a finding that defendants 1 and 2 were agriculturists and ordered that the plaint be returned for presentation to the Hyderabad Court where defendants 1 and 2 resided.

The learned Judge has based his order on two grounds : first, that S. 11, Dekkhan Act applied and second, that as no leave of the Court had been obtained for instituting the suit in the Larkana Court the plaintiff could not maintain the suit in the Larkana Court.

Now, it is well settled that where a suit may be instituted in more Courts than one the plaintiff has a right to select his venue. It is, no doubt, true that this right has to a certain extent been curtailed by the provisions of S. 11, Dekkhan Act. That section provides that a suit which falls within Cl (w), S. 3 of the Act should be instituted in the Court where the sole defendant who is an agriculturist or where there are more than one defendants who are agriculturists all such defendants reside. But it preserves the right of the plaintiff to select his venue where all the defendants who are agriculturists do not reside within the jurisdiction of one Court. It expressly provides that the plaintiff shall in that case have the option of instituting the suit in any Court in which any one of such agriculturists resides.

Now in the present case the defendants 3 and 4 had been held to be agriculturists. They admittedly reside in the jurisdiction of the Larkana Court, and, therefore, there is no doubt that the Larkana Court had jurisdiction to entertain the suit.

While dealing with this part of the case the learned Judge seems to have lost sight of the fact that he had recorded a finding that defendants 3 and 4 were agriculturists. He seemed to entertain the view that it was not open to the plaintiffs to admit at a very late stage of the proceedings that defendants 3 and 4 were agriculturists with the object of giving jurisdiction to the Larkana Court. He was of the opinion that the plaintiffs could not give jurisdiction to that Court by making a false admission of facts. We think that it was not open to the learned Judge to treat the admission by the plaintiff as false and especially so when he had recorded a finding holding that defendants 3 and 4 were agriculturists. If defendants 1 and 2 disputed that defendants 3 and 4 were agriculturists and if as has now been contended on their behalf they were not present when that issue was decided it was incumbent on them to have moved the Court to review its finding on that issue and to have led evidence on that point.

It is further contended that so far as the cause of action against defendants 1 and 2 was concerned it fell within Cl. (w), S 3, but so far as cause of action against defendants 3 and 4, who were sureties was concerned it fell under Cl (x) of that section, and that, therefore, under S. 11 of the Act the suit could only be instituted in the Court within whose jurisdiction defendants 1 and 2 resided.

We are not prepared to hold that the cause of action against defendants 3 and 4 does not fall within the purview of Cl. (w), S 3. The words ,

"on a written or unwritten engagement for the payment of money not herein provided for"

are wide enough to cover the case of a surety because under his contract a surety expressly agrees to render himself liable for the debt of his principal on the failure of his principal to pay the money or in other words expressly engages to pay such money.

Clause (x) reads as follows :

" Suits for the recovery of the money due on contract other than the above and suits for rent etc "

The bare reading of the above clauses makes it abundantly clear that it does not refer to contracts which fall within the purview of Cl. (w), that is to say, contracts in respect of an engagement whether written or unwritten to pay money. Clause (x) does not, therefore, refer to a contract of suretyship like the present

We think, therefore, that the learned Judge was in error in declining jurisdiction on that ground.

With regard to the second ground on which the learned Judge has proceeded, namely, that permission of the Court was necessary under S. 20 (b), Civil P. C., it is sufficient to observe that the learned Judge has not applied his mind to the fact that the cause of action against all the defendants indubitably arose within the jurisdiction of the Larkana Court, the hundis having been executed by defen-

dants 1 and 2 at Larkana, and the amount being made payable there. So far as defendants 3 and 4 were concerned they not only resided there but had agreed to stand sureties for defendants 1 and 2 and to pay the amount at that place. No leave was, therefore, necessary under S. 20 (b), Civil P. C.

We accordingly set aside the order of the lower Court and direct the learned Judge to take back the plaint on his file and dispose of it according to law The respondents to bear the costs of this appeal.

The costs of the lower Court to be costs in the cause.

R M /R.K *Order set aside.*

A I. R. 1929 Sind 172 (1)

BARLEE, A. J. C.

Phoenix Trading Co. Ltd.—Plaintiffs.

v.

F. R. B. Diwanchand Sibal and *Sons* —Defendants.

Original Civil Suit No. 95 of 1925, Decided on 2nd May 1929.

Civil P. C, O. 37 — Suit on dishonoured bill of exchange — Acceptor getting possession of goods—He cannot plead that he was merely acting as agent for the drawer—Evidence Act, S. 117.

In a suit on a dishonoured bill of exchange after the defendant has accepted the Bill and by so doing has got possession of the goods he cannot be allowed to plead that he was merely an agent acting for the drawer. He cannot be allowed to defend himself on the lines : *A. I. R.* 1918 *P. C* 146, *Ref.* [P 173 C 2]

Sri Kishen Das H. Lulla—for Plaintiff.

Dip Chand Chandumal — for Defendants

Order.—This suit has been filed under O. 37 by the Phoenix Trading Co., Ltd., against a Karachi firm for damages due to the dishonour of a bill of exchange accepted by the defendant firm. The disacceptance and dishonour are admitted and the question is whether leave to defend should be given.

The defence is that the acceptance was conditional and that the condition was not fulfilled. It is pleaded that the defendant firm had dealings with one Doremans, a Dutch Merchant, that a sum of Rs. 8,000 was due to them, that Doremans sent them goods accompanied by the draft in suit and they accepted the draft and so obtained the shipping documents, on condition that before the bill was presented for payment Doremans would pay them Rs. 8,000 but that he failed to do so.

This might or might not be a good and sufficient defence were Doremans the plaintiff. It would certainly be a permissible defence. The question is whether it is a good defence against the Phoenix Trading Co , Ltd. In other words, after the defendant accepted the bill, and by so doing got possession of the goods, can he be allowed to plead that the defendant was merely an agent acting for Doremans. In my opinion he cannot be allowed to defend himself on these lines It is contrary to all established rules that :

"in an action on a pro-note or bill of exchange against a person whose name properly appears as a party to the instrument it is not open to either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Per Lord Buckmaster in *firm of Sadasuk Janki Das* v. *Kishen Pershad* (1).

This is the principle of S. 117, Evidence Act. The rule is one of policy for the convenience of trade and the conduct of commercial affairs and I can see no reason why the acceptor should in this case be allowed a privilege not allowed to the drawer in the Privy Council case.

Leave to defend is, therefore, refused. Decree as prayed with costs and interest from suit to payment at six per cent the rate provided in the instrument

R.M./R.K. *Leave refused.*

(1) A.I R 1918 P.C 146=46 Cal. 663=46 I.A. 33 (P.C.)

A. I. R. 1929 Sind 172 (2)

RUPCHAND, A. J. C.

Murlidhar J. Punjabi—Plaintiff

v.

Naraindas Motaram—Defendant.

Original Civil Suit No. 391 of 1924, Decided on 5th March 1929.

(a) Tort—Defamation — Words accusing person of criminal offences are per se defamatory — Defendant must prove that statements are true.

Words used by the defendant accusing a person of certain criminal offences which expose him to imprisonment or other heavy penalty are per se defamatory and the defendant must prove that, the statements are substantially true. *Mac Pherson* v. *Daniels*, (1829) 10 *B. & C.* 263. [P 174 C 1]

(b) Evidence Act, S. 105—In case of defamatory statements burden is on defendant to show that his allegations are substantially true.

Where the statements made by the defendants are per se defamatory, the burden is on the defendant to prove that the allegations on which his comment was based are substantially true. The plaintiff should not be called upon to prove the quantum of damages. *A. I. R.* 1929 *Sind* 90 and *Devis* v. *Shepstone*, (1888) 55 *L. J. P. C.* 51, *Ref.* [P 174 C 2]

Dipchand Chandumal—for Plaintiff.

Kimatrai Bhojraj—for Defendant

Judgment.—The plaintiff is a pleader of this Court and has served as President of the Shikarpur Municipality for several years. He holds the title of a Dewan Bahadur The defendant is a retired Deputy Collector and a pensioner. He too had been a Councillor of the Shikarpur Municipality for several years, probably for the same duration as the plaintiff.

In 1920 the plaintiff was the President of the Municipality and Chairman of the Managing Committee. The defendant had some reason to be dissatisfied with the manner in which the plaintiff was carrying on his work in the Municipality. He wrote several articles, but they did not bear his name, in a paper called the "Vatan" published in that place in the issues of 30th March, 4th April and 10th April 1923, with the result that the plaintiff prosecuted the Editor of that paper, but subsequently, it is said, that on account of the Editor being a lad of sixteen years and not knowing English the plaintiff did not press that prosecution which was withdrawn somewhere in the month of June 1923.

On 2nd July 1923, a letter under the signature of the defendant was published in the "Daily Gazette" of Karachi, which paper has a very wide circulation, making certain serious allegations against the character of the plaintiff. It reproduced certain allegations which had previously been made in the "Vatan." This resulted in the present suit being filed for defamation both against the defendant and the Editor of the "Daily Gazette" The case against the Editor has been withdrawn, and we are now concerned only with the case against the defendant.

The allegations of fact which are said to be defamatory are stated in para. 8 (c) and 8 (d) of the plaint. The first allegation is that the plaintiff removed a petition filed by one Tara Singh from the municipal records and entered a false and deceptive note. The second allegation is that he falsely entered the words "with permission" on the top of Resolutions Nos 582 and 583 about the formation of Committees on 23rd February 1923; and the third is that he forged certain documents or abetted the forgery of those documents by the Chief Officer of the Municipality in connexion with the election of certain Committees. Certain details have been given extending to over one hundred lines describing the nature of this forgery. Briefly stated, the allegation is that one Mr. Atmaram was shown as the mover of a motion to select certain Committees. Mr. Atmaram was not present when that motion was moved or passed, he having come to the meeting of the municipality after the Committee had been appointed when the next item on the agenda was under discussion and that the Chief Officer had accordingly made a note showing that Mr. Atmaram attended the meeting when the next item was being discussed. But subsequently realizing that according to the municipal rules the mover being absent at the time of the appointment of the members of the Committees, the resolution was ultra vires, the plaintiff had certain alterations made so as to show that the mover Mr. Atmaram was present before the motion was put to the vote, and that he did so notwithstanding the protest of several members including the defendant.

On the strength of these three charges levelled by the defendant against the plaintiff the defendant has made certain strong comments as to the conduct of the plaintiff by alleging that the municipal administration under the plaintiff had given the highest dissatisfaction to the public of Shikarpur, and that it was a record of false minutes, deliberate misrepresentation of facts, highhandedness and selfishness that at once made Mr. Murlidhar unfit for the responsible office of the President of a City Municipality. The defendant goes on to say that .

"the Judicial Commissioner of Sind should consider whether Mr. Murlidhar, on the face of the criminal offences committed and other acts of dishonesty practised by him, can be

allowed to remain on the roll of the noble legal profession to which he belongs."

Lastly, the defendant appeals to Government to take criminal action against the plaintiff by stating :

"Are not law and order the favourite stronghold of the bureaucracy going to be enforced in this instance. Full particulars of these offences have been given."

Now, the Indian Law draws no distinction between "slander" and "libel." Even under the English Law, the words used by the defendant accusing the plaintiff of certain criminal offences which exposed the plaintiff to imprisonment or other heavy penalty (and not merely to a fine in the first instance with possible imprisonment in default of payment of fine) are per se defamatory: see Odgers on "Slander & Libel," p 53. The only possible defence to such an action and one which has been taken in this case, is that the defamatory matter was true in substance and in fact. The allegations made by him on which the alleged comment is based are all made by him as true to his knowledge, he being personally present in the municipal meetings at the time when these alleged offences are said to have been committed, and, therefore, if these allegations are proved not to be true, they amount to wilful falsehood which again is by itself a proof of malice.

If the plaintiff is a criminal cadet questio he is unfit to be a member of the honourable profession or to be entrusted with the duties of the President of a Municipality, and he cannot in that case claim any damages. As said by Littledane, J , in *MacPherson* v. *Daniels* (1) :

"But if the defendant relies upon the truth as an answer to the action, he must plead the matter specially ; because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment,) but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to possess."

If, therefore, the plaintiff has committed criminal offences and claims to recover damages for loss of his reputation he cannot succeed. If, on the other hand, the allegations of fact are proved to be untrue, no question of privilege can possibly arise. I had occasion to discuss this point while sitting on the High Court side in the case of *Mir Allahabux Khan* v. *Emperor* (2) wherein I said that one should not :

"lose sight of the important distinction which has been repeatedly pointed out between 'fair comment' based on well known or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappears."

On this point the observations of their Lordships of the Privy Council in *Davis* v. *Shepstone* (3) are pertinent :

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticizm, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticizm and allegations of fact, such as that disgraceful acts had been committed, or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

As the statements made by the defendant in his letter are per se defamatory, I think the burden is on him to prove that the allegations on which his comment was based were substantially true in fact. I also do not think that the plaintiff should be called upon to prove the quantum of damages. Looking at the position of the plaintiff and also the circulation which the "Daily Gazette" has, the amount of damages claimed by him is in no way excessive but, of course, it will be open to the defendant to prove that the amount claimed by the plaintiff should be reduced by proving any of the following circumstances.

(1) Evidence falling short of a justification , (2) absence of malice ; and (3) bad reputation of the plaintiff

Mr. Kimatrai has asserted that he wishes to lead evidence on these points and has further stated on instructions from his client, who is in Court, that his client is not prepared to offer any apology, that he asserts that the statements made by him are substantially true, and that he would prove them to be true. In view of the above observations, some of the issues framed in the case can easily be disposed of, and I propose to record my findings on them.

(1) [1829] 10 B. & C. 263=8 L. J. (O. S) K. B. 14=5 M. & Ry. 25.

(2) A. I. R. 1929 Sind 90.

(3) [1888] 11 A. C. 187 (190)=55 L. J. P. C. 51=50 J. P. 709=34 W. R. 722=55 L. T. 1

(1) Does the letter in "Daily Gazette" of 2nd July 1923, contain statements which are per se defamatory ?

Yes.

(2) Have these statements been made maliciously with a view to harm the reputation of the plaintiff as alleged in para. 7 of the plaint.

Mr. Dipchand has stated that he does not propose to rely upon the damages being enhanced on the ground that the statements were maliciously made ; but that he has only asked for this issue being raised for the purpose of showing that the letter was inspired by malice In view of the fact, that it is per se malicious, I do not think it necessary to call upon the plaintiff to prove that it was, as a matter of fact inspired by malice.

(3). Are the statements contained in the said letter substantially true ? If so, is there any cause of action against defendant 1. ?

This issue is an issue of which the burden is on the defendant and is the main issue in the case It will be decided after the evidence is recorded.

(4 & 5) Were the statements contained in the said letter bona fide in the discharge of public duty and a fair comment on the conduct of a public man ? If so, are they actionable ?

Are the said statements privileged as having been made bona fide in the interests of morality, and for public good and as relating to the conduct of a public man in his public capacity ?

The findings on these issues will follow the result of Issue 3.

(6 & 7) Is there any cause of action against defendant 2. ?

If there is, are they liable ?

Struck off as the defendant 2 has been given up.

(8). Has the plaintiff's reputation or credit been injured and has he suffered any mental pain ?

There can be no doubt that the allegations affected the reputation and credit of the plaintiff at any rate with persons who were not conversant with the affairs of the Shikarpur Municipality and that he has suffered mental pain But whether these facts would entitle him to damages or not, would depend upon the finding on Issue 3.

(9). Is the plaintiff entitled to any damages ? If so, what ?

If the finding on Issue 3 is against the defendant, the plaintiff will, in my opinion, be entitled to the amount claimed without further proof unless the defendant gives evidence in mitigation of such damages.

I now call upon the defendant to lead evidence on the main issue of which the burden is on him.

After this order was dictated, Mr. Kimatrai has argued that the plaintiff should give formal evidence that he has suffered pain of mind and also that he has suffered in reputation I do not think that such formal evidence is necessary in this case, and, therefore, I disallow his request.

R.M./R.K. *Order accordingly.*

A I R. 1929 Sind 175

PERCIVAL, J. C. AND RUPCHAND, A. J. C.

Illahibux—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 40 of 1929, Decided on 17th April 1929, against decision of Addl. Sess. Judge, Hyderabad.

Evidence Act, S 27—No statement or its part, not relating distinctly to facts deposed to by the accused, should go on record unless there is discovery in consequence thereof.

The words used by the legislature in S. 27 make it absolutely clear that only so much of such information whether it amounts to a confession or not, as relates distinctly to the fact which is deposed to as discovered in consequence of the information received, may be proved.

An accused gave information to the police in these words : "I shall produce the lathi with which I killed Ismail." It had been admitted as evidence under S. 27 . The lathi which the accused handed over had no marks of blood whatsoever. [P 176 C 2]

Held . that if the mere fact of the lathi having been handed to the police, might be relied upon, for the purpose of introducing an alleged confession made by the accused to the police, the provisions of S. 26 would become nugatory. [P 176 C 2]

Partabrai D. Punwani—for Appellant.

C. Lobo—for the Crown.

Percival, J C.—The accused Illahibux has been convicted by the Additional Sessions Judge of Hyderabad under S. 302 with the murder of his uncle Ismail and sentenced to transportation for life.

A considerable amount of evidence has been given in this case, and, as pointed out by the learned Additional Sessions Judge, the circumstantial evidence against the accused is very strong. The evidence shows that the accused went to one

Mitho's house and took the deceased from there on an allegation which was not correct. He was last seen going with the deceased from Mitho's house. There is evidence of certain persons who say that they heard cries on the way by which accused and the deceased went That evidence may perhaps not have been correct, because the persons are relations of parties But, apart from that, the circumstantial evidence, as indicated above, is strong as against the accused. There is the further fact that Mariam, the wife of the deceased, with whom the accused is known to have had illicit connexion, stated to various leading men of the community that the accused had confessed to her that he had killed the deceased As pointed out by the learned Additional Sessions Judge, there is no reason why Mariam should give evidence against the accused in this way The probabilities would be that she would support him rather than the contrary. In fact, as has been pointed out by the learned Additional Sessions Judge, the leading men of the community were endeavouring to hush up the case not to concoct the evidence against the accused.

Taking the evidence as a whole, I agree with the learned Additional Sessions Judge that the offence is fully brought home to the accused, and that the conviction should be confirmed.

It is desirable, however, to refer to the remarks of the learned Additional Sessions Judge on S. 27, Evidence Act. The learned Judge has admitted the words "I shall produce the lathi with which I killed Ismail." These words he has admitted relying on the ruling of the Lahore High Court delivered on 24th February 1928, and on certain other cases But since the judgment of the learned Additional Sessions Judge there has been a Full Bench ruling of the same Court of seven Judges in which S. 27, Evidence Act has been fully considered. It was held in that ruling by five out of the seven learned Judges that the words which can be admitted under S. 27 are very limited. Words such as "with which I killed Ismail" would not be admissible under that ruling, with which ruling I am not disposed to disagree

However, as pointed out by the learned Judge, even apart from this evidence, and even apart from the judicial confession of the accused, there is sufficient evidence to bring home the offence to the appellant. I, therefore, dismiss the appeal and confirm the conviction and sentence.

Rupchand, A. J. C.—I concur. The words used by the legislature in S. 27, Evidence Act make it absolutely clear that only so much of such information whether it amounts to a confession or not, as relates distinctly to the fact which is deposed to as discovered in consequence of the information received, may be proved. Now, what is the fact which has been deposed to as discovered in consequence of the information received from the accused in the present case. The answer to that question is that nothing has been discovered. The lathi which the accused handed over had no marks of blood whatsoever. Every person possesses a lathi, and if the mere fact of the lathi having been handed to the police, may be relied upon, for the purpose of introducing an alleged confession made by the accused to the police, the provisions of S 27 would become nugatory. In my opinion great care should always be taken before admitting under the provisions of S 27 statements made by an accused person, and before such statements are admitted Court must be satisfied that the conditions laid down by that section are fulfilled and that no part of such statements which do not relate distinctly to the facts which are deposed as having been discovered in consequence thereof should be permitted to go on the record.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1929 Sind 176

BARLEE, J. C AND ASTON, A. J. C.

Shafi Mahomed—Applicant.

v.

Kamruddin and *others*—Opponents.

Criminal Revn. Appln. No 52 of 1929, Decided on 28th June 1929.

Criminal P. C., S. 439 (5)—Complainant ordered to pay compensation exceeding Rs. 50 under S. 250, has right of appeal and so no revision lies — Criminal P. C., S. 250.

A complainant who has been ordered to give compensation under S. 250, has the right of appeal whenever compensation awarded exceeds Rs. 50 in the aggregate whether this amount is payable to one accused or distributed amongst several accused. Therefore no revision lies in such a case. [P 177,C 1]

Husomal M. Gurubuxani—for Applicant.

Kimatrai Bhojraj—for Opponent.

Aston, A. J. C.—This is an application for the revision of an order dated 25th February 1929 passed by the learned 1st Class Magistrate Dadu, dismissing the complaint of the applicant and directing the applicant to pay Rs. 20 as compensation to each of the 10 accused under S 250, Criminal P. C.

Mr. Kimatrai who appears for the respondents has raised a preliminary objection that no revision lies.

Mr. Kimatrai points out that the applicant had a right of appeal and since he can appeal, he cannot apply to this Court in revision.

On behalf of the applicant a number of authorities have been cited : namely, *Assan Mal Chatu Mal* v *Dilbar* (1), *Pereira* v. *Demello* (2) and *Sumaria* v. *Emperor* (3) a decision of the Allahabad High Court, *Iobhil Mallah* v. *Emperor* (4) a decision of the Patna High Court and *Sarab Dial* v. *Bir Singh* (5)

It appears to be settled law that a complainant who has been ordered to give compensation under S 250, Criminal P. C. has the right of appeal whenever the compensation awarded exceeds Rs. 50 in the aggregate whether this amount is payable to one accused or distributed amongst several accused.

I am of opinion that Mr. Kimatrai's contention that revision does not lie is correct and would, therefore, dismiss this application.

R.M./R.K. *Application dismissed.*

(1) A. I. R. 1926 Sind 19=19 S L. R. 66.
(2) A. I. R. 1925 Bom. 129=49 Bom. 440.
(3) A. I. R. 1926 All. 247.
(4) A. I. R. 1926 Pat. 70.
(5) A. I. R. 1923 Lah. 638=9 Lah. 462.

A. I. R. 1929 Sind 177

PERCIVAL, J. C., AND ASTON, A. J. C.

Mt. Hanifabai and *another*—Appellants.

v.

Karachi Port Trust—Opponents.

Misc. Civil Appeal No 3 of 1929, Decided on 21st February 1929, from an order of J. C., Sind, D/- 22nd September 1928.

(a) Workmen's Compensation Act, S. 2 (1) (d)—Definition of "dependents" excludes certain relatives.

The expression "dependent" as defined in S. 2 (1) (d), includes wife, husband, parent and some other near relatives. But certain relatives are expressly excluded. Therefore it follows that gratuities are to be paid to particular persons who do not or may not include certain heirs to the deceased. [P 178 C 1]

(b) Succession Act (1925), S. 370—Succession certificate must be given in respect of estate which goes to heirs—It cannot be given in case of gratuity to be paid to particular persons.

If succession certificate is to be given in respect of the estate of the deceased person it must be in respect of an estate which goes to the heirs of the deceased person A succession certificate cannot be granted in case of gratuity which does not form part of the estate of the deceased but is merely a sum paid to particular persons who are not necessarily the heirs of the deceased. *A. I. R.* 1924 *Sind* 57, *Ref.* [P 178 C 1, 2, P 179 C 1]

Srikishendas H. Lulla—for Appellants.

T. G Elphinston—for Opponents.

Judgment.—This is a miscellaneous appeal against the order passed by Mr. Wild, Acting, J C. of Sind, in which he refused to grant a succession certificate to the applicants Mt. Hanifabai and Mariambai, widows of Abdulla Umer, on the ground that he was unable to give a succession certificate or letters of administration in a case of this character.

Abdullah Umer was a servant of the Karachi Port Trust and he was killed in the execution of his duty. The Karachi Port Trust are in the habit of giving gratuities to relations of persons who draw less than a certain amount of pay from the Port Trust, and who are killed in the execution of their duty. The said notification runs as follows:

"Gratuities will be paid to officers and servants of the Board injured, where the injury results in permanent, total or partial disablement as defined in the Workmen's Compensation Act, or to the surviving relatives of any of such officers and servants killed in the execution of their duty in accordance with the scale laid down in that Act."

"*Note*—For the purposes of this rule the surviving relatives will be dependents as defined in the Workmen's Compensation Act, S. 2 (1) (d)."

The applicants, Mt Hanifabai and Mariambai, have appealed to this Court. The position, however, is little peculiar, owing to the fact that the Port Trust consider that the Court can give a certificate in the circumstances of this case, while the appellants contend that no such certificate can be granted. However, in any case we have been in a position of hearing arguments on both sides

as to whether a succession certificate can or cannot be granted.

Now, it appears to me apart from the merits of this particular case, whether it is to the advantage of the appellants or not that succession certificate cannot in fact be granted in the circumstances of this case, and that the view taken thereon by the learned Acting Judicial Commissioner was correct.

It will be noticed that the notification states lastly that "gratuities" will be paid, secondly, that the disablement in question is as defined by Workmen's Compensation Act, thirdly, the scale is as laid down in the Workmen's Compensation Act, and fourthly (to my mind the most important provision) the gratuity is to be paid to the "dependents" as defined in the Workmen's Compensation Act.

Now, it is contended by the learned counsel on behalf of the Port Trust that we have to look not to the Workmen's Compensation Act but to the case of Insurance or Provident Funds as analogies in the present instance. But it is significant that in the notification as mentioned above, in respect of three particulars, reference is to be made to the Workmen's Compensation Act.

Now, in regard to the expression "dependents" it is defined in S 2 (1) (d), Workmen's Compensation Act, as meaning wife, husband, parent and some other near relatives. But it is noticeable that certain relatives are expressly excluded for instance, a major son who would naturally be an heir or one of the heirs in the case. Therefore we have it that gratuities are to be paid to particular persons who do not or may not include certain heirs to the deceased.

Now, we may turn to the Succession Act, S. 370, which would apply in this case. Reference is there made to S 212 which expressly refers to any part of the "property" of a person who had died intestate. Similarly in the proviso to S. 370 reference is to the effects of the deceased person. It seems to me to be clear that succession certificate must be given in respect of the property of a deceased person. Now if the succession certificate is to be given in respect of the estate of the deceased person, I am of opinion that it follows that it must be in respect of an estate, which goes to the heirs of the deceased person. Further, it does not seem to be correct to hold that a succession certificate can be given in respect of the property of the deceased which is to go to the particular persons, who are not necessarily the heirs of the deceased.

Reference has been made in this connexion to the case reported as *Aimai* v. *Awabai Dhanjishaw Jamsetji* (1). Now in that case it was held that the Karachi Port Trust Provident Fund does not pass to the nominee but does form part of the estate of the deceased. But the reasoning of that decision is contrary to the view that in this case gratuity in question forms part of the estate of the deceased. At p. 319 (*of* 18 *S. L. R.*) of the judgment Mr. Kennedy, J. C., observed:

> "The Port Trust might say to the subscriber, if you serve me well for a certain number of years I will pay to you, or to any one you name a certain gratuity. In that case, I take it the gratuity would not be part of the estate of the deceased and administrator would have no claim to it."

In the present instance the case is even stronger. Here the man in question, Abdullah, was not a subscriber, and he could not arrange that the amount should be paid to a particular person. As indicated above, according to the view there taken, even a gratuity payable at the request of the deceased to the particular person in Mr Kennedy's opinion would not form part of the estate of the deceased. The distinction in respect of the provident fund and insurance, as indicated by Mr. Kennedy's judgment, is that in that case the amount involved forms part of the deceased's estate. That is to say, it goes to the heirs of the deceased whereas in this instance it does not necessarily go to the heirs of the deceased To get over the difficulty it was argued on behalf of the Port Trust that, even if this money was paid to the dependents still there was a trust on the dependents to distribute part of the amount to the heirs. I cannot, however, accept that argument. It seems to me to be clear from the wording of the notification that there is no obligation on the part of the dependents to pay any part of the money to any one else.

The position, therefore, is that whether we think it desirable or not in this case to grant a succession certificate the Court cannot give a succession certifi-

(1) A. I. R. 1924 Sind 57=18 S. L. R. 311.

cate, because the gratuity in question does not form part of the estate of the deceased but is merely a sum paid to particular persons, who are not necessarily the heirs of the deceased on a particular event coming into effect

The appeal is accordingly dismissed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1929 Sind 179 (1)

BARLEE, J. C. AND KALUMAL PAHLUMAL, A. J. C.

Emperor

v.

Ghulam Ahmed—Accused.

Criminal Ref. No. 102 of 1929, Decided on 16th July 1929, from Dist. Magistrate, Karachi.

Criminal P. C., S. 35—Order that sentences of imprisonment in default of fines should run concurrenly is illegal.

Section 35, which empowers a Court to direct that imprisonment imposed on a person convicted at one trial of two or more offences should be concurrent does not refer to sentence of imprisonment in default of payment of fine but refers only to substantive sentences That being so the order that the sentences of imprisonment in default of fines should run concurrently is illegal. 5 *S. L. R.* 263, *Rel. on.* [P 179 C 1, 2]

Partabrai D. Punwani — for the Crown.

Judgment.—The District Magistrate, Karachi, has made a reference to this Court in the case of one Ghulam Ahmed who was convicted on 21st December 1928, on three charges under S. 468, and sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of Rs 150, or in default to suffer further rigorous imprisonment for six months on each of three charges. It was ordered further that the sentences were to run concurrently. In the opinion of the District Magistrate the order that the sentences of imprisonment in default of fines should run concurrently was illegal.

Notice has been issued to Ghulam Ahmed but there is no appearance on his behalf. It is pointed out to us by the learned Public Prosecutor that S 35, Criminal P. C., which empowers a Court to direct that imprisonment imposed on a person convicted at one trial of two or more offences should be concurrent, does not refer to sentences of imprisonment in default of payment of fine but must refer only to substantive sentences. This appears to us to be clear from the wording of S 35, Criminal P. C., itself and it has been laid down by this Court as proper interpretation in the case of *Emperor* v. *Akidullah* (1), where Pratt, J. C., ruled as follows .

"Again the Magistrate has imposed a fine for each offence and has directed the terms of imprisonment in default of the fines to run concurrently Such an order is not justified by S. 35, Criminal P. C. In case of the part payment of the fine it would be difficult to estimate what portion of which term of imprisonment should terminate under S. 69, I. P C.

Accordingly we direct that the sentences of the Additional City Magistrate, should be amended so as to make it clear that the sentences of imprisonment in default of payment of fines should not run concurrently

P.N./R K. *Order accordingly*

(1) [1911] 5 S. L. R. 263=15 I. C. 808=16 Cr. L. J. 536.

A. I. R. 1929 Sind 179 (2)

BARLEE, J. C., AND ASTON, A J C.

Karim Baksh—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 273 of 1929 and Criminal Revn Appln. No. 32 of 1929, Decided on 25th June 1929

Penal Code, S. 302 — Court can sentence accused person to death merely on circumstantial evidence but such evidence must be incompatible with his innocence and incapable of explanation upon any reasonable hypothesis except that of his guilt.

There is no rule of law or practice to prevent a Court from sentencing an accused person to death merely on circumstantial evidence.

The accused person visited the village in which the murdered person lived and was at the shop of the deceased on the night of the murder, and that night both had slept on cots in front of the shop. In the morning the person was found murdered and the accused had disappeared. At the time the accused had come to the village he was wearing shoes and also possessed a tin box of cigarettes. A pair of shoes and a tin box were found at the shop, and the accused, who was discovered when followed along the foot-prints sitting amongst some crops, was bare footed. When the accused was discovered he was in possession of the property of exactly the same description as the stolen property. Blood-stains were also found on the shirt of the accused.

Held : that circumstantial evidence was incompatible with the innocence and incapable of explanation upon any reasonable hypothesis

except that of his guilt and the accused could be sentenced to death : *A. I. R.* 1926 *Bom.* 519, *Rel. on.* [P 182 C 1]

Fakirchand Vij—for Appellant.

C. Lobo—for the Crown.

Judgment—One Karim Baksh alias Mahomed Urs has been convicted of the offence of murder and also of the offence of house-breaking and theft and sentenced to transportation for life under S. 302, I. P. C, and to terms of imprisonment for the offences under Ss. 457 and 380, I P. C. He has appealed from jail and his appeal has been accepted on the question of sentence only. But the Public Prosecutor in Sind has filed an application on behalf of the Crown for enhancement of the sentence under S. 302, and, therefore, Karim Baksh, whom in future I shall call he accused, has been called on to show cause why his sentence should not be enhanced. At the same time a pleader who has been briefed by the Crown on his behalf, has been allowed to criticise the judgment of the Sessions Judge with a view to show that he should be acquitted

The facts out of which this case has arisen are as follows :—

It is in evidence that the accused visited the village of Mir Hassan in Sanghar Taluka in the Thar Parkar District at the end of June 1928. He stopped first in the otak of one Haji Bilawal, and afterwards he became the guest of the deceased, Abdul Aziz, who in partnership with one Abdul Gafur, owned a shop in that village. It is in evidence that on the evening of 28th June Abdul Gafur brought Rs. 40-0 0 to the shop, and in the presence of the accused gave the money to the deceased, Abdul Aziz, who put it in the cash box and locked the shop That nig t the accused and the deceased slept on cots in front of the shop In the morning Abdul Aziz was found lying dead on his cot He had obviously been murdered. The accused had disappeared, but had left behind him, it is said, a pair of shoes and a tin-box in which he had kept some cigarettes. Information was at once sent to the police post at Sanghar. The informant was witness Kalu (Ex. 5) who stated that a 'Nango Fakir' who had been sleeping at the shop, the previous night, had murdered Abdul Aziz, had taken the keys of the shop had opened it, had stolen Rs. 60-0-0 and other goods, and had run away. Whilst Kalu was making his report, some villagers followed the foot-prints which had been left by the runaway until they came to a bridge called "the bridge of Kandiari." From that place no foot-prints could be found ; so they went to the police station at Kandiari and made a report to a police officer, named Mahomed Yakub, who went with them to the Local Zamindar, Mahomed Waris, and made enquiries.

It was learnt that a Fakir had arrived at his village and had gone away again. They searched in the neighbourhood, and found the accused sitting amongst some crops. He was arrested and searched. On his person were found two silver ornaments (a hassi and kathmal) and Rs. 60 0-0 including two currency notes of Rs 10, five currency notes of Rs. 5 each and Rs. 15-0-0 in cash, and a green silk handkerchief It was noticed also, that there were blood stains on his shirt. A mashirnama was made at the time, and it gives details of the property found on the person of the accused and mentions the fact that blood-stains had been seen on the sleeve of the shirt. The accused was arrested and brought to Mir Hassan's village ; and, after the usual foot-print test had been held, he was challaned, with the result, as I have said, that he was convicted by the Additional Sessions Judge, Hyderabad, with the concurrence of all the three assessors, of house-breaking and theft and murder. But in passing sentences, the learned Additional Sessions Judge refused to sentence the accused to death on the ground that there was nothing but circumstantial evidence against him.

The first point for our consideration is whether the evidence against the accused is true. The second is whether if true, it justifies the conviction. And in that connexion, we have to consider whether the offence was of such a nature as to justify the sentence of death. The first part of the evidence is that which was led to prove that the accused went to the village of Mir Hassan and was a guest of the deceased, and on the night of the murder slept beside him This, as has been pointed out by the learned Additional Sessions Judge, appears to have been proved beyond doubt. The accused was seen by many persons in the village, and on the night of the murder was seen at the deceased's shop by the deceased's

partner Abdul Gafur and the witnesses Kalu, Haibat and Makhumdin.

It is his defence that he never went to the village at all but that he is an innocent man who had been caught and accused unjustly This, however, seems to be improbable to believe. The witnesses were strangers to him, and it is not conceivable that they have given false evidence in the matter. It is impossible that they could have been mistaken. The theory put forward by the learned pleader for the accused is that some of the villagers may have committed the murder and that the accused may have been made a scape-goat. But it is perfectly obvious that this theory cannot account for the presence of stolen property in the accused's bag when he was found 13 miles away from the scene of the offence, and the blood-stains on his shirt have not been explained I think we are perfectly safe in saying that the accused did visit the village, and was at the shop of the deceased on the night of the murder.

The next part of the evidence is that he disappeared before dawn This is clear from the same evidence. Then there is evidence that his disappearance was not only untimely but hurried, since he left behind him his shoes and the box of cigarettes The learned pleader has contended that neither the shoes nor the box have been clearly identified ; and of course the mere fact that the shoes, which were found beside the cot, fitted the accused would not be evidence that they belonged to him. But the prosecution have not had to rely on proof that they fitted him exactly. What has been proved is that when he came to the village he was wearing shoes, that a pair of shoes was left behind him, when he went away, and that when he was found he was bare footed. The presumption that the shoes found beside the cot on which he had been lying were his appears to be very strong.

The same remarks apply to the box. There is evidence that he had brought with him a tin-box of cigarettes, and after he disappeared a tin-box was found on or near his cot. The presumption is strong that he had left it behind. Thus there is every reason to suppose that his departure was stealthy and hurried. But the strongest evidence against him is that he was found in possession of stolen property. Whilst the tracking party was at Kandiari the Head Constable at Sanghar post visited the scene of the offence, and Abdul Gafur, the deceased's partner, gave him a complete list of the property that was missing. He mentioned a "hassi," a "kathmal," currency notes and cash to the value of Rs 60-0-0 and a green silk handkerchief valued at annas 12 On or about the same time, and quite independently 13 miles away, the Head Constable of Kandiari was searching the accused and he discovered on him property of exactly the same description, that is to say, two notes of Rs. 10, five currency notes of Rs. 5, a silver hassi and kathmal and Rs. 15-0-0 in cash and a green silk handkerchief. It is impossible for us to believe that the property found on the accused was other than the property which had been stolen.

The only criticism of this evidence is that the two silver ornaments found were not such as are capable of actual identification. But even if this be granted it is of no consequence. The learned Public Prosecutor does not rely on the identification of these ornaments, but on the fact that the accused had in his possession exactly the same ornaments and exactly the same amount of money, of the same denominations, as had been stolen. The learned pleader in a lengthy and painstaking analysis of the evidence has discovered some discrepancies, but they are of a minor nature and do not seem to us to be at all relevant to the matter under inquiry. What the accused had to explain was, why he left the village before dawn how he came to have stolen property in his possession and how he came to have blood-stains on his shirt. In the absence of any explanation, we agree with the learned Additional Sessions Judge that he has been rightly convicted.

The last question then is as to whether the evidence is of such a nature as to justify the sentence of death On this point the first argument of the learned pleader was that the application made on behalf of the Crown was out of time But this is clearly an error since the rules of the Court allow six months for an application on behalf of the Crown and the sanction of Government was received by the Public Prosecutor within three months of the date of conviction

The only other argument of the learned pleader is practically that used by the learned Additional Sessions Judge, that a

sentence of death should not be inflicted when there is no direct evidence of eye-witnesses. We are, however, unable to agree to this argument. It is very seldom that murders of the worst type, that is to say cold blooded murders committed for the sake of gain, are witnessed by any one except the murderers. And there is no rule of law or of practice that we know of to prevent a Court from sentencing an accused person to death merely on circumstantial evidence. The rule which has been enunciated in the case of *Shivabhai* v. *Emperor* (1) at p. 691, (*of* 50 *Bom.*), is merely this that, before a man can be convicted of a murder, the circumstantial evidence must be incompatible with his innocence and incapable of explanation upon any reasonable hypothesis except that of his guilt A fortiori, before a man can be sentenced to death, the evidence must be incompatible with any hypothesis except that of his guilt In this case, it seems to us that there is no possible hypothesis except that of guilt. The witnesses had no reason for levelling a false accusation against the accused, and it appears to us to be as nearly certain as is possible in human affairs that he is guilty. And, as I have said, it is almost impossible to imagine that the witnesses can have had any reason for making a false accusation against him and they can have had no opportunity for concocting false evidence.

For these reasons, we are of opinion that the application made by the learned Public Prosecutor on behalf of the Crown must be allowed Accordingly, in the place of the sentence of transportation for life we sentence the accused Karim Baksh alias Mahomed Urs to be hanged by the neck until he is dead. It only remains to add with respect to sentences under Ss. 457 and 380 and 302 that we do not think that the fines should have been imposed. We set aside so much of those sentences as are concerned with the payment of fines.

P N./R K. *Sentence enhanced.*

(1) A.I.R. 1926 Bom. 515=50 Bom. 683.

* A. I. R. 1929 Sind 182

PERCIVAL, J. C., RUPCHAND, A. J. C.

Ismail and *others*—Appellants.

v.

Tayaballi Essaji and *others*—Respondents.

First Appeal No. 48 of 1926, Decided on 9th May 1929.

(a) Contract Act, S. 253 (1)— Properties purchased in firm's name—Purchase money paid out of partnership assets — Buildings built with great cost—Property purchased is partnership property.

The fact that properties were purchased in the name of a firm, the purchase money being paid out of the partnership assets and considerable amounts were spent on constructing buildings thereon, is a strong indication that the properties were purchased and treated as partnership properties 25 *Mad.* 149, *Foll.* and *Bank of England* Case, 130 *R. R.* 276, *Ref.* [P 186 C 1]

(b) Evidence Act, S. 103—Title of deceased disputed—Property shown to be of partnership—Onus lies on persons claiming through deceased person.

Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm, the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death.

(c) Mahomedan Law— Suit for partition by some heirs of deceased partner — Property shown to be partnership property and treated as such for a long period by the partnership—Suit for partition of property is incompetent —Suit for settlement of partnership accounts is barred by Limitation Act, Art. 106.

S and *H*, both mahomedan ladies, instituted a suit in 1924 for partition and possession of their share in certain immovable properties which *E* husband of *S* and father of *H*, was said to have died possessed of. The suit properties were included in a partnership business. *E* died in 1898. From that time the properties remained under the management of those who directed the partnership business. The rents realized therefrom were entered in the firm's rokar; the bills of rent were issued and suits for its recovery were filed in the name of the firm and in respect of each immovable property a separate khata was maintained treating each item as an asset of the firm. This continued upto 1917 when *G* the son of *E* also died.

Held: that the suit for partition of property which is partnership property of *E* is incompetent as framed. [P 190 C 1]

Held further: that even the suit for settlement of accounts of the partnership, dissolved by the death of *E* and subsequently by the death of *G*, is statute barred. [P 190 C 1]

*** (d) Civil P. C., O. 39, R. 1 — Essentials for seeking interlocutory injunction indi-**

cated—Balance of convenience is in favour of attaching mortgagee or creditor for not granting injunction — Notice of pending litigation to intending purchasers should be insisted on the creditor.

A person who seeks the aid of the Court by way of interlocutory injunction must as a rule be able to satisfy the Court (1) that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that he will be entitled to relief, (2) that the Court's interference is necessary to protect such person from that species of injury which the Court calls irreparable before his legal right can be established upon trial, and (3) that the comparative mischief or the inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise by granting it. [P 190 C 2]

Thus when a mortgagee or attaching creditor is proceeding to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases, and all that the Court might do ex majeure cautila is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit. [P 191 C 1]

T. G. Elphinston—for Appellants.

Fatehchand Assudamal, Tolasingh K. Advani, Dipchand Chandumal, Rewachand Vassammal, Tainatrai Bhojraj, and *S. A. Trikla*—for Respondents.

Rupchand, A J. C. — This appeal arises out of a suit instituted by Sakinabai and Hoosainbai respondents 6 and 7 for partition and possession of their share in certain immovable properties which one Essaji husband of respondent 6 and father of respondent 7 was said to have died possessed of. Paras. 3 and 4 of the plaint read as follows:

"3. That the deceased left several heirs entitled to his property according to Mahomedan Law. A full pedigree of the descendants of the deceased is hereto attached and marked B. The plaintiffs and defendants 1 to 18 are all the heirs of the deceased living at present.

"4. That the plaintiffs are entitled to a share in the property left by the deceased Essaji according to their shares under Mahomedan Law, and their shares according to Mahomedan Law in the property of the deceased will be 124 shares out of 432 shares i.e., a little over one fourth."

They further claimed that their share in the said properties be alloted to them free of the mortgage and other charges created thereon by some of the heirs of the said Essaji and impleaded the transferees as defendants 19 to 26

Defendant 1 was ex parte. Defendants 2 to 18 supported the plaintiffs' case except, that they disputed that the plaintiffs were entitled to the share claimed by them and averred that five out of the fourteen properties in suit had been been acquired after the death of Essaji by the sons of Essaji :

"for and on behalf of all the heirs and held the same in trust for other heirs to the extent of other owners' interest."

Exhibit 40 gives the list of the first batch of nine properties and Ex. 41 gives the second batch of five propertias acquired before and after Essaji's death respectively.

The chief contesting defendants were defendants 19 to 26. Their case, inter alia, was that the properties in suit which existed during the lifetime of Essaji were partnership properties of the firm of Ismailji Karimji and Co., and after the dissolution of that firm they were possessed by the firm of Essaji Ismailji and Co., which consisted of Essaji and his sons on the one hand, and Abdul Hussain and his sons on the other, that on the death of Essaji which took place in 1898 these properties continued to be the partnership properties of Essaji's sons and Abdul Hussain and his sons, that on Abdul Hussain and his sons withdrawing from the firm of Essaji Ismailji and Co, these properties became partnership properties of that firm as then constituted, that the claim of the plaintiffs was barred by limitation under Art. 106, Lim. Act, and that in any case the plaintiffs had lost their right by adverse possession under Arts. 142 and 144, Lim. Act, that the plaintiffs had no claim to the properties subsequently acquired by Essaji's sons which were also partnership properties, that they were estopped by their conduct from claiming a share in any of the properties and that they were even otherwise bound by the alienations made in favour of the defendants 19 to 26. They further pleaded that the suit was badly framed.

After the institution of the suit, the plaintiffs gave up defendants 19 who were mortgagees of two of the nine properties said to have been acquired before Essaji's death, and the suit as against them was dismissed. The defendants were, however, brought on the record again at the instance of defendants 2 to 18.

The learned trial Judge gave effect to some of the pleas raised by the

transferees and dismissed the plaintiffs' suit.

The plaintiffs have not appealed, but the heirs of Gulam Hussain, one of the sons of Essaji, have come to us in appeal and have challenged the findings of the lower Court not only in respect of the cause of action as set up by the plaintiffs but also on other grounds which will presently appear.

The following is the tabular statement (For tabular statement please see p. 185) showing how the plaintiffs and defendants 2 to 18 are related to one another and the approximate time when some of the persons mentioned therein are said to have died. It gives the pedigree from the grandfather of Essaji as it is necessary for the purposes of explaining the alleged devolution of the first batch of properties. Ex. 40. This suit was filed in 1924, about twenty six years after the death of Essaji and it is hardly disputable that it was instituted by defendant 1 at a time when he was hopelessly involved with the object of preventing the sale of the properties in suit for as long a period as possible That object appears to have been attained as in consequence of the injunctions issued by the Court, the sales have been stopped. It is equally clear that the chief contesting defendants being strangers to the family are at a considerable disadvantage and have to rely in support of their case on the documentary evidence and on certain admission forced out from defendant 1, who has made every endeavour to save the property from the transferees.

It will not be out of place to refer at the outset to the history of the family and the mode in which the male members of the family carried on their business before suit

Nothing appears to be known of what Karimji did or in what name the business was carried on by him in the beginning except that we have an entry in the revenue records in respect of one property being item No. 6 in Ex. 40 in the name of Moosaji Karimji and thereafter in the name of Karimji Moosaji. But it is proved beyond doubt that for a number of years prior to 1892 his sons Ismailji, Jafferji and Alibhoy carried on business as partners in the names of Ismailji Karimji and that in this business they were helped by their own sons. On the death of Ismailji in 1887, his sons Essaji and Abdul Hussain took his place and received one-third share in the business.

Ismailji had left two daughters who appear to have taken no proceedings to claim a share in the estate of Ismailji whatever its nature was.

In 1892 the firm of Ismailji Karimji & Co., was dissolved. Essaji and Abdul Hussain commenced to do business in the name of Essaji Ismailji & Co. In this business each brother was helped by his sons Likewise Jafferji's sons and Alibhoy and his sons did business on their own account. At the time of the dissolution of the firm of Ismailji & Co., in 1892 certain properties numbering sixteen and certain cash was alloted to Essaji and Abdul Hussain. The daughters of Essaji were not parties to this division and do not appear to have been consulted in any way

In 1904 Abdul Hussain withdrew from the firm of Essaji Ismailji & Co, and started his own business, when ten out 16 immovable properties and Rs. 49,000 cash were allotted to the sons of Essaji. At that time again none of the female members of the family of Essaji appear to have been consulted at all.

The firm of Essaji Ismailji & Co., carried on business up to 1914. Ghulam Hussain died in 1917 and his place appears to have been taken up by his adult son Adamali. Mahomedalli died in 1921 leaving no male issue. Adamali died in 1923, and at the date of suit Tayaballi defendant 1 was the only adult representative of this firm.

Karimji's family is a Borah family, and it is now settled that Borahs of Karachi are governed by Mahomedan Law. Prior to the case of *Sakinabai* v. *Ghulam Hussain* which was referred to the Borah Pir and whose answer came up for consideration before this Court in *Ghulam Hussain* v. *Sakina Bai* (1), it was a debatable question whether the Borahs of Karachi like the Girasia Borahs had not continued to follow Hindu customs since their conversion to the Mahomedan faith, and were governed by the Hindu Law. No special custom has been pleaded in this case, and therefore no question arises that the Hindu Law of inheritance and succession is ap-

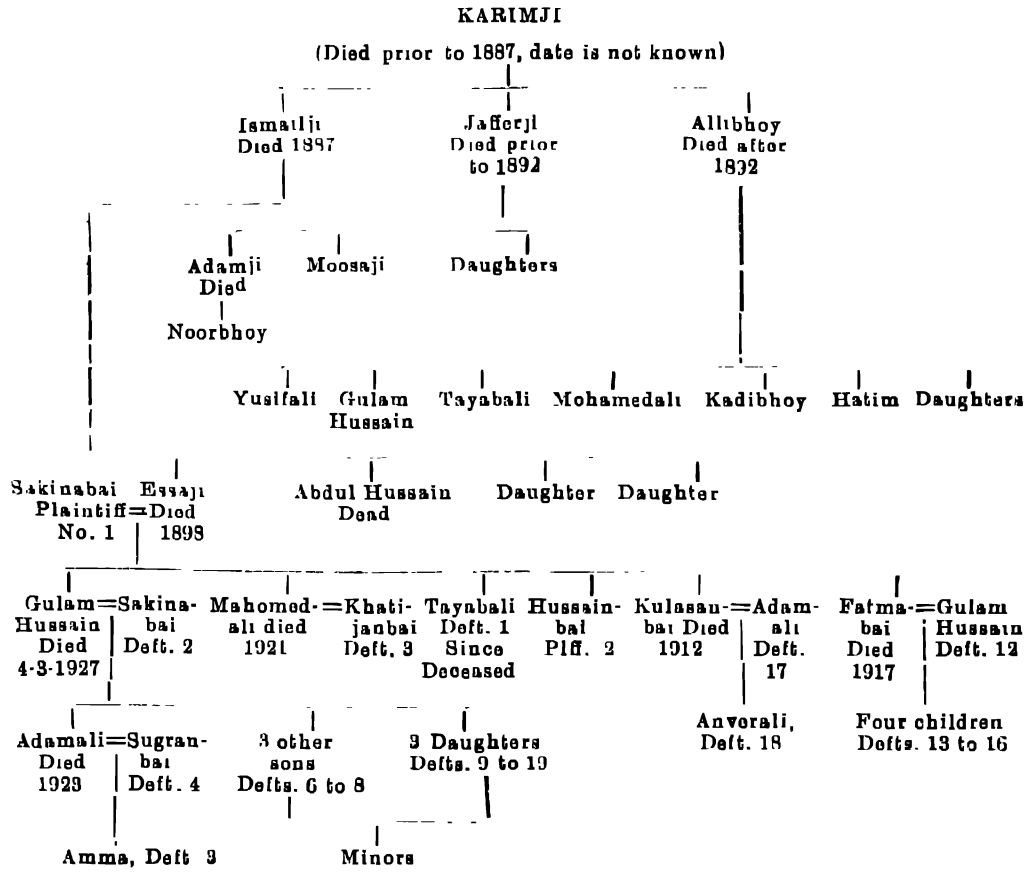
(1) [1913] 6 S. L. R. 146=19 I. C. 374.

plicable to the heirs of Essaji. But in order to grasp fully the nature of the evidence in this case and the position taken up by the female members of the family of Essaji it will not be out of place to refer to the evidence of Yusufali Alibhoy, the oldest living descendant of Karimji, as to the mode in which the different male descendants of Karimji have been carrying on their business and dealing with their property. He states:

"In 1896 Ismailji's sons did their own business and so Jafferji's sons. Before this, sons of Jafferji, sons of Ismailji and my father were carrying on business in the name of Ismailji Karimji & Co. At the time of the partition the properties became the properties of the sons alone and not of the family. When the sons of Jafferji, the sons of Ismailji and Alibhoy commenced to carry on the business in the name of Ismailji Karimji & Co., the rents ofall the immovable properties that belonged to the three branches were credited to the joint account of the firm till 1896. When in 1896 there was a separation between the aforesaid three branches, each branch was allotted separate possession of the immovable properties as they stood at the time of the previous partition. The properties that came to my branch were regarded as belonging to the brothers alone and not to the family. Ever since 1896 our firm carries on business in the name of Yusufali Alibhoy Karimji & Co. The properties that fell to our lot are the properties of the firm. Only the brothers are interested in the firm. According to the custom prevailing amongst us none of the ladies or the children of the house have any interest either in the firm or the properties that fell to our share on partition. But according to the religion they may claim interest if they like."

One of the main questions at issue is whether the properties in Exs 40 and 41 were acquired and possessed by the sons of Essaji as properties belonging to the firm of Essaji Ismailji & Co, consisting of his three sons to the exclusion of the female heirs of Essaji.

So far as properties referred to in Ex 41 are concerned the case is simple We have the account books of the firm of Essaji Ismailji Karimji & Co., from 1904 showing that all these properties were acquired after that date. We have the relevant documents showing how those properties were acquired



and the admissions of Tayaballi as to the mode in which they were dealt with. There is a separate khata in the books of the firm in respect of each property. Ex. 41 has been prepared by defendant 1 from the account books. It shows approximately the amount spent on each property and the rents realized therefrom from the date of its acquisition up to the date of the suit. (The judgment then summarized the same and proceeded.) The cost of these properties is Rs. 3,50,000 exclusive of interest and the income that has accrued therefrom is Rs 1,40,000 A good part of it has been paid as taxes and land rent which appears not to have been brought into the account.

All the money spent on these properties has come out of the coffers of the firm of Essaji Ismailji & Co, none of the brothers having contributed anything from their private resources or by any other heir of Essaji (The judgment then discussed the relative documents executed about the time of each of these properties except property No. 1 and proceeded) It has been argued that the fact that the properties were purchased in the name of the firm is not sufficient to warrant the presumption that they were partnership properties. It has been suggested that the business of the firm was that of commission agency and that there was no occasion for the firm to deal in properties. In the end it was said that so far as plots 81 and 82 are concerned, there is no presumption that they were purchased as partnership properties. No. 1 having been purchased in the name of all the three brothers as individuals and plot 82 having been purchased in the name of Tayabali alone

A number of rulings have been cited at the Bar on this point, but it will be sufficient to refer to only two of them. In the *Bank of England* case (2) which is the leading case on the point, it was held that there is no rule that where lands are bought by partners in trade and are paid for out of the partnership assets, they of necessity become part of the joint estate; nor on the other hand, that if they are not bought for the purposes of the partnership business, they are not joint estate; nor does the form of conveyance settle the question, which must be determined with reference to all the circumstances of the case. In that case one of the two partners carrying on business of leather factory bought lands for the purpose of erecting a residence on part of it and selling the remainder to a railway company. He offered a share to his partner who was also desirous of building a house out of town for his own residence. The offer was accepted and the purchase money paid out of the partnership assets, but the conveyance was to the partners in separate moieties The partners at their individual expenses built houses upon portions of the land set apart for the purpose, but the other expenses relating to the land were paid out of the partnership assets It was held on consideration of all the facts of the case that the whole of the land was joint estate.

In dealing with the effect of the partners having constructed the buildings at their own expenses, Turner, L. J. said: at p 284:

"It cannot, I think, be laid down as a universal rule that where lands are bought by partners in trade, and are paid out of partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade . . . . . or they may have been bought not for the purpose of being used and employed in the trade, but for the purpose of a mere speculation on account of the partnership, for I know of nothing which can prevent partners from speculating in land . . . . . Again they may have bought without reference to the purpose of the trade or the benefit of the partnership with the intention of withdrawing from the trade the amount employed in the purchase, and converting that amount into separate property of the partners or they may have been bought on account of one or more partners he or they becoming debtors to the partnership for the amount laid out in the purchase. The form of conveyance in these cases does not settle the question, for in whatever form the conveyance may be, that may be a trust of the land which may follow the money liable however as other trusts of the like nature are to be rebutted by evidence . . . . . and we have to consider whether the circumstances attending the purchase show that it was made on account of the partners individually, or of any one or more of them in whose name the land may have been bought."

And, Knight Bruce, L J. said:

"Whatever they or either of them may have contemplated doing, there was I think no agreement between them as to any mode of alloting, appropriating or disposing of both

(2) 130 R. R. 276.

or either of the two villas or dwelling houses, or dealing with either of them ; and I repeat that subject to the possibility (not now material) that with respect to the expenditure of each, there might have been an accounting between them, the whole estate remained partnership property at the time of the bankruptcy."

In *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3) while dealing with the question of Limitation, Bhashyam Ayyangar said :

"It was further contended by the learned Advocate-General that the three years' period of limitation prescribed by Art. 106 would be inapplicable to houses and lands purchased by the first defendant from the profits of the partnership. This contention would certainly hold good if it had been alleged and proved that, from time to time, portions of the assets of the partnership were, by the agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners (Lindley on 'Partnership' 5th Edn. pp. 334 and 335.)"

"In the absence, therefore, of any such allegation and proof, lands and houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are prima facie partnership property. *Nerot* v. *Burnand* (4), *Wedderburn* v *Wedderburn* (5)"

"The case is therefore governed by the ordinary rule that, unless a contrary intention appears by express agreement or by the nature of the transaction, property bought with money belonging to the firm, is deemed to have been bought on account of the firm *Bank of England* Case (6)

The facts of the present case viewed in the light of these two rulings are so strong that there can be no two opinions on the point that these five properties were purchased and treated as partnership properties. Not only was all the purchase money paid out of the partnership assets, but considerable amounts were subsequently spent on constructing buildings thereon. No debit appears to have been made in the books against any individual partner of the share of the cost of any of the five properties. Tayabali has admitted in his evidence that the bills of rent of all the immovable properties including those in Ex. 40 to which I shall presently refer were issued in the firm's name, and suits for recovery of rents were filed in the firm's name.

Tayabali has also admitted that all moneys were drawn from the firm for purchase of the properties in Ex. 41 as also certain other properties which were subsequently sold and that the sale proceeds of these properties were credited to the firm : (LI 490-500) On the top of it Tayabali has admitted that his firm bought and sold certain other properties by way of speculation. These admissions are sufficient to warrant an inference that besides doing commission agency the partnership dealt in purchase and sale of lands and that the properties in Ex. 41 were purchased and owned by the partnership as partnership properties. The fact that the plots 81 and 82 were not purchased in the firm's name are easily explained, and the form of the transfer in the names of all partners in respect of plot 81 and in the name of one of them in the case of plot 82 is of no material consequence whatsoever.

The case of the remaining nine properties referred to in Ex. 40 is more complicated. The books prior to 1904 are not forthcoming It is said on behalf of the plaintiffs that these books were with Abdul Hussain, who is dead, and his son who is now living is a minor and does not know what has become of the books. This may or may not be true. The fact remains that the evidence of the entries therein is not available. We are therefore left to base our conclusions on the conduct of the parties and the different documents relating to the purchase of these lands, such of them as are available and the proceedings taken from time to time to have mutation of names effected. (The judgment then gave the history and description of the nine properties possessed by the family before Essaji's death and proceeded.) Now at the division of 1892 between the three branches of Karimji's family these plots appear to have been dealt with as partnership property. Ismilji's sons had been working as partners of the firm before and after their father's death which took place in 1887. Jafferji's sons had done the same. Allibhoy was alive. His sons had likewise worked with him in the business. Sixteen properties were alloted to Ismailji's sons as their share.

There was a confusion in the mind of Yusifali as of the time when the three branches commenced to trade separately, and in one part of his evidence he has

(3) [1898] 25 Mad. 149=11 M. L. J. 353
(4) 4 Russ. 247.
(5) [1856] 22 Beav 104.
(6) 3 D. F. & J. 645.

said that it was in 1892, and in another part in 1896. But that is immaterial. Whether the division took place in 1892 or 1896, he has stated clearly that the rents of all the properties of the three branches were credited into the joint account of the firm of Ismailji Karimji upto the time of this division, and so far as his branch was concerned, the properties which fell to their lot belonged to his firm. The same may fairly be presumed to have been the case with the other branches.

During the continuance of the old firm each adult male member of each branch had worked as a partner, and had contributed towards the acquisition of the properties in whatsoever name they may have been purchased. Some of the properties were acquired in the name of the old firm, others in the names of senior members and again others in the names of junior members of each branch. But all were put in the hotchpot and the rents accruing therefrom treated as assets of the firm. There is no allegation, much less proof, that Ismailji or Abdul Hussain or Alibhoy bought the properties which stood in their respective names on their own behalf. We have the further fact that none of the females of any branch were consulted at the division or acquired any share at the division of 1892 or that any of them has up to this day claimed a share in any of the properties on the ground that such properties were treated as co-ownership property. On the top of it we have a clear admission in Tayabali's evidence that the sixteen properties which came to the share of Essaji and Abdul Hussain were acquired out of the family business of Ismailji Karimji (L 600). These sixteen properties were thus indubitably partnership properties of the old firm of Ismailji Karimji or Ismailji Karimji & Co. and continued in the possession of the firm of Ismailji Karimji or Ismailji Karimji & Co. as such even after the branches of Jafferji and Allibhoy had withdrawn from it.

In this connexion a good deal was said about the names in which the business was carried on both prior and subsequent to 1892. It was said that the name of this firm was Ismailji Karimji & Co. and not Ismailji Karimji. But it is clear from the evidence that both names appear to have been used indiscriminately and that whether the name of Ismailji Karimji or of Ismailji Karimji & Co. was used in connexion with any business it referred to one and the same firm, and not to the individual Ismailji.

Another point on which stress was laid was that as some of the leases and entries in the revenue registers described Ismailji Karimji as a Borah, they referred to Ismailji alone and not to his firm. But that argument loses much of its force when we have it (a) that the entries in respect of plots leased in the name of Messrs Ismailj Karimji & Co, described the firm as a Borah and an individual person residing in Karachi in the same way as the entries in respect of Ismailji (b) that the leases were renewed in the name of Ismailji Karimji long after he had died.

Now it is not seriously disputed that the firm of Ismailji Karimji or Ismailji Karimji & Co. continued to do business upto 1904 when Abdul Hussain withdrew from that firm and its name was changed to that of Essaji Ismailji or Essaji Ismailji & Co.

If these sixteen properties were partnership properties at the death of Essaji, the right of the plaintiffs, if any, was by a suit for settlement of account of the partnership dissolved by the death of Essaji and such portion of the assets including immovable property being decreed in their favour as fell to their share : *Sudarsanam Maistri* v. *Narasimhulu Maistri* (3) *Mohideen Bee* v. *Syed Meer Saheb* (7) *Gopal Chetty* v. *Vijayaraghavachariar* (8) and *Venkataratnam* v. *Siram Subba Rao* (9).

Under Art. 106, Lim Act, the plaintiffs' cause of action for settlement of accounts of that partnership was statute-barred in 1901 and could be revived in 1924 by the devise of treating it as a suit for partition of immovable properties left by the deceased.

As the title of Essaji to these properties was disputed the onus lay on the plaintiffs to prove that they belonged to him at the time of his death.

It appears that in the earlier stages of the trial, the plaintiffs were not fully

(7) [1916] 38 Mad. 1099=32 I. C. 1004.
(8) A. I. R. 1922 P. C. 115=45 Mad. 378=49 I. A. 181 (P. C.).
(9) A. I. R. 1926 Mad 1010=49 Mad. 733.

alive to this serious defect in their claim and in the evidence of the plaintiffs which was recorded on commission no attempt was made to set up a partition between Essaji and Abdul Hussain before Essaji's death. This attempt was for the first time made in the evidence of Tayabali by setting up a partition between the two brothers in 1896 But he was forced to admit that he had no evidence to prove the alleged partition except his own statement (line 475). The account books prior to 1904 would have thrown a flood of light on this point. But these books were not produced It is true that Abdul Hussain was dead and so were his adult sons who had at one time taken part in the business. But there is nothing to show that these books have been destroyed or that they could not be secured notwithstanding an attempt made to secure them. On the contrary, we have a clear admission from Tayabali that he had made no endeavour to secure them Apart from the fact that the burden of proving the alleged partition was on the plaintiffs and defendants 1 to 18, and that in the absence of cogent evidence they must fail, a fair amount of presumption arises against them in consequence of the non-production of the books The case does not, however, rest here. We have documentary evidence to show that there was only one division of property between Abdul Hussain on the one hand and Essaji's sons on the other and that this was in 1904 This appears from the mutation application filed by the parties in 1917 in respect of properties 1 to 3 and the correspondence carried on with the municipality in respect thereof.

Notwithstanding the dissolution of partnership between Essaji's sons and Abdul Hussain and his sons in 1904, mutation of names of several of the properties allotted to Essaji's branch was not effected and that an attempt was made in that behalf in 1917, long after the Transfer of Property Act was extended to Sind.

On 8th February 1917, a number of applications were made to the municipality for effecting mutation of names in favour of Essaji's sons. (The judgment then discussed the nature of the various applications and proceeded.) From 1904 up to the date of suit properties in Ex. 40 were dealt with in the same way as properties in Ex. 41. Both sets of properties remained under the management of those who directed the business of Essaji Ismailji & Co, the rents realized therefrom were given to the cashier of their firm who entered them in the firm's rokar and kept them along with the other monies of the firm (Tayabali 11. 400 to 410). The bills of rent were issued and suits for its recovery were filed in the name of the firm (Tayabali 1 495).

The fact that the rents were not credited to the watau khata (profit and loss account) is easily explained. Since Essaji's death, there had been no potamel and no distribution of profits (Tayabali 1. 418). This statement finds ample support in Ex 45 the entry of Rs 49,299 3-3 cash which is said to have fallen to the lot of Essaji's sons at the division of 1904. It reads thus :

(Old account of Bhai Ismailji Karimji, 1961)

Cr.	Dr.
	Rs. 49,299 3 3 balance due to you carried forward to new khatavani, p. 21.

Abdul Hussain withdrew from the firm on getting certain properties and cash as his share in the assets without any potamel having been drawn up (Tayabali 1. 600) and what remained of the cash was credited to the old books and debited to the new books As in respect of cash, so in respect of each immovable property a separate khata was maintained treating each item as an asset of the firm The same state of affairs continued notwithstanding the death of Ghulam Hussain, Adamali and Mahomedali : (Tayabali 11.605 to 610). On the top of it we have clear proof that in 1917 the parties dealt with these properties as partnership properties. Applications for mutation of names Exs. 55 to 57 and Ex 82 relating to properties 1 and 3, and 6, 7 and 8 respectively are all attested by Yusifali Alibhoy and his brother Tayabali Alibhoy The former applications contain a prayer of relinquishment by the ladies and the latter applications ask for a direct transfer from the name of Abdul Hussain to Essaji's sons. Now it cannot be contended, even for a moment, that both Yusifali and Tayabali who were so closely connected with the ladies were parties to a fraud being perpetrated on them or that they did not inform the

ladies of what was being done. It has been suggested that ladies of the family were in strict purdah and that their signatures were taken from them without informing them what was being done. This is hardly likely. Some of the ladies were married and their husbands were not in purdah. Four married women whose husbands were alive had signed the application and it is difficult to believe that none of them did so without advice of the husbands or that they were duped by the sons of Essaji and by the two attesting witnesses who were the paternal cousins of their father.

For these reasons and for the reasons given by the learned Additional Judicial Commissioner in his able and careful judgment, we hold that the suit for partition of property which was partnership property of the deceased Essaji and others was incompetent as framed and that if the suit be treated as one for settlement of accounts of the partnership which was dissolved by the death of Essaji and the subsequent partnership which was dissolved by the death of Ghulam Hussain in 1917 would be statute barred.

It has been argued that the plaintiffs had claimed a share not only as the heirs of Essaji but also as the heirs of Ghulam Hussain and that the Court should therefore go into the further question as to the settlement of accounts of the partnership between the heirs of Ghulam Hussain and his partners. In this connexion it was further urged that even if the claim of the plaintiffs be barred by limitation, the claim of the appellants, some of whom are not minors, is competent.

We are afraid we cannot permit the suit for partition of property left by Essaji to be converted into a suit for settlement of accounts of the partnership between Ghulam Hussain and his brothers

The appeals therefore fail in limine, and it is hardly necessary for us to consider any further questions.

Before we part with the case, we wish to refer to the serious prejudice which has been caused to some of the mortgagees particularly defendants 19 by the issue of injunction preventing them from realizing their security.

It has been brought to our notice that such injunctions are too frequently issued notwithstanding the decisions of this Court to the contrary.

Now the effect and object of an interlocutory injunction is merely to keep matters in status quo until the hearing or further orders and the principles on which an injunction will issue are well settled. A person who seeks the aid of the Court by way of interlocutory injunction must as a rule be able to satisfy the Court (a) that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that he will be entitled to relief, (b) that the Court's interference is necessary to protect such person from that species of injury which the Court calls irreparable before his legal right can be established upon trial, and (c) that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise by granting it

If these principles are applied to the present case, what do we find? It is no doubt true that the legal right of the plaintiffs to a share in certain immovable properties was being disputed and that as will presently appear except as against some of the defendants, the plaintiffs had a prima facie claim for trial but that was not enough No injunction was necessary for the protection of their right if any which might have been established at the trial. The mortgagees could only bring to sale the right, title and interest of their mortgagors in the properties and nothing more. If the mortgagors had been permitted to realize their securities pending the trial, no irreparable injury would have been caused to the plaintiffs and defendants 2 to 18. Not only that but no injury whatsoever would have resulted to them. The mortgagees were parties to the suit and the doctrine of lis pendens enunciated in S. 52, T P. Act applied and any purchasers from them, whether such purchasers were brought on the record or not, would have been bound by the result of the litigation.

On the other hand, the injury caused to the mortgagees by the issue of an injunction in this case and in almost every other case of a like nature, is irreparable. The mortgagees have been prevented from getting back their money or at least such part of it as they could have realized by the sale of the right, title and interest of the mortgagors,

when they wanted it most; their interest has mounted up and their securities have gone down in value considerably. All this loss falls on their shoulders for no fault of theirs and they have no redress against the persons at whose instance the injunctions were issued. Lastly the probabilities of success against some of mortgagees were practically nil and the case of each mortgagee should have been considered separately. Some of the mortgages were in respect of properties acquired subsequent to the death of Essaji, and with regard to them, the plaintiffs had on the pleadings not even a prima facie case to go to trial The mortgage in favour of defendants 19 stood even on a firmer footing.

The plaintiffs had relinquished their claim against the defendants and the suit as against them had been dismissed, and the injunction issued against them discharged It is extremely doubtful if they could be brought on the record again at the instance of some of the defendants who were acting in collusion with the plaintiffs. The proper remedy of these defendants was by a separate suit. Be that as it may, these defendants relied upon the sanads deposited with them in support of their claim. Both these sanads showed in unmistakeable terms that the plaintiffs had relinquished their interest, if any, in the properties in suit, Prima facie, therefore, the probability of their success against defendants 19 was far too remote especially in view of the provisions of S. 41, T P. Act. That was another serious obstacle in the way of the issue of a temporary injunction. In similar cases this Court both on the original and appellate side has refused to grant injunctions It has been repeatedly pointed out that where a mortgagee or an attaching creditor is proceeding to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases, and all that the Court might do *ex majeure cautila* is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit.

The loss caused to some of the mortgagees in the present case is to be regretted, and all that need be said is that applications for injunctions of a like nature will in future be discouraged and that the Courts below will not lightly issue injunctions in suits of this nature We have no hesitation in dismissing this appeal and in discharging the injunctions. The appellants will bear the costs of defendants 19 to 26 and the other defendants will bear their own costs of the appeal.

On the question of pleader's fees to be taxed in this case, we will hear the parties further on Monday next.

Percival, J. C.—I entirely agree.

I wish to add a few words only to make it clear that I thoroughly endorse the remarks of the learned Additional Judicial Commissioner on the question of injunctions. I agree with his conclusion that

> "all that the Court might do *ex majeure cautela* is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court of otherwise the intending purchasers should be informed of the pendency of the suit."

No doubt it may be said that it is easy to be wise after the event, and that the learned Judge, the late Mr. Raymond, could not tell that the hearing of the suit and appeal would be so protracted, and that the value of land would continue to fall in Karachi. But now that we have had the experienec of this case, and of other cases brought by banks in Karachi, it is only right that we should express our opinion that experience shows that

> "the comparative mischief or the inconvenience which is likely to arise from withholding that injunction will be less than that which is likely to arise by granting it."

Experience shows that when important banks and other respectable creditors of the same character try to bring mortgaged property to sale, the debtor puts up one relation after another, first a widow, then a minor, and so forth, to file suits against them; and the result of these suits is that, even if they are entirely without justification, still an injunction is liable to be granted, and the creditor is kept out of his dues for four or five years, by which time the value of the land has not improbably gone down, and the creditor has lost heavily for no fault of his own.

The record shows that in this particular case the late Mr Raymond granted an injunction with great hesitation; and if a Judge's hands are strengthened by

Bench rulings on this point he will be less inclined to grant such injunctions.

Mr. Raymond observed in his order of 30th January 1925

"Had it been brought to my knowledge, or had there been a statement either in the application or in the affidavit that accompanied it, that Cox and Co. were not parties to the suit in which the application was made, I certainly would not have granted interim injunction."

Again in his order of 18th May 1925 he said :

"The only order that I can pass on this application, and I certainly do so much to my regret, is that Messrs. Cox and Co. be restrained until the disposal of the suit from selling the properties mortgaged with them."

When this case came on appeal, again injunction against the sale of the properties was granted ; but the Nazir of this Court was appointed receiver to manage the properties. Even this arrangement, however, has proved far from satisfactory. It has given a large amount of work to the Nazir, and to this Court also in the matter of interlocutory applications, and the value of the land has continued to decrease.

Speaking for myself I am satisfied, from the experience of this and other cases, in which Karachi banks and other substantial creditors have been concerned, that though on the face of it the refusal to grant an injunction may appear to be a hardship to the debtor, still it is in reality the course that is most conductive to commercial morality and to the interests of the litigating public as a whole.

V.S./R.K. *Appeal dismissed.*

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* A I. R. 1929 Sind 192

BARLEE, A. J C.

Pokhardas Gabrani & Sons — Plaintiffs.

v.

Sewaram Girdharilal—Defendants

Suit No. 365 of 1926, Decided on 14th May 1929.

(a) Civil P C., O 30, R 6—Suit against firm—Summons on a person as partner—Defence in partner's name but contained nothing individual—There is technical flaw which can be corrected by Court even at argument stage.

In a suit against a firm summons was served on a person as partner in the firm. The partner though he was not served in the individual capacity filed a written statement in his own name and not as representative of the firm. There was nothing individual in the defence.

Held : that there was only a technical flaw which could be corrected by the Court even at the argument stage. [P193 C 1,2]

*** (b) Civil P. C , O. 30, R. 9—When all members of one firm are also members of another, suit cannot be brought by one against other for account or for balance due—Proper remedy is suit for partnership account of other firm.**

Though a suit will lie when one or more of the partners of a firm are members of another firm, and perhaps some suit will lie when all the members of the former are members of the latter, a suit for an account or for the balance found due on an account cannot be brought in the latter circumstances, as the proper remedy is a suit for a partnership account of the second firm . *A. I R.* 1921 *Bom* 414, *Rel on* ; 25 *Bom.* 606 and *A. I. R.* 192, *Bom.* 414, *Expl.* [P 194 C 1]

Suganlal Hussanand—for Plaintiffs.

Hukumatrai M. Eidnani—for Defendants,

Judgment.—This is a suit filed by the firm of Pokhardas Gabrani and Sons of Karachi against the firm of Sewaram Girdharilal of Tank, in the Dera Ismail Khan district by their manager to recover Rs. 6,140-10 6 alleged to be due for wines and other goods supplied to the defendant firm and for Rs. 853-5 6 claimed as interest at 6 per cent, or in the alternative as damages. Process was issued under O. 30, R. 3 (b) in the name of the manager in charge, and was served at the defendant-firm's place of business on one Putamchand. A defence was, however, filed by Sewaram who pleaded,

(1) That the suit was not maintainable as framed because all the persons who constituted the plaintiffs' firm were members of the defendant firm.

(2) that during the period in suit the defendant firm had been managed by one or other of the partners of the plaintiff firm and that they had acted with gross negligence and 1 or in bad faith.

(3) that interest at 12 per cent had been charged and,

(4) that the usual mercantile credit had not been allowed, and in consequence the claim in respect of interest was excessive.

On these pleadings the following issues were framed :

1. Whether all or any of the persons constituting the plaintiffs firm were and are also partners in the defendants firm of Sheoram Girdharilal ? If so, what is the result ?

2 Were any entries made in the defendants' books by any of the partners of the plaintiff firm with gross negligence and 1 or in bad faith ? If so, is the defendant Sheoram not bound by the entries so made, can the defendant Sheoram raise such a plea ?

3 Did the plaintiffs supply to the defendants goods shown in the account in suit.

4. Are defendants not liable for items 1 to 6 referred to in the statement of objections to the account ?

5. What amount, if any, is due to the plaintiffs on the said account ?

6. To what interest, if any, are plaintiffs entitled ?

7. Whether plaintiffs are liable for any loss as alleged in para. 6 of the written statement ? If so, can the defendants raise the plea in this suit ?

8. If so, for what amount are plaintiffs liable and can the defendant get credit therefor in this suit ?

9. On the accounts in suit what amount if any, will be due to the plaintiffs from the defendants ?

10. General.

FINDINGS

Issue 1 (a)	All.
Issue 1 (b)	As below.
Issue 2	No.
Issue 3—5	Unnecessary.
Issue 6	6 per cent.
Issue 7	No custom proved.
Issue 8—9	Unnecessary.

At the hearing the defendant filed some documentary evidence but no witnesses were examined by either party Before coming to the issues framed on the pleadings I must first deal with a point of law which has been raised by the plaintiffs' learned pleader in his opening address. His contention is that inasmuch as the suit is one against a firm, and none of the partners has been served with summons in his individual capacity, it was not open to the defendant Sheoram to file a defence except one on behalf of the firm. The learned pleader contends, therefore, that Sewaram's written statement, which he filed in his own name and not as representative of the firm, cannot be looked at and the suit must be treated as undefended. I do not think that his ingenious argument is sound. Sewaram was entitled to appear, and indeed was bound to appear, individually in his own name, and the only flaw in the procedure is that the subsequent proceedings ought to have been in the name of the firm. This flaw can, however, be corrected even at this stage, and as it was only technical since there is nothing personal in the defence put forward I may with safety ignore it. There is no prejudice to the plaintiff on this, for Sewaram came forward at the proper time and I am not introducing a new partner.

Issue 1 embodies the principal matter in dispute. It contains fact and law and I shall deal with the facts first. The plaintiffs' firm consists of a father and 5 sons and their learned pleader describes it as a joint family firm. It is admitted that one of the sons, Girdharilal, is a partner in the defendants' firm and there is evidence that another Khanchand was concerned in it. The question of fact in dispute is whether he was a partner, and whether his father and brothers also were partners. There is no oral evidence and I have to decide it from certain documents which have been admitted. Ex. No 8 is a hundi accepted by Khanchand on behalf of the firm Sewaram Girdharilal. Ex. No. 5 is a demand bill of exchange drawn by the same man at Lahore on Sewaram Girdharilal, in favour of the Frontier Bank. These show that he was at least a manager, and probably a partner. Ex. 12 is produced to show that the plaintiff firm in the printed heading to their office note paper stated that they had a branch at Tank, and Ex. 13 to shew that the head office of Sewaram Girdharilal was at Tank But the most illuminating document is a post card Ex. (7) written by Khanchand to the manager of Khirgi shop (the defendant firm). The address is "Shewaram Girdharilal, Wine Depot, Khirgi." The relevant portion runs as follows :

"In future whatever quantity of wine you supply to Lala Pokardas do not debit him the sale price thereof but debit it 20 per cent. less because a man who is proprietor of the shops should get things at cost price."

"Bills of thousands of rupees have been prepared by the branches in the name of Lala Pokardas in all of which sale price has been charged. When we and all the men of the firm can purchase things from the shops at cost price why should sale price be charged from him . . . . . Whatever loss you suffer should be debited to the shop or wine account."

This makes it very probable that Pokardas was a member of the firm of Sewaram Girdharilal ; and it is, I think safe to go further. The letter did not refer to wine supplied for his private consumption. The writer speaks of thousands of rupees, and he must have been referring to sales on a commercial scale. The inference then is that the firm of Lala Pokardas and not Lala Pokardas personally had been supplied, and that the firm was meant to get 20 per cent discount as proprietor. Considering these documents and remembering that Pokardas and his sons, were

a joint family firm I think it safe to infer that their branch at Tank was no other than the firm of Sewaram Girdharilal which was at one time managed by Khanchand. At any rate the documents justify the presumption that the plaintiff's firm was a partner of the defendants' firm, and it has not been rebutted by any evidence coming from them

In view of this finding the next question is whether the firm of Pokardas can sue the defendant firm in which all its members were partners for an account On this I have heard a very interesting argument as to the effect of O. 30, R. 9 on the old common law rule that no person may be both plaintiff and defendant Reliance has been placed on the dictum of Sir Lawrence Jenkins in *Rustomjee* v. *Seth Purshotumdas* (1) a case before the enactment of R. 9, and on *Jamshedji Naoroji* v. *Sorabji Naoroji* (2) in which *Rustomjee's* case is quoted with approval, but no reference has been made to that rule. It seems to me that no authority is needed for the opinion that the rule has altered the law for it allows a suit between two firms which have partners in common and that was exactly what the common law forbade; and the alteration was obviously intended to avoid the difficulties mentioned by Sir Lawrence Jenkins, which equity had to get round by clumsy expedients. But, though a suit will lie when one or more of the partners of the plaintiff firm are members of the defendant firm, and perhaps some suits will lie when all the members of the former are members of the latter, I agree with Mr. Hakumatrai that a suit for an account or for the balance found due on an account cannot be brought in the latter circumstances, as the proper remedy is a suit for a partnership account of the 2nd firm. For this I find authority in the case of *Kirshna Anappa* v. *Ganpat Sakharam* (3). The plaintiff firm consisting of S B. and K sued the defendant firm owned by K. alone for accounts. It was held that the suit should be for a general account. Obviously there, as in the present suit, the plaintiffs were suing for a part of the account between them : and therefore, the plaint offended the fundamental rule which is embodied in O. 2, R. 1 that every suit shall so far as possible be framed so as to afford a ground for final decision upon the subjects in dispute and to prevent further litigation. If the suit be allowed to go on, and if it ends in a decree for the plaintiff firm that decree will not be executable without more. To prevent the victimization of Sewaram, the executing Court will have to refuse the plaintiff firm leave to recover from him more than the quota due from him : and that will mean nothing less than a settlement of the accounts of the defendant firm. Thus it is not possible to settle by this suit all the matters in dispute. They can on the other hand all be settled in a suit for a partnership accounts of the defendant firm of Sewaram Girdharilal · I hold then that this suit cannot proceed, not because there is no cause of action, but because the plaint has not been framed and cannot be framed to include all the matters in dispute.

I need only add on this issue that, as Pokardas is now dead, and his sons are his legal representatives they are all as such interested in the defendant firm, so it seems to be immaterial whether he was a partner of that firm in his individual capacity or as manager of a Hindu joint family firm. The only other issues on which I need record findings are 2 and 7. The defendants have no evidence of negligence or bad faith or of any custom to give credit as alleged in the written statement para. 6.

P S Since writing this judgment I have been referred to an English decision cited in Annual Practice 1927, to the effect that the English rule corresponding to R. 9, O. 30 has not altered the common law rule since it is merely a rule of procedure. I fear that I can not understand this, for to my mind the rule that the same person may not be both plaintiff and defendant is itself a rule of procedure. However, this question though interesting is academic in the circumstances of the present case. It appears to me that if the plaintiff can amend his plaint and ask for an account, the suit need not be dismissed but that he may be allowed to withdraw his plaint. He must make an application to amend and on that application I can

(1) [1901] 25 Bom. 606=3 Bom. L R. 227.
(2) A. I. R. 1921 Bom. 414
(3) A. I. R. 1924 Bom. 263.

consider whether it is necessary to dismiss the suit, a course which will involve loss of court-fee, or can help him in any way.

P N./R.K. *Order accordingly.*

A. I. R. 1929 Sind 195

PERCIVAL, J. C., AND RUPCHAND, A. J. C.

Khaser Khan—Appellant.

v

Rattanchand and *another* — Respondents.

First Appeal No 56 of 1927, Decided on 1st May 1929.

(a) Benami—Motive for benami purchase held to be not reasonable

Where a person said that as he was a resident of native State and owned vast lands in British India and as he wanted somebody to attend to revenue authorities in British India he got the sale-deed executed benami in the name of another, such motive cannot be said to be a reasonable one as a simple power of attorney would have served the purpose [P 196 C 2]

(b) Benami—Burden of proof—Burden of proving that person named in sale deed as purchaser is benamidar lies on person alleging it and he must prove that the purchase money came from him.

If a person alleges that he is the real purchaser and the person named in the sale deed as purchaser is his benamidar, the onus lies heavily on him to prove by cogent and satisfactory evidence that the other is a benamidar and that the transaction is not what it purports to be. He must prove that the purchase money came from his pocket. In order to discharge this burden it is not sufficient merely to point to matters of suspicion or even to plausible conjecture : 13 *W. R. (P. C.)* 14, 14 *M. I. A.* 235 *(P. C.)*; 11 *M. I. A.* 28 *(P.C.)*; 25 *Cal.* 473 *(P. C.)* and 6 *C. L. J.* 472, *Rel. on.* [P 198 C 1]

(c) Transfer of Property Act, S. 41— Benamidar can lease out benami property to bind real purchaser—Benami.

A benamidar being a certified purchaser has at least all the authority of an agent under law of agency and a deed of lease, executed by him of property of which he is the benamidar, is binding on the real purchaser in the absence of notice to the lessee that he has withdrawn the authority from the benamidar or that there was reservation of it. [P 197 C 1]

(d) Benami—Suit by *N* against *K* for a declaration that he is real purchaser and *K* mere benamidar—Entry by *K* into account book of *N* of whole amount spent in purchasing property—Such entry is not acknowledgment that all money was paid by *N*.

Per *Rupchand*, A. J. C.—Where a suit was brought by *N* against *K* for a declaration that he was the real purchaser of property and *K*, who was mentioned in the sale deed as purchaser was a mere benamidar, the fact that *K* made an entry into account book of *N* of the whole amount spent in purchasing the property, is in no sense an acknowledgment that all the money was paid by *N* but is consistent with an entry made by a partner in a books howing the total cost to the debit side of their joint purchase [P 199 C 1]

Bhojsing G. Phalajani — for Appellant.

Dipchand Chandumal — for Respondents.

Percival, J. C.—This suit relates to a Jagir purchased from one Rais Ghulam Hyder by a sale-deed dated 23rd August 1922 and which describes the defendants as purchasers. The plaintiff sued for a declaration that he was the real purchaser and owned and that defendants 1 and 2 were benamidars. The suit was dismissed as against defendant 1 Rattanchand and was decreed as against defendant 2 Mir Usifali who is the son of the plaintiff, Nawab Kaiser Khan. The plaintiff Nawab Kaiser Khan filed this appeal in respect of his claim against defendant 1 Rattanchand.

The issues in this case apart from issue 4 which has been dropped were:

1. Is the defendant 1 benamidar for plaintiff as alleged in the plaint ?
2. Is the lease in favour of defendant 1 invalid and not bining on the plaintiff ?
3. What order regarding compensation and against whom ?

The findings were

1. In the negative.
2. In the negative and against the plaintiff.
3. Plaintiff is entitled to nothing.

The main issue in this case and the issue which has been chiefly argued in this appeal is issue 1, namely, is defendant 1 benamidar for plaintiff as alleged in the plaint? The land in question was purchased for Rs. 79,000-0-0 by the plaintiff. Out of this land 1/4th was purchased in the name of defendant 1 and the matter in dispute is with regard to that one-fourth of the land that is 1/16th of the whole land of which 1/4th was bought for Rs. 79,000-0-0.

The learned First Class Subordinate Judge has dealt very carefully with the question whether defendant 1 was a benamidar for the plaintiff or not He observes that the usual tests to be applied are (1) the source whence the purchase money came (2) the possession of the title deeds (3) the management and possession of the property purchased (4) the motive for the benami purchase and (5) other surrounding circumstances bear-

ing on the question. He has considered all these various circumstances and has come to the conclusion that they one and all point to the transaction not being benami, and to defendant 1 being entitled to one-fourth share in the land. The point on which the learned Judge particularily relies are points 1, 4 and 5 namely (1) the source whence the purchase money came (2) motive for the benami purchase and (3) other surrounding circumstances bearing on the question. Now, there is no doubt that the burden of proof is on the plaintiff to show that the money came from him. A considerable amount of evidence has been given on this point, but the learned First Class sub-Judge has shown after going carefully into the case that the plaintiff has not proved that the whole of the purchase money came from him. Defendant 1 contends that he paid Rs. 20,000 odd that is to say about one-fourth of the total amount of Rs 81,000-0-0 which includes some incidental expenses and as pointed out by the learned First Class Sub-Judge it is not absolutely necessary to hold it proved that defendant 1 paid the full amount of Rs. 20,000. The learned Sub-Judge has held that the plaintiff has failed to prove at any rate that a sum of Rs. 15,000 out of these Rs. 20,000-0-0 came from him. He observes:

"There is not the least doubt that the bulk of the consideration proceeded from the coffers of the plaintiffs but at the least it has not been satisfactorily proved that the old coin money was consigned to Rattanchand for change, that Rs. 6,000-0-0 were remitted to him through Baijhikhan and Kalandar Bux and that Rs, 7,000 odd were borrowed from Jhuromal and utilized for this transaction."

As he points out, we have to consider the fact that defendant 1 very probably gave some assistance in the regard to the purchase of the land and therefore he may be held to be entitled to the one-fourth share even though he has not proved that he has paid in full Rs. 20,000-0-0. In any case, defendant 1 has produced documents which show that some part of Rs. 20,000-0-0 came from his pocket. The conclusion of the learned Frst Class Sub-Judge is that the plaintiff has failed to prove that the whole of the purchase money entirely came from him and his finding is that some part at least came from defendant 1 and I agree with this conclusion.

His argument as regards the motive for the benami purchase appears to me to be also distinctly strong. He observes in the course of his judgment (line, 588).

"The motive for a benami transaction must always occupy a prominent place as a determining factor. Ordinarily it is to manufacture a shield against creditors and in some cases it is affection for the wife, children or near relatives."

Then he goes on to show that there was no reason why the plaintiff who was a literate chief owning vast lands and who had the advantage of the counsel of shrewd bania employees and a host of Mahomedan servants should allow the document to be passed in such a manner that "he fell into the clutches" of defendant 1. It is suggested that the document was passed in the name of defendant 1 because plaintiff hoped thereby to secure efficatious management of the land. But as has been pointed out by the learned Sub-Judge it was simple enough to give defendant 1 a power-of-attorney for that purpose It seems to me reasonable to hold that the plaintiff secured the assistance of defendant 1 by giving him one-fourth share in the transaction in order that by this means he would get someone who was interested in the land itself and would be willing to work for him.

Another point to which the learned Sub-Judge has attached considerable weight and which also to me appears to be of importance is the fact as observed at line 769 of his judgment that:

"In the absence of any cogent reason for disguising Seth Rattanchand's real character in this transaction everyone who took any serious part in the affair should have been cognizant that he was mere benamidar and no real owner. At the least the vendor, the broker, the writer of the deed and its two attesting witnesses should have been aware of it and would have said so in their evidence."

Yet none of these persons gave evidence to that effect. The next circumstance is that Mir Usifali (defendant 2) treated Rattanchand not as a mere benamidar but as a co proprietor. The learned Sub-Judge in this connexion refers to letter Ex. A-1 which shows that Mir Usifali treated defendant 1 as being entitled to one-anna share. In reply to this argument the learned pleader for the appellant contends that reliance cannot be placed on Mir Usifali because at the time when Ex. A-1 was passed Mir Usifali was not on good terms with his

father, the plaintiff. But it is rather going too far to suggest that he would deliberately give up his right to a part of the compensation money in order to benefit Rattanchand who is a bania. There are other documents which I may refer to but not discuss in detail for instance notice Ex. 200 which was issued and published by Mr. Tolaram pleader on behalf of the Nawab in March 1924 and which also strongly supports the case of defendant 1. The learned First class Sub-Judge has dealt with all these various documents and has shown clearly that evidence on behalf of defendant 1 is much stronger than that on behalf of the plaintiff. The burden of proof lay on the plaintiff and not only has he not discharged this burden but taking the evidence of both parties by themselves, the evidence of defendant 1 is stronger than that of the plaintiff I see no reason, therefore, to disagree with the view taken by the learned Sub-Judge that it is not proved that defendant 1 a benamidar for the plaintiff.

The other point discussed by the learned Sub-Judge is whether the lease passed in favour of defendant 1 by defendant 2 is not binding on the plaintiff. This issue seems to be more or less of academic interest at present because the plaintiff has now died and defendant 2 who was one of plaintiff's sons, is one of his heirs. But apart from that point of view, this issue has also been carefully considered by the learned Sub-Judge He points out that the lease is impeached on various grounds particularly that defendant 2 was a minor and, therefore, not competent to contract, and that, being a benamidar he had no right to execute the deed. He has dealt with these points carefully and on the first point he shows that there is no reason to believe that defendant 2 was a minor at the time of the lease.

And on the question whether being a benamidar he had a right to contract he has observed at line 979.

"At the worst Mir. Usifali being a certified purchaser had at least all the authority of an agent under the law of Agency. He was fully competent to lease out and Rattanchand had no good ground for presuming any secret reservation of the authority or repudiation thereof before he became cognizant of the notice Ex. 200."

I see no reason, therefore, to disagree with the learned First Class Sub-Judge in respect of his finding on issue 2. There remains issue 3 regarding compensation namely the item of Rs. 1,000 On this point also it is only necessary to add that I see no reason to disagree with the finding of the learned First Class Sub-Judge. The finding on this issue practically follows from the finding on issues 1 and 2. For these reasons I would dismiss the appeal with costs.

Rupchand, A. J. C —The plaintiff-appellant Nawab Kaiser Khan, who has died since the filing of this appeal, instituted this suit for a declaration that certain property which was purchased by a purchase-deed dated 23rd August 1922, in the name of his son Usifali Khan defendant 2 in the case and in the name of Rattanchand, defendant 1 in the case, was a benami transaction made solely for his own benefit and that the recitals therein showing that his son was entitled to a 12 annas-share and Rattanchand was entitled to a 4 annas-share were not true. The reason assigned by him in the plaint for getting the deed executed in the name of Rattanchand was that Rattanchand had been managing certain other lands on behalf of plaintiff in the British Territory and for the sake of convenience and in order to enable him to transact business with Revenue and other Government Officials his name was shown in the sale-deed as being co-purchaser of a 4 annas-share. The plaintiff further alleged that during the period that he was extradited to Multan on account of certain political reasons, Rattanchand had taken undue advantage of Usifali who was a minor and had obtained from Usifali a lease in respect of this land which was void both on the ground that at the time it was executed Usifali was a minor and also that Usifali had no interest in and could not, therefore, lease out the land He prayed that he be declared as the owner of the land in suit and that the lease executed by Usifali in favour of Rattanchand in respect of a 12 annas-share therein be declared as void He also prayed for a decree for Rs. 4,000 received by Rattanchand from Government as compensation for a portion of this land acquired under the Land Acquisition Act. His case was that on the strength of a power-of-attorney given to Rattanchand by Usifali and on the strength of the sale-deed which showed that Rattanchand

was entitled to a 4 annas-share, he had recovered this sum from Government. The plaintiff failed to convince the lower Court as to the bona fides of his claim.

Usifali had supported the case of the plaintiff, and the question of benami purchase was, therefore, confined to a 4-annas share purchased in the name of Rattanchand. The onus lay heavily on the plaintiff to prove by cogent and satisfactory evidence that Rattanchand was a benamidar and that the transaction was not what it prima facie purported to be. In order to discharge this burden it is not sufficient merely to point to matters of suspicion or even to plausible conjecture. *Sookheemonee Dassee* v. *Mohendro Nath* (1), *Faez Bukhsh Chowdry* v. *Fakirudin* (2,) *Sreeman Chunder Day* v. *Gopalchunder* (3), *Sulaiman Kadr Bahadur* v. *Mehndi Begam* (4) and *Wazirruddin* v. *Lala Deoki Nandan* (5). Not only has the plaintiff failed to discharge this burden but there is convincing evidence adduced on behalf of Rattanchand that the transaction was what it purported to be

Rattanchand has produced his account books which appear to be genuine and which contain a khata of the purchase of his share in the land and the amounts paid by him from time to time towards the purchase money. In the course of the cross-examination of Rattanchand an attempt was made to show that he had not sufficient funds at his disposal on the different dates on which he is alleged to have paid some of the money. But that attempt failed and the answers given by Rattanchand appear to us to be satisfactory. In this connexion it will be sufficient to refer to the criticism of the learned pleader for the plaintiff to one of the credit items which are said not to be genuine. Rs. 2,300 were said to have been realized by Rattanchand from his saraf-ka-shop in gold and silver in Jacobabad. It was said that the books of that shop had not been produced. But the learned pleader did not put any question on that point to Rattanchand. He stopped short in his cross-examination after the explanation was given. If the learned pleader disputed that this item was not genuine, it was open to him to have called upon Rattanchand to produce the books of the saraf-ka-shop and if he had failed to do so a presumption might have been drawn against him. A somewhat similar criticism was directed against other items in the account but with no tangible result. Some of these entries appear to have been made long before the extradition of the plaintiff, and no sufficient reason has been assigned for holding that Rattanchand contemplated from the very inception of the transaction to set up an adverse claim.

Our attention has been invited to a writing which Rattanchand made in one of the books of the plaintiff in respect of the purchase of land in suit. That entry is Ex 144 and reads as follows:

"Ram Ram Sat. Account of the Jagir land.
Rs 79,000-0-0 price of land to Wadero Ghulam Hyder Khan.
,, 2,064-8-0 expenses of stamp, writing charges, brokerage etc.
,, 300-0-0 expenses of Diwan Totaldas from Shahdadkot to Sukkur.
,, 500-0-0 cash paid to Rattan Puj Topandasani for miscellaneous expenses of land.
,, 88,884-8-0 Total.
(Sd.) RATTAN."

It was argued that the entry contained a clear admission by Rattanchand that this land was purchased by the plaintiff that Rattanchand had not paid a single pie out of the purchase money and that he had no interest therein. I am rather inclined to the view that the entry is in no way inconsistent with the case of a joint purchase. It is no doubt true that Rattanchand has attempted to give a false explanation with regard to this entry. He has said that he made a pencil entry and that entry showed at the end of it the shares of the partners but the plaintiff's employees had inked over that entry and rubbed off the last portion of it. On the other hand, the reason assigned by the plaintiff's employees for obtaining this entry is equally fallacious. It is alleged that as a large sum of Rs. 69,000 was sent by the plaintiff with Usifali a minor who was accompanied by two of the employees of the plaintiff, these employees were anxious to obtain a receipt from Rattanchand for this large sum of money and so they asked him to make the entry.

(1) [1869] 13 W. R. 14=4 B. L R. 16 (P.C).
(2) [1871] 14 M. I. A. 234=9 B. L. R. 456=2 Suther 490=2 Sar. 733 (P.C.).
(3) [1866] 11 M. I. A. 28=7 W R. 10=1 Suther 651=2 Sar. 215 (P.C).
(4) [1898] 25 Cal. 473=25 I. A. 15=2 C.W.N. 186=7 Sar. 254 (P.C.)
(5) [1907] 6 C. L. J. 472.

Now in the first place, there is, as will be seen presently no proof that Usifali was a minor then. In the next place the money was not paid to Rattanchand but to the vendor and was acknowledged in the sale-deed, and lastly the entry does not contain an admission of Rs. 69,000 only but recites the whole amount spent on the purchase including the item of expenditure incurred. In my opinion this entry is more consistent than not with an entry made by a partner in a book showing the total cost to the debit side of their joint purchase and appears to have been made with the object and is in no sense an acknowledgment that all the money was paid by the plaintiff. The learned pleader has argued that there is no reason why the entries from the books of the plaintiff should not be believed in preference to those in the books of Rattanchand. The learned Judge below has discussed the nature of these entries and the character of these books, and I am not prepared to differ from him as to the nature and character of these entries, or as to the reliability of the evidence given in support of them. The motive assigned by the plaintiff for the benami purchase is not one which could be easily accepted. It is more probable that the plaintiff who possessed extensive lands outside British Territory and was not, therefore, anxious to buy lands in British India unless he could arrange for their proper cultivation agreed to take up Rattanchand as a partner with a share of 4 annas so that he might manage the partnership lands for the benefit of both. But to say that merely because the plaintiff wanted somebody to attend to the revenue authorities, therefore, he got the sale-deed executed benami in the name of Rattanchand showing him as a sharer to the extent of 4 annas is asking too much. If that was the object of the plaintiff it was equally easy for him to execute a power-of-attorney in favour of Rattanchand to enable him to attend to the revenue authorities.

The subsequent conduct of the parties right up to the filing of the suit is also consistent with Rattanchand having been the real owner of the four annas share. There is evidence to show that at the time of the sale-deed another document was drawn up which according to Rattanchand was executed by Usifali purporting to be a partnership deed between him and Usifali as to the future management of the land. That document is not now forthcoming but it has been proved from the entries produced by the stamp vendor that a stamp for the partnership deed was purchased from him at the time when the sale-deed was executed.

There is also the evidence of the bondwriter and the attesting witnesses that such a document was executed at that very time. This lends great support to the case put forward by Rattanchand and the learned Judge was well advised in drawing an adverse inference against the plaintiff in consequence of the non-production of that document. This is not all. The power-of-attorney executed by Usifali authorizing Rattanchand to recover Rs. 3,000 only out of the compensation for acquisition of land by Government and the subsequent notice issued under instructions from the plaintiff all lead to the same conclusion. Whether Rattanchand has paid his full share of the purchase money or not is not a question before us and I therefore do not propose to go into it I have no hesitation in holding that not only has the plaintiff failed to discharge the onus placed on him, but there is positive evidence to the contrary, and that his case therefore fails on the first point.

Now with regard to the lease executed by Usifali in the first place it has been argued that Usifali was a minor at the date of the execution of the lease and that therefore the lease was void ab initio. The only substantial piece of evidence relied upon by the plaintiff in support of his case on this point is a purchase deed executed in 1919 in favour of Usifali represented by the plaintiff as his guardian. In that deed the age of Usifali is shown as 12 years Now admittedly in 1919 Usifali was a minor and there was no occasion then for the plaintiff to show in the sale deed the exact age of Usifali. It was sufficient to mention that Usifali was a minor and any gratuitous statement made there as to the approximate age of Usifali is no positive proof of his age. On the other hand we find that in 1922 when the purchase deed was executed for such a large sum of money as Rs. 79,000 the plaintiff entrusted the work to Usifali.

If Usifali was only 15 years of age it is hardly likely that this would have happened. If Usifali was a minor then the deed would have been executed in his favour as a minor in the same way as the deed of 1919 and the Sub-Registrar would not have accepted the document for registration from Usifali as he appears to have done. In 1923 Usifali executed a power-of-attorney in favour of Rattanchand in respect of Rs. 3,000 out of Rs. 4,000 payable as compensation by Government referred to above. This power was executed by him in the presence of the City Magistrate, Shikarpur, It is again hardly likely that an officer of that position would have endorsed a power-of-attorney executed by a minor where money was to be recovered from Government under that power.

The lease in favour of Rattanchand was executed by Mir Bakhshali acting as the attorney of Usifali under a power-of-attorney given to him by Usifali. That power was executed in the presence of another official and Mir Bakshali was a relative of Usifali. It is again not likely that the officer concerned would have attested the power or that Mir Bakshali would have acted on a power given by a minor. In all these different transactions Usifali is shown to be an adult and has purported to act as such. If there was any presumption in his favour on account of the recital made in the deed of 1919 such presumption has been abundantly rebutted. I hold that Usifali was an adult at least in 1924 when he executed the power-of-attorney in favour of Mir Baksh on the strength of which the lease was executed. The lease is therefore not void ab initio.

The question whether it is voidable at the instance of the plaintiff on the ground that Usifali had no authority to execute it, is now of only academic importance. The period of the lease has expired and the plaintiff is dead. Usifali is one of his heirs. If the heirs of the plaintiff have a claim against Rattanchand for an account of the produce of 12 annas share he has a counter claim against Usifali on the strength of the lease and the heirs can settle that dispute inter se. The suit is for a declaration that the lease is void. No relief has been asked for accounts and in the intended suit for such accounts it is open to Rattanchand to counter claim. Apart from this it would appear that the learned Judge below was perfectly right in holding that there were no grounds for coming to the conclusion that Usifali had exceeded his authority, and that the lease executed by him was not binding on the plaintiff. Usifali was the son of the plaintiff. He had with the consent of the plaintiff got the purchase deed executed in his favour and was looking after the property. It is said that the plaintiff was made to leave his territory on account of petition made against him by Usifali. We have not got that petition before us and we are not in a position to say how far that statement is true. But one thing is clear that prior to the execution of the lease in favour of Rattanchand the plaintiff had not given any intimation to Rattanchand that Usifali no longer represented him. Whatever dispute there might have been between the father and the son and of which even if Rattanchand was aware there was not sufficient notice to Rattanchand that the power given to the son of managing the property had been withdrawn. For these reasons, I hold that the lease executed by Usifali in favour of Rattanchand was not voidable either. For these reasons, I concur that this appeal should be dismissed with costs.

P.N/R.K. *Appeal dismissed.*

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* A. I. R. 1929 Sind 200

BARLEE, J. C., AND KALUMAL, A. J. C.

Dayaram Pritamdas—Appellant.

v.

*Narainda*s and *others*—Respondents.

Misc. Appeal No. 61 of 1926, Decided on 29th July 1929, from judgment of 1st Cl. Sub-Judge, Hyderabad.

*** (a) Civil P. C., Sch. 2, para. 20—Award in excess of authority — Separable portion may be directed to be expunged even under Sch. 2, para. 20—Remaining portion should be made basis of decree under Sch. 2, para. 21.**

Where a Court finds that arbitrators had been guilty of having exceeded their authority and that the additional portion of the award is separable from the rest, the Court can direct such additional portion to be expunged even in cases falling under Sch. 2, para. 20, the remaining portion being made bals of the decree under Sch. 2, para. 21 ;

A. I. R. 1914 *P.C.* 105 and *A. I. R.* 1928 *Sind* 144, *Rel. on.* : *A. I. R.* 1929 *Sind* 107, *Dist.* [P 203 C 1]

* **(b) Civil P. C., Sch. 2, para. 15—Private enquiries or examining evidence in absence of party — No misconduct where there is waiver.**

There is no misconduct of arbitration in having made private enquiries or examined evidence in the absence of a party to the arbitration proceedings where that party by his own conduct waives the objection he has to such a procedure *A I R.* 1921 *Mad* 271 and 18 *Bom.* 299, *Ref.* [P 203 C 2]

(c) Arbitration — Receivers may be appointed by arbitrators when option is given to so appoint.

Where the arbitrators have the option of determining the liabilities payable by a firm, of collecting outstandings due to the firm, or discharging the mortgage debts either themselves or of appointing a receiver to carry out all these purposes, the arbitrators are right in exercising the option in appointing a receiver to carry out all these details that would take necessarily pretty long time : 21 *Cal.* 590 (*P.C.*), *Rel. on. A. I. R.* 1928 *Sind* 144, *Ref.* [P 204 C 1]

Kimatrai Bhojraj—for Appellant.

Chuhermal Valiram—for Respondents.

Kalumal, A. J. C. — This is an appeal against judgment of First Class Sub-Judge, Hyderabad refusing to file an award and pronounce judgment in accordance therewith under para 20, Sch. 2, Civil P. C.

The facts giving rise to this appeal are that by a document dated 23rd October 1925 the appellant and respondents all brothers referred their disputes to the arbitration of 3 arbitrators by name Lokumal Satramdas, Chandiram Ramkishendas and Lilaram Wadhumal outside the Court. The parties to the document had been doing business as partners in Colombo and Japan. The business had sustained losses, the firms were partially wound up and all creditors of Colombo except one paid up from the assets of these firms. Bhai Naraindas one of the respondents, who had been before failure in charge of Colombo firm, on his return to Hyderabad Sind to which place the parties belong, was charged with misconduct and misappropriation of partnership property. Disputes subsequently arose and as they could not be amicably settled and as the creditors pressed for their dues, they were referred to arbitration.

By Ex. 58 as I read it, the arbitrators were not only invested with powers to decide disputes among the partners inter se but they were also empowered to act themselves as receivers to wind up their business or continue it, redeem mortgaged properties, discharge debts, dispose of ornaments to pay off firm liabilities or appoint a receiver to carry out these purposes. The arbitrators were by this document also authorised to enquire into and decide secret matters that might come to their notice in the course of proceedings. In substance they were clothed with wide powers to decide what they thought best in the interests of the parties.

The arbitrators after the document above mentioned was executed by the parties in their favour entered on the reference, held several sittings in presence of the parties, examined them and their account books and some witnesses. They passed thereafter their award on 3rd February 1925 which was submitted to the lower Court by three of them on 1st March 1925 under para 20, Sch 2 Civil P. C. On notice being issued to Naraindas Parmanand objections were raised by him. The lower Court recorded thereafter evidence adduced by parties in support of and against the objections and decided that it could not accept the award and pass judgment in terms thereof. This judgment has been assailed in this appeal.

The grounds on which the learned Judge of the lower Court refused to take the award on its file are briefly these :

(1) That there were no disputes that could form the basis of the document relied upon as reference and that there was, therefore, in fact no reference at all.

(2) That the arbitrators exceeded their jurisdiction inasmuch as they entertained and decided matters that were extraneous to the reference to determine which the arbitrators as alleged were not clothed with any authority by the parties.

(3) That the authority to the arbitrators to inquire into and decide secret matters vitiated the entire reference and the award that followed

(4) That the award was bad as the arbitrators were guilty of misconduct having examined as alleged some witnesses in the absence of the opponent Naraindas and instituted some enquiries in his absence

(5) That the award was bad as the arbitrators had failed to carry out the

terms of the reference such as sale of properties to pay off mortgage debts, collection of outstandings, discharge of creditors etc. etc. In other words it was alleged that the award was not final and uncertain.

Ground 1

As to this point perusal of the document Ex. 58 in the light of evidence led in our opinion shows clearly that disputes had arisen between parties inter se with respect to the karkhanas they had at Colombo and Japan partially wound up with some creditors left unpaid necessitating ascertainment as to what was due by one brother to the others, as to the winding up of the concerns and as to finding out best means by which the creditors could be paid off and as to balance left if any, being distributed among them. The arbitrators it appears to facilitate speedy decision on their part were invested with powers such as appointment of a receiver for various purposes mentioned in the reference In these circumstances it is difficult to understand what else could this document be, if not an agreement to refer disputes. It is surely not a trust deed or a document drawn up with the sole and exclusive object of gathering in assets and discharging liabilities. The main object of the document was to my mind to determine liabilities of partners inter se and their extent. This determination in a way was connected with collecting outstandings and discharging of the assets of the firms. Various powers were, therefore, conferred on the arbitrators in the reference in question which undoubtedly was an agreement referring disputes to arbitration i e, reference. Finding of the lower Court that this document was not in law a reference but either trust deed or a deed appointing receivers could not as above explained, therefore, be sustained.

As to the Grounds 2 and 3 unsoundness of the contentions and findings by the learned Judge that the arbitrators were wrong in entertaining and deciding matters relating to Santdas, a dumb and deaf brother of the parties Mr Kimatrai for the appellant has taken his stand on 3 points :

(i) that as it was not possible to determine what amount was due to or by each party unless liabilities, attaching to the parties not with respect to creditors only but also that arising out of the right of this dumb and deaf brother if he had any, had first been determined the arbitrators had by necessary implication the authority to decide to this subject (ii) that the arbitrators had jurisdiction to go into this matter as it was one of the matters covered by "secret matters" referred to in the agreement Ex. 58 for their inquiries and determination when brought to their notice: and (iii) that the arbitrators during the course of proceedings had expressly been authorized by opponent Naraindas in any event to decide this matter as they deemed best.

The third contention in our opinion is well grounded. The award refers to this express authority which we hold proved even otherwise on the evidence. The arbitrators who have had no axe of theirs to grind have deposed to this authority. It is besides difficult to understand why the authority should have been set up falsely when it was not disputed by respondents 2 and 3 though it is against their interest as they would have otherwise got the amount awarded to the deaf and dumb brother divided between themselves. Decision on this point besides does not in any way enhance Naraindas' liability. Naraindas, as found by the arbitrators had to pay Rs. 30,000-0-0 It is from this amount that Santdas has been awarded Rs. 7,500-0-0. As to the jewellery given to Santdas though it was no doubt originally entrusted to arbitrators for meeting some of the creditors it was under authority subsequently conferred on them as deposed to by the arbitrators and as mentioned in the award made available for disposal in the way arbitrators thought best. No grounds have been made out why we should accept Naraindas' evidence in preference to two arbitrators who had no interest of theirs to serve nor any ground to invent a lie on this point. In this view it is unnecessary to examine minutely the other two contentions urged by Mr. Kimatrai for the appellant. The second contention, however, has for its support solemn testimony of both the arbitrators which we are not prepared to discard. As to the first contention there is in our opinion no force therein. The arbitrators were not appointed to determine the claims of this brother left out

of the reference nor was the determination as to this brother's rights necessary to determine liabilities of parties to the reference inter se.

Had we found that the arbitrators had been guilty of having exceeded their authority in this respect this portion of the award being separable from the rest, we would have directed it to be expunged as observed by their Lordships in a case reported in *Amir Begam* v. *Badruddin Husain* (1) the separable portion even in cases falling in para 20 could be deleted and the remaining part made basis of the decree under para. 21, Sch. (2) Civil P. C. The Bench ruling of this Court has taken the same view as would be found in a case reported in *Kotu Mal* v. *Jeyram Das* (2) remarks at page 793 independently of the Penal Code ruling not referred to therein. Another Bench ruling of this Court in *A. I. R.* 1929 *Sind* 107 relied upon for the contrary view has in our opinion no application as no question of separateness there arose. In view of the dictum of the highest tribunal binding on all Courts in India it is needless to refer to any other rulings should there be any holding to the contrary. Before I have done with part of the case I may here as well refer to the contention raised for Naraindas that award is illegal as it has dealt with guardianship of Santdas the matter that could not in law be referred to arbitration. The arbitrators in their award have not in our opinion appointed any guardian They have merely nominated someone to receive amount awarded to him for his benefit

Ground 4.

As to the misconduct of the arbitrators in having made private inquiries or examined evidence in the absence of Naraindas the objection on this score as seen from the written statement page 4 of the paper book was based on general allegations that arbitrators had held no sitting (at all) nor had they acted together (on any occasion) and that they sometimes jointly and often individually had made inquiries from various people behind the back of Naraindas. In this written statement no specific instance of misconduct was alleged. Examination of the evidence recorded on this point discloses that this plea was raised in the hope as is usually the case of finding materials later on to base the general allegations upon. Even according to the evidence of Naraindas himself he was persent at two sittings out of three meetings held. According to the deposition of the arbitrators whom we have no reason to disbelieve he was present at all the 3 sittings. Evidence undoubtedly establishes further that two servants of the parties that had given some information as to the kharara lost as alleged by Naraindas were both asked by the arbitrators brought by Naraindas and examined on the point in his presence later on. There could therefore be no doubt that the arbitrators had held no proceedings that could possibly have prejudiced him and that no prejudice as it appears has accrued to him. As to the information given to arbitrators with respect to missing kharara, Naraindas has had an opportunity of examining witnesses on this point in the presence of all the parties and placing his own case for consideration of the arbitrators.

It is besies highly probable if the story of the arbitrators has to be accepted (which we have no reason to discard) that Naraindas was well aware of what the arbitrators had been told on the subject before the matter as to the missing kharara was openly taken in hand in subsequent proceedings. The rulings relied upon under holding that evidence taken or inquiries held in the absence of one of the parties vitiated the entire proceedings and the award following thereafter, can be of no avail in the particular circumstances of this case. Here information as to the missing kharara was communicated to the arbitrators by the parties and the matter was later on inquired into in their presence. Naraindas produced the two witnesses referred to above for examination and raised no protest though he was and must have been aware of the nature of the information received by the arbitrators. Naraindas could in these circumstances be deemed to have waived the objections he had to this procedure (vide *Mohidin Sahib* v. *Ramaswami Chetty* (3): *Cursetji Jehangir* v *W. Crowder* (4), remarks at pp 311 and 312)

(1) A. I. R. 1914 P.C. 105=36 All. 296 = 17 O. C. 120 (P.C.).
(2) A. I. R. 1928 Sind 144.
(3) A. I. R. 1921 Mad. 271.
(4) [1894] 18 Bom. 299.

It is no doubt true that if an award contains no final decision on all matters requiring determination it is wholly bad and cannot be allowed to be placed on the file. It is equally true that the result would be the same even if any of the matters has been left undetermined (see Russel's Law of Arbitration Edn. 1929 p. 214) In the present case, however, to my mind nothing that was required of the arbitrators under the terms of the reference has been left undecided As remarked above the arbitrators had the option of determining the liabilities payable by the firm in question of collecting outstandings due to the firm or discharging the mortgage debts etc. either themselves or of appointing a receiver to carry out all these purposes. The arbitrators in my opinion looking to the nature of the case before us rightly exercised the option in appointing a receiver to carry out all these details that would take necessarily pretty long time. The arbitrators have in the present case in consonance with the authority derived from the reference passed by the parties thus determined what was required of them under the document (agreement to refer disputes) and have therefore fulfilled the requirements as pointed out by their Lordships of the Privy Council in a ruling reported in *Makund Ram* v. *Salig Ram* (5). It was, it looks, in contemplation of parties to have a speedy determination of their disputes inter se and realising that the acts required of a receiver if any appointed in terms of the reference in question would necessarily take long time the parties deliberately invested arbitrators with the power to appoint a receiver. The award in question is therefore as complete as the circumstances of this particular case permit. It is in other words as final as the nature of the case requires see: *Kotumal* v. *Jeyram Das* (2).

The result of our findings is that the order of the lower Court in refusing to pass a judgment in terms of the award is set aside and the judgment as required by law under para 21 passed in terms thereof

Respondent Narainda will bear costs throughout.

V.S./R.K. *Appeal allowed.*

(5) [1894] 21 Cal. 590=21 I. A. 47=6 Sar. 423 (P. C.).

* A. I R 1929 Sind 204

BARLEE, J. C. AND KALUMAL, A. J. C.

Motumal Kishindas—Applicants.

v.

Ghanshamdas Parmanand — Opponent.

Revn. Appln. No 2 of 1927, Decided on 31st July 1929, from order of Small Cause Court Judge, Shikarpur.

* **(a) Provincial Insolvency Act, S. 39—Order of discharge releases insolvent from all provable debts—But order of annulment cannot prevent creditor from proceeding in civil Court.**

Under the Provincial Insolvency Act of 1907 if a creditor did not prove his debt and was not included in the schedule he could even after the discharge enforce his claim. The new Act of 1920 is the same except that an order of discharge under it does release the insolvent from all provable debts. But there is nothing in the Act to show that the order of annulment can prevent a creditor who has not proved his debt from proceeding to enforce it in a civil Court. *A. I. R.* 1924 *Sind* 122, *Rel on.* [P 205 C 1, 2]

(b) Provincial Insolvency Act, S. 29—Suit stayed is not at an end—Court cannot made final order dismissing suit which has been stayed.

The presumption from the word "stay" is that the suit stayed is not at an end, but may be continued until a further order is passed and as all orders in suit must be made after hearing parties, a Court cannot make a final order until it has heard objections, even where the creditor, whose suit is stayed, has not made an application the Court would have to consider his request to continue the suit. .. [P 205 C 2]

Srikishendas H. Lulla—for Applicant.

Dipchand Chandumal—for Opponent.

Judgment.—This is an application for revision of an order made by the Small Cause Court Judge, Shikarpur, dismissing the applicant's suit with costs.

There is no dispute about the facts. The applicant filed a suit against the opponent in the Shikarpur Court. Whilst the suit was pending the opponent-defendant was adjudged an insolvent. The suit, was therefore, stayed under S. 29, Prov. Ins. Act of 1920. The adjudication of insolvency was afterwards annulled under S. 38 of the Act as the Court accepted a scheme of composition. But the applicant had not proved his debt in the insolvency Court. He applied to the civil Court to continue his suit, and the order, of which the complaint is made, was passed the only

ground being that he ought to have filed his claim in the Insolvency Court.

The first question for us to consider is what is the effect of an order of insolvency Court under S. 39, Provl. Ins. Act, approving a proposal for composition.

This is clear from the section itself which says:

"The composition or scheme shall be binding on all the creditors entered in the said schedule, so far as it relates to any debts entered therein."

By schedule is meant the schedule of the creditors who have proved their debts under S. 33 of the Act. And, as the applicant had not proved his debt under that section the scheme was not binding on him If authority for this proposition is needed it is to be found in the case of *Meghraj* v. *Virbhandas* (1), the head note of which runs as follows:

Section 24, Provl. Ins. Act 3 of 1907, though it requires all creditors to tender proofs of their respective debts makes no provision as to the effect of any creditor failing to come to prove his debts."

Under the Insolvency Act of 1907, if a creditor does not prove his debt and is not included in the schedule he can even after the discharge enforce his claim.

In the body of the judgment Raymond, A J. C., says as follows:

Section 24, Provl. Ins. Act 3 of 1907, on which the learned Additional Judicial Commissioner has mainly relied requires that all persons alleging themselves to be creditors of the insolvents in respect of debts provable under this Act, shall tender proof of their respective debts by producing evidence of the amount and particulars thereof, but the section makes no provision as to the effect of any creditor failing to come in to prove his debt. Cl. 3 of the same section clearly contemplates a creditor applying to prove his debt at any time prior to the discharge of the insolvent and not necessarily at the time that the official receiver is about to frame a schedule of the insolvent's creditors. But unfair though it be, if a creditor does not choose to adopt either of the above courses and have his debts scheduled, that will not preclude him from attempting to recover any amount due to him even after the insolvent has been discharged, for under the Act of 1907, the order of discharge releases the insolvent only from the debts mentioned in the schedule framed."

The new act is the same except that an order of discharge under it does release the insolvent from all provable debts. But the decision of analogy is applicable to the present case and it is clear that there is nothing in the Act to show that the order of annulment can prevent a creditor, who has not proved his debt, from proceeding to enforce it in a civil Court.

The principal argument on behalf of the opponent the defendant, however, is that the Court, having granted a stay had no power to continue the suit because there is nothing in the Insolvency Act to show that the plaintiff may apply to have his suit continued after the annulment of the adjudication. Mr Dipchand has suggested that the omission was intentional, as the legislature wanted to enforce all creditors to prove their debts It is true that the Insolvency Act makes no express provision on the point, but we are unable to agree with the inference which the learned pleader seeks to draw. In the first place a perpetual stay is equivalent to a dismissal and the word "dismissed" would have been more fitting, had it been intended that the suit should abate. The presumption from the use of the word "stay" that is the suit stayed is not at an end, but may be continued in any case that some further order is required, and as all orders in suit must be made after hearing parties, a Court cannot make a final order dismissing a suit which has been stayed, until it has heard objections. It follows that, even if the applicant had not made an application the Court would have had to consider his request to continue the suit, and that the difficulty raised for the opponent is merely technical Lastly we would say that S. 29, Provl. Ins. Act, does not deal with procedure at all. It neither shows how the Court can be moved to stay a suit nor how it can be moved to set aside a stay. For procedure we murt go to the Civil Procedure Code, and if we do so there is no difficulty, for all a plaintiff has to do is to make an application to the Court to take the next step in the proceedings, when the Court will consider whether there remains any objection to further preceeding. It has been contended that the Judge has exercised a discretion with which we should not interfere. We are unable to agree. In accordance with the decision in *Meghraj* v *Virbhandas* (1), he was bound to proceed with the suit and decide it on its merits.

The application is therefore allowed. The Judge of the lower Court should

(1) A. I. R. 1924 Sind 122=17 S. L. R. 30.

proceed with the suit according to law. Costs to be costs in the cause

V.S /R.K. *Application allowed.*

A. I. R. 1929 Sind 206

PERCIVAL, J. C., AND BARLEE, A. J. C.

Jhamandas—Applicant

v.

Mt. Bibi Aishan and *others*—Opponents.

Privy Council Appln. No. 107 of 1926, Decided on 19th March 1929.

(a) Limitation Act, S. 12 (3)—In application for leave to appeal only time required in obtaining copy of decree can be excluded and not time in getting copy of judgment.

Subsection (3), S. 12, does not apply to an application for leave to appeal but merely to appeals from decrees The time requisite for obtaining copy of judgment can be excluded in addition to time for obtaining a copy of the decree only in cases where a decree is appealed from or sought to be reviewed. Therefore in an application for leave to appeal the law permits exclusion only of the time occupied in obtaining copy of the decree and the applicant is not permitted to deduct time required for obtaining copy of a judgment *A. I. R. 1925 Sind* 60, *Ref., A. I R.* 1928 *P C* 103, *Dist* [P 206 C 2]

(b) Limitation Act, S. 5—Negligence by pleader's clerk is not sufficient cause within meaning of S. 5 where party is negligent in making enquiries.

Where the applicant has been negligent in leaving the matter in the hands of his counsel without making any enquiry about his application for four months he is not entitled to the benefit of S. 5. Negligence on the part of the pleader's clerk is negligence on the part of the party and is not sufficient cause within the meaning of S. 5. 7 *S.L.R.* 207, *Rel. on.* [P 207 C 2]

(c) Limitation Act, S. 12—Decree not drawn up—Still application for copy must be made to save limitation.

The fact that a decree has not been drawn up is no sufficient reason for not applying for a copy of the decree . 1 *S. L. R.* 71, *Rel. on.* [P 208 C 1]

T. G. Elphinston—for Applicant

Tolesing Khushalsing—for Opponents 1 and 2.

Barlee, A. J. C.—This is an application for permission to appeal to the Privy Council against the decision of a Bench of this Court in First Appeal No 14 of 1919 The judgment of this Court was delivered on 29th April 1926. Thereafter, on 6th May, application was made for a copy of the judgment. On 17th September an application was made for a copy of the decree The application for permission to appeal to the Privy Council was not made till 15th October, 5½ months from the date of the judgment against which it is desired to appeal. The time allowed for making an application for permission to appeal to the Privy Council is 90 days. But this can be extended by the addition of the time requisite for obtaining a copy of the decree under S. 12, sub-S. (2), Lim. Act, provided that the application for a copy was made before the expiry of the period of 90 days. In fact, as I have said, the application for copies was not made within 90 days, but was actually made 51 days after the expiry of that period. Prima facie, then the application for leave to appeal is time barred.

Mr. Elphinston seeks to bring his application within time by deducting, under S. 12, sub-S. (3), Lim. Act, the time requisite for obtaining a copy of the judgment, and, in the alternative he asks us to exercise the discretion given us by S 5, Lim. Act, and, to excuse the delay which was due to a mistake made by his clerk.

Subsection (3), S 12, however, does not apply to an application for leave to appeal but merely to decrees. It runs:

" where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded. "

And it has been held in the case of *Nur Mahomed* v *Hassomal* (1) that in computing the period for an application for leave to appeal to the Privy Council S 12, Lim. Act, only allows the deduction of the time occupied in obtaining a copy of the decree under 12, Lim. Act It is there stated by Raymond, A. J. C :

" The words used in both these Cls. 2 and 3 are perfectly plain and unambiguous, and the use of the word 'also' in Cl. 3 clearly manifests the intention of the legislature that the time requisite for obtaining a copy of the judgment can be excluded in addition to the time for obtaining a copy of the decree, only in cases where a decree is appealed from or sought to be reviewed. Therefore, in an application for leave to appeal the law permits exclusion only of the time occupied in obtaining a copy of the decree. Whatever be the intention of the legislature in establishing the distinction, there is no doubt that the distinction exists and it is not open to us to circumvent it or nullify the effect of the section "

Since then, the application is not permitted to deduct the time requisite for obtaining a copy of the judgment, it follows that his application for a copy of the decree was made after the expiry of

(1) A. I. R. 1925 Sind. 60=17 S. L. R .306.

the period of 90 days allowed him for his application for leave to appeal to the Privy Council, and that by that time the latter application was time barred.

Mr. Elphinston has urged, however, that the case which I have cited as an authority for this Court has been overruled by the Privy Council in *Jujibhoy N Surty* v. *T. S. Chettyar* (2) The facts of that case were as follows:

The appellant had filed a suit on the Original Side of the High Court of Rangoon which was dismissed and he presented an appeal to the Appellate Side of that Court The appeal was apparently out of time, and he sought to bring it within the period of limitation by deducting the time requisite for procuring copies of the decree and judgment To this it was replied that it was not permissible to deduct the time necessary for obtaining a copy of the decree, since by the rules of the High Court of Rangoon, the appeal could have been presented without annexing the two documents. The question, then, was whether, in view of the fact that the High Court of Rangoon, in exercise of the powers conferred on them by S. 122, Civil P C., had annulled O. 41, R. 1, Civil P. C , so that it was no longer necessary for a party to annex to his petition of appeal a copy of the decree appealed against it was permissible for an appellant to deduct the time requisite for obtaining the copy of the decree. The High Court decided against the appellant and held that his appeal was time barred. But, on an appeal to the Privy Council their Lordships, decide that in view of the grammatical construction of sub-R (2) which expressly states that an appellant can deduct the time requisite for obtaining a copy of the decree appealed from, the appellant could not be deprived of that right by an alteration of the Civil Procedure Code. In effect their Lordships decided that the power given to the High Court by S. 122, Civil P C., to amend O. 41, R 1, did not empower them to amend S 12, Lim. Act. This decision cannot be useful to the learned counsel for two reasons. In the first place, it is a decision on the meaning of Cl (2), S. 12 and not of Cl. (3) and secondly it is a direct decision that a statute must be interpreted literally according to its grammatical meaning, and that, when its grammatical meaning is plain, Courts are not allowed to interpret it, so as to give effect to what they think may have been the intention behind it. It is really, therefore, an authority against the position taken up by the learned counsel for in the present case what we are asked to do is to decide that Cl. (3) though it refers only to decrees, must be held to be applicable by implication to applications for leave to appeal also.

In other words, we are asked to amend it by inserting after the words "decree" the words "or on application for leave to appeal." The decision of the Privy Council cited by the learned counsel forbids us to interpret the section in any such way. It, therefore, follows that S. 12 can be of no use to the applicant and that his application is time barred

Learned counsel has asked us to exercise in favour of his client the discretion given us by S. 5, Lim. Act But it does not seem to us that this is a case in which we can equitably exercise that discretion in his favour: The delay is one of 51 days and it is not negligible, and it cannot be said that there was no negligence on the part of the applicant himself. He left the matter in the hands of his counsel, whose clerk made a foolish mistake · and for four months he appears to have made no inquiry about his application Had he been diligent in keeping in touch with his counsel, that mistake could have been rectified in time, Every case of this nature must be decided on its merits Nevertheless we can look to the judgments of this Court for guidance, and I find that in this Court negligence on the part of the clerk has been looked as negligence on the part of a party. I need only quote the case of *Allahdadshah* v *Mukadum Amin Mohomed* (3). In that case an appeal was barred by seven days and the delay was due to an oversight on the part of a pleader's clerk. Nevertheless the Court refused to admit that negligence of a pleader's clerk was a sufficient cause within the meaning of S. 5, Lim. Act. In the present case there has been a delay of 51 days and it appears to me that the applicant is even less entitled to indulgence.

(2) A. I. R. 1928 P. C. 103=6 Rang 302=55 I. A. 161 (P. C.).

(3) [1914) 7 S. L R. 201=24 I. C. 977

For these reasons, it appears that the application for leave to appeal to the Privy Council is time barred and I would, therefore, dismiss it with costs.

Percival, J. C.—I wish to add a few words.

I quite agree with my learned colleague that the law regarding the exclusion of time in the case of this nature is as laid down in the case of *Nur Mahomed* v. *Hassomal* (1) which ruling is not merely the law, which prevails here and which we are, therefore, obliged to follow, but which to my mind very clearly lays down the reason why a copy of the judgment is not necessary. My learned colleague has already pointed out that this is not overruled by the case of *Jijibhoy N. Surty* v. *T. S Chettyar* (2). The main distinction between the two cases is that *Nur Mahomed* v. *Hassomal* (1) deals with an application for leave to appeal, while *Jijibhoy N. Surty* v *T. S. Chettyar* (2) was a case of an appeal itself from a decree of a High Court on its original side to its appellate side. It is clear, therefore, that the time taken for obtaining a copy of the judgment cannot be excluded in this case.

However, there was one other point which was raised by the learned counsel for the applicant, to which a reference may be made. It is that he contends that in this instance it was impossible for the applicant to file his application in time because the decree had only been drawn up just about the time when the application was filed. The applicant, he contends was unable to get a copy of the decree, because the decree was not drawn up. It is true that there was considerable delay in drawing up the decree, because a number of lands were involved, and it took some time for an inquiry to be made, as to which were the particular lands which were to be mentioned in the decree. The matter was referred to the learned pleaders for the parties, and the decree could not be drawn up until after these details had been settled. There, however, was no reason why an application should not have been made for a copy of the decree. It is evident, I think, that the fact that a decree has not been drawn up is no sufficient reason for not applying for a copy of the decree. If a ruling on that point is required, it is to be found in *Lakhoomal* v. *Joomremal* (4) referred to to by the learned pleader for the respondents, and in subsequent cases. In that case it was laid down that:

"Where a decree is not prepared and signed for several days after passing of the judgment, the appellant is not entitled to exclude the period of such delay, unless he has put in an application for a copy of the judgment and decree."

Now in the present case the judgment was delivered on 29th April 1926 but no application for a copy of the decree was made till 17th September 1926, which, as mentioned by my learned colleague, is 51 days after the period of limitation was over.

One further point may be mentioned regarding the excuse of delay under S. 5, Lim. Act. I quite agree with my learned colleague on this point; but it may be further noted that the affidavit put in on behalf of the applicant on the point was not put in till 26th April 1928. The applicant, in my opinion, should have stated at the time of making an application why the application was not time barred, as it appeared to be on the surface. The hearing of the application was originally fixed for early in 1928, and it was not till after the limitation point wastaken on behalf of the respondent that this affidavit was put in. It may be observed also that in the affidavit no reason for the delay has been given except the statement of the counsel's clerk:

"It seemed to me that it was useless to file an application for a certified copy when the decree had not been prepared."

I would just add that the hearing of this application has taken a considerable time, but the delay is due to the deaths which have occurred amongst the parties to this application, and to the request by the learned counsel for a later hearing of the application.

As long ago as 23rd December 1927, this Court passed an order:

"Postponed till 3rd February. The matter to be treated as urgent as it is a Privy Council appeal."

So far as this Court was concerned, every endeavour was made to dispose of the application as soon as possible.

I, therefore, agree with my learned colleague in the order proposed by him.

R.M./R.K. *Application dismissed.*

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(4) [1907] 1 S. L. R. 71.

A. I. R. 1929 Sind 209

PECEIVAL, J. C., AND RUPCHAND, A.J.C.

Kodumal Jethanand—Plaintiffs—Appellants

v.

Bulchand Gurmukhdas—Defendant—Respondent

Second Appeal No. 21 of 1926, Decided on 14th May 1928.

(a) Dekkhan Agriculturists' Relief Act, S. 22—"Agriculturist" means agriculturist at the date of attachment or sale.

The words "immovable property of an agriculturist" in S. 22 prima facie refer to a person who is an agriculturist at the date of the attachment or sale of his immovable property. [P 209 C 1]

(b) Dekkhan Agriculturists' Relief Act, S. 22—Judgment-debtor not agriculturist at trial of suit—Acquiring that status since passing of decree—He gets benefit of S. 22 at execution proceedings.

Where a judgment-debtor who has failed to establish his status as an agriculturist at the trial of suit, claims the benefit of S. 22 in execution proceedings, and successfully shows that he has acquired the status of an agriculturist since the decree, he gets the benefits of S. 22: *A. I. R.* 1927 *Bom.* 492 (*F.B.*), *Rel. on.*; *A. I. R.* 1925 *Sind* 86, *Expl.* [P 210 C 1]

G. A. Kikla—for Appellants.

Javhermal Vilaitrai—for Respondent.

Rupchand, A.J.C.—The short question raised in this appeal is whether it is open to a judgment-debtor to claim in execution proceedings the benefits of S. 22, Dekkhan Agriculturist's Relief Act on the plea that since the date of the decree passed against him he has acquired the status in agriculturist within the meaning of the Act.

The "words immovable property of an agriculturist" in that section prima facie refer to a person who is an agriculturist at the date of the attachment or sale of his immovable property as the case may be. It has, however, been argued that the Act was intended to afford relief to bona fide agriculturists and that it could never have been intended to help unsuccessful traders to defeat or delay their creditors by acquiring the status of agriculturist in execution proceedings and our attention is invited to the facts of this case which affords typical example of the manner in which the defendants-respondents are attempting to take an undue advantage of the provisions of the Act.

The defendants were sued in the Small Cause Court, Bombay, in respect of their trade debts. They pleaded that as they were agriculturists residing at Mirpur Khas in Sind, that Court had no jurisdiction to entertain the suit. They failed to establish their status as agriculturists, and a decree followed. Shortly after the decree was transferred to the Court at Mirpur Khas they applied under the provisions of S. 22, Dekkhan Agriculturists' Relief Act, that as they were agriculturists their immovable property was immune from attachment or sale. The trial Court rejected this plea in limine. On appeal the learned District Judge has remanded the case to the trial Court to determine whether the defendants had aquired the status of agriculturists since the decree, and if so to afford them relief. It is against that order that the present appeal has been filed. The result is that for the last four years the decree has remained unexecuted.

There is a good deal to be said in favour of the view advanced by the learned pleader for the plaintiffs. But the question for us to answer is not what the legislature meant, but what its language means and we have to abide by the words of the section without attempting to reform it according to the supposed intention of the legislature, or attempting to exclude cases which fall within its express meaning in order to make the law reasonable: *Huriomal* v. *Hazarisingh* (1).

We can find nothing in S. 2 which contains the definition of an agriculturist to limit the applicability of S. 22 to those cases only when the person claiming relief was held in suit to be entitled to the benefits of an agriculturist and it is not within our province to interpolate those words into the section.

The question, whether a person who was an agriculturist at the date of his arrest though not at the date of the decree sought to be executed could claim the benefit of S. 21 of the Act, recently came up before the Full Bench of the Bombay High Court in *Maneklal Girdharilal* v. *Mahipatram* (2). After reviewing the somewhat conflicting de-

(1) A. I. R. 1925 Sind 49=18 S. L. R. 19 (F.B.).

(2) A. I. R. 1927 Bom. 492=51 Bom. 454 (F.B.).

cisions on Ss. 15-B, 20 and 21 of the Act, which are to a certain extent cognate sections dealing with the powers of the Court to afford certain reliefs to agriculturists in execution proceedings, it was held that the material date for the determination of the status of an alleged agriculturist was the date of the attempted arrest. But by reason of the definition of the term "agriculturist" in S. 2 (2) of the Act, that determination may also benefit the determination of his status at the date when the liability arose At p. 1116, Crump, J., said:

"Section 21 is plainly designed to protect the agriculturist. That is the policy of the Act. It can be read as enabling the agriculturist to claim protection when a judgment-creditor seeks to arrest or imprison him in execution of money decree. That indeed is the meaning of the word used. I have not yet found any practical difficulty in so interpreting it. If that is the meaning, the party claiming protection must show that he at the date of the attempted arrest or imprisonment was an agriculturist. Therefore he must show that he is within the definition contained in S. 2 of the Act. He may be either an agriculturist within the general definition contained in S. 2 "first" or he may come under the special and inclusive definition in S. 2 "secondly" which is also applicable as S. 21 forms part of Ch. 3. Thus though the question of status arises for consideration at the time of the proposed arrest or imprisonment, the answer may have to be given with reference to the time when the liability was incurred. And the latter date would in the case of an application for execution, be the date of the decree."

In my opinion, the same reasoning equally applies to S. 22 of the Act.

It is rather unfortunate that a defendant should have the advantage of avoiding arrest and the sale of his immovable property by pleading on the one hand that he was an agriculturist at the date of the cause of action or by showing that he was held to be an agriculturist in the decree though he had since ceased to be an agriculturist, and on the other by pleading that he was an agriculturist at the date of the arrest or the sale of property though he was not an agriculturist before such date. But the remedy lies with the legislature. It has been repeatedly pointed out that the Act is badly drafted, that in several respects it goes far beyond its preamble, that since the enactment of the Usurors Loans Act, Act 10 of 1918, much of it is out of date, that the time of the Courts is wasted in trying issues of status raised by dishonest defendants and that the Act is at present doing more mischief than good. But so long as the Act remains on the Statute Book, in its present form, it is the duty of the Court to give effect to it.

Our attention has been invited to the case of *Lawrence Phillips & Co.* v. *Nazareth* (3), where sitting as a single Judge I gave effect to the plea that it was not open to the defendant to prove that he was an agriculturist at the date of the suit having failed to raise that plea before the decree was passed against him. It is sufficient to observe that in view of the Full Bench case in *Manekkal Girdharilal* v. *Mahipatram Mansukharam* (2) with which we agree, the the decision in the *Nazareth's* case is of academic importance only In that case the question whether under S. 21, the status of the defendant was to be determined at the date of his arrest was not seriously pressed, nor was any attempt made to prove that since the decree the defendant had acquired the status of an agriculturist. The head note reads as follows:

"Wherein suit falling under Cl. (w), S. 3, Dekkhan Agriculturists' Relief Act, the defendant does not expressly raise the plea that he is an agriculturist and as ex parte decree is passed against him without examining the parties required by Ss. 7 and 12 of the said Act, the Court must be deemed to have decided by necessary implication that the defendant was not an agriculturist, and the defendant could not be permitted in execution proceedings to raise the plea that he was an agriculturist at the time when the ex parte decree was passed against him."

So far as it goes it appears to be un objectionable but is of no substantial help to a judgment-creditor in securing the arrest of a debtor who is as a matter of fact an agriculturist at the date of his arrest.

For those reasons we dismiss this appeal but make no order as to costs.

Percival, J. C. — I agree. I also agree that an amendment of the Dekkhan Agriculturists' Relief Act is desirable.

V.S./R.K. *Appeal dismissed.*

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(3) A. I. R. 1925 Sind 86=19 S. L. R. 247.

A. I. R. 1929 Sind 211

BARLEE, J. C. AND KALUMAL, A. J. C.

Secy. of State—Appellant.

v.

Gurmukhdas and *another*—Respondents.

First Appeals Nos. 51, 52 and 54 of 1928, Decided on 6th August 1929.

Limitation Act, S. 5—Distinction must be made between Government and private person under S. 5

In considering an application for extending period fixed by law for presentation of appeal a distinction must be made between Government and a private person. Though any delay is evidence of laches in the case of a private individual, the same cannot be said of Government and so delay can be condoned if it is inevitable. [P 211 C 2]

T. G. Elphinston—for Appellant.

Kimatrai Bhojraj—for Respondents.

Order.—We have to deal with three applications on behalf of Government for the extension of the period fixed by law for the presentation of appeals 51, 52 and 54 of 1928. All these appeals have been made against an order of the District Judge, Hyderabad, in a land acquisition enquiry, in which he consolidated three distinct matters. This judgment was delivered on 29th March 1928, and a compared copy was given to the Government Pleader on 17th April. He had applied for it even before the judgment was delivered. The appeal period was 90 days and expired on 27th June and the appeals were filed on 27th July 30 days late. Government sanction had not been received in Sind until 14th July when the time limit had already been passed.

Mr. Elphinston, who has argued this case for the Government Pleader, has pointed out that had the Government Pleader Nawab Shah applied for certified copies of the order and bill of costs, which is a necessary part of it, the appeals would have been in time as the appellant would have been entitled to deduct the whole period from 4th April, when costs were deposited to 17th July on which date the copy of the bill was prepared. But this is not a legitimate argument for, if we are to consider what might have happened, we must not forget that but for the negligence of a copyist the copy of the bill might have been ready by 19th April, if not earlier and the appellants would have been able to deduct no more than 21 days. What we have to see is what was the real cause of the delay and whether there are circumstances which entitle the appellant to indulgence.

In view of the fact set out by the Government Pleader in his application we think that we must allow the appellant the extension which he asks for. The Act makes no distinction between Government and a private individual but it is obvious that in considering an application under S. 5 a distinction must be made. A private person has only himself to consider and must be presumed to be familiar with every aspect of his case. Government has to consider the public interest and cannot be expected to know the fact of each individual case They require time for inquiry and consideration before taking action and must consult the local officers, to whom they cannnot delegate their powers. It follows that a time which may be ample for a private litigant may be none too great for Government. Further there are difficulties in connexion with Sind cases which probably are not felt in any other province. We think, then, that though any delay is evidence of laches in the case of a private individual, the same cannot be said of Government. And in the present case, since it appears that the matter was treated urgent by the Government Pleader at the outset, and by the Remembrancer Legal Affairs at the last stage we are inclined to think that there was no delay except such as was inevitable, in view of the number of hands through which the papers had to pass. Accordingly we condone the delay and accept the appeals as in time. This decision of course leaves open the question whether the appeals 52 and 54 which were not accompanied by certified copies of the award are inadmissible on that account.

Costs to be costs in the cause.

P.N./R.K. *Application granted.*

A. I. R. 1929 Sind 212

RUPCHAND AND BARLEE, A. J. Cs.

Abdul Rahman and *others* — Appellants.

v.

Haji Mahomed Idris and *others*—Respondents.

First Appeal No. 42 of 1924, Decided on 23rd April 1929.

(a) Mahomedan Law—Partition—No custom alleged that they had adopted Hindu Law—Claim must be decided under Mahomedan Law.

There is no such thing as "joint family property" amongst Mahomedans and in the absence of any allegation much less proof that according to an immemorial custom the parties had adopted the principles of Hindu Law the Court is bound to apply the principles of Mahomedan Law in determining the claim for partition : *A. I. R.* 1922 *Sind* 41 and 38 *Mad.* 1099, *Rel. on.* [P 214 C 2]

(b) Mahomedan Law—Manager of joint property acquiring new property in his own name—Such property cannot be joint unless there is an agreement between himself and other co-owners.

A Sunni Mahomedan died leaving three sons and one daughter. The eldest son continued to manage the joint property and his name was recorded in the Record-of-Rights as the manager of joint property. Subsequently he acquired new property in his own name and in the name of his son. All the members of the family lived and messed together. The manager died leaving his one brother, sister and sons.

Held that in order to succeed in getting a share of the properties subsequently acquired by the manager in his own name it was incumbent on the other co-owners to have averred and strictly proved that new properties were acquired and possessed by the manager either under an express or implied agreement on behalf of himself and other coheirs and that he had agreed to account for them in respect thereof. The mere fact that the parties lived and messed together was not a necessary evidence of such implied agreement as in Hindu Law : 38 *Mad.* 1099 and *A. I. R.* 1922 *Sind* 41, *Ref.* [P 214 C 2]

(c) Adverse possession—Co-owner's possession is not adverse unless there is disclaimer by open assertion of hostile title—Entry in revenue papers or non-enjoyment of produce is insufficient.

In order that possession of one co-owner may be adverse to the other, there must be on the part of the co-owner setting up adverse possession a disclaimer of the other's right by an open and unequivocal assertion of a hostile title. Mere entry of name in the revenue registers is insufficient, and mere enjoyment of the produce is equally insufficient : *A. I. R.* 1928 *Mad.* 652 ; *A. I. R.* 1928 *Rang.* 95 and *A. I. R.* 1921 *Sind* 177, *Rel. on.* [P 215 C 2]

(d) Evidence Act, S. 101 — Burden of proof—Co-owner alleging breach of trust against another co-owner—Burden of proof lies on co-owner alleging—Trust Act, S. 90.

Where a co-owner of property wants to take action against other co-owner for breach of trust under S. 90, Trust Act, it is incumbent on him to allege and prove as a fact that the other co-owner by availing himself of the position of a co-owner had gained an advantage in derogation of his rights : *A. I. R.* 1916 *P. C* 227, *Ref.* [P 215 C 2]

(e) Bombay Land Revenue Code (as amended by Act 6 of 1901), S. 56—Effect of amendment on the grant of fallow-forfeited land to co-owner—Such grant is personal.

The grant of fallow-forefeited land to only one of several co-owners of join property subsequent to 1901 is in the absence of any other circumstance a grant to him personally and this is more so in survey numbers granted on restricted tenure [P 215 C 2]

T. G. Elphinston—for Appellants.

Gopaldas Jhamatmal and *Tahilram Maniram*—for Respondents.

Rupchand, A. J. C.—This appeal arises out of a suit filed by plaintiff-respondent 1 for partition of property. The following tabular statement shows the relationship of the parties :

(For tabular statement see p. 213.)

The plaintiff instituted this suit in the first instance only against defendants 1 to 5 claiming one-third share in the property left by Haji Mahomed, that subsequently acquired by Haji Umer in his own name and in the name of his son Abdul Rahman defendant 1. He ignored all the family relatives and based his claim for his share in all the property which Haji Umer died possessed of on the allegations contained in paras. 4 and 6 of the plaint which are as follows :

"4. That these properties continued joint and undivided in the hands of the plaintiff and his brothers and as Haji Umer father of defendants 1 to 4 was the eldest member of the family, the agricultural land was entered in his name in the Record-of-Rights but, the plaintiff, Haji Umer and Ali Guhar all remained in joint occupation of the land, and used to get it cultivated and enjoyed its produce."

"6. That after the death of Ali Guhar the plaintiff and Haji Umer deceased continued in joint occupation of the land and on the strength of that land took some land from the Government and also purchased some land from the produce thereof. As Haji Umer was the eldest member of the family he got his and his eldest son Abdul Rahman's name entered in the khata, but all the land continued joint and undivided property and all the parties continued to have it cultivated and jointly enjoyed the produce of it, and they continued joint in food, messing and estate up to this day."

Defendants 1 to 5 pleaded that there was a partition between the sons of Haji Mahomed shortly after his death, that the parties have been separate in every way except that after the death of Ali Guhar, Haji Umer had brought up Hidayutallah as his son, that the plaintiff's claim to such property as was left undivided was statute barred, that the plaintiff had no claim whatsoever to the property subsequently acquired by Haji Umer and defendant 1, and that the members of the family were necessary parties to the suit. In consequence of the last plea defendants 6 to 12 were joined as parties to the suit. They have supported defendants 1 to 5.

The property which Haji Umer died possessed of consists of the following :

(i) Agricultural lands and building sites purchased by him in his own name and in the name of defendant 1 ;

(ii) Cash about Rs. 30,000 and other moveable property of considerable value :

(iii) Agricultural lands which have continued in his possession from the days of Haji Mahomed ;

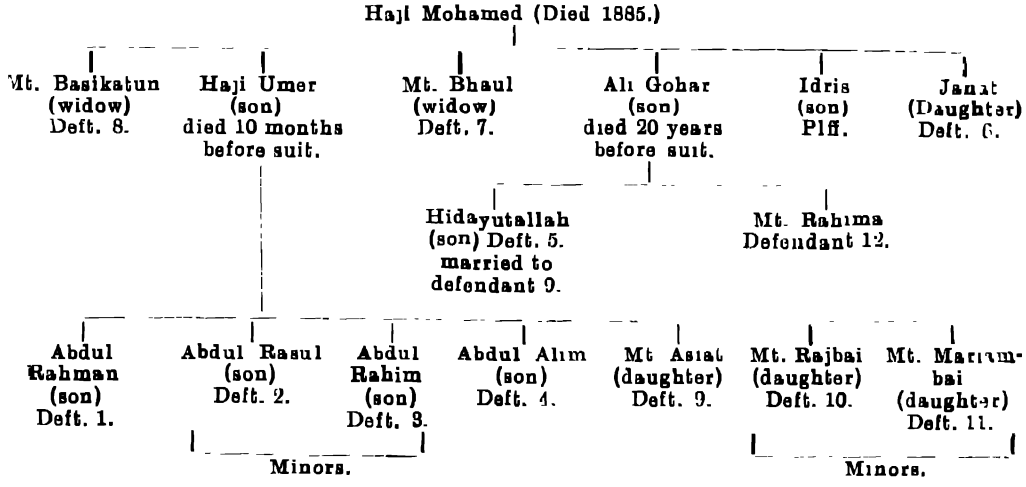
(iv) Agricultural lands which were fallow-forfeited and regranted to him ,

(v) Agricultural lands which formed the frontage of Haji Mahomed's lands and were granted to him ;

(vi) Alluvial lands granted to him in lieu of certain katcha lands held by Haji Mahomed on a temporary lease which had been eroded by the river.

The learned Judge below upheld the contentions of the plaintiff except as to his share in the property. He held that the proper legal share which the plaintiff was entitled to was not one-third but 2/7th only and accordingly passed a preliminary decree in favour of the plaintiff for partition and possession of that share in all the aforesaid properties. It is against that decree that defendants 1 to 5 have come to us in appeal. Now, with regard to the question whether there was a partition between the plaintiff and defendants 1 to 5 after the death Haji Umer, Mr. Elphinston has frankly admitted that there is no sufficient evidence to prove it. We accordingly accept the finding of the lower Court on that point. With regard to the rest of the case, we are afraid we cannot accept the finding of the learned Judge below except in respect of item 3, nor can we accept the reasoning on which he has proceeded.

Though at one place the learned Judge has observed that the expression "join



family," "joint messing" and "joint residence" freely used by the witnesses in their evidence cannot be accepted in the sense in which they are understood under the Hindu Law, he has fallen into a very patent error in holding that as on the death of Haji Mahomed the property he died possessed of was entered in the revenue records in the name of Haji Umer as manager of the family and as Haji Umer had obtained possession thereof in his capacity as manager and had not renounced his managership up to his death, all the property which he died possessed of must be deemed to have been acquired and possessed by him on behalf of himself and the other heirs of Haji Mahomed. The learned Judge has not applied his mind to the claim of the plaintiff in respect of each item of the property in dispute separately In deal-

ing with items 1 and 2 he has assumed that Haji Umer acted as the agent of his coheirs merely and solely because he got possession of the lands on the death of Haji Mahomed and got them transferred in his own name in the revenue records as representing them, and has observed as follows :

"If we once accept the position that throughout the various transactions Haji Umer acted as the agent of the plaintiff, as I have done, it is obvious that plaintiff will be entitled to a share in all such acquisitions whether in the name of Umer or his son. For, admittedly he handled all the income and no independent source to provide him with funds, has been proved in the case. It is contended that even as a manager, Haji Umer as a co-owner was not a trustee for the rest of the family and therefore all the property acquired by him which was not original ancestral property should not be held to have been so acquired for the benefit of the family. It is pointed out that he used to take up contracts and acquired wealth to which the family would not be entitled. The position that a manager is not a trustee for the other members of the family who constitute him as such, may be conceded to the extent that he would not be called upon to render a strict account of the income and the expenditure . . . . . The fact of Umer's taking up some contracts may be held established but the more important point with regard to this is whether he gained or lost upon such contracts. That point has not been handled and the burden of proving gain lay on the defendants. That burden has not been discharged. That being so, the only reasonable inference that can be raised is that the acquisitions were with common funds from the profits of the lands originally held and the plaintiff would be entitled to share in such acquisitions."

In our opinion this is applying the principles of Hindu Law with a vengeance. Even according to the Mitakshara Law the plaintiff would have been called upon to give prima facie proof that the property acquired by Haji Umer was joint family property although the plaintiff might have in that case been able to discharge the burden by proving that Haji Umer was the manager of the joint family and possessed a nucleus from which he could have acquired that property. The plaintiff was fully alive to the necessity on his part to prove that there was a nucleus of the joint property in the possession of Haji Umer from which he could have made his subsequent acquisition. He accordingly stated in the plaint that the deceased had left moveable property and cattle of considerable value He, however, failed to establish it and the income, if any, out of agricultural lands was in no way sufficient to warrant the inference that it formed a nucleus of the subsequent acquisitions by Haji Umer. But apart from this, the learned Judge was not dealing with the case of a Hindu family. He was dealing with the case of a Mahomedan family pure and simple. There is no such thing as "joint family property" amongst them. *Mohideen Bibi* v. *Mear Saheb* (1) And in the absence of any allegation much less proof that according to an immemorial custom the parties had adopted the principles of Hindu Law, the learned Judge was bound to apply the principles of Mahomedan Law in determining the claim of the plaintiff: *Vazir* v. *Dwarka Mal* (2). No question could therefore possibly arise that items 1 and 2 were acquired and possessed by Haji Umer on behalf of all the heirs

Apart from the fact that there was no proof that Haji Umer possessed emoluments accruing from the lands of Haji Mahomed sufficient to acquire items 1 and 2, he could not be said to have held such emoluments as the agent of his coheirs or to have purchased from such emoluments properties as their agent. In order to succeed in getting a share of the immovable properties subsequently acquired by Haji Umer and the cash and moveable property he died possessed of, it was incumbent on the plaintiff to have averred and strictly proved that such properties were acquired and possessed by Haji Umer either under an express or implied agreement on behalf of himself and the plaintiff and other coheirs, and that he had agreed to account to them in respect thereof. The learned pleader asked us to read para. 6 of the plaint in a manner as to show that an implied agreement was pleaded by him, and has argued that there is evidence in support of it. We have gone through the evidence very carefully and we cannot find anything in it to suggest that any implied agreement was either set up or proved All that we have from the witnesses on behalf of the plaintiff is a general statement that the parties lived and messed together, and that all the properties were joint, that is to say, evidence which might fairly have been

(1) [1915] 38 Mad. 1099=32 I. C. 1002.
(2) A. I. R. 1922 Sind 41=16 S. L. R. 193. (F.B.).

given in support of a case of parties governed by Hindu Law. Furthermore the evidence adduced on behalf of the plaintiff is not convincing. It is too vague in its nature and is of persons who are deeply interested in the plaintiff. On the other hand, the evidence adduced by the defendant is more reliable and consists of respectable men, one of whom was Mr. Shersing, a Deputy Collector for a number of years in the district where the lands were situated. It is clear from his evidence that he was given to understand by the plaintiff himself that he had been living separately from Haji Umer for a number of years before his death. There is also abundant evidence to prove conclusively that the plaintiff and Haji Umer had independent business each on his own account, Haji Umer taking up fish and forest contracts and agricultural leases on his own account, maintaining a separate banking account of his own in which he had such a large sum of money as Rs. 30,000 and keeping separate accounts with diverse people in his own name and that the plaintiff took some small petty contracts on his own account, maintained separate accounts with Banias and lived more or less a poor life and at times worked as a hari.

On the evidence we have no doubt that for a number of years the plaintiff had been excluded from the enjoyment of his ancestral lands. The plaintiff's case therefore both on the allegations as contained in para. 6 of the plaint as also on the further ground, assuming that it had been alleged that there was an express or implied agreement between the parties in respect of subsequent acquisitions must fail. We accordingly hold that the plaintiff has no claim whatsoever either to the cash of Rs. 30,000 or the other moveable property left by Haji Umer deceased or the lands purchased by him in his own name or in the name of his son. The plaintiff's case in respect of all these properties therefore fails. With regard to the lands which were originally owned by Haji Mahomed and continued to be in the possession of Haji Umer up to his death, the case of the plaintiff stands on a different footing. He and Haji Umer were co-owners thereof and the defendants had to prove that the plaintiff had lost his rights therein by adverse possession. Now, it is well settled that in order that possession of one co-owner may be adverse to the other, there must be on the part of the co-owner setting up adverse possession a disclaimer of the other's right by an open and unequivocal assertion of a hostile title : *A. I R.* 1928 *Madras* p. 652 ; mere entry of name in the revenue registers being insufficient : *Than Gyaung* v. *Ma Lun Baw* (3) and mere non-enjoyment of the produce being equally insufficient : *Mt. Dhaghari* v. *Mt. Khatun* (4) In the present case not only there is no evidence of a disclaimer of the title of the plaintiff, but we have a clear admission contained in Exs. 189 to 192 suits filed by Haji Umer in the year 1904 and 1912 that the plaintiff was a co-owner with him in certain survey numbers which had been inherited by them and some of those survey numbers are the subject matter of the present suit. The present suit was filed in 1921. No question can therefore possibly arise that Haji Umer had acquired an exclusive title to them by adverse possession. The plaintiff is therefore entitled to a share therein.

The burden of proving his claim to items 4 to 6 was equally on the plaintiff and he has failed to discharge it. S. 56, Bombay Land Revenue Code as amended by Act 6 of 1901 has placed fallow forfeited lands disposed of (a) by sale on account of the defaulter, (b) by restoration to him of the said lands, (c) by grant to strangers, and (d) by reservation as Government waste lands on the same level. The grant of fallow forfeited land to Haji Umer subsequent to 1901 was, in the absence of any other circumstance, a grant to him personally, and this was the more so in the case of survey numbers granted to him on restricted tenure. In order to attract the applicability of S. 90, Trust Act, it was incumbent on the plaintiff to allege and prove as a fact that Haji Umer by availing himself of the position of a co-owner had gained an advantage in derogation of the rights of the plaintiff. If Haji Umer had intentionally allowed the survey numbers to be forfeited in order to obtain a grant from Government in his own name it would have been another matter. In that case, probably on the

(3) A. I. R. 1928 Rang. 95.
(4) A. I. R. 1922 Sind 177=16 S. L. R. 25.

strength of the decision in *Deo Nandan Prasad* v. *Janki Singh* (5) the plaintiff might have succeeded in getting a share therein. But that is not the case here. On the other hand, if the plaintiff's case was that Haji Umer had, as a matter of fact, applied for grant of fallow forfeited survey numbers on behalf of himself and on behalf of his cosharers it was incumbent on the plaintiff to place on record sufficient materials to prove that case. All that we have on the record are: (a) the ijazatnamas granted by Government, (b) the kabuliats executed by Haji Umer in favour of Government, and (c) certain entries in the revenue records prior to 1914 which contain in the words "mukhyakhatedar."

Now, the ijazatnamas are clearly made out in the name of Haji Umer and do not help the plaintiff. The kabuliats are on a printed form which a grantee is required to execute whether the grant be made to him in his personal capacity or on behalf of himself and others The same form is required to be executed by a manager of a Hindu joint family in his capacity as such and a non-Hindu. It is for the protection of Government and purports to bind the grantee and his present and future co-occupants to pay Government assessment and to be bound by the terms of of the grant. No inference can therefore be drawn one way or the other in consequence of the kabuliats having been executed by Haji Umer that he obtained the grants on behalf of himself and the plaintiff. The entries in the revenue registers showing the name of Haji Umer all appear in registers maintained by Government prior to 1914 that is prior to the amendment of S. 135, Bombay Land Revenue Code. In the new register kept after 1914, Haji Umer is shown as the sole khatedar. The tapedar has explained that the expression "mukhya khatedar" was after that date confined to entries relating to lands possessed by members of a joint Hindu family and that in the case of non-Hindus the names of all the co-occupants in each survey number were maintained in the registers. The entries exhibited by the plaintiff do not therefore help him.

The learned pleader has stated that the plaintiff was not in a position to adduce further evidence as the applications alleged to have been made by Haji Umer are said to have been destroyed. But if the plaintiff has delayed in bringing his case to Court, he has to thank himself for this evidence not being forthcoming. Under the circumstances, we are afraid we cannot allow the plaintiff a share in any of the fallow forfeited lands which have been regranted subsequent to 1901. The case of the plaintiff with regard to mohag and alluvial lands granted in lieu of eroded lands is still weaker. None of the co-owners had any right to mohag lands being granted to them. Assuming that certain mohag lands were granted to Haji Umer, they were granted to him in his own right and not in his right as co-owner of the lands possessed by him. It is also clear from the evidence that the katcha lands were held on a temporary lease and if such lands were eroded no presumption can arise that other lands which were granted on similar temporary leases were granted by Government to Haji Umer in lieu of the eroded lands The plaintiff's case therefore fails in respect of the property in suit except in respect of lands possessed by Haji Mahomed and lands fallow forfeited and regranting prior to 1901 and which have continued to remain in the possession of Haji Umer.

We therefore vary the decree of the lower Court and pass a preliminary decree in favour of the plaintiff only in respect of those lands In view of the above finding, the parties have put in the following consent application showing what survey numbers have to be partitioned between the parties and there will be a decree accordingly :

The following survey Nos. to be partitioned. All are in Deh Shahpur : S. Nos. 3, 4, 48, 49, 50, 90, 94, 95 and 160,"

"If S. No, 25, Deh Shahpur, has been in the possession of Haji Umer and the defendants after him since the death of Haji Mahomed or if this S. No. was fallow forfeited and regranted before 5th October 1901, and has been in the like possession ever since, and still in possession of the defendants, this number also should be partitioned."

"In addition to the above, the S. Nos. in suit in Dehs Kabjo Kharijani and Savri are to be partitioned and no others."

The plaintiff will also be entitled to mesne profits on his share in the above lands from the date of suit till parti-

(5) A. I. R. 1916 P. C. 227=44 Cal. 573=44 I. A. 80 (P. C.).

tion, but he will have to account for the allowance which he has received unde the order of this Court pending the disposal of this appeal from the other side.

In the end Mr. Gopaldas has contended that as pending the appeal one of the sisters has died and as the plaintiff is her sole legal representative, he should also get her share. On the other hand, Mr. Elphinston has contended that a deed of gift was executed by the sister in favour of defendant 1, and that therefore the plaintiff has no claim to her share. We are afraid we cannot go into this question at this stage but we leave it open to the trial Court to adjudicate upon these adverse claims on a proper application being made in that behalf. With regard to costs, we think that taking into consideration the fact that the plaintiff has succeeded only in a very small part of the claim put forward by him he should bear his own costs and in addition thereto bear half the costs of the other throughout

M.N./R K. *Decree modified.*

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* A. I. R. 1929 Sind 217

BARLEE, J. C. AND KALUMAL, A. J. C.

Thakurdas and *another*—Appellants.

v.

Topandas and *others*—Respondents.

First Appeal No. 17 of 1926, Decided on 29th July 1929.

*** (a) Transfer of Property Act, S. 3—Attestation of witnesses—Writer of mortgage-deed and Sub-Registrar are attesting witnesses—Transfer of Property Act, S. 59.**

The writer of a mortgage-deed, who deposes that after he had written the document, the executant admitted the contents of the deed and signed it, and the Sub-Registrar who authenticates the mortgage-deed after the executant has acknowledged his signature, are both, for the purpose of proving a document attesting witnesses within the meaning S. 3. *A. I. R.* 1921 *Cal* 208, *Rel. on.* [P 218 C 1]

(b) Hindu Law—Joint family business—Business started by Hindu manager is not ancestral business—Use of minor's share in trade cannot make minor a partner.

A business started by a Hindu manager of a coparcenary is not an ancestral business in which his minor sons are interested, even if it be started out of ancestral funds. The trade must be ancestral or at any rate it must be a trade in which all the members of a joint family have interest; merely by using a minor's share in trade a father or other manager cannot make the minor a partner and liable for trade debts: 34 *Bom.* 72, *Rel. on.* [P 219 C 1, 2]

Dipchand Chandumal for Appellants.

Tolasing K. Advani and *Kimatrai Bhojraj*—for Respondents.

Judgment.—The plaintiff-appellants sued to recover Rs. 6,861-14-0, which they claimed was due to them from defendants-respondents 1 and 2 on a mortgage executed by defendant 1 for himself and his minor son defendant 2 in favour of Jhamandas defendant 9, the mortgage having been legally transferred to them the plaintiffs by the original mortgagee.

Defendant 1 raised several pleas principally that the mortgage-deed had not been executed for the benefit of his family Defendant 2 who was represented by the Nazir of the Court as guardian ad litem, pleaded that his father defendant 1 had no right to mortgage his share in the ancestral properties, that the money had been borrowed for hazardous speculations, and that the alleged debt was not an antecedent debt He pleaded ignorance of the mortgage.

The principal issues with which we are now concerned were Nos. 5 and 8.

The learned First Class Sub-Judge has held on issue 5 that it has not been proved that defendant 1 executed the mortgage in suit, and on issue 8 that the defendant 2 is not liable for the amount in suit. He has held that defendant 1 is personally liable for the debt, and has made a personal decree against him for the amount claimed with costs and interest.

In appeal the first question we have to decide is embodied in issue 5 of the lower Court and the question raised in this issue is whether the document in suit created a mortgage, that is to say, was it signed by defendant 1 and attested as required by S. 59, T. P. Act. S. 59, T. P. Act, requires the attestation of two witnesses and the learned Sub-Judge following the Privy Council case of *Shamu Patter* v. *Abdul Kadir* (1), rightly decided that the attestation of a mortgage-deed within the meaning of the section must be made by the witnesses signing their names after seeing the actual execution.

In this case the evidence is that they signed without seeing the execution and accordingly he has held that the deed did not amount to a mortgage. But,

(1) [1912] 35 Mad. 607=16 I. C. 250=39 I.A. 218 (P.C.).

since he decided the point, the law has been changed by Acts 27 of 1926 and 10 of 1927, which provide that "attested" means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or has received from him a personal acknowledgement of his signature, but it shall not be necessary that more than one of the witnesses shall have been present at the same time.

Thus it must be shown that there has been attestation by two witnesses, and the mode of proof varies. Against an executant nothing is required except his admission. Against other parties one of the attesting witnesses must be called and examined unless (a) the document be registered and (b) execution not specifically claimed. This is the effect of S. 68, Evidence Act, as amended by Act 31 of 1926. In other cases the execution can be proved by any legal evidence. In the present case the document is registered, it purports to have been attested by two witnesses and there has been no specific denial of execution, so all that we have to see is whether in the circumstances of the case it is proved that Topandas executed it and acknowleged his signature to the attesting witnesses. The evidence consists of the depositions of the writer and of one attesting witness Manghumal. The former has deposed that after he had written the document Topandas, defendant, admitted the contents and signed it, and that the attesting witnesses were called later. Manghumal says that he attested at the instance of defendant 1.

This appears to us to be sufficient. After so many years it cannot be expected that Manghumal could remember the exact words used, but his impression was that Topandas asked him to attest his signature, and that amounted to a personal acknowledgement, especially as we know independently from the writer that it was his signature. Half the requirements of S. 59 are thus satisfied, and the other half are satisfied by the writer's signature on the document: for though he signed as writer and not as a witness he was in fact a witness of the execution. This is the view taken by the Calcutta High Court in *Jagannath Khan* v. *Bajrang Das* (2). The Allahabad and Patna Courts have taken a different view, but with respect we think that the Calcutta view is sound and equitable. In any case the document bears also the signature of the Sub-Registrar made at the time of registration and this also satisfies the requirements of the present law, for if the executant was the man who acknowledged the signature before him the Sub-Registrar was an attesting witness On this point I think that the evidence of the executant himself is sufficient. He has deposed that he went before the Sub-Registrar and there can be no doubt on the subject. It follows that it has been proved that the document was executed by defendant 1, and attested by at least three witnesses; and it is, therefore, a mortgage-deed.

The only other question is whether the document binds the share of defendant 2 who was at the time of execution a minor and member of the family of defendant 1. On this point we have heard a very interesting legal argument, but before discussing the legal aspect of the case I must discover the facts. The father of Topandas (defendant 1) was a money lender, and Topandas went to Bokhara for trade and on his return after his father's death started trading in grain. He suffered losses and borrowed money. It is proved by evidence both oral and documentary that he used to do forward business but there is nothing to show that this business amounted to gambling. It has frequently been ruled that "forward" transactions, though necessarily speculative, do not necessarily fall within the definition of gambling and no authority is needed on this point. It is also in evidence that he used to drink and play cards, but it has not been proved that the debt in suit was contracted for drink or gambling of this sort. The questions of fact which have been debated at the Bar are whether the grain business was ancestral and whether Topandas incurred the debt in suit to pay antecedent debts, or at any rate whether the lender Jhamandas made enquiries and was assured that the money was required for the payment of antecedent debts.

The first question presents no difficulty. One witness only has said that the father of Topandas was a grain merchant, but it is clear from the rest of the evidence that Topandas started dealing in grain after his father's death, with

(2) A. I. R. 1921 Cal. 208=48 Cal. 861.

the money made by him abroad and the money left by his father. On the second point there is no reliable evidence. It was for the plaintiff the mortgagee's assignee to prove that the money was wanted to pay debts, or at least that the lender made adequate enquiry and was satisfied that this was the borrower's object. He has merely proved that Topandas was in debt. This is the opinion of the learned Sub-Judge, and it has not been denied that he was in debt. But there is no clear evidence that any debts were actually paid off out of the mortgage money and the learned Sub-Judge has not believed Jhamandas's statement that he made enquiries. In this obviously he was correct. There is nothing in the document about debt or enquiries; and since the only object of such enquiries is to safeguard the lender, the silence of the document seems to us to be conclusive. Normally all that a lender is interested in, is the sufficiency of his security, and if Jhamandas made enquiries he must have done so to satisfy himself that Topandas was justified in mortgaging his son's share of the family property If he had done so it is inconceivable that he would have neglected to see that the deed embodied a recital of the debts to be paid off. Moreover, considering the nature of the business there is no probability that Topandas required the money to pay his debts. The accounts that have been filed show that he was obliged from time to time to pay earnest money to bind contracts in "futures"; in fact within 15 days of this loan he paid out Rs. 6,600-0-0 to witness Tarachand, Rs. 600 0-0 on account of deposit and Rs. 6,000-0-0 on account of deposit of vaida commodity. Naturally a man who deals in " futures " will require ready money for his business, and it is at least as likely that he borrowed the Rs. 5,000-0-0 in suit for the future business as to pay past debts; in fact it is more likely as we know that he used the Rs. 6,600-0-0 mentioned for his trade and we do not know that he paid any debts.

On these facts the claim of the plaintiff to a mortgage charge on the share of the minor coparcener in the mortgaged property must fail. A business started by a Hindu manager of a coparcenery is not an ancestral business in which his minor sons are interested, even if it be started out of ancestral funds. It is stated by Dr. Gour (Hindu Code Edn 1919 p. 575) that

" it is only when the family as a whole or through any of its members continues an ancestral trade out of its joint family funds that it is subject to the law of the joint family necessarily accommodated to that of partnerships."

The trade must be ancestral or at any rate it must be a trade in which all the members of a joint family have entered: vide *Raghunath* v. *Bank of Bombay* (3), which is still an authority on this point and no authority has been cited for the startling proposition that, by using a minor's share in trade, a father or other manager makes the minor a partner and liable for trade debts.

It follows from this that the money borrowed for the purpose of the business started by Topandas was not money borrowed for a family purpose. To establish the right of Topandas to mortgage his minor sons' share it was, therefore, necessary for the plaintiff to prove that he used the money to pay his antecedent debts. This principle has been laid down in innumerable cases and I need only cite those of *Sahu Ramchandra* v. *Bhupsing* (4) and *Brij Narain* v. *Mangal Prasad* (5).

The appeal must, therefore, fail as against the minor defendant, in view of the findings that the loan was not for family necessity or to pay antecedent separate debts of the father. The only question that remains is what sort of decree should be made. We are asked on the one hand to make a conditional decree under O. 34, R. 6, against the father's share and against the son's share in the event of the proceeds of the sale of his share being insufficient and the authority of *Kandasami* v. *Kappa Mooppan* (6), is relied on The ground for this demand is that, though the son's share is not bound by the mortgage, he will be under a pious obligation to pay the balance of the mortgage debt qua debt unless it is illegal or immoral. In this case, however, though the defendant pleaded that the debt was of that nature, the lower Court has recorded no findings

(3) [1910] 34 Bom. 72=2 I. C. 173=11 Bom. L. R. 255.
(4) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126 (P.C.).
(5) A. I. R. 1924 P. C. 50=46 All 95=51 I.A. 129 (P.C.).
(6) [1920] 43 Mad. 421=38 M. L. J. 209=11 M. L. W. 221=55 I. C. 320=(1920) M.W.N. 181.

on the point. We think it best to leave this question to be decided when it arises in execution rather than to remand the case which is an old one.

Order.—In view of these findings the decree of the lower Court is modified. Plaintiffs are given the usual preliminary mortgage decree against defendant 1's interest in the property with costs. No order as to minor's costs of this appeal.

V.S./R.K. *Order accordingly.*

A. I. R. 1929 Sind 220

RUPCHAND AND BARLEE, A. J. Cs.

Santdas Gobindram—Appellants.

v.

Secy. of State—Respondent.

First Appeal No. 150 of 1925, Decided on 14th May 1929.

Railways Act, S. 57—S. 57 modifies the rule that carrier must stop goods on notice by consignor—Railway Company acting under S. 57—Contract Act, S. 99 has no effect—Railway failing to observe both Contract Act. S. 99 and Railways Act, S. 57—Demurrage cannot be claimed from consignee.

The rule that upon a consignor informing a carrier that he is an unpaid vendor and requesting him to stop the goods in transit, the latter is bound to do so, is modified by S. 57, which gives to the railway administration the right to ignore the notice and to make delivery to the consignee of goods. A railway administration may accept notice from the consignor of goods to stop the goods delivered in transit, or it may act under S. 57, in which case there is no stoppage in transit as defined in the Contract Act, S. 99. But if the railway administration fails to act under the provisions of the Contract Act in giving effect to the notice of stoppage in transit and likewise fail to act under the special provisions of S. 57, they will have to take the consequences upon themselves and are not entitled to claim any demurrage from the consignee: *Ex parte Golding*, 13 *Ch. D.* 628; *Tigress* Case, 32 *L. J. Adm.* 97 and *A. I. R.* 1916 *P. C.* 7, *Ref.* [P 222 C 1]

Srikisendas H. Lula—for Appellants.

T. G. Elphinston—for Respondent.

Rupchand, A. J. C.—The facts of this case are hardly in dispute. A waggon load of tooria seed was despatched from Jhandialla railway station to the plaintiffs at Karachi. The railway receipt which is dated 1st March 1923, was made out in the name of the plaintiffs both as the consignor and the consignee of the goods, and the railway receipt forwarded to them by one of their servants. On or about 6th March, one Jwalamal Nathumal of Jhandialla claiming to be an unpaid vendor of the goods requested the Station Master Jhandialla to stop the goods in transit. He claimed to be the person who had actually handed over the goods to the Station Master for despatch. Thereupon the Station Master, Jhandialla, sent the following telegram to the District Traffic Superintendent, Karachi:

"Detain delivery of 174 bags tooria R. R. No. 70665 of 1st March 1923 as desired by Jawalamal who tendered forwarding note in favour of Seth Gobindram Santram the sender and consignee: Station Master."

The reply sent by the Distric Traffic Superintendent, Karachi, has not been exhibited, but its purport appears sufficiently from the letter sent by him to the plaintiff on 20th March, to which I shall presently refer. On 16th March, the waggon arrived at Karachi, but it was not put along side the plinth of the plaintiffs for the purpose of being unloaded. In answer to the plaintiffs' letter protesting against non-delivery of the goods, the District Traffic Superintendent wrote a letter dated 20th March, which is as follows:

". . . . . I beg to inform you that it is admitted that the invoice and railway receipt showed your client as consignors and consignee Santdas Gobindram, but the fact still remains that the goods were tendered at Jhandialla for despatch by entirely a different party Jwalamal Nathumal who had also presented the forwarding note. The railway is therefore quite justified in withholding delivery of the goods in transit under the instructions of the said party since he declared that he is an unpaid vendor. In this connexion I would like to draw your attention to S. 57, Railways Act, 9 of 1890. I have, however, served the seller (unpaid vendor) with a registered notice to produce a Court's certificate or injunctions in support of the detention of goods and stoppage of delivery to the invoiced consignee within 15 days. Until the expiry of the period prescribed in my notice, I regret, I cannot allow delivery to your client. In case the seller (unpaid vendor) fails to comply with the notice served on him, I will issue instructions for delivery being made to your client on the distinct understanding that all charges including demurrage, wharfage etc. due to the railway will be recovered at the time of delivery of goods. In this connexion I draw your attention to Ss. 55 and 56, Railways Act. 'As regards deterioration, damage etc. to goods, I reiterate that the railway is under no circumstances responsible for the same, since the delivery has been withheld under the instructions of the seller of the goods who is an unpaid vendor."

As the result of a subsequent interview by the plaintiffs' pleader with the District Traffic Superintendent, the plaintiffs took delivery of the goods on 24th March under protest and on payment of Rs. 406 as demurrage which was said to have accrued between 16th and 24th March.

Thereafter the plaintiffs instituted this suit for recovery of (a) Rs. 406-2-0 paid as demurrage ; (b) Rs 233-5-9 said to be loss due to short weight, and (c) Rs. 220-11-0 said to be loss due to depreciation of goods during the period of detention The learned trial Judge dismissed the suit.

Several interesting questions of law have been argued on both sides. But the question appears to me to be one of fact pure and simple.

Taking the case of the defendant at its best, I am prepared to assume that Jawalamal was an unpaid vendor, that he had exercised the right of stoppage in transitu and had given notice to the defendant in that behalf. The question arises whether the railway administration accepted such notice as valid and acted upon it,

If they had done so, their obligation to deliver the goods to the consignee under the railway receipt was at an end. They were in that case bound to deliver the goods according to the directions of the unpaid vendor. In that case it would have been equally within their province to claim a lien on the goods for demurrage and for wharfage as the case may be accruing due from the date of the goods having been stopped in transitu up to the date on which the unpaid vendor made arrangements to take delivery of the goods from the railway : *Booth Steamship Co.* v. *Cargo Flot Iron Co.* (1).

In the present case, the claim of the railway administration would have been for demurrage, and not for wharfage, that is to say, claim for compensation for undue detention of the waggon, treating it as a profit-earning chattel : *G. W. Ry. Co.* v. *Phillips* (2) But the railway administration were doubtful about the rights, if any, of Jwalamal Nathumal over the goods and were evidently not prepared to accept the risk of treating him as an unpaid vendor. Before they had received any protest from the plaintiffs, they wrote sua motu to Jawalamal that they shall not do anything more than detain delivery for 15 days so as to enable him to obtain an order from a competent Court requiring the railway administration to withhold delivery.

This was a half-hearted measure. It was neither here nor there. At the expiry of 15 days the railway administration removed the interim embargo they had placed on the goods and gave delivery to the plaintiffs on the strength of the original contract of carriage evidenced by the railway receipt, and not in pursuance of any subsequent directions given to them by the unpaid vendor to deliver the goods to the plaintiffs as his agent. The result is that on the one hand they recognized their contractual liability to deliver the goods to the plaintiffs, on the other, they levied from them demurrage when not only the plaintiffs were in no way to blame for the undue detention of the waggon, but, were clamouring for delivery.

The learned counsel for the defendant has been unable to quote any precedent where a carrier has been able to claim demurrage resulting from his own fault in failing to give effect to a notice of stoppage of goods in transitu and requiring the alleged unpaid vendor to obtain an order from the Court in the meantime detaining the goods only temporarily.

It has been faintly suggested that the railway administration were kind to the plaintiffs in giving them delivery of the goods. We are, however, not concerned with the underlying motive of the railway administration but with the question whether their action was justified in law, and if not, what was its effect on the legal rights of the parties to the action. The procedure adopted by the railway administration in this case appears to me to be unwarranted by any principle of law.

Two plain courses were open to the D. T. S. when he received the notice of Jwalamal to stop the goods in transitu assuming that his request amounted to a valid notice. If he thought he was bound by it, he should have given effect to it unconditionally, and should not have ordered an ad interim detention of the goods. If, on the other hand, he had any

(1) [1926] 2 K. B. 570.
(2) [1908] A. C. 101=77 L. J. K. B. 306=24 T. L. R. 293=98 L. T. 319.

doubts as to its validity he should have acted under the provisions of S. 57, Railways Act, which reads as follows:

"Where any animals, goods or sale proceeds in the possession of a railway administration are claimed by two or more persons, or the ticket or receipt given for the animals or goods is not forthcoming, the railway administration may withhold delivery of the animals, goods or sale proceeds until the person entitled in its opinion to receive them has given an indemnity, to the satisfaction of the railway administration against the claims of any other person with respect to the animals, goods or sale proceeds."

This section has been enacted to meet doubtful cases like the present. If the D T. S had acted under this section and there was delay on the part of the plaintiffs in giving the required indemnity cadit questio they would have been liable for the undue detention of the goods If, on the other hand, they had furnished the required indemnity, no demurrage would have occurred As the railway administration failed to act under the provisions of the Contract Act in giving effect to the notice of stoppage in transitu and likewise failed to act under the special provisions of S. 57, Railways Act, they have to thank themselves for the consequences I hold that the plaintiffs are entitled to refund of Rs. 406 0-0.

In order to establish their claim in respect of the other two items the plaintiffs had to prove that the loss was due to detention of the goods between 16th and 23rd March. This they have failed to do. There is no question of the contents having been removed during this period. The shortage in weight is due to driage of tooria and this may equally have occurred during the first fortnight

There is no evidence to prove that there was any deterioration of goods due to sweating or due to the goods being kept closed in the waggon. There is also no evidence to show in what condition the tooria was when loaded. Even the person who analysed the goods after delivery has not been called The plaintiff's claim in respect of both these items therefore fails.

For these reasons I would pass a decree in favour of the plaintiffs for Rs. 406-0-0 with interest at six per cent per annum from date of suit to payment with costs on that amount throughout, and dismiss the plaintiff's claim in respect of the remaining two items with costs thereon throughout.

Barlee, A. J. C.— The appellants a Karachi firm, sued the defendants as representing the N. W. R. Administration, to recover money which they had been required to pay as wharfage, and also compensation for damage done to their goods, consigned by them, it was alleged, by rail from the Punjab to Karachi in 1924. The defence was that the plaintiff had not been the cosignor but that the goods had been consigned by one Jwalasingh and that they had been delayed in transit because Jwalasingh had instructed the Station Master of Jhandialla Station, the despatching station, to withhold delivery on the ground that he was an unpaid vendor.

The principal issues framed in the trial Court were these. (1) Who were the consignors of the goods in question? (2) Did Jwalamal instruct the defendant to withhold delivery? (3) If so, was the defendant justified in doing so? (4) Was the defendant entitled to claim demurrage? (actually the claim was for wharfage or rent for the use of the truck) (5) Did the goods deteriorate?

The learned trial Judge held that Jwalamal was the consignor, that he instructed the defendant to withhold delivery, and that the defendants was justified in doing so. In consequence he decided that nothing was due to the plaintiff.

These findings are attached in the petition of appeal where the principal contentions are (1) that since the railway receipt shows the plaintiff both as consignor and consignee the learned Judge erred in holding that the man who merely arranged for the despatch was the consignor, (2) that the notice given to the defendant by Jwalamal was insufficient in law to justify the stoppage of the goods Mr. Elphinston's reply on the first point is that the case is analogous to that of *ex parte Golding* (3), G. D. & Co sold goods to *K* who resold to T. G. D. & Co. shipped the goods in the name of *T* as consignor and consignee On *K*'s failure G. D & Co. were allowed the right of stoppage in transit. Apart altogether from authority it is clear on the evidence that the name written in the consignment note as that of the consignor is not necessarily that of the actual consignor and the Station

(3) [1900] 13 Ch. D. 628=48 W. R. 491=42 L. T. 270.

Master in this case was justified in regarding Jwalasingh as the consignor.

The other point, too, has no substance. It is true that a consignor, to justify his action, has to prove that his consignee is insolvent or about to become insolvent. But we are not considering not what gives a right of stoppage, but what is a sufficient notice, and it has been held in an English case that on a consignor informing the carrier that he is an unpaid vendor and requesting him to stop the goods in transit, the latter is bound to do so: *Tigress* case (4). Whether in India he is bound to obey or not will be considered later. It seems to me to be the question on the answer to which the decision of this case depends, and I need only say here, in answer to the argument now under consideration, that at least a carrier is entitled to obey such a notice

But the grounds of appeal set out in the appeal memo are not the grounds which have been taken in Court. The case for the plaintiff as now put forward is this

"Jwala Singh consigned the goods to the plaintiff, who became the owner, as soon as the carrier received possession, and on receiving the railway receipt became entitled to take delivery, on payment of any rate, terminal or other charge due from him (S. 55 I. R. A").

He was always ready to take possession, and the delay which occurred was not caused by him. In consequence the wharfage charged for detention of the waggon was not due from him, and should not have been recovered from him.

This argument seems to me to be unanswerable. The delay was due to the action of the consignor, and to justify the recovery of the charges from the plaintiff, the defendant has to show either that he was entitled to recover from the plaintiff money due from the consignor under the terms of the contract of carriage, or that he is justified in retaining the money recovered under a fresh contract. No attempt has been made to establish that the plaintiff was agent of the consignor, and I need not go into this. The rights of a holder of the railway receipt are clearly defined by their Lordships of the Privy Council in *Ramdas* v. *Amarchand & Co.* (5). So the defendant has to show that the plaintiff's rights as consignee were at an end and that he received the goods under a fresh contract.

The defendant's case, if I have understood it correctly, is briefly that the right of the plaintiff to take delivery was divested by the stoppage in transit. The stoppage was effected by the notice given by the consignor, and thereafter the defendant, as carrier, held the goods on behalf of the consignor The plaintiff was in the position of an owner whose goods had been lawfully bailed, and he was not entitled to recover them until he paid the bailee's charges. Having paid them, and having received the goods in consideration of that payment, he is not entitled to recover them.

The objection to this argument is that the District Traffic Suprintendent never in fact recognised the consignor's right to stop the goods in transit A letter addressed by him to the plaintiff is on record and it shows that he had refused to recognize the consignor's notice as effecting a stoppage in transit, and giving him a right to delivery He wrote that he had given him notice to produce a Court's certificate or injunction in support of the detention and promised delivery to the consignee in the event of the consignor failing to comply with that notice. He invited attention to S. 57, Railways Act, which provides that.

"Where any animals, goods or . . . in the possession of a railway administration are claimed by two or more persons . . . the railway administration may withhold delivery . . . until the person entitled in its opinion to receive them has given an indemnity against the claims of any other person."

Clearly he was acting under this section.

The question then is what was the effect of this procedure, that is to say, how far, if at all, the rights of the consignor and consignee were affected by it. The learned counsel for the defendant has relied on the *Tigress* case (4) which decides that the right to stop goods in transit

"means not only the right to countermand delivery to the vendee but to order delivery to the vendor."

If this is the law which applies to Indian Railway Administrations, the

(4) [1863] 32 L. J. Adm. 97=11 W. R. 538=9 Jur. (n.s.) 961=8 L. T. 117.

(5) A. I. R. 1916 P.C. 7=40 Bom. 690=43 I. A. 164 (P.C.).

plaintiff's right was divested by the notice, and the District Traffic Superintendent could do nothing to prevent the result. But with respect I venture the opinion that this rule is modified by S 57, Railways Act, which gave the District Traffic Superintendent the right to ignore the notice and to make delivery to the plaintiff. Whenever there are two persons who claim delivery, a railway administration has a right to use this section, and to decide between them which is in its opinion "entitled to possession" This seems to me to be quite inconsistent with the rule in the *Tigress* case (4) which gives a carrier no choice in the matter but makes him a bailee for the consignor. To put the matter quite shortly, it cannot be supposed that the legislature has given railway administrations leave to hand over goods to persons who have no right to take delivery, and it follows that the section by implication modifies the rule in the *Tigress* case (4). A railway administration may accept notice, in which case the consignee's rights are divested, or it may act under S. 57, in which case there is no stoppage in transit as defined in the Contract Act, and the consignee's right is kept in abeyance I would only add that the provisions in the section about indemnity does not seem to affect this view. It is one thing to say that an administration may be liable for damages to a consignor who proves that he has suffered damage, and another thing to say that the mere disobedience of his orders gives him a right to damages.

For these reasons I agree with my learned brother that the plaintiff-appellant must be allowed to recover the wharfage paid by him. He had a right to delivery, and that right was not divested by the consignor's notice. It must be assumed, therefore, that delivery was made under the contract of carriage, and he was not liable to pay anything for the delay either on his own account or on account of the consignor. I agree with the order proposed by my learned brother.

V.S./R.K. *Order accordingly.*

A. I. R. 1929 Sind 224

BARLEE, J. C., AND KALUMAL, A. J. C.

Mahomed Azim Md. Ibrahim—Appellants.

v.

Dist. Local Board and *others*—Respondents.

Misc. Appeal No. 22 of 1929, Decided on 26th July 1929.

Bombay Local Boards Act, S. 27—Illegal election—Chairman and Vice-Chairman to continue to perform duty till new Board begins to function—Balance of convenience is on the side of granting injunction and should not, therefore, be refused.

Where it is clear that if the new Board is not legally constituted its acts will be ultra vires and that if it be restrained from functioning, the duties of the Board cannot be carried on at all, the Chairman and Vice-Chairman of the old Board should continue to perform their routine duties until the new Board begins to function, and in such a case the balance of convenience is on the side of a person who has brought a suit for a declaration that the election to the Board is illegal and for an injunction to prevent the Board functioning, temporary injunction should, therefore, be granted. [P 225 C 1]

Fatehchand Assudamal— for Appellants.

Tejmal Hassamal—for Respondents.

Judgment.—A suit has been filed by one Mahomed Azim in the Court of the 1st Class Sub-Judge of, Hyderabad against the District Local Board, Nawabshah, and others apparently for a declaration that the election to the School Board of Nawabshah District was illegal and for an injunction to prevent the Board functioning. A temporary injunction was sought by the plaintiff and was given by the Court. But on the question of injunction being heard inter partes, the learned 1st Class Sub-Judge discharged it. His reason was that though he felt doubtful whether the old School Board could legally continue, he was afraid that the injunction would "paralyse in toto the machinery of the School Board," a result seriously detrimental to the interest of education and out of all proportion to the abstract sentimental satisfaction to the plaintiff of having worsted his adversaries so far.

The ground on which the plaintiff claimed that the election had been invalid was that, though he personally obtained more votes than the candidate below him, that candidate had been declared elected member because he was

a Hindu. Now there is a rule that of the elected general members two must be Hindus, therefore, the first two Hindus on the list had to be declared elected whether they obtained more votes than the plaintiff or not. But what he alleges is that the third Hindu who had no special rights was declared elected though he had received a fewer votes than himself.

It appears, then, that what the plaintiff has complained of, is not that the election was illegal but that he himself is being refused admission to the Board though he was duly elected. But the result is the same because presumably if a candidate who is not elected is appointed to the Board, the Board will not be legally constituted as required by the Act, and its proceedings will be invalid.

Naturally the learned 1st Class Sub-Judge has not given any finding on the main question as to whether the plaintiff was entitled to be appointed on the Board and obviously we cannot give opinion on the merits without prejudicing the case. The only question is whether the balance of convenience lies in maintaining the injunction, or rather re-issuing the temporary injunction or in refusing to do so. And in considering this matter, we have to consider what will be the probable result of either course of action. It is clear that if the new Board is not legally constituted its acts will be ultra vires. On the other hand if it be restrained from functioning, the duties of a Board cannot be carried on at all, for the old Board cannot function without running the same risk. But we find out though the duties cannot be performed by the old School Board, the Chairman and the Vice-Chairman of the old Board can continue to perform their routine duties until the new School Board begins to function. By Government Resolution No. 2534 dated 12th April published in the Bombay Government Gazette Part 1 of 19th April 1928, p. 714 a rule has been made under S. 27 of the Act which provides as follows :

" The term of office of the Chairman and Vice-Chairman shall be co-extensive with that of the School Board; provided that, if either of them resigns his office or ceases to be a member of the School Board a fresh election to fill up the vacancy shall be held, and provided further that, on the expiry of the term of office of a School Board, the Chairman and Vice-Chairman shall continue to perform the current administrative duties of their offices until such time as a new Chairman and Vice-Chairman shall have been duly elected and have taken charge of their duties."

We find then that though the old School Board will not be able to function their work, will not be paralysed, as supposed by the learned 1st Class Sub-Judge inasmuch as the Chairman and Vice-Chairman will be able to carry on the current duties of their office until such time as they hand over charge to the Chairman and Vice Chairman who are to be elected of the new Board when they are elected.

The balance of convonience is then on the side of the plaintiff or rather on the side of granting an injunction for in this we do not consider the plaintiff but the public benefit. We, therefore, reverse the order of the lower Court and direct that a temporary injunction should issue to be maintained until the case is decided. At the same time we suggest to the learned Sub-Judge, he should expedite the final disposal of the litigation to the best of his abilities so that the dead-lock may be removed as soon as possible. Costs of this application to be costs in the cause.

V.S./R.K. *Order reversed.*

A. I. R. 1929 Sind 225

BARLEE, J. C., AND KALUMAL, A. J. C.

Lilaram—Appellant.

v.

Tikamdas and *others*—Respondents.

Misc. Appeals Nos. 26 and 27 of 1925, Decided on 25th July 1929.

(a) Civil P. C., O. 22, Rr. 2 and 4—Word "survive" in O. 22, R. 2, is used in its ordinary sense of outliving.

It cannot be said that the word "survive" in O. 22, R. 2, is used in the technical sense and that it is meant to apply only to such legal representatives as have acquired the rights of the deceased by survivorship such as trustees and executors and not by inheritance. The word is used simply in its ordinary sense of outliving. Thus if during the pendency of the appeal one of the parties to it dies but all his nearer heirs are already on the record it is not necessary to apply under O. 22, R. 4, to join the legal representatives of the deceased as parties, but the Court need only make an entry under O. 22, R. 2 : *A. I. R.* 1929 *Mad.* 152; *A. I. R.* 1925 *Rang.* 95; *A. I. R.* 1926 *Lah.* 607, *Rel. on.*; *A. I. R.* 1925 *Pat.* 123, *A. I. R.* 1926 *Lah.* 37, *not Foll.* [P 226 C 1]

(b) Civil P.C., O. 22, R. 9—Order of abatement is appealable.

An order of abatement must necessarily be followed by a decree and even if no decree be drawn up through the fault of the Court, such order is appealable. [P 226 C 2, P 227 C 1]

(c) Interpretation of Statutes—Court.

It is not the function of a Court to speculate as to the meaning of the legislature but to determine the meaning of words used. Courts' duty is not to examine the law to see whether it is equitable or not but to interpret it giving the words their natural meaning even though the interpretation based on recognized principles leads to inequitable results. [P 226 C 2]

Tahilram Manram—for Appellant.

Tolasing K. Advani—for Respondent.

Judgment.—The respondent Tikamdas filed a suit for partnership accounts against the appellant and his father and brothers. The Joint Judge Shikarpur made a preliminary decree and Lilaram appealed against it, and again against the final decree But while the appeals were pending his father died, and the Joint Judge passed an order directing the appeals to abate because the appellant had not applied within 3 months to have the legal representatives of his deceased father put on the record In fact the legal representatives were already on the record as there were no nearer heirs than the appellant and his brothers who had been co-defendants in the suit. The question then is whether in such circumstances it is necessary for the plaintiff or an appellant to make an application under R. 4, O. 22 to join as parties, persons who are already on the record or whether it is the duty of the Court under R. 2 to make an entry to the effect that the right to defend survives to the surviving defendant or respondents alone. The answer to this question depends on the meaning of the word "survive" as used in R. 2. It is urged on the one hand by Mr Tolasing that it is here used in the technical sense, and that R. 2 is meant to apply only to such legal representatives as have acquired the rights of the deceased by survivorship such as trustees and executors, and not by inheritance; and on the other hand Mr. Tahilram contends that the word must be used in its ordinary sense of outliving. We think that this latter view is the correct one, firstly because the ordinary rule of interpretation obliges us to give the word the same meaning in R 2 as in Rr. 1, 3 and 4, and in these rules obviously it is not used as a term of art; and secondly because of the wording of R. 4 itself. It directs the Court to cause a person to be put on the record, and it is not possible for the Court to obey, if that person be already on the record. Admittedly all that a Court can do is to make a note against his name as provided by R. 2. I would add that the legislature is not likely to have framed the rules in this way, had it intended that a formal application must be made on the death of any party, were it not that such an argument and all a priori arguments of a like nature are in my opinion illegitimate. It is not the function of a Court to speculate as to the meaning of the legislature but to determine the meaning of the words used.

This appears to be the first time that this question has come before this Court directly, but there are several rulings of other High Courts on the subject and they differ. The view which we have adopted agrees with that of the Madras and Rangoon Courts and with the latest Lahore rulings. : see *Achutan Nair* v. *Manavikraman* (1), *Maung Po* v. *Ma Shwe Ma* (2), *Gopaldas* v. *Mulchand* (3). On the other side is the Patna Court; *Lilo Sonar* v. *Jhagru Sahu* (4), but the most interesting case is that of *Gurdittamal* v. *Mahomed Khan* (5), as in it alone have we been able to find any reasoned decision. The ratio decidendi was that legislature evidently intended to allow a legal representative to file a fresh pleading on being joined and that unless he is joined under R. 4 (1) he can have no right to do so under R. 4 (2). This may be correct, and it is possible that a defendant may be seriously prejudiced if on succeeding to the rights and liabilities of another he be not allowed to plead afresh. But with respect we consider that that is all beside the point. It is not our duty to examine the law with a view to seeing whether it is equitable or not. All that we have jurisdiction to do is to interpret it, and the fact that our interpretation may lead to inequitable results cannot justify us from departing from recognized principles and ignoring the natural meaning of words. It has been contended that no appeal lies to this Court, as the appellant had a remedy under O. 22, R. 9, which permits an application to the original Court in which a suit or appeal has abated to set aside the abatement. Mr. Tahilram replies that his application under R. 2

(1) A. I. R. 1929 Mad. 152=51 Mad. 847.
(2) A. I. R. 1925 Rang. 95=2 Rang. 445.
(3) A. I. R. 1926 Lah. 607=7 Lah. 399.
(4) A. I. R. 1925 Pat. 123=3 Pat. 859.
(5) A. I. R. 1926 Lah. 87.

not be considered to have been an application under R 9 since at the time, the time limit had been extended and he quotes *A. I. R.* 1924 *Lahore* 424. This appears to be correct : but there is another answer to the respondent's objection and that is that the order of abatement must necessarily have been followed by a decree and every decree is appealable. In fact it appears that no decree was drawn up, but that is the fault of the Court and the parties must not be prejudiced by the mistake of a Court. For these reasons we allow the appeals, and remand the cases for trial on the merits according to law.

P.N./R.K. *Appeals allowed.*

A. I. R. 1929 Sind 227

ASTON, A. J. C.

Asiatic Petroleum Co. (India), Ltd.—Plaintiffs.

v.

Hafiz Azeezudeen & Son and *another*—Defendants.

Suit No. 663 of 1927, Decided on 5th April 1929.

(a) Civil P. C., S. 20—Suit on contract—Court where agreement is accepted has jurisdiction.

In suits on contracts the making of the contract is part of the cause of action. The Courts within whose jurisdiction the agreements in suit are accepted have jurisdiction. [P 228 C 2]

(b) Civil P. C., S. 20—Parties cannot confer jurisdiction by agreement on Court when it does not possess it.

A clause in agreements which provided that all legal proceedings instituted by the company or the agent in connexion with or arising from the terms and conditions of the agreement were to be tried by the proper Courts in the place where the head-quarters of the company were situated would not confer any jurisdiction on a Court which had no jurisdiction. [P 229 C 2]

(c) Civil P. C., S. 20—Defendant agent of plaintiff to sell goods at *M* agreeing to make payments, be accountable and to report stock at Karachi and also agreeing to sue and be sued in Karachi Courts—All clauses read together conferred jurisdiction on Karachi Courts.

Defendant was the plaintiff's agent for the sale of the plaintiffs' goods in the district of Meerut. He had to remit sale proceeds to Karachi, to render accurate and sufficient account of sales of goods every month and to submit to the plaintiff at the end of each month an accurate report of stocks of goods belonging to the plaintiff. This agreement further specifically stated, that "the agent must submit at the end of each month to the company at Karachi" a certified statement detailing the property of the company and it contained the clause that all legal proceedings are to be instituted in Karachi.

Held : that the clauses relating to payment accountability, reporting or jurisdiction in the agreements should be read together and the Court in Karachi had jurisdiction. (1898), *A.C.* 524; *A.I.R.* 1924 *All.* 530, *Dist.* [P 229 C 2]

W. Chenney—for Plaintiff.

Kewalram Jethanand—for Defendants.

Judgment.—This is a suit filed by the plaintiffs to recover Rs. 22,935-5-1 from the defendants as due from the defendants under the agency accounts, viz., Rs. 16,127-8-5 under the Kerosine Oils Agency account, Rs. 6,264-9-11 under the Motor Spirit and Petroleum Products Agency account and Rs. 543-2 9 under the Liquid Fuel Agency account The plaintiffs's case is that the defendants acted as agents of the plaintiffs inter alia at Meerut for the sale of Kerosine Motor Spirit and Petroleum Products entrusted to them on the terms and conditions mentioned in the agreements entered into between the parties the last of such agreements being dated 24th July 1923 regarding the sale of kerosine oil, 23rd July 1923 regarding the sale of motor spirit and petroleum products and 18th March 1924 regarding the sale of liquid fuel. It was understood by the parties under the agreements that the defendants would render monthly to the plaintiffs at Karachi an account of the sales effected by the defendants and pay moneys due by the defendants to the plaintiffs at Karachi and defendants did in fact from time to time render accounts. The three agencies of the defendants were terminated in March 1927. The defendants have failed to pay Rs. 22,935-5-1 which they owe. The plaintiffs contend that the Karachi Court has jurisdiction to try the suit because the agreements were accepted at Karachi, the defendants agreed to render accounts and pay moneys due from them at Karachi and the agreements provided that all suits were to be filed in Karachi. By consent issue 2 is being tried as preliminary issue. It is as follows:

1. Has this Court jurisdiction to try the suit (covers paras. 4, 5 and 9 of the plaint and paras. 4 and 5 of the written statement). With regard to issue 2, the plaintiff mainly relies on the fact, that the three agreements were signed on behalf of the plaintiff at Karachi that under the agreements for kerosine and petrol, the agents undertook to remit all proceeds of sale to the company to render at

the end of each month to the company an accurate and sufficient account of the sales, and to submit at the end of each month a full and accurate report showing the condition of all stocks of oil and other property committed to their charge and that under the agreement for liquid fuel the agent undertook to make true payment and delivery of the sale proceeds and of all moneys and securities received by him on behalf of the company as and when required by the company and to submit to the company at Karachi at the end of each month a certified statement detailing all property of the company held by him. Reliance is further placed on the fact, that the petrol and liquid fuel agreements each contained a clause providing that all legal proceedings that might be instituted by the company or the agent in connexion with or arising from the terms and conditions of the agreement were to be tried by the proper Court or Courts at Karachi.

Defendants' letter Ex. 9 (e) dated 16th July 1923 indicates that plaintiffs on 9th July 1923 sent the defendant four copies of agreements. Defendant returned them duly witnessed together with two copies of petrol agreements signed and witnessed. The defence contend that the sending of printed agreements constituted an offer on the part of the plaintiffs which defendant accepted by signing the agreements and posting them to plaintiffs. On behalf of the plaintiffs it is contended that the sending of the agreements did not amount to an offer; it merely constituted an intimation that plaintiffs would be prepared to consider a tender or offer made by defendant on the terms mentioned in the draft agreements and that the agreements were not complete until plaintiff signed them in Karachi. Plaintiffs further contend that evidence relating to prior agreements was irrelevant, the agreements in suit being duly executed agreements in writing. Curiously enough, plaintiff in his affidavit has referred to the liquid fuel agreement as being an agreement dated 23rd July 1923. Mr. Chenny has assured me that this was a clerical error for 18th March 1924. I have verified the accuracy of this statement by referring to the agreement annexed to the plaint and marked *C* which is dated 18th March 1924; this agreement contains the clauses referred to in plaintiffs' affidavit and I am satisfied that 23rd July 1923 was a clerical error.

We have therefore on the one hand the statement in plaintiffs' affidavit that the three agreements in suit were accepted by the plaintiffs at Karachi where they were signed on plaintiffs' behalf by Mr. Hodges. This statement is not rebutted by the evidence put in on defendant's behalf. Defendant relies on an agreement entered into a long time previously, which was varied in part, e. g., as to the amount of security, by subsequent written agreements between the parties. The original agreement did not in my opinion form any part of the agreements in suit, and the circumstances in which it was entered into, in my opinion, throw no light on the question, when the agreements in suit were completed. Defendant relies on documentary evidence by the letter already referred to dated 16th July 1923 as proving that the agreements were accepted in Meerut. It is to be noticed, that the letter has no bearing on the agreement dated 18th March 1924 relating to liquid fuel, and if the letter is considered, it is clear that it lends no support to the defendant's contention, for the defendant in the letter does not treat the terms as finally settled. He has signed the agreement but in the covering letter he objects to one of the clauses in the agreement, which he has signed, and suggests an alteration, or action being taken under another clause. Plaintiffs did not agree to the proposed alteration and Mr. Hodges signed the agreement in Karachi, as it stood. In the circumstances I think the plaintiff rightly contends that the agreement was not completed until Mr. Hodges signed it in Karachi. In suits on contracts the making of the contract is part of the cause of action: see Mulla's Civil Procedure Code, 6th edn, p. 78. The allegation in plaintiffs' affidavit that the agreements in suit were accepted in Karachi is not rebutted and this Court would accordingly have jurisdiction.

With regard to the other facts relied on as giving jurisdiction the decision of the House of Lords in 1898 *A. C.* 524 shows that the mere fact, that an agent had to remit sale proceeds to a place within the jurisdiction of a Court would not suffice to give the Court jurisdiction to try a civil suit between the principal

and agent, for the obligation to "remit" is consistent with the agent having discharged his whole obligation, when he posted the cheque, draft, or bill, outside the jurisdiction, and the contract was therefore wholly performable outside the jurisdiction. The present case, however, is distinguishable from 1898 *A. C.* 524. There the plaintiff having made advances and payments to J. P. & Co. on certain shipments of goods to Pernambuco sent bills of lading with a covering letter to defendant, directing the defendant to hold the bills and property in trust for plaintiffs and to receive payment from J. P. & Co, according to the invoices, and remit the proceeds in first class Bank bills to plaintiff. In the present case the defendant was not discharging duties similar to those of a banker, to whom bills of lading and invoices are sent, nor was he dealing with the plaintiff on the pucca adhattia system, as in *Tikaram* v. *Daulatram* (1) His position far more resembled the position outlined in the judgment in *Tikaram* v. *Daulatram* (1) at p. 468 (*of* 46 *All*) He was the plaintiffs' agent for the sale of the plaintiffs' goods in the district of Meerut; he had not only to remit sale proceeds to Karachi, he had to render accurate and sufficient account sales of kerosine and petrol every month and the word "render" in the context seems to me clearly to mean deliver or cause to be delivered to plaintiff in Karachi. He had to submit to the plaintiff at the end of each month an accurate report of stocks of oil and other property belonging to the plaintiff, (the word submit is explained in dictionaries as meaning present and in the context would mean I think present to the company or their head office at Karachi)

He had to make "true payment and delivery" of sale proceeds of liquid fuel "as and when required by the plaintiff" a provision which would in my opinion constitute the plaintiffs to require payment and delivery at their head office in Karachi. He had to "submit to the plaintiff at Karachi" at the end of each month a certified statement detailing all the plaintiffs' property held by him. In *Tikaram* v. *Daulat Ram* (1) at p. 468 (*of* 46 *All.*) the learned Judges observed:

"Persons who contract with agents 800 miles away and who wish to place their agents under an obligation to pay or be sued in the foreign district must in our view be careful to provide expressly for that in the contract."

It is noticeable in this connexion, that the petrol and liquid fuel agreements each contained a clause, which provided that all legal proceedings instituted by the company or the agent in connexion with or arising from the terms and conditions of the agreement were to be tried by the proper Courts in Karachi. This clause by itself would not, of course, confer any jurisdiction on a Court which had no jurisdiction but it seems to me when read with the other clauses to throw valuable light on the intention of the parties. In fact the clauses relating to payment, accountability, reporting or jurisdiction in the respective agreements should in my opinion be read together, each agreement of course be considered separately.

So far as the wording of the liquid fuel agreement is concerned there seems to me no doubt that this Court would have jurisdiction. The phrase there, is not "remit the sale proceeds," but

"make true payment and delivery thereof as and when required by the company."

This agreement further specifically states, that

"the agreement must submit at the end of each month to the company at Karachi"

a certified statement detailing the property of the company and it contains the clause and all legal proceedings are to be instituted in Karachi. There seems to me no doubt that the intention of the parties was that the agreement was to be accountable to the company at the head office in Karachi and make such payments as were due in Karachi and sue and be sued in Karachi.

With regard to the petrol agreement the word "remit" no doubt occurs but it occurs in association with such words in other clauses in the agreement as

"render to the company accurate and sufficient account sales submit at the end of every month a full and accurate report"

and it has the same clause as the liquid fuel agreement relating to all legal proceedings. I think the intention of the parties also with regard to the petrol agreement was the same and the inference does not appear to me to be removed by the mere fact that plaintiffs did not press their claim to discount on up country cheques or granted a concession if a remittance was made in a particular manner, viz., by a payment to the Meerut

(1) A. I. R. 1924 All. 580=46 All. 465.

Bank with a request to the Bank that the money might be credited to plaintiffs' current account with the Bank at Karachi.

The kerosine agreement on the one hand does not seem to me to comply with the conditions laid down by the Allahabad High Court in *Tikaram* v *Daulat Ram* (1) at p. 468 (*of* 46 *All.*). The agent had to "remit" sale proceeds, a duty which was performable in Meerut, the language no doubt is used in association with other words in Cls. 6 and 7 viz., "render" and "submit" which convey the idea that the agent was to report and account in Karachi and the agreement lacks the provision contained in the petrol and liquid fuel agreements that all legal proceedings were to be instituted in Karachi

Had the plaintiffs case depended on the wording of the kerosine agreement alone, my finding on issue 2 with regard to the kerosine agreement would have been in the negative; for the reasons already set forth, however, my finding on issue 2 is in the affirmative with regard to all three agreements Plaintiffs to bear the costs of the hearing of this issue, care being taken that defendant does not pay costs twice over.

M N/R K. *Order accordingly.*

A. I. R. 1929 Sind 230

RUPCHAND, A J. C.

Munshilal Amansing and *another*—Plaintiffs.

v.

Bishenlal Dattaram—Defendant.

Original Civil Suit No. 626 of 1928, Decided on 2nd July 1929.

Contract Act S. 254—One suit for settlement of different partnerships of different partners does not lie—Accounts of different partnership can, however, be gone into for other purposes in one suit—Court instituting enquiry into financial relations of partners inter se—Limitation offers no bar to Court—Limitation Act, Art 106.

No suit can lie for settlement of three different partnerships consisting of different partners. But it does not follow that the accounts of different partnerships cannot be gone into in one and the same suit for certain purposes or that the statute of limitation is a bar to the taking of such accounts for all purposes whatsoever. Limitation offers no bar to a Court instituting an enquiry into the financial relations of the partners inter se at the commencement of the partnership which the Court is engaged in winding up. and for this purpose, it may be necessary to go into the accounts of a previous partnership. Thus where a partner is neither seeking any relief against the heirs of a deceased partner, nor does he ask for accounts of partnerships dissolved by their deaths being taken for the purpose or making their heirs liable, but is only asking for dissolution and settlement of accounts of the partnership, the statute of limitation is no bar: *Betjemann* v. *Betjemann*, (1895) 2 *Ch.* 474 and 3 *S. L. R.* 108, *Rel. on*; 25 *Mad.* 26, *Ref.* [P 232 C 2; P 233 C 1]

Kimatrai Bhojraj and *Tolasing K. Advani*—for Plaintiffs.

Dipchand Chandumal—for Defendant.

Judgment.—This is a suit for dissolution and for settlement of accounts of a partnership carried on at Karachi in the name and style of Dattaram Munshilal. The plaintiffs are brothers residents of Hansi in the Punjab The defendant is also a resident of that place and is distantly related to the plaintiffs.

There is hardly any dispute about the facts It is alleged on behalf of the plaintiffs that both of them and one Charanjilal who is now dead, carried on business at Hansi in the name and style of Mataram Ruriram and that in Sambat 1972 or 1915 A. D the firm of Mataram Ruriram, the defendant representing himself and the joint family consisting of himself and his sons and one Sadaram started a business in partnership which was to be carried on at Karachi in the name of Dattaram Munshilal, the shares of the parties being ten annas, four annas and two-annas respectively

The accounts of that partnership are alleged to have been settled in Sambat 1974, a few months before the death of Sadaram which took place in that year. On his death the business is said to have continued in the same manner as before. In October 1927, Charanjilal died and thereafter again the business is said to have continued on as before.

On 21st September 1928, the plaintiff filed the present suit. Paragraphs 4 to 6 of the plaint which are pertinent to the points in issue read as follows:

"4. That the said Sadaram died in 1917, when his connexion with the partnership firm of Dattaram Munshilal ceased and the partnership business was continued by the remaining partners in the same name and style, the share of Mataram Ruriram being 12-annas and defendant four annas; 5. On 5th October 1927, the said Charanjilal referred to in para. 1 of the plaint died and, therefore, his share of the assets and liabilities in the firm of Mataram Ruriram was taken over by the plaintiffs: 6. That the partnership business

of the firm of Dattaram Munshilal has continued up to this date, the share of the plaintiffs being 12-annas and of the defendant being four annas as shown in para. 4 hereof."

On 8th October 1928, the defendant filed a suit against the plaintiffs in the Court of the First Class Subordinate Judge at Hansi for settlement of accounts of the said partnership business, but made no mention therein of Sadaram or Charanjilal having been partners He averred that the two plaintiffs who are defendants in that suit and he himself carried on business at Karachi in the name of Dattaram Munshilal from Sambat 1972 up to 1st October 1928, and he wanted accounts of the partnership up to that date.

That suit being subsequent to the present suit has been stayed under S. 10, Civil P. C.

On 4th December 1928, the defendant filed his defence in the present suit denying that he had become a partner of the plaintiffs as representing the joint family consisting of himself and his sons, and pleaded that both before and after the death of Sadaram, his son Surajsingh had continued as a partner of the firm, that he himself had ceased to be a partner in the firm on the death of Charanjilal, that the sons of Sadaram and Charanjilal were necessary parties to the suit, that the suit was technically bad being in respect of three different partnerships, and that the plaintiffs were liable for certain alleged losses on several grounds specified in the written statement. He also disputed the jurisdiction of the Court to entertain the present suit.

On these pleadings the following issues were raised :

1. Did the defendant enter into partnership as alleged in para. 1 of the plaint as manager or representative of the joint family consisting of himself and his sons ?

2. Is the partnership with a firm invalid in law ?

3. What were the shares of the original partners ?

4. Was Surajsing partner of the firm during the lifetime of his father ?

5. Did Sadaram's connexion with the firm not cease on his death, and did his son Surajsing continue as a partner representing his father's share, if not, who took up the share of Sadaram ?

6. Did the plaintiffs take over Charanjilal's share in the assets and liabilities of the firm ?

7. Did Lakmichand, son of Charanjilal, continue as a partner after his father's death ? If so, what were the shares of the partners ?

8. Were the partnerships dissolved on the death of Sadaram and Charanjilal ? If so, were the partnerships carried on after their respective deaths new partnerships and can all the said partnerships be impleaded in one suit ?

9. Did the defendant inform the other partners on the death of Charanjilal that he was no more their partner and not liable for any dealings subsequent thereto or was it agreed and arranged that he would not be liable for any future dealings ?

10. Are Lakhmichand and Surajsing's heirs necessary parties to the suit ?

11. Are plaintiffs liable to pay the amount due by the firm of Ramchand Ganchiram, if any ?

12. Are the plaintiffs liable to pay the losses due on the contracts with Ramkishen Mamraj?

13. On accounts being taken what amount if any is due and to whom ?

14. General.

FINDINGS.

Issue 1 has been struck off as it hardly arises at the present stage. The question of the liability of the joint family property, if any, for payment of the debts incurred by defendant 1 is a question fit for being determined in execution proceedings.

Issue 2 —This issue has not been pressed. The partnership was not between the firm of Mataram Ruriram and others but it was a partnership between the individual members of the firm of Mataram Ruriram on the one hand and others who joined them as partners in the firm of Dattaram Munshilal. Though the share allotted to the individuals composing the firm of Mataram Ruriram was one indivisible share, there is nothing in law to render such a partnership invalid except where the total number of partners composing such new firm exceeds twenty and thereby violates the provisions of the Indians Companies Act. My finding, therefore, on this issue is in the negative.

Issue 3.—There is no dispute about the shares of the original partners and no evidence has been given to contradict the averments in the plaint. I hold that their shares were as shown in the plaint.

Issues 4 and 5.—The plaintiff Ruriram has denied that Surajsing was a partner during the lifetime of his father. He has also denied that Surajsing continued as such afterwards. He is supported by entries Exs. 5/16 and 5/17 which show that in Sambat 1981 a sum of Rs. 428-9-0 said to be due by Sadaram was debited to the vatta account as irrecoverable.

The only evidence to the contrary is that of the defendants. He is a cantankerous old gentleman, and his evidence does

not carry any weight with me. As a matter of fact, I have not called upon the plaintiffs to cross-examine him. In his anxiety to delay the settlement of accounts on which he is very probably heavily indebted, he has made certain contradictory averments in the plaint filed by him in the Hansi Court and in the evidence given by him before me. As a matter of fact, even if I were to hold that Sadaram's son continued as a partner after the death of his father for a couple of years as alleged by the defendant in his evidence, the position of the parties would be no better and no worse as will appear hereafter from the finding on issue 9. I hold on this issue that Surajsingh was not a partner in the lifetime of his father and that Sadaram's interest in that firm ceased on his death.

Issues 6 and 7.—Ruriram has sworn that as Charanjilal was heavily indebted to the plaintiffs and had left no property, they (the plaintiffs) took over the assets and liabilities of the firm of Mataram Ruriram on themselves and discharged Charanjilal's son from all liability either to the firm of Mataram Ruriram or to the firm of Dattaram Munshilal. This is a statement against the plaintiffs' own interests. It finds support in the evidence of Lakhmichand, the son of Charanjilal, a boy of about 21 years of age who was brought down to give evidence in this case. So far as the defendant is concerned, he is in no way affected by the relinquishment by the plaintiffs of their claim against Charanjilal's heir and by their agreeing to be responsible to the defendant in respect of any loss for which Charanjilal is accountable to the partnership of Dattaram Munshilal. The defendant's share was four annas as against twelve annas collectively allotted to the plaintiffs and Charanjilal, and his liability is neither less nor more than four annas in the rupee whether Charanjilal's heir continues as a partner or not. I hold on issue 6 in the affirmative, and on the first part of issue 7 in the negative; no finding is, therefore, necessary on the second part of issue 7.

Issues 8 and 10.—These seem to me the issues on which great stress has been laid by the learned pleader of the defendant in support of the several technical pleas raised in the written statement. Now, there can be no doubt that in law the partnership which was started in Sambat 1972, was dissolved in Sambat 1974 on the death of Sadaram, and that the business which was carried on by the remaining partners was a business carried on by them as constituting in the eye of the law a new partnership and that again on the death of Charanjilal in October 1927, the surviving partners continued on the business likewise as forming new partnership. It is also not open to argument that no suit can lie for settlement of three different partnerships consisting of different partners. But it does not follow that the accounts of different partnerships cannot be gone into in one and the same suit for certain purposes or that the Statute of Limitation is a bar to the taking of such accounts for all purposes whatsoever. The effect of surviving partners continuing the business without settlement of accounts after a dissolution caused by the death of one of their former partners was dealt with by the Court of Appeal in the leading case of *Betjemann* v. *Betjemann* (1). The facts of that case are that *A* and his two sons *J* and *G* carried on business in partnership from 1856 to 1886. When *A* died there were no articles of partnership and no settled accounts. After *A*'s death, *J* and *G*, carried on business as partners without winding up the other partnership and without coming to any settled accounts. *J* died in 1893 and his executrix brought a suit for account of the partnership between *J* and *G* from 1893. *G* claimed the account of the old partnership to be taken from 1856, the executrix of *J* demurring to that plea inter alia on the ground that the Statute of Limitation was a bar to such account being gone into. In dealing with that point Lindley, L. J., observed at p 478:

"The plaintiff is the executor of John; and although John and George William the two sons continued the partnership, it was, in point of law a different partnership, viz., a partnership between two. They continued the partnership account as one account, and never wound it up. They brought in all the balances, carried on the balances at the bankers, carried on the ledgers, and carried on the account without a break. Now as between persons who deal with each other upon that footing, I fail to see the Statute of Limitations has any application whatever. Notwithstanding, therefore, that the partner-

(1) [1895] 2 Ch. 474=44 W. R. 182=73 L. T. 2=64 L. J. Ch. 641.

ship was determined between the three, and that there was a new partnership between the two, there was no break in the account and the account was never brought to an end. My view is that the learned Judge misapplied the doctrine of *Knox Gye* (2), in holding as between these two brothers, who went on without a break, that the account could be considered as severed in 1896, and that there was a new cause of action arising then."

The case was followed by Bhashyam Ayyangar, J., in *Ahmsa Bibi* v *Abdul Kader Saheb* (3) and by a Bench of this Court in *Parchomal Vasandmal* v *Pamandas Alamchand* (4) In the last cited case which is binding on me, Crouch, A. J. C. has said at p. 111 .

"When a partnership is a continuing one, there is, technically a new partnership formed whenever any partner dies. On such death, each surviving partner is presumed to invest in the new partnership his share of the assets of the dissolved partnership and to take over his share of the liabilities. As soon as the new partnership is formed, each partner is personally responsible to, and has personal rights against, all the others. When such new partnerships come into existence without settlement of accounts it is necessary, when winding up, to go into the accounts of the old partnership, in order to ascertain the state of accounts as between the several partners when the new partnership commenced. Three years after the death of a partner, the law of limitation presents a bar to any suit for accounts in respect of the partnership of which he was a member , and there can be no question of granting dissolution of a firm already dissolved. But limitation offers no bar to a Court instituting an enquiry into the financial relations of the partners inter se at the commencement of the partnership which the Court is engaged in winding up and, for this purpose, it may be necessary to go into the accounts of a previous partnership."

Now the plaintiffs are not seeking any relief either against Sidaram's heirs or against Charanjilal's heirs. They do not ask for accounts of the partnerships dissolved by their deaths being taken for the purpose or making their heirs liable, and so the statute of limitation does not apply. As no relief is claimed against such heirs either, prima facie no question of non-joinder of parties arises

The plaintiff's case is that on the death of each of the said persons, the partnership was continued without settlement of accounts, that when each new partnership was formed, each surviving partner was presumed to have invested in the new partnership his share of the assets of the dissolved partnership and to have taken over his share of the liabilities.

Now the plaintiffs seek in effect for dissolution of the new partnership which was continued after the death of Charanjilal up to the filing of the present suit. Now in order to determine what share of the assets and liabilities were brought in in this new partnership by the plaintiffs on the one hand and the defendant on the other, it is necessary to go into the accounts of the prior partnership which was carried on before that date with Charanjilal as an additional partner, and for the purpose of going into the accounts of that partnership for that limited purpose, there is no bar in law to the accounts being gone into either on the ground of limitation or on the ground of Charanjilal's heirs not being on the record as parties I can quite understand that if Charanjilal had a separate share in the partnership a question might have been raised as to the liability of defendant in respect of the amount which Charanjilal had to pay, and in that case the question whether Charanjilal's heirs should be on the record or not would have required serious consideration. But in the present case, Charanjilal had no separate share and so far as the liability of the defendant is concerned, the presence of Charanjilal's heirs is absolutely unnecessary. Apart from the above, we have the evidence of Ruriram that on Charanjilal's death, the plaintiffs took over his liabilities to the knowledge of the defendant and the defendant agreed to it. It is true that the defendant has denied that he was present at the interview between Ruriram and Lakhmichand, and so far as that part of his statement is concerned, I am prepared to attach some weight to it. I was not convinced with the evidence of Lakhmichand who attempted to improve the case of the plaintiffs much further than it was necessary, and went far beyond what Ruriram had stated in his own evidence, but I am prepared to accept Ruriram's own statement that he and his brother Munshilal did take up the liabilities of Charanjilal and discharged this penniless boy Lakhmichand of all his liabilities and that they informed the defendant about it who acquiesced in the same, and allowed the business to be carried on between the plaintiffs and the defendants as partners,

(2) [1878] 5 H. L. 656=42 L. J. Ch. 234.
(3) [1902] 25 Mad. 26.
(4) [1910] 3 S. L. R. 109=4 I. C. 600.

they having the same shares as before, that is to say, the defendant having four annas share and the two plaintiffs having twelve annas share instead of the two plaintiffs and Charanjilal having that collective share. And I am supported in this very strongly by the plaint filed by the plaintiff himself where he has made no mention either of Charanjilal's share of the partnership having been dissolved at the death of Charanjilal, but he has treated the partnership as continuing up to 1st December 1928. It is hardly open to him to blow hot and cold and raise new technical pleas with the object of delaying the settlement of accounts merely and solely because he has been forestalled by the plaintiffs in his attempts to drag the plaintiffs to Hissar Court, and to have the accounts taken in this Court. If these accounts were taken in the Hissar Court he would be confronted by his own plea that the accounts could be gone into prior between the plaintiffs and the defendants and that Charanjilal's heirs and Sadaram's heirs were not necessary parties

So far as the accounts of the partnership prior to the death of Sadaram are concerned, the case of the plaintiffs is much stronger. In addition to the above arguments equally applying in respect of the accounts prior to the death of Sadaram, we have the further fact that the amount which was due by Sadaram was only a small sum of Rs. 428, and that though it was written off in Sambat 1981, the defendant never protested against it up to the filing of the suit. Perhaps it will not be necessary for the commissioner to go into the accounts prior to Sambat 1974, but if it becomes necessary to ascertain what are the assets and liabilities of the defendant which he brought into the hotchpot when Charanjilal died, and if that cannot be ascertained without going into the accounts of the partnership carried on before Sadaram's death, then I can see no reason why this account should also not be gone into. I hold on issue 8 that the partnerships were dissolved on the death of Sadaram and Charanjilal, and that the partnerships which were subsequently carried on were new partnerships in the eye of law. The suit being properly constituted for settlement of accounts of the last partnerships, it is open to the parties to go into the prior partnerships for the purpose of ascertaining the assets and liabilities brought by each partner in the new partnership. My finding on issue 10 is that Lakhmichand and Surajsingh are not necessary parties in the suit as so constituted.

Issue 9.— On this issue the only evidence is that of the defendant himself. He has flatly contradicted his own verified plaint filed in the Hissar Court and Ruriram has denied it on oath. In addition to that we have the letters of the defendant Exs. 5/12 and 5/14 where the defendant requested the plaintiffs to help him in deceiving the income-tax authorities and both letters show that the Karachi business was being carried on to the knowledge of the defendant after the death of Charanjilal. In Ex. 5/14 inter alia he has written as follows :

"What is your opinion about toorias? If you expect a rise and there is good demand from offices, and if the Europeans also expect a rise, then purchase 200 tons tooria. Pay in our account."

This letter is dated 2nd February 1928. Now no doubt the words "in our account" refer to the account of the firm of Bishinlal Dattaram, but this letter also proves that the defendant knew that the firm of Dattaram Munshilal was carrying on business in Karachi, and therefore, he asked that firm to make a contract if it was a profitable one. I have no hesitation in holding on this issue against the defendant

Issue 11 — This issue is based on para. 12 of the written statement which read as follows :

"It is further submitted that the plaintiffs are brothers being sons of the same father. There is a firm of Ramchand Ganshiram at Hansi in which the plaintiffs are also interested being partners therein. This firm of Ramchand Ganshiram had an account with the firm of Dattaram Munshilal on which there is due to the firm of Dattaram Munshilal a sum of about Rs. 40,000. This defendant submits that plaintiffs must be made to pay this amount."

As I read this paragraph the defendant's case was that as the plaintiffs were partners of the firm of Ramchand Ganshiram, they were liable to make good the loss of Rs. 45,000 due by that firm. He has given a complete go by to that written statement. I understand, his allegation at present is, that because the Karachi firm dealt with Ramchand Ganshiram who was a relative of the plaintiffs and because they did not get

his consent before opening that account, he is not liable for the same. The additional ground on which he disputes his liability is evidently that because the plaintiffs neglected to take proceedings against Ramchand Ganshiram for the recovery of the amount due by him he being their relative, they should be made responsible for the same.

Apart from the fact that all these pleas were not specifically raised in the written statement, there is no substance whatsoever in them. The defendant has admitted in his examination that the manager at Karachi had full power to transact business with any persons he liked and that he himself was never consulted when the firm of Dattaram Munshilal opened accounts with any other constituent. If, therefore, that firm opened account with any particular constituent who was their relative, the mere fact that they failed to consult the plaintiffs will not make them liable. Apart from that, it is admitted that the defendant knew about eighteen months ago that Ramchand Ganshiram was indebted to the partnership to the extent of Rs. 45,000 and still he never raised any protest or sent any notice It also does not appear that the plaintiffs have been in any way indifferent in not making recoveries. It is in evidence that they have as a matter of fact realized as much as they could by taking over the properties of that firm in the name of Munshilal and thereby reducing the indebtedness of that firm by Rs. 18,000. If Ramchand Ganshiram is a man of no means, and if, therefore, no suit has been filed against him, it can hardly be said that the defendant can avoid his liability in respect of the same. I may further point out there are some relatives of the defendant himself who are indebted to the partnership and who are impecunious, but still the defendant has not agreed to undertake their liability on his own shoulders. I hold on this issue against the defendant.

Issue 12.— This issue is based on para 13 of the written statement. It is no doubt true that in this paragraph the defendant has alleged that the Karachi firm had unauthorizedly entered into contracts with that firm, and as the plaintiffs were related to the proprietors of that firm, they should be made liable. The reasons given by me in dealing with issues 10 and 11 equally apply to the present issue, and I have no hesitation in holding on both issues also against the defendant

Issue 13.— The case will now go to the commissioner with directions to speedily proceed with the accounts after requiring the plaintiffs to file a potamel showing what amount according to them the defendant has to pay and inviting objections from the defendant against the said potamel. The Commissioner should give fifteen days' time to the plaintiffs to file a potamel and a further time of fifteen days to the defendant to file his objection to that potamel

Issue 14. — I pass a preliminary decree for accounts of the partnership and order that the defendant do pay costs up to-date, Commissioner's fee Rs. 30 to be deposited in the first instance within seven days by the plaintiffs Report within two months.

V S./R K. *Suit decreed.*

A. I. R. 1929 Sind 235

BARLEE, J. C. AND KALUMAL, A. J. C.

Parumal Thawerdas—Appellant.

v.

Abdul Rauf and *others*—Respondents.

First Appeal No. 23 of 1926, Decided on 3rd August 1929.

(a) Evidence Act, S. 68—Mortgagor, scribe and attesting witnesses dead—In view of amended definition of attestation and varied mode of proving attested document as amended by S. 68 proof of probability of execution is sufficient.

Where the executant of a mortgage-deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attestation in S. 3, T. P. Act, and to the varied mode of proving a registered document as amended by S. 68, Evidence Act, it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. [P 236 C 2]

(b) Transfer of Property Act, S. 58—Combination of possession of lands and personal covenant to pay creates simple combined with usufructuary mortgage.

A mortgage-deed began by providing that the mortgagee should take the land and repay himself both principal and interest out of the products of land; it was also provided that in the event of the crop not being enough to satisfy the whole claim the mortgagor agreed to pay an enhanced rate of interest and to pay the amount due if demanded out of his other property, there was in addition a specific provision that the creditor was to be entitled to sell the mortgaged property.

Held that the mortgage was a combination of usufructuary with simple mortgage.

[P 237 C 1]

(c) Limitation Act, Art. 132—Combination of simple and usufructuary mortgage—Suit to recover amount from mortgaged property after 12 years is barred.

Where the mortgage is a combination of usufructuary with simple mortgage, a suit to recover mortgage money from lands brought after 12 years of the execution of the mortgage-deed is barred by Art. 132. *A. I. R.* 1929 *P.C.* 139, *Rel. on.* [P 237 C 2]

Fatechand Assudamal—for Appellant.

Judgment.—This appeal raises an interesting legal point and unfortunately it has been argued ex parte We should have welcomed an appearance on behalf of the respondents.

The facts are as follows: The plaintiff sues as heir of his deceased brother Harumal on a deed of mortgage which purports to have been executed on 23rd April 1909 in favour of Harumal by Sadallah and Dost Mahomed who are also dead, as are the writer and both attesting witnesses. He seeks to recover the principal sum of Rs. 6,800-0-0 with an equal amount of interest from land which fell to the share of the joint mortgagors at a partition in lieu of the 1/3rd undivided share of the estate which was mortgaged. The defendants who are the legal representatives of Sadallah and Dost Mahomed pleaded ignorance of the transaction and denied the claim.

The learned Sub-Judge decided that it had not been proved that Sadallah and Dost Mahomed had executed the document. Secondly that the plaintiff was not entitled to recover the sum claimed from the mortgaged land or its substitute and thirdly, that his claim was time barred and he dismissed the suit with costs.

The first question for us to decide is whether it has been proved that Sadallah and Dost Mahomed executed the document and whether it is a mortgage, that is to say, was it duly attested as required by S. 59, T. P. Act. When the suit was decided, it was necessary for the plaintiff to prove not only that the mortgagors had executed the document but that their signatures had been attested by 2 attesting witnesses who were both present at the time of execution and signed the document. But the effect of the amending acts since passed, Nos. 27 of 1926 and 10 of 1927 had changed the position and all we have to see is whether each of the witnesses was present and saw the executants sign or received afterwards a personal acknowledgment from each. It is not now necessary that the witnesses should actually witness the act of signing. Further the mode of proof of an attested document has been changed by Act 31 of 1926. Up to the date of its becoming law, S. 68, Evidence Act, required that the person propounding an attested document should call at least an attesting witness if one were alive. If no attesting witness were available it was necessary under S. 69, to prove the handwriting of at least one such witness and in addition the handwriting of the executant. The new Act makes an exception in favour of registered documents provided that they are not specially denied and the amendment, to 68 covers 69 also which has to be read as a corollary to it. The result is that in the present case since there was no specified denial of execution, it was open to the plaintiff to prove the execution and attestation in any way, he liked, so long as the evidence was sufficient to satisfy the Court that the execution was so probable that a prudent man ought under the circumstances of this case, i. e., considering that all the parties and witnesses are dead, to act upon the supposition that it was executed. This being so, we find the evidence sufficient. The plaintiff has proved the handwriting of the writer and 2 attesting witnesses, and also that the Sub-Registrar satisfied himself that the executants were the men who acknowledged execution before him and in addition he has proved an admission of execution made by Dost Mahomed in a subsequent civil proceeding.

The next point decided by the learned Sub-Judge was that the mortgage was intended to be usufructuary and consequently, that since possession had never been taken by the mortgagee no mortgage existed. He treated the document as a mere agreement to mortgage and held that mortgagee had the right to sue for possession or under S. 68, for his money and no other remedy, and that both these remedies were barred by limitation. Assuming, however, that the plaintiff had the rights of a simple mortgagee none the less in the Sub-Judge's opinion his claim was time barred as his right to sue had accrued to him in 1909

when the mortgagor failed to give possession under the contract. Lastly, he held that in any case the cause of action must have accrued at latest on 1st April 1911, but I need not deal with this point as, though the deed speaks of four crops in several places, it interprets this phrase as being equivalent to 2 years.

It appears to us that the learned Judge has misinterpreted this document and that it was not a mere usufructuary mortgage but a combination of usufructuary with a simple mortgage. It begins by providing that the mortgagee should take the land and repay himself both principal and interest out of the crops of the 2 years 1909-1911, then comes a clause which provides that in the event of the crop not being enough to satisfy the whole claim, the mortgagor agreed to pay an enhanced rate of interest and to pay the amount due if demanded out of his other property. This amounts to a personal covenant and then there comes a specific provision that the creditor was to be entitled to sell the mortgaged property. But until he is paid or chose to sell the land he was to remain in possession. It seems to us that nothing could be clearer than that the mortgage was not exclusively usufructuary.

The question of limitation is left. The right to claim specific performance and the claim to recover the money on the personal covenant are barred. Both rights accrued in 1909. But it is contended that the right of sale did not accrue until 23rd April 1911 when the period of two years expired. Mr. Fatehchand's argument is that though in 1909 the mortgagee could have repudiated the contract and sued for his money under S. 68, T. P. Act, he had no right at that date to sue under the contract for the sale of the mortgaged property since by the contract it was not repayable until April 1919. He could interpret the words:

"when the money sued for becomes due in Art. 132, Lim. Act, as meaning due under the contract by which the immovable property was charged."

It appears to us that this argument cannot be supported without doing violence to the plain meaning of Art. 132, and producing a result which was never contemplated by the contracting parties. To begin with we are not entitled to add anything to a statute unless it is impossible to interpret it without an addition. Where the words are plain, effect must be given to them, without alteration, and in this case the wording is plain enough. Secondly, though undoubtedly under the terms of the contract the mortgagee was not entitled to sue for sale until the expiry of two years his agreement to wait was given on the understanding that the mortgagor fulfilled his share of the bargain and gave him the land. He cannot be held to be bound by this agreement after it was broken by the mortgagor. It follows that Mr. Fatehchand has no right to rely on the contract and must point out in the general law of mortgage some authority for the proposition that a mortgagee is not entitled to the benefit of his security as soon as he becomes entitled to repayment of his money. Naturally the learned pleader has not been able to find any such rule, on the contrary we find in the latest part of the *Bombay Law Reporter* a case on all fours with that in suit *Narsingh Partap Bahadur* v. *Mahomed Yakub Khan* (1). A money lender made an advance on the security of land on condition that he was to have possession, secure interest and a right of sale. The borrower did not give possession and he sued to recover principal and interest by sale. Their Lordships held that the mortgagor had deprived him of his security and that under S. 68, T. P. Act, the money had become payable and that a decree for the sale should be made. I quote the following words:

"It would indeed be a startling result of the legislature if in such a case as this where a default has been made of a kind which materially affects the security there existed no remedy for the immediate enforcement of the mortgage."

This remark was made because the Courts in India had held that the only relief was a suit for specific performance. The result would be even more startling here in Sind where the property of an agriculturist can only be sold in specifically mentioned mortgage, for a money decree would be probably quite useless to a mortgagee and he might have to wait for years to get either principal or interest if he could not get a decree for sale against the mortgaged property. For this reason we must reject the appeal.

V.S./R.K. *Appeal dismissed.*

(1) A. I. R. 1929 P.C. 139.

A. I. R. 1929 Sind 238

KALUMAL, A. J. C.

Francis Paul De Souza—Plaintiff.

v.

Secy. of State—Defendant.

Suit No. 278 of 1926, Decided on 12th July 1929.

(a) Railways Act, S. 77—Notice must be given to Agent and served as under S. 140—Notice to Divisional Commercial Superintendent is not sufficient.

Notice required under S. 77 read with S. 140 must be given to the agent concerned. Notice of suit against a railway company could only be served in one of the three ways described by S. 140. A notice of the claim against the railway company, even within the statutory period, to the Divisional Commercial Superintendent as per R. 6, Goods Traffic N. W. Ry. (1924) is no notice as required by the Railways Act : *A. I. R.* 1926 *Lah.* 253 (*F.B.*), *Dist* ; *A. I. R.* 1925 *Sind* 229 , *A. I. R.* 1922 *Mad.* 362 (*F.B.*), *A. I. R.* 1923 *All.* 301 and *A. I. R.* 1926 *Bom.* 138, *Ref.* [P 240 C 1]

(b) Railways Act, S. 72—Person bringing cattle to railway station for consignment—Times of running of cattle trains should be enquired by consignor.

A person bringing cattle to the railway station is bound to inquire as to the times of running of cattle trains and cannot by omitting to inquire put upon the company the obligation to forward cattle out of the ordinary course of their arrangement. [P 242 C 2]

(c) Railways Act, S. 72—Consignment of animals delivered to railway company—Death of animal in transit—Insufficient provision of food and water by consignor—Railway Company held not responsible for death of animals.

A merchant delivered a consignment of 50 pigs to the railway authorities at Delhi for carriage to Karachi. The loaded waggon left for Karachi by the first available passenger train and arrived at Karachi after a delay caused by halt at the intermediate stations for about 18 hours. The two servants of the merchant left Delhi by the same train to which the loaded waggon was attached. 35 pigs of the consignment expired in transit before reaching Karachi. It appeared from the evidence that the servants failed to provide sufficient food and water in the waggon carrying the pigs.

Held : that the servants of the railway company were not guilty of negligence or misconduct and that they did nothing that contributed to the loss of pigs. [P 242 C 2]

W. Lobo—for Plaintiff.

Chanthram D. Motwani—for Defendant.

Kalumal, A. J. C.—The present is a case arising out of a consignment of 50 pigs delivered to the railway authorities at Delhi for carriage to Karachi Cantonment on 12th March 1925. A four wheeled wagon was requisitioned from N. W. Railway and utilized for carriage of the live stock. The passenger train with this consignment left Delhi at 5-30 p.m., on 12th March 1925, reaching Samasatta at about 4 p.m., on 13th March 1925. Probably the same train after a halt of about 6 hours at this station left, carrying pigs arriving at Rohri junction on 14th March 1925 at about 7 a.m. Here as the train bringing pigs had to stop the waggon with pigs was detached and taken to a goods shed platform. Another train to which this wagon was attached left Rohri at about 7 p.m. same day. 35 pigs out of this consignment expired in transit before reaching Karachi Cantonment. One of the remaining 15 pigs it appears died at Cantonment station and two more soon after they reached the farm of the plaintiff. Events so far are admitted or may be taken as established on the evidence recorded.

The defendant's liability for this loss of 38 pigs is based on the alleged neglect or misconduct of railway servants, firstly because the goods were dispatched from Delhi without obtaining freight in advance and instructions from the consignor or without affording the consignor an opportunity of giving instructions ; secondly, because the pigs were not dispatched by a through train so as to avoid detention of 12 hours at Rohri ; thirdly, because, the pigs were loaded in a waggon not sufficiently large to accommodate the number ; fourthly because Lachman, attendant in charge of pigs was not permitted to throw out carcasses of pigs found dead at Rohri ; and fifthly, as no opportunity was given for making proper provision for food and water needed for pigs. The loss suffered by the plaintiff is value at Rs. 1,373-10-0, the details whereof are found in the memo annexed to the plaint.

The action of the plaintiff is resisted on various grounds some of which are technical. Technical pleas raised are that the suit is not maintainable, no notice as required by S. 77, Railways Act, 9 of 1890, having been given to the Agent, N. W. Railway, and that the plaintiff being neither consignor nor consignee has no cause of auction. On the merits the claim is resisted on the ground that the consignment as required on 11th March 1925, by the plaintiff's agent left Delhi on 12th March 1925, by the passenger train at about 5-20 p.m. and that the

waggon supplied at the plaintiff's agent's request having been loaded by about 12 noon, the plaintiff's men at Delhi had sufficient time to give instructions and make proper arrangements if they had desired to do so and that there was no unnecessary detention which could have been responsible for the death of the animals. Facts in para. 4 of the plaint from which inference as to neglect and misconduct is sought to be drawn have also been traversed. The defendant finally in the alternative has pleaded that the plaintiff or his agent having failed to make a declaration as required by S. 73 of the Act is debarred from claiming more than Rs. 10 for each of the animals lost, and that the claim, if allowed, should be restricted to 35 pigs and could not possibly cover the case of animals dying after they had reached their destination The plaintiff has also been put to the proof of various items comprising the claim as particularized in the memo above referred to.

On the pleadings, the following issues by Court embodying the contentions of the parties have been raised :

1. Is the suit barred for reasons given in para. 1 of the written statement ?
2. Has the plaintiff any right to sue ?
3. At whose risk was the consignment carried ?
4. How many pigs died in transit ?
5. Is the defendant responsible for the pigs that did not die in transit ?
6. Were the defendant's servant guilty of negligence and misconduct as alleged by the plaintiff ?
7. Did any of the pigs die through the neglect and misconduct of railway servants as alleged by the plaintiff ,
8. Is the plaintiff entitled to more than Rs. 10 per pig for the pigs for which the defendant is held liable ?
9. To what amount, if any, is plaintiff entitled ?
10. General.

The case has been argued at some length exhaustively, by pleaders concerned. The Court is now required to determine various points urged. It would be, I think, convenient first to dispose of two technical pleas raised embodied in issues 1 and 2.

The plea as to the plaintiff not having any cause of action is evidently based on the railway receipt wherein the plaintiff's agent Vellows is shown as consignor and consignee. The evidence adduced, however, leaves no room to doubt that the consignment was for the plaintiff and that Vellows acted merely as his agent. This plea for the defendant cannot therefore on this finding stand. Rightly, therefore, has this contention not been stressed by Mr. Choithram for the defendant. The plea, however, as to the notice being not proper needs serious consideration. The notice as required by Railways Act dated 15th October 1925, part of Ex. 21 addressed to the agent is clearly beyond six months as required by S 77, from the date of consignment. Such a notice is by S. 140, Railways Act, required to be sent to the agent by one of the three modes given there. The notice above referred to is prima facie invalid, having been sent more than six months after the goods had been consigned at Delhi to the railway for despatch.

To meet this plea which appears fatal to the plaintiff's claim, Mr. Lobo has contended that notice of the claim in question was given within the statutory period to the Divisional Commercial Officer known also as Divisional Commercial Superintendent who had been duly authorised to receive such notices by the agent as per R. 6, Goods Tariff, N. W. Ry. (1924). Such notice delivered to the officer abovesaid as held in *Debi Ditta Mal* v. *Secy of State* (1), is tantamount to a notice as required by statute to the agent under S. 77, Railways Act, read with S. 140 of the said Act This contention of Mr. Lobo, has no doubt support in this ruling in case delegation by the manager of such authority to the Divisional Commercial Officer be held proved. As a fact, Mr. Lobo's contention as far as I have understood him is not that the notice to the officer abovesaid must be deemed to have been sent by him to the agent, and that the agent should be deemed therefore to have received it within the statutory period as contemplated by S. 77 read with S. 140, Railways Act. If this is, however, his contention as remarked in *Secy. of State* v. *Bellaram Mohandas* (2), remarks at p. 28 (of 18 *S. L. R.*), the Court cannot from the fact that notice reached Divisional Commercial Officer deduce that this officer communicated the same to the Agent within the statutory period. This fact should be strictly proved and is not a matter of deduction.

(1) A. I. R. 1926 Lah. 253=7 Lah. 298 (F.B.).
(2) A. I. R. 1925 Sind 229=18 S. L. R. 25.

Accepting that the law has been correctly laid down in *Devi Ditta Mal* v *Secy. of State* (1), though the view taken there and the reasoning underlying it borrowed from *Mahadev Aiyar* v. *S. I. Ry. Co.* (3), has been doubted in *Secy. of State* v. *Bellaram Mohandas* (2), above cited, could it now be said that the plaintiff has on the evidence in this case established delegation of authority by the agent as such? All that this R. 6 relied upon by Mr. Lobo says is that any application in connexion with claims for compensation and refund of overcharges relating to Karachi Division should be made to Divisional Commercial Officer, Karachi. This rule does not at all refer to the statutory notice as required by the Railways Act. In my opinion notice required by S. 77, Railways Act, should, to be valid, be addressed to the agent. Besides R. 6, Goods Tariff, applies to goods carried by goods trains and not to live stock carried by passenger trains. To the present case the rules in Coaching Tariff apply In the Coaching Tariff there is no rule corresponding to R. 6 of Goods Tariff. In this Coaching Tariff the provisions in S. 77 are reproduced in R. 32. This makes it abundantly clear that notice required under S. 77 read with S. 140,.Railways Act has not been dispensed with so far as the agent is concerned. The case reported in *Devi Ditta Mal* v. *Secy. of State* (1) is besides the case of dead stock not live stock.

Notice of suit against a Railway Co., could only be served in one of three ways described by S. 140, Railways Act, vide: *Cawnpore Cotton Mills Co.* v. *G I. P. Ry. Co.* (4) and *G. I. P. Ry. Co.* v. *Chandu Lal Sheo Pratap* (5). This has not been done in this case, with the result that no notice could be said as required by the Act to have been given to the agent.

This finding though by itself is sufficient to dispose of the case in its entirety, I would like to deal with other issues raised on the merits as well, parties having led their entire evidence on the said issues. However, before I deal with the rest of the issues, I would like to preface my judgment on this part of the case with few remarks not out of place at this stage. (The judgment then discussed inconsistency between correspondence and statements and proceeded). With these general comments, I think it is the duty of this Court to closely examine the evidence led for the plaintiff and not accept it unless it bears unmistakeable signs of truth and reliability. The plaintiff's own evidence is not of any value, at least not of much value, as his information is solely derived from his agent Vellows and his servant Lachman.

Issues 4 *to* 7.—It is convenient to deal with these 4 issues together. The plaintiff's case is that Vellows, his agent was sent to Delhi to purchase pigs for him that he was supplied with necessary funds to meet the cost including purchase price and railway freight, that he was supplied by the Deputy Station Superintendent with a waggon to load the animals in pursuance of his requisition made on 11th March 1925, that the pigs were all loaded on 12th March 1925 by about 12-30 noon, that it was arranged with the said Superintendent that the carriage containing pigs could be attached by the passenger train leaving next morning and that the freight was demanded of him in the forenoon of 12th March 1925, but not paid till about 6 p. m. that day. It is further stated that relying on the assurance given that the pigs would be leaving by the morning train of 13th March 1925 as arranged Vellows leaving Lachman with two water buckets to look after the pigs went to Delhi City at about 1 p. m. to arrange for food and casks needed for feeding and watering the pigs, on the journey, and that on his return to the station at about 6 p m. to pay freight he was surprised to learn that the pigs had already left by the evening train. It is asserted that Vellows there and then protested against this action and left that very night by another train to catch the train carrying pigs at Bhatinda. Vellows in this depressed state of mind due to anxiety about pigs going without food and water all the way, forgot to have food for the pigs or take casks that he had ordered to be made for watering pigs. It is further said Vellows though he succeeded in catching the train carrying the pigs at Bhatinda at about 2 a. m. on 13th March 1925, yet did not even have a

(3) A. I. R. 1922 Mad. 362=45 Mad. 513 (F.B.).
(4) A. I. R. 1923 All. 301=45 All. 353.
(5) A. I. R. 1926 Bom. 138=50 Bom. 84.

look at the pigs there to see their condition that he travelled from Bhatinda to Samasatta by the same train carrying the pigs and that at Samasatta he caught Lahore Mail leaving Lachman behind to come with the pigs. This witness further asserts that he did not inquire even at this station if he could procure casks needed for watering pigs on the way.

This version of the plaintiff's case given by Vellows plaintiff's manager, it is extremely difficult for any Court to accept Comments already made are sufficient to destroy the value, if any such evidence has. Vellow's statement Ex. 10 admittedly taken down correctly at Cantonment Karachi makes no mention of the conduct complained of of railway servants at Delhi, is silent altogether about the promise by railway officers at Delhi, to send the waggon in question by passenger train on the morning of 13th March 1925. There is again sharp conflict between Vellows' statement and that of Lachman in very many important particulars. Lachman says that Vellows told him at Samasatta that he could not procuro casks at Delhi whereas Vellows' version is that he forgot all about them in the anxiety that he felt for the pigs going without sufficient quantity of food and water on account of the action of the railway authorities. Statements Exs. 9 and 10 in unmistakeable terms show that both Vellows and Lachman travelled by the same train that left with pigs on the evening of 12th March 1925. Statements made in this Court by these two witnesses are not only conflicting on this point but bear impress of falsity in several particulars. They contain many untruths and half truths more dangerous than untruths. Both these witnesses not only have shown no regard for truth, probably because they want to save their own skin, and escape the liability for loss caused to the plaintiff by their own neglect, but they created adverse impression on the Court while being examined. It is needless to analyse further this sort of evidence brimming with falsehoods.

It is urged for the plaintiff that the railway officials should have advised the plaintiff's agent to send the consignment of pigs by the morning train. It is no part in my opinion, of railways business to advise unasked the consignors as to the train or route they should send their consignments by. It is the business of consignors to acquaint themselves with rules and regulations of the railway to find out the train or route that will suit their purposes: vide *Arunachalam* v *Madras Ry. Co.* (6) remarks at p. 122.

The story told by Vellows, plaintiff's agent that he had sufficient funds to pay the freight on the morning of 12th March 1925 when the pigs were loaded, could not be true. He must have spent at least between Rs. 100 to Rs. 200 on the fare from Karachi for himself and the attendant Lachman and the food and other necessaries required for their stay at Delhi for about a week for loading the pigs etc. etc. He could not therefore be in possession of sufficient funds to pay the freight when demanded as he had not then received Rs. 1,000 remitted to Hiralal by the plaintiff.

Giving my very best attention to the evidence adduced by the plaintiff, I have not the least hesitation in coming to the conclusion that the story as to Superintendent at Delhi agreeing to send pigs by the morning train of 13th March 1925, as to the freight being paid after the pigs had as a matter of fact left the station and as to the plaintiff's agent being deprived of an opportunity to bring sufficient food and water for the pigs, is nothing but a fiction, creature of anxiety on the part of the plaintiff to snatch somehow or other a decree against the defendant. The correspondence read as a whole viewed in the light of the documents referred to above already and in the light of the comments already made, read with the testimony led for the defendant which I have no reason not to accept, has established beyond doubt that the railway servants were not in the least to blame, that the plaintiff's agent not knowing or anticipating what would happen to the pigs did ask the railway to send the pigs by the train leaving on the evening of 12th March 1925, and that both the manager and the servant of the plaintiff did leave by the train carrying pigs from Delhi. It appears to me that both these men either by reason of want of experience on their part of foresight or neglect of their duty failed to provide suffi-

(6) [1910] 33 Mad. 120=3 I. C. 931=6 M. L. T. 292.

cient food and water in the waggon carrying the pigs, and by reason of that and because of their neglect to properly look after the pigs throughout the journey, the animals suffered and died. The animals were attended to after they had left Delhi station only two times, once at Samasatta and once at Rohri.

This certainly was dereliction of duty on the part of the plaintiff's agent and his servant. There is no evidence on the record reliable to justify this Court holding that 35 pigs died at Rohri after the train had arrived there and before another train taking the pigs at Rohri station had started. It appears to me that the pigs for want of care, scarcity of food and water not supplied to them by reason of neglect on the part of the plaintiff's servant and not by reason of heat, if there was any at all, at Rohri suffered soon after they had left Delhi and continued suffering thereafter with the result that 35 of the lot died during the course of the entire journey.

Under R. 150, Coaching Tariff, the attendant who is allowed to travel free is solely responsible for the watering and feeding of the animals en route. Under R. 98, Traffic Manual, the loaded waggon has to leave by the first available train as was done in this case. By despatch order placed with the railway by plaintiff's agent Ex 11 the railway authorities are not liable for damage or loss arising from delay not caused by the negligence or misconduct of their servants. It is inconceivable therefore in the circumstances of this case mentioned here and above that the defendant could be held liable.

Before I have done with these issues, I would very briefly touch the point as to burden of proof. This point in this case loses its significance as evidence has been led by both sides. It is only when evidence is led by one side not rebutted by the other side that the question as to onus assumes importance. Even assuming, as contended, that the onus lay in this matter on the railway to prove the cause or causes of loss of animals by death, the same has been in my opinion amply discharged.

It is doubtful in my opinion that in cases of this kind before the Court where the obligation as to looking after the animals as regards their watering and food admittedly lay on the plaintiff's attendant it is incumbent on the railway authorities to prove the cause of death of the animals in question. The consignment left as held by me, by the train as asked by the plaintiff's agent or as it should have ordinarily left and that the train missed no connexion at any junction en route. It is not proved that the railway officials by any act on their part or by omission to perform any obligation that lay on them contributed to this loss of the pigs. A person bringing cattle to the railway station is bound to inquire as to the times of running of cattle trains and cannot by omitting to inquire put upon the Company the obligation to forward cattle out of the ordinary course of their arrangement: see Halsbury's Laws of England Vol. 4 foot-note under para. 64 My findings on issues 4 to 7 are therefore that the pigs died in transit, that the defendant is not responsible for the pigs that did not die in transit, that the defendant's servants were not guilty of negligence and or misconduct, and that they did nothing that contributed in the least degree to the loss of pigs in question and that the pigs did not die because of any act of commission or omission on the part of the defendent's servants.

Issue 8. There is no doubt that even if the plaintiff had succeeded in making out the responsibility of the defendant he would not have been awarded more than Rs. 10 there being no declaration as required by S. 73, Railways Act. *Issue* 9. The plaintiff is not entiled to anything whatsoever.

The result of my findings is that the plaintiff's action must fail and be dismissed with all costs

V S /R.K. *Suit dismissed.*

A. I R. 1929 Sind 242

RUPCHAND AND DE SOUZA, A J. Cs.

Emperor

v.

Alias

Criminal Ref. No. 4 of 1928, Decided on 20th March 1928, made by the 1st Addl. Sess. Judge, Hyderabad.

Criminal P. C., S. 403—Magistrate of co-ordinate jurisdiction should not entertain fresh complaint after discharge on same facts and evidence and if complainant is aggrieved by refusal of the first Magistrate

to examine witnesses as to alleged admissions of guilt he must appeal to higher Court.

Though there is no absolute bar to an accused person being again put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is a well recognised and salutary rule of law that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which are known to the complainant and on evidence which was available when the first trial was held; and so if the complainant is aggrieved by the refusal by the Magistrate who held the first trial to examine the witnesses as to the alleged admission of guilt it is his duty to appeal to the higher Court and not to have recourse to a fresh complaint being filed before another Magistrate of co-ordinate authority. [P 243 C 1, 2]

C. Lobo—for the Crown.

Judgment—The First Additional Sessions Judge, Hyderabad, has referred to us the case of *Duru* v. *Alias* with a recommendation that the proceedings taken by Duru before the Sub-Divisional Magistrate, Desert, be quashed on the ground that a similar complaint filed by him against the same accused before the First Class Magistrate, Mithi, had been dismissed under S. 253, Criminal P. C. It is clear from the deposition of the complainant that the only additional ground on which he has filed the second complaint is that during the pendency of the first complaint, the accused had approached him for a settlement and offered to pay him compensation, that at that time the accused had admitted his guilt and that though he had asked the first trial Magistrate to examine the witnesses as to the alleged admission of guilt, the first trial Magistrate had refused to do so. Now though no doubt, there is no absolute bar to an accused person being again put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is a well recognized and salutary rule of law, that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which are known to the complainant and on evidence which was available when the first trial was held. A departure from this rule is in effect an assumption by the Magistrate of the powers of the appellate Court, and is utterly contrary to sound principle.

It is abundantly clear from the statement of the complainant that there were no new facts and no new evidence had come to light after the passing of the order of discharge, and if the complainant was aggrieved by the refusal by the Magistrate who held the first trial to examine the witnesses as to the alleged admission of guilt it was his duty to have appealed to the higher Court and not to have had recourse to a fresh complaint being filed before another Magistrate of co-ordinate authority. For those reasons we accept the reference and quash the proceedings now pending against the accused Alias in the Court of the Sub-Divisional Magistrate, Desert.

P.N./R.K. *Proceedings quashed.*

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* A. I. R. 1929 Sind 243

BARLEE, J. C., AND KALUMAL, A. J. C.

K. S. Mahomed Hussain — Accused—Applicant

v

Emperor—Opposite Party.

Criminal Revn. Appln. No. 15 of 1929, Decided on 26th July 1929.

*** Criminal P. C., S. 561-A—Relevant remarks, forming reasoned basis of argument, cannot be expunged from judgment.**

Section 561-A declares the inherent jurisdiction of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice and if to secure the ends of justice, it appears to be necessary to expunge any matter from the judgment of a criminal Court, then the High Court has power to do so. Principles which govern the action of High Courts in such a case are these: if an unjustifiable attack be made on a person who has had no opportunity of being heard in his own defence, and the remark is irrelevant and separable it can and should be expunged, especially if he is neither a party nor a witness. But it is not proper to delete them unless they are separable, that is to say, if they form an integral part of the argument. A Judge or Magistrate is bound to record reasons for his decision and even in the interest of justice, the High Court cannot delete those reasons and leave the decision without its reasoned basis. Unless the remarks are irrelevant or can be expunged without ruining the argument, the High Court cannot legitimately interfere: *A. I. R.* 1925 *Lah.* 392 and *A. I. R.* 1927 *All.* 193, *Dist.*; *A. I. R.* 1925 *Lah.* 187, *Discussed.* [P 244 C 1, 2]

C. M. Lobo—for Applicant.

Partabrai D. Punwani — for the Crown.

Judgment.—The applicant is a Deputy Superintendent of Police in the Sukkur District. He was a witness for

the Crown in Sessions Case No. 66 of 1928 in the Sessions Court, Sukkur and he asks us to expunge from the judgment of the Sessions Judge some remarks which were made against his conduct and character.

The remarks of which he complains were these :

"The whole thing has the appearance of being a job put up by the police with the assistance of these two zamindars,"

and secondly,

"It is much to be deprecated that a police officer of the rank of Deputy Superintendent of Police and two zamindars of such a high status should have lent themselves to such a scheme even out of mistaken zeal."

The sessions case was the trial of one Panjal and three others on charges of murder and under S. 201, I. P. C. The Crown sought to prove an extra judicial confession made by the accused Panjal to the zamindar Ghulam Nabi and K. B Imambux, and also that the accused had repeated a statement in the presence of the Deputy Superintendent of Police, K. S. Mahomed Hussain. This statement made by him had led to the discovery of certain ornaments which furnished evidence of a very valuable character. The learned Sessions Judge discussed this evidence and for several reasons stated that he was unable to accept the statements of the witnesses at their face value. He then made the remarks of which complaint has been made.

We have already, in dealing with the appeal made on behalf of Government against the acquittal of Panjal, commented on the evidence and expressed the view that there was no justification for the strictures made on the zamindars or on the Deputy Superintendent of Police, and accepting this evidence, we have convicted the accused of an offence under S 201. It is only necessary, therefore, to repeat that we are of opinion that a Sessions Judge should not make remarks of this nature against a high officer of police unless there are very solid grounds to support them.

The question now is whether we should expunge these remarks from the record.

Section 561-A declares the inherent jurisdiction of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court 'or otherwise to secure the ends of justice,' and it has been decided that, if, to secure the ends of justice, it appears to be necessary to expunge any matter from the judgment of a criminal Court, then this Court has power to do so. The section is new but it has been made use of by other High Courts to justify the deletion of libellous remarks such as those complained of by the applicant, and we are satisfied that we have jurisdiction to expunge objectional passages in the interest of justice. The question is what principles should govern our action Obviously, if an unjustifiable attack be made on a person who has had no opportunity of being heard in his own defence, and the remark is irrelevant and separable it can and should be expunged, especially if he is neither a party nor a witness. But it is not so easy to expunge remarks which though unjustified, are relevant and we do not think that it is possible to delete them unless they are separable, that is to say, if they do not form an integral part of the argument. A Judge or Magistrate is bound to record reasons for his decision and even in the interest of justice we cannot delete those reasons and leave the decision without its reasoned basis. We can operate but we must not kill the patient.

We regret, then, that the remarks of which the applicant complains must stand, for they form a necessary part of the argument The prosecution sought to prove a confession, and the production of property ; and, if that evidence had been accepted, the Court was bound to convict. The learned Sessions Judge refused to believe the zamindars who swore to the confessions, and gave his reasons. But the zamindars' word was confirmed by that of the Deputy Superintendent of Police, who had heard the confession and seen the production. Logically then the Sessions Judge was bound to express his opinion of the Deputy Superintendent of Police and he did so. We do not agree with his views, but since we cannot say that they were irrelevant or expunge the passage without ruining the argument, we cannot legitimately interfere.

The learned Public Prosecutor has discovered three decisions on this section *Amarnath* v. *Emperor* (1), *Benarsi Das* v. *Emperor* (2), *Panchanan Banerji* v. *Upendra Nath Battacharji* (3).

(1) A.I.R. 1925 Lah. 187=5 Lah. 476.
(2) A.I.R. 1925 Lah. 392=6 Lah. 166.
(3) A.I.R. 1927 All. 193=49 All. 254.

In the second of these cases, *Benarsi Das* v. *Emperor* (2), the remarks which were expunged obviously must have been irrelevant and separable Their Lordships remarked that not content with deciding the issues which properly arose out of the charge which he had to try, the Magistrate proceeded to express strong opinions as to the motives which he considered had inspired the prosecution, and declared that the accused had been the victim of a conspiracy on the part of the petitioner who was neither a party nor a witness.

In the Allahabad case it appears that the Magistrate had made the remark that the complainant was a profligate and this remark was not supported by the evidence, and appears to have been irrelevant to the case.

Our only difficulty comes in when we turn to the case of *Amarnath* v. *Emperor* (1). In that case the Magistrate, in dealing with the evidence of a police officer, stigmatized him as a perjurer and the High Court expunged the passage on the ground that the finding was based on evidence which was on the record, and that they had satisfied themselves that it was wholly unjustified.

This case perhaps might be taken as an authority for the deletion of relevant remarks made against witnesses, for it may have been necessary for the Judge or Magistrate to express an opinion on this particular witness. But the question as to whether a High Court has power to expunge relevant passages does not seem to have been raised, and it is not clear from the report that the evidence of the police officer was so important as to form the whole basis for the conviction, or acquittal as the case may be.

We, therefore, cannot look upon this decision as an authority for the proposition that a remark should be expunged if it is libellous and untrue, even at the risk of ruining of the argument of the Court. And we think we are justified in taking the view which we have indicated above that passages must only be deleted if they are irrelevant and do not form integral part of the judgment in which they appear.

For these reasons we must reject the application made by K. S. Mahomed Hussain but at the same time we repeat that we consider that the remarks made against him were wholly unjustified.

K.N./R.K. *Application rejected.*

A. I. R. 1929 Sind 245

BARLEE, J. C. AND KALUMAL, A. J. C.

Emperor

v.

Panjal and *others* — Accused — Respondents.

Criminal Appeal No 41/4 of 1929, Decided on 22nd July 1929, from acquittal order of the four accused of Sess Judge, Sukkur, in Sessions Case No. 66 of 1928.

(a) Evidence Act, Ss. 24 and 27—Confession should not be accepted, when evidence does not show that it was not caused by inducement—Statement leading to discovery of articles is admissible.

Where the Court is not satisfied on evidence that the confession made by the accused was not caused by any inducement, threat or promise proceeding from any person in authority, the confession should not be accepted A statement leading to discovery of certain articles is, however, admissibe under S. 27. [P 248 C 1]

(b) Evidence Act, S. 114—Evidence of witnesses relations of co-accused should not be accepted without independent corroboration

Where four men are suspected and relatives of three try to implicate the fourth alone who is a stranger, they are naturally suspected of bias and the principle universally adopted in the case of co-accused comes into play and a Court should require some independent corroboration before accepting the evidence. [P 248 C 2]

Partabrai D. Punwani—for the Crown.

Mulchand—for Respondents

Judgment.—An appeal has been filed by the Public Prosecutor for Sind on behalf of Local Government against the acquittal of the four accused in Sessions Case No. 66 of 1928 of the Sessions Court, Sukkur.

The first accused Panjal was sent up on a charge of murder to the sessions Court. The three other accused were committed subsequently on a charge under S. 201, I. P. C. but that charge was amended by the learned Session Judge who added against them also a charge under S. 302. The first accused Panjal has been re-arrested but the three other accused have not been arrested and their whereabouts are unknown. However, as Panjal has now been in jail for several months and there appears to

be no probability that the police will be able to find the other three men we shall take up his case and deal with it separately.

The charge against the four accused was that on 12th February 1928 they committed murder by intentionally causing the death of one Sahibdino Mehano. Sahibdino was a railway gangman and a brother of the witness Yakub (Ex. 6). Yakub deposed that Sahibdino came to visit him because there was a betrothal in his house. On the next day Sahibdino left his house in the evening, that is at Tipharı to go to the well of Miro accused 2. Miro lived near Yakub on the other side of a canal, and it is in evidence that Sahibdino had fallen in love with Miro's sister Mt. Izat, who was separated from her husband and lived with Miro. Sahibdino did not return and Yakub searched him but without success He appears to have obtained some information from one Juwan and on the third day Sahibdino's corpse was found buried near the well of Miro. Yakub then went to the police and laid the information. He stated that on the day after the marriage ceremony in his house Sahibdino had left his house and had not returned and that he had been informed by Juwan that he had seen him (Sahibdino) near the well of Imambux Khan, where accused 2, Miro, used to cultivate. He described the search and the discovery of the body, and then stated that Sahibdino had been on terms of criminal intimacy with Mt. Izat, the sister of Miro, and on that account he suspected Miro his uncle Makhno and Panjal. Panjal was no relative of the other accused but was living with Miro as a servant or partner. Yakub suspected him because it was supposed that he too was intimate with the woman Izat.

After this information had been recorded, the Sub-Inspector Mr. Fakir Mahomed went to the scene of the offence and commenced inquiries. He remained there till 28th February and returned on 4th March and stayed in or about the village till 13th March but was unable to find any evidence at all. During this time Miro was questioned by Ghulam Nabi a local zamindar, who had been called in to help in the investigation Finally Ghulam Nabi was asked by the Sub-Inspector to question Panjal, and he took the opportunity offered by the visit of Panjal to offer condolence to him on the death of one of the relatives and questioned him. He has deposed that, after he had questioned him for sometime, he made a statement, and on this he called the Deputy Superintendent of Police, K S. Mohomed Hussain Shah who was also engaged in the investigation. It was then ascertained from Panjal that he had in his possession a silver chain which had been worn by the deceased. He was taken to the house of Miro and produced a silver chain from a hiding place under a mat in the hut. After that he was questioned about two gold ornaments which the deceased had been wearing in his ears and which were missing (the lobes of the ears had been cut off). He stated that he had given one of the kevtis (ear ornaments) to a goldsmith named Lachman that he might have a ring made out. Lachman was called and produced a kevti in three parts, and stated that it had been given by Panjal The police obtained statements from Zangi and Izat the sister of the accused Miro. And on the strength of this evidence the accused Panjal was committed for trial on a charge of murder Some time afterwards the police learned to have witnessed the burying of the body and implicated the three accused; and on that evidence they too were committed to the Court of Sessions on a charge under S. 201 but as I have said the learned Sessions Judge added a charge under S. 302

The evidence as against Panjal with whom we are now concerned consists of firstly, the evidence that he had made a confession to Ghulam Nabi Zamindar and repeated it to Khan Bahadur Imam Bux Khan, Honorary Magistrate of the Second Class, secondly that he had made a statement to the Deputy Superintendent of Police as well as to these zamindars and had produced ornaments which, it is alleged were on the person of the deceased at the time he was killed. Thirdly, there is the evidence of Izat and the boy Zangi and lastly, the evidence of Pathan and Ghulam Ali that they had seen Panjal and the other three accused burying a body on the evening of the disappearance of Sahibdino.

The learned Session Judge agreeing with all four assessors found that the

accused were not guilty of any offence. He disbelieved the evidence of Izat and Zangi and styled it as "obviously worthless and unreliable" because, though they had made clear statements before the committing Magistrate implicating Panjal, they had attempted to resile from those statements in the Court of Sessions. He expressed the opinion that these witnesses had implicated Panjal probably with the idea of saving Miro, who was the father of one and brother of the other witness. As regards the confession the learned Sessions Judge has said that he was unable to accept the evidence of zamindars at its face value, firstly because pressure had been brought on Panjal, secondly because the statement of the accused Panjal given in the words of Ghulam Nabi, was extremely bald and unsatisfactory; and thirdly in view of the discrepancies between the statements of the two zamindars as regards the discovery of silver chain and kevti he expressed the view that:

"the whole thing has the appearance of being a job put up by the police with the assistance of the two zamindars,"

and further on:

"A perusal of the statement of the witness Lachu is also sufficient to show that the whole story about the kevti being left with him by the accused is a fabrication."

But he has not indicated in detail as to what part of this statement was so improbable as to be unworthy of credit. We are quite unable to agree with the learned Sessions Judge that there is any reason for supposing that there has been any "job put up by the police with the assistance of these two zamindars." It is possible and as I shall show later, not improbable that some pressure was brought to bear on Panjal to make a confession. But this is altogether besides the point. The present question is as to whether accused Panjal did make any statement at all; and we find it very difficult to believe that these zamindars have concocted the evidence. We have listened to Mr. Mulchand on the subject for a considerable time but he has not been able to give us any satisfactory reason even for the suspicion why they have done so. His sole argument is that K. B. Imambux Khan Jatoi had a grudge against Panjal because Punjal's brother had made an application to the District Magistrate for the transfer of a case in which he was interested, from the Court of the Khan Bahadur to some other Court, on the ground that the Khan Bahadur was a friend of his opponent. Possibly the Khan Bahadur may have been irritated or annoyed by this application But it is scarcely conceivable that so unimportant a matter led him to wreak his vengeance on Panjal's brother by concocting evidence so as to procure Punjal's conviction on a charge of murder, i.e., that he would abet a legal murder

Apart from this the evidence shows that it was Ghulam Nabi, who pays Rs. 4,000 assessment and is a Commissioner's durbari, who first questioned the accused Panjal and to whom Panjal made his first statement, and it is not suggested that Ghulam Ali had any ill will towards Panjal or that Khan Bahadur had any influence over him. Further it is clearly proved by the evidence of the Deputy Superintendent that Panjal did produce a silver chain which was buried in his hut and that he did make a statement which led to the discovery of another ornament which had been worn by the deceased The production of these ornaments shows that he must have made a statement of some sort, unless of course the Deputy Superintendent of Police was also a party to the plot. This has been suggested by the learned Sessions Judge as a reason for refusing to consider his evidence, but we feel that we must strongly repudiate the suggestion The Deputy Superintendent is a high officer of the police and it is not the least likely that he would be a party to any such inequity. I need not labour the point for the defence has not been able to point out to a single piece of evidence to justify this view.

The next question is whether the accused Panjal made a voluntary confession and before we can consider the evidence as to what he said we must be satisfied that it was not caused by any inducement threat or promise proceeding from any person in authority. We are not so satisfied. The evidence on the point is very meagre. Ghulam Nabi stated to the Committing Magistrate as follows. "I reminded him that he was the culprit and such things could not remain secret." That is all there is on the record about a conversation which must have been

prolonged; and it is not shown what induced Panjal to confess to a murder. It is true that strictly speaking it was for him to show some ground for the belief or at any rate suspicion that pressure had been employed or inducement given; but in practice it is clearly impossible for an accused person to produce evidence of this nature, and Courts are bound to form their views from a consideration of all the surrounding circumstances In this case there are circumstances which certainly raise a suspicion that Panjal had been induced to speak by some threat or inducement. The investigation had gone on without result for three weeks and the police were faced with failure Ghulam Nabi had questioned Miro without success and it is not improbable that he was authorized to make an offer to Panjal as an inducement. And it is difficult to see why Panjal should have confessed of his own free will for no reward. Ghulam Nabi was not his chief or employer and had no particular authority over him, and it is not likely that he was suffering from remorse. We think then that the learned Sessions Judge was justified in refusing to accept the confession, though we do not agree with the reasons which he has given

The evidence of the confession must, therefore, be excluded except the statements made by Panjal that he had hidden a silver chain and given gold kevti to to the Sonar Lachman. This part of his statement was admissible because it led to the discovery of both articles, which were identified as the deceased's and undoubtedly must have been his. These statements and the production are guaranteed by the evidence not only of the zamindars but also of the Deputy Superintendent of Police. They connect Panjal with the crime.

The next question then is whether he committed the murder. Apart from this statement about the ornaments the evidence is not satisfactory. Izat and Zangi made statements in the Court of the committing Magistrate and tried to resile from them in Sessions Court This of course does not show that they were false witnesses, nor does their delay in making statements to the police affect their value. But their evidence must be treated with caution, since they are closely connected with the three other accused, Miro, his brother and cousin. When four men are suspected and the relatives of three try to implicate the 4th alone and is a stranger they are naturally suspected of bias, and the principle universally adopted in the case of co-accused comes into play, that is to say a Court will naturally require some independent corroboration. It is useless to say that Panjal was Izat's paramour, for this has not been proved; even if he was her paramour or one of them, it is not unlikely that she was prepared to sacrifice him for the sake of her brothers. We agree then, with the learned Sessions Judge that it is unsafe to rely on the uncorroborated testimony of witnesses who are likely to have had an interest in protecting the accused. Further there are two circumstances which indicate that they have not told the whole truth. In the first place the boy deposed that the deceased was trussed up before he was killed. This was probably the truth It is not a detail he is likely to have invented and it suggests that Panjal was not the only one engaged. The other point is that the Crown put forward two witnesses who swore that they had seen the four accused burying the body at or about sunset The learned Sessions Judge refused to credit them because they kept quiet for two months I grant that their evidence would not be enough to justify the conviction of the three, but Panjal is entitled to the benefit of it, and it contradicts Zangi's story and connects Panjal's co-accused with the crime

To sum up we exclude the confession except so far as it relates to the ornaments discovered and the evidence of Izat and Zangi and we are left with clear proof that Panjal was a party to the disposal of the corpse, but not that he murdered Sahibdino. He is not shown to have had an adequate motive, and he is implicated merely by the near relatives of his co-accused.

We convict him of an offence under S. 201, I P. C. and sentence him to rigorous imprisonment for a period of five years.

R.M./R.K *Order accordingly.*

A. I R. 1929 Sind 249(1)

BARLEE, J C. AND ASTON, A. J C.

Mulchand—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 62 of 1929, Decided on 24th June 1929, from judgment of Addl. City Mag., Hyderabad.

Railways Act, S. 120—Section does not apply to railway servants.

The latter portion of S. 120 has a reference to the forfeiture of fares and of passes or tickets and to the removal of the offender from the railway by any railway servant, and thus shows its inapplicability to railway servants. [P 249 C 1, 2]

Hassaram Jashanmal—for Applicant.

Partabrai D. Punwani — for the Crown.

Judgment —This is an application of the revision of the judgment of the learned Additional City Magistrate of Hyderabad who convicted the applicant and sentenced him to pay a fine of Rs 20-0-0.

It appears that the applicant is an Assistant Station Master, Hyderabad Station. The complainant is a Guard on the North Western Railway and a dispute arose about the time which should be entered in the summary as the time of the departure of the train of which the complainant was a Guard. The complainant had previously suspected the chaprasi of the accused named Goso for the theft of his lamp some three days before. The Assistant Station Master did not share in this suspicion and believed that his chaprasi was innocent. The Guard on the day of the alleged offence and previously cursed the man who stole his lamp. The accused is alleged to have abused the Guard and used obscene language and to have assaulted him. The learned Magistrate considered that both parties were at fault, and that a nuisance under S. 120, Railways Act, had been committed by both. But since the police had only sent up the Assistant Station Master, he sentenced him to pay a fine of Rs 20-0-0.

Our attention has been invited to the provisions of the Railways Act, and to the fact that Ss 87 to 98 refer to forfeitures incurred by the Railway Co., Ss. 98 to 105 to offences committed by the railway servants, Ss. 106 to 130 to other offences and S 131 to procedure. It is contended that S. 120, the section under which the accused was convicted has no application to railway servants A reference to that section appears to confirm the contention, for the latter portion of the section has a reference to the forfeiture of fares and of passes or tickets and to the removal of the offender from the railway, by any railway servant. It would follow, if S. 120 applied to railway servants, that an Assistant Station Master might be removed from the railway by any porter, if he used abusive language. The learned Public Prosecutor concedes that S. 120 has no application. The circumstances do not appear to be such as to justify our convicting the accused of any offence.

We therefore set aside the conviction of the applicant and order the fine, if paid, to be refunded.

P.R./R.K. *Conviction set aside.*

A. I. R. 1929 Sind 249(2)

BARLEE, J. C. AND KALUMAL, A. J. C

Mahomed Saleh—Accused—Appellant.

v

Emperor—Opposite Party.

Criminal Appeal No 130 of 1929, Decided on 16th July 1929, from judgment of the Addl. Sess. Judge, Hyderabad.

Penal Code, S. 367—Test of lawful guardianship is that infant or minor should be in position to apply to his guardian for protection.

The test of lawful guardianship is that the infant or minor should be in a position to apply to his guardian for protection. It is not necessary and the law does not require that the Crown should prove that a minor has been taken actually from the actual custody of his guardian. [P 250 C 1]

Partabrai D. Punwani — for the Crown.

Judgment.—The appellant was committed to the Court of Sessions, Hyderabad, and was tried by the Additional Sessions Judge of Hyderabad on a charge under S. 367, I. P. C. The case for the prosecution as given by Fakiro the complainant, was as follows .

Fakiro was a boy of 10 years who belonged to Karachi. He said that he had left Karachi and had gone to Hyderabad to stay with an uncle At the end of 20 days his aunt and her son left for Sehwan to see a fair and he expressed his desire to go with them. They went to the Hyderabad station where Fakiro missed the train. He then went to Kotri and caught another train. At Kotri he says he met the accused who spoke to him

and they went together as far as Sehwan. When they reached Sehwan, the accused, he said, would not let him go, frightening him with a story that the police would arrest him for travelling without a ticket, but took him to a jungle, where he tied his hands and feet and left him. He remained there for several days in confinement and then the accused took him across the Indus to a deserted house. The next day he took him to a village to beg and while in the village he succeeded in attracting the attention of the passers-by to whom he made a complaint The result was that both boy and man were taken to the police and the accused was prosecuted for an offence under S 367, I P C., that is with kidnapping the boy with intention to satisfy unnatural lust.

The learned Judge framed three issues. The first as to kidnapping, the second as to intention and the third as to wrongful confinement He decided that the boy had been kidnapped from lawful guardian but that the accused had not had the intention of satisfying his unnatural lust and thirdly that he had wrongfully confined him in such a way that his relations might know it.

We are quite unable to agree with the reasons which the learned Additional Sessions Judge has given for his findings on issue 1. He relied merely on the word of the boy. But the boy's evidence was not sufficient to show that he was in the lawful guardianship of any one at the time when he met the appellant. The test of lawful guardianship is that the infant or minor should be in a position to apply to his guardian for protection. It is not necessary and the law does not require that the Crown should prove that a minor has been taken actually from the actual custody of his guardian, so long as he is in a position to resort to his guardian he is said to be in the keeping of his lawful guardian. In this case, however, the boy was in Kotri. His father was in Karachi. And there is no evidence of any sort that he had any uncle or aunt at Hyderabad. On the second point, we agree with the finding of the learned Additional Sessions Judge. The boy certainly did allege that the appellant had committed sodomy with him, but he was not sent to a doctor for examination and we think it would have been unsafe to rely on the mere word of such a witness. On the third point, as to whether the boy was wrongfully confined, we are of the same opinion and we do not think that the learned Additional Sessions Judge was well advised in accepting his uncorroborated word. We prefer to follow the assessors who disbelieved him. We accordingly set aside the convictions and sentences and direct that the appellant be released.

P.N./R.K. *Conviction set aside.*

A. I. R 1929 Sind 250

ASTON, A. J. C.

Wahid Bux Bhutto and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. Appln. No 201 of 1929, Decided on 22nd August 1929.

(a) Criminal P. C., S. 227—Fact that prosecutor might have examined witness is no ground to add charge of conspiracy to charge of offence under Penal Code S 314.

The fact that the learned Public Prosecutor might have examined witnesses had he not been of opinion that they had been tampered with is not a reasonable ground for adding a charge of conspiracy to a charge of an offence under S. 314, Penal Code in the absence of any evidence of such a conspiracy. [P 252 C 1]

(b) Evidence Act, S. 30 — Statements implicating co-accused but not incriminating maker are not admissible in evidence—Parts of such statements are admissible against maker under Evidence Act, S. 14.

Statements alleged to have been made by an accused implicating a co-accused but not incriminating himself are not admissible against the co-accused. Parts of the statements, however, are admissible in evidence as admissions against the person who made them indicating knowledge on their part. [P 252 C 1]

(c) Evidence Act, S. 32 (5) — Statements as to name of one's mother and other relations are admissible.

Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under S. 32 (5), in a charge under S. 368, I. P. C. [P 252 C 2]

(d) Evidence Act, S. 32 (1) — Statement made by person as to circumstances of transactions resulting in her death are admissible when cause of her death is in question.

The statement of a deceased person that she was confined in the house of an accused, that *H* was keeping watch over her and that another accused had raped her on account of which she had become pregnant and that they were getting ready to give her medicine to miscarry and so put an end to her life is admissible in evidence under S. 32 (1), as a statement made by a person as to the cir-

cumstances of a transaction which resulted in her death, in a case in which the cause of her death comes into question. [P 252 C 2]

(e) Evidence Act, S 27—Fact known to police cannot be re-discovered on statement of accused.

A fact known to the police cannot be re-discovered on the statement of an accused person so as to make such statement or such incriminating conduct admissible under S. 27. [P 253 C 1]

(f) Criminal P. C., S. 526—Scope.

The High Court has power to transfer case to the Court having jurisdiction from a Court not having jurisdiction : 18 *All.* 350 , 8 *Bom.* 312 and 2 *Bom.L.R.* 394, *Rel. on.*, 36 *Mad.* 387, 9 *All.* 191 (*P.C.*), 42 *Mad* 791, 23 *O.C.* 97, *A.I.R* 1925 *Oudh* 190 and *A. I. R.* 1925 *Pat.* 187, *Ref.* [P 253 C 2]

T. S. Elphinston—for Applicants.

C. M. Lobo—for the Crown

Judgment. — This is an application made by the accused to this Court in the exercise of its High Court jurisdiction to quash the commitment of the accused to the Sessions Court

Section 215, Criminal P. C , provides that a commitment once made under S 213 by a competent Magistrate can be quashed by the High Court only and only on a point of law.

It was pointed out by Lord Buckmaster in the case of *Nafar Chandra Pal* v. *Shukur Shiekh* (1) at p. 195 (*of* 46 *Cal.*) that questions of law and of fact are some times difficult of disentangle

"The proper legal effect of a proved fact is essentially a question of law so also is the question of the admissibility of evidence, and the question, whether any evidence has been offered on one side or the other , but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact."

On behalf of the applicants it is contended that there was no evidence that the accused Jan Mahomed committed any offence, that there was no evidence that any of the accused committed an offence under S. 314, I. P. C , the only charge exclusively triable by the Court of Sessions, on which the accused Osman and Bhiru were committed and that on the remaining charges under Ss 368 and 120-B certain alleged statements made by the deceased Khanzadi would be inadmissible in evidence under S 30 (1), Evidence Act, since in the charges under Ss 368 and 120-B the cause of Khanzadi's death was not in question The defence contend that if the charge against the accused under S 314, is eliminated and so too the alleged statements of Khanzadi the evidence remaining on the record on the charges under Ss 368 and 120-B, does not amount to a prima facie case and that since the learned Magistrate had jurisdiction to try an offence under Ss. 368 and 120-B and could have inflicted in the aggregate 4 year's imprisonment and fine he misdirected himself in committing the accused to the Court of Sessions It is further contended on behalf of the applicants that the Sessions Court, Larkana, had no jurisdiction to try the case and that, therefore, the Judicial Commissioner's Court had no power to transfer the case to the Sessions Court at Hyderabad, since cases can only be transferred which have been committed to a Court having jurisdiction. I agree with the contention put forward on behalf of the accused Jan Mahomed, that there is no evidence against him of the commission of any offence The prosecution case against him is that he is the son of the accused Nooh in whose house the abducted woman Khanzadi is alleged to have died, that neither Jan Mahomed nor his father alleged that they did not live together although the learned Public Prosecutor was unable to point out any evidence that they lived together. The witness Hayat merely alleged that they lived in a forest about a call from Mahomed Osman. The further evidence against Jan Mahomed is that he is related to the servants of Mahomed Usman, that he attended the funeral of "Khanzadi" and expressed opinions about the cause of her death, which did not in any way incriminate himself.

With regard to the charge under S. 314, I. P. C., the learned Public Prosecutor stated that he wished to have a charge framed against all the accused of having entered into a conspiracy to commit that offence. The difficulty in the way of this, is that there is no evidence that the accused conspired to commit an offence under S. 314, as the learned Magistrate pointed out in his order. The learned Public Prosecutor now states that his three principal witnesses were not examined in the Committing Magistrate's Court and that he told the Magistrate they had been tampered with. The fact that the learned Public Prosecutor might have examined witnesses had he not

(1) A.I.R. 1918 P.C. 92=46 Cal. 189=45 I.A. 183 (P.C.).

been of opinion that they had been tampered with, does not appear to me a reasonable ground for adding a charge of conspiracy to commit an offence under S 314, in the absence of any evidence of such a conspiracy and it does not appear to me to be a matter to be taken into consideration when determining whether the evidence recorded amounts to a prima facie case In turning now to the case against Mahomed Osman and his brother Bhiroo on the charge under S. 314, I. P. C., a considerable amount of evidence has been admitted and placed on the record The learned Public Prosecutor concedes that since the Crown did not put Janat into the witness box the statements she is alleged to have made as to the cause of Khanzadi's death were inadmissible in evidence

It seems to me also clear, that the statements alleged to have been made by other accused implicating Mahomed Usman but not in criminating themselves, were also inadmissible against Mahomed Usman S. 30, Evidence Act, provides that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some others of such persons is proved the Court may take into consideration such confession as against such other person as well as against the person who makes such confession The statements relied on did not incriminate the persons who made them (except indirectly with regard to an ingredient of another charge) and so they could not be considered as evidence against Mahomed Usman and Bhiroo. Parts of the statements, however, were in my opinion admissible in evidence as admissions against the persons who made them indicating knowledge on their part, that the woman had been abducted. This Budhoo is alleged to have said that it would have been better if the woman had been returned. This was in my opinion evidence against Budhoo of guilty knowledge for the purposes of S. 368, I. P. C Similarly another class of evidence to which strong objection has been taken by the defence, namely, statements alleged to have been made by Khanzadi as to her name and husband's name and as to her alleged abduction by Wahiddino and rape by Bhiru and removal to Habibullah would be inadmissible under S. 32, Evidence Act, against Wahib Bux and Bhiru on the charge under S 368, I. P. C Since that was not a matter in which the cause of Khanzadi's death came into question they would, however, be evidence that Khanzadi gave information to Sidik and Ali Mahomed as to her identity and as to her abduction and would therefore be evidence of knowledge on the part of Sidik and Ali Mahomed And statements alleged to have been made by Khanzadi as to the name of her mother and other relations (except her husband) would be admissible under S 32 (5), Evidence Act. And the alleged statement of Khanzadi to Hayat that she was confined in the house of Usman, that Habibullah was keeping watch over her and that Bhiru had raped her on account of which she had become pregnant, that they were now getting ready to give her medicine to miscarry and so put an end to her life was in my opinion admissible in evidence under S. 32 (1) as a statement made by a person as to the circumstances of a transaction which resulted in her death in a case in which the cause of her death came into question.

It is clear that the cause of death comes into question in a charge under S. 314 and the circumstances to which "Khanzadi" referred were circumstances in a transaction resulted in her death. In addition to the above evidence the Crown led evidence to show that the woman was taken from Usman's house to the house of Budhoo and then taken to Nooh's house in the jungle and that she died in child-birth after having given birth to a still born child, that she and the child were buried, but that when the police had the graves opened, in the course of their investigation the corpses had been removed.

If the inadmissible evidence regarding the alleged statements of Janat and of the co-accused is eliminated there appears to me insufficient evidence to justify the commitment of the accused Mahomed Usman and Bhiru under S. 314, I. P. C. There is nothing to show that any drug was administered to Khanzadi, there is nothing to show that she exhibited any of the symptoms of poisoning. Beyond the fact that she was delivered of a still born child in the house of Nooh in the forest and died soon afterwards and the statement

she made that "they were getting ready to give her medicine to miscarry" there is practically no evidence on this charge. There is nothing to show who removed the corpses and the statement of Khanzadi is so vaguely worded that it may merely have amounted to an expression of her apprehension or suspicion With regard to the charges framed against all the accused under Ss 368 and 120-B the case is in my opinion different :

"There is direct evidence and circumstantial evidence; there is evidence of motive; there is evidence that the woman who the prosecution say was detained in the house of Wadero Wahid Bux and was subsequently with Avees in the village of Gudd and with Mahomed Osman and his brother Bhiroo in Tatta Taluka and taken by the Kamdar of Usman and Bhiroo to Budno and who died in the house of Nooh in the forest could have been none other than Khanzadi."

Inadmissible evidence has been recorded as to the pointing out of the place of burial by Nooh It has been repeatedly held by the Judicial Commissioner's Court that a fact known to the police cannot be re-discovered on the statement of an accused person so as to make such incriminating conduct as the pointing out of a place admissible under S. 27, Evidence Act There is other evidence, however, against Nooh. The learned Magistrate in my opinion exercised a right discretion in committing the case to the Sessions. The alleged offence was of a grave character; the case for the Crown was that the offence was committed not as a result of human weakness or frailty, not on account of the infatuation of one of the accused with the deceased but simply and solely for the sake of causing misery and suffering to the husband of the unfortunate woman, by way of revenge. The woman it is alleged was kept in confinement under circumstances causing her acute anguish and suffering and she eventually died. Had the learned Magistrate decided to try the charges which he framed under Ss. 368 and 120-B himself he would in my opinion have erred and he would have exercised a wrong discretion.

With regard to the point taken on behalf of the applicants that a transfer could only be made by a High Court from a Court having jurisdiction to try it, reliance has been placed on the ruling of Spencer, J. and Sundaram Ayyar, J. in *Asst. S. J., North Arcot* v. *Ramammal* (2). The learned Judges there followed a ruling of the Privy Council in *Ledgard* v *Dull* (3) which related to the transfer of a civil suit. The same Court in *Ganapati Chetty, In re* (4) held that even if the High Court had no jurisdiction on its original side to try a case, an order could be made under S. 526, Criminal P. C. directing the trial at the High Court Sessions. Another case relied on by applicants was *Emperor* v. *Sheo Dayal* (5) but this was dissented from by the same Court in *Mubarak Ali* v *Abdul Haq* (6). Reliance was also placed on *Bhagwati* v *Emperor* (7) but the facts there were distinguishable since the Patna High Court had no power to transfer a case out of the Provinces I agree with the view expressed in *Queen Empress* v. *Ram Debi* (8), *Queen Empress* v *Thaku* (9) and *Queen Empress* v. *Atmaram* (10) that the High Court has power to transfer a case to the Court having jurisdiction.

For the reasons I have mentioned I quash the commitment of Jan Mahomed and I quash the commitment of Mahomed Usman and Bhiroo on the charge under S. 314, I P. C. I dismiss the application to quash the commitment of the accused (with the exception of Jan Mahomed) on the charges under Ss. 368 and 120-B..

V.S./R K. *Order accordingly.*

(2) [1912] 36 Mad. 387=22 M. L. J. 141=13 I. C. 275=(1912) M. W. N. 3.
(3) [1887] 9 All. 191=13 I. A. 134=4 Sar. 741 (P.C.).
(4) [1919] 42 Mad. 791=37 M. L. J. 60=10 M. L. W. 263=51 I. C. 468=(1919) M. W. N. 808.
(5) [1920] 23 O. C. 87=57 I. C 459=21 Cr. L. J. 635.
(6) A. I. R. 1925 Oudh 490.
(7) A. I. R. 1925 Pat. 187=3 Pat. 417.
(8) [1896] 18 All. 350=(1896) A. W. N. 96.
(9) [1884] 8 Bom. 312.
(10) [1900] 2 Bom. L. R. 394.

A I. R 1929 Sind 253

RUPCHAND AND BARLEE, A. J Cs.

Sanwaldas Kundandas—Accused—Applicant

v

Emperor—Opposite Party.

Criminal Revn. Appln. No. 202 of 1929, Decided on 1st October 1929.

(a) Evidence Act, S. 24—Conviction may be based on retracted confession though it must be dealt with caution—Criminal Trial.

A retracted extra judicial confession can in law be a sufficient basis to support a conviction. Though utmost caution must be used in dealing with retracted confessions, there is no rule that they are not by themselves legal evidence sufficient to justify a conviction. *A. I. R.* 1921 *Sind* 129, *Foll.* [P 254 C 2]

(b) Criminal P. C., S. 32 — Award of punishment should be in proportion to conduct and attitude of accused.

Magistrates when deciding on the question of sentence are justified in taking into consideration the conduct of an accused person in his own defence.

Where an accused person is clearly guilty and instead of throwing himself on the mercy of the Court defends himself by throwing mud at witnesses who are persons of standing and honour, he really is deserving of very little consideration. [P 255 C 1]

C.M. Lobo—for Applicant

D. N. O. Sullivan—for the Crown

Rupchand, A. J. C.—Mr. Lobo has been unable to satisfy us that the extra judicial confession made by the accused to Mr. Jamshed Mehta, President of the Karachi Municipality and relied upon by the learned trying Magistrate was not voluntary or that it was not true, and therefore though it was retracted in Court, it could validly form the basis of conviction: *Mahomed* v. *Emperor* (1). But in this case, there are strong circumstances which amply corroborate the extra judicial confession. We have it that the accused made certain inculpatory statements to Mr. Kamberally which statements were repeated by him before Mr. Rewachand, Ex. 3 is their record. There is also strong corroboration of his conduct in having approached principal Gokhale through his friend Professor Kusalramani, and though he himself did not say anything in the presence of principal Gokhale, the discription given to us of what transpired at that interview by principal Gokhale is very strong corroboration of what the accused subsequently admitted to Mr. Jamshed. The evidence in this case has been accepted by the learned trying Magistrate and by the learned Sessions Judge who summarily dismissed the appeal as to the merits. There are no grounds whatsoever for us to come to a different conclusion. We therefore dismiss the revision application.

One further point attracted our attention during the course of arguments. The accused has been very leniently dealt with by the learned Magistrate. He received one day's imprisonment and a fine of Rs. 1,000 on each of the counts. This fine was limited in appeal to Rs. 2,000 only. The question, however, was whether in view of the seriousness of the offence with which he was charged and the conduct of the accused in having retracted his confession and challenged the credibility of each of the witnesses some of whom occupy a very high position, he should have been so leniently dealt with and whether this was not a fit case where we should issue notice to him to show cause why his sentence should not be enhanced. We have, however, seen the accused here in Court and we think that in view of his tender age, and the facts that he is a misguided youth, and that the conduct of this case has probably been in the hands of some other persons than himself, we have refrained from calling upon him to show cause why his sentence should not be enhanced.

Barlee, A. J. C.—I concur. The whole basis of Mr. Lobo's argument in revision is that on the record there is no legal evidence to support the conviction. It is his contention that a retracted extra judicial confession cannot in law be a sufficient basis to support a conviction. This point, however, has been settled by the case of *Mahomed* v. *Emperor* (1), quoted by my learned brother. The confession in that case was an extra judicial confession and it was laid down by the Court that, though utmost caution must be used in dealing with retracted confessions there is no rule that they are not by themselves legal evidence sufficient to justify a conviction.

In this case, then, in my opinion, the applicant has been rightly convicted, for it seems to me that it is as certain as anything can be that Mr Jamshed did not make a mistake. All the circumstances of the case point to that fact that the applicant admitted his guilt to him.

As regards the sentence, I find that the learned Magistrate took a lenient view of the case because the accused was an inexperienced young man. I quite agree with my learned brother that the sentence was unduly light, but I do not think it necessary for us to issue notice for a enhancement. I would point out, however, as I did in a case which recently came up before this Court, that

(1) A. I. R. 1921 Sind 129=16 S. L. R. 67.

in my opinion Magistrates when deciding on the question of sentence are justified in taking into consideration the conduct of an accused person in his own defence. Where an accused person is clearly guilty and has really no defence, but instead of pleading guilty and throwing himself on the mercy of the Court defends himself by throwing mud at witnesses who are persons of standing and honour, he really is deserving of very little consideration But I agree that in the present case, it is not necessary to enhance the sentence and that no notice should be given. For these reasons, I concur in the judgment just delivered

V.S./R.K *Application dismissed*

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* A I. R. 1929 Sind 255

PERCIVAL, J. C. AND ASTON, A J. C.

Saleh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 157 of 1929, Decided on 24th September 1929, from decision of Addl. Sess. Judge, Hyderabad, D/- 1st June 1929.

(a) Penal Code, S. 392—Court cannot base conviction on insufficient evidence—Admission in statement of accused examined under Criminal P. C., S. 342 of receiving property but for some other purpose does not cure defect in prosecution evidence — Evidence Act, S. 101.

It is not open to a Court to base a conviction under S. 392, on insufficient evidence coupled with the mere fact that accused in his statement admitted to have taken the property from the complainant for some other purpose, which was not believed by the Court.

In the darkness of night, accused were alleged to have robbed the complainants of Rs. 50, which one of the complainants had on his person. The prosecution evidence was insufficient by itself to justify conviction. But the accused, while being examined under S. 342, Criminal P. C., admitted receiving Rs. 50 by way of fine, to hush up a criminal offence committed by one of the complainants. This admission, though not believed by the Court, was taken into consideration while convicting the accused.

Held, that the evidence was insufficient by itself to justify the conviction of the accused. [P 256 C 2]

*** (b) Criminal P. C., S. 342—Evidence in criminal case — Statement under S. 342, cannot fill up gap in evidence of prosecution divorced from context.**

The Crown has to rely on the prosecution story and the evidence called in support of it. It cannot fill up a gap in the evidence for the prosecution by a statement made by the accused in his examination under S. 342, and a fortiori it cannot for such purpose rely on an admission in the statement of the accused, divorced from its context: 26 *Cal* 49 and 27 *Mad.* 238, *Rel. on.* [P 256 C 2]

Hatim B Tyebji—for Appellant.

C. M. Lobo—for the Crown

Aston, A. J. C.—This is an appeal from the conviction and sentence of the learned First Additional Sessions Judge, Hyderabad, dated 1st June 1929, convicting the appellant under S. 392, I. P. C, and sentencing him to rigorous imprisonment for one year and a fine of Rs 50 or in default to suffer rigorous imprisonment for three months.

The facts of the case briefly, according to the prosecution, are that the complainants Saleh and Abdullah are tin smiths who go from place to place in search of work. On 4th January 1929, they were in Matal's village and asked the Zamindar Matal for food and shelter. He replied that he was ill and had a guest, they could go to the mosque, he would give them food but could not give them bedding. They did not like the idea and on meeting the accused and on being invited by the accused to go with them and be entertained, they preferred to accept the invitation of the accused. The complainant's story is that they were given food and shelter by the accused and at 2 a. m in the darkness of the night, the accused robbed them of Rs 50, which the complainant Abdullah had on his person. Accused 3 then lighted a fire for the purpose of counting the money. They were locked up in the house for a certain time and then taken to a pit at the outskirts of the village and then released with threats that if they raised an outcry they would be cut into pieces and charged with theft.

There was a grave weakness in the case for the prosecution for two reasons. In the first place, the complainants in their first report alleged that it was they who lighted the fire in the house to which they were taken and that they lighted it before the robbery, whereas in evidence their story was that accused 3 lighted the fire after they were robbed at 2 a. m. for the simple purpose of counting the money.

The next weakness was that the complainants in their evidence deposed in detail to the acts committed by the various accused while robbing the complainants, while later on they admitted that the night was so dark that it was

impossible to identify any person until some time after they were released from the pit to which they were taken a considerable time after the offence was committed In the early stage of investigation a defence was raised by Sumar in whose house the offence is alleged to have been committed that the complainant Saleh had had intercourse with a filly. The accused at the early stage made no mention of the alleged defence and at the trial the other accused with the exception of the appellant did not raise this defence but when the appellant was asked to make his statement to the Court he appears to have considered it advisable to put forward the defence which was raised by Sumar and he adopted that defence namely that the complainant had had intercourse with a filly, that he had been taken to the Zamindar Matal, and thence to the accused's house, that the complainant's brother had paid Rs. 50 as a fine and that the matter had been hushed up.

The learned Sessions Judge drew attention to the weakness in the case for the prosecution arising from want of light. He was unable to believe the complainant's story that they had identified the other accused committing various acts He also considered the story for the prosecution that accused 3 lighted the fire for the purpose of counting the money was an improbable story and he acquitted all the accused except accused 2.

In the case of No. 2 he referred to the fact, that this accused had admitted receiving the Rs. 50, and therefore since he did not believe it was paid as hush money, there could be no doubt so far as the guilt of this accused was concerned.

I am unable to agree with this view of the case. It seems to me that the circumstances were more favourable so far accused 2 was concerned than the other accused. The acts alleged against the other accused were more detailed than those against accused 2. Throughout the incident, according to the prosecution story, accused 2 is alleged to have played a less prominent part. If the darkness prevented the identification of the other accused in the commission of any act, which formed part of the alleged robbery, it a fortiori prevented the identification of accused 2. I am of opinion that it was not open to the Court to base a conviction on such evidence coupled with the mere fact that No. 2 in his statement adopted a story which was not believed by the Court, that the complainant's brother had paid him Rs 50, by way of fine, to hush up a criminal offence. The Crown had to rely on the prosecution story and the evidence called in support of it. It cannnot fill up a gap in the evidence for the prosecution by a statement made by the accused in his examination under S. 342 : see *Basant Kumar* v. *Queen Empress* (1) and *Mohideen* v. *Emperor* (2) and the other cases cited in Sohoni's Code of Criminal Procedure p. 764, and, a fortiori it cannot for such purpose rely on an admission in the statement of the accused, divorced from its context

The prosecution evidence in this case was insufficient by itself to justify the conviction of the accused. The mere fact that the accused in his statement under S 342, adopted a story, which was not believed by the Court, a part of which included an admission of the receipt of Rs. 50, under totally different circumstances, does not appear to me to have remedied the defect.

For these reasons I would set aside the conviction and sentence of accused 2 (Saleh) and direct the fine, if paid, to be refunded

V S./R K. *Conviction set aside.*

(1) [1899] 26 Cal. 49.
(2) [1904] 27 Mad. 238.

END